

COURT OF APPEAL
LAGOS DIVISION
23RD MAY, 2005. CA/L/224/2004
CORAM:- M. D. MUHAMMAD, B. C. OGUNBIYI,
M. L. GARBA, JJCA

ALPHA PROPERTIES APPELLANT
INTERNATIONAL LIMITED

AND

1. NIGERIA DEPOSIT INSURANCE
CORPORATION RESPONDENTS
2. ALPHA SOFITEL HOTELS PLC
3. JIMI LAWAL

JUDGMENTS - Consent judgments - Party wrongly affected - By terms of settlement adopted as consent judgment - Which terms he is not signatory to - May appeal against the consent judgment with leave of court (H1)

APPEALS - Briefs - Respondent's brief - Omission of - A respondent who has neither filed a cross-appeal nor a respondent's notice - Will not be allowed to file a brief or proffer oral argument attacking the decision being appealed against (H2)

FACTS

The plaintiff/1st respondent as liquidator/receiver of a bank, had instituted an action against the 2nd and 3rd respondents as well as the appellant at the Lagos Zone of the Failed Banks (Recovery of Debts) and Financial Malpractices Tribunal for recovery of certain sums owed by the 2nd respondent to the Bank. Subsequently, the 1st and 2nd respondents reached an amicable settlement and signed terms of settlement which they moved the tribunal to adopt as a consent judgment.

Eventually, the 1st respondent as judgment creditor applied for leave from the High Court to enforce the said consent judgment. It was a term of the judgment that the 2nd respondent/judgment debtor's hotel project being built on the land of the 3rd respondent was to be transferred to the 1st respondent in satisfaction of the debt.

It was common ground, though a party to the suit at the tribunal, the 3rd respondent neither participated therein nor signed the terms of settlement. Leave was granted to the 1st respondent as prayed, whereupon the 3rd respondent, being dissatisfied, brought this appeal against the ruling granting the leave.

ISSUE FOR DETERMINATION

"Whether the lower court has the power to grant the leave it did for the execution of the judgment decreed by the Failed Bank Tribunal on 18th March, 1998 and if the powers have been appropriately exercised."

HELD (Unanimously dismissing the appeal per **MUHAMMAD JCA**)
Consent judgments - Party wrongly affected

1. Where a party in a suit in which the matter in controversy was resolved pursuant to a consent judgment following terms of settlement to which the party was not a signatory, the remedy available to the party the consent judgment so wrongly affected is to appeal against the judgment with leave of court. Alternatively, by a fresh action appellant can have the judgment set aside by a court of competent original jurisdiction.

The tribunal's judgment has not, from the records available to us, been appealed against. At least the instant appeal is not against the judgment more than six years after same had been delivered. And the judgment has not been set aside. Appellant must discharge the burden of displacing the presumption that the tribunal's orders which affected it in spite of the fact that it was not a signatory to the terms of settlement were correct. Until the appellant has appealed against the tribunal's subsisting consent judgment, or filed a fresh action to that end, he cannot be heard to question the tribunal's judgement on appeal. There being no appeal against the judgment, its correctness or otherwise cannot be raised in the instant appeal.
 (p. 767 B)

APPEALS - Briefs - Respondent's brief - Omission of

2. It is true that the rules of court appear to allow respondents to concede to the appellant such points they choose to. It is however never open for a respondent to totally concede to appellant in the appeal. While in answering "all the material points contained in the

appellant's brief the respondent may in his brief concede such points he chooses to, the brief must, in spite of the concession, contain reasons why the appeal ought to be dismissed. The Supreme Court has defined what the traditional role of a respondent in an appeal is: a respondent who has neither filed a cross-appeal nor a respondent's notice will not be allowed to file a brief or proffer oral argument attacking the decision being appealed against. *Kotoye v. CBN* relied upon by senior counsel to the 1st respondent is apposite. See also *Oguma Associated Co. Ltd. v. IBWA Ltd.* (1988) 1 NWLR (Pt.73) 658.

We are bound by these decisions. Accordingly, the briefs and oral arguments filed and proffered by the 2nd and 3rd respondents in the course of this appeal, being incompetent, have been struck out and discountenanced. The appeal has been a straight duel between the appellant and 1st respondent only. (p. 768 A/E)

REPRESENTATION

Prof. S.A. Adesanya, SAN (with him, M.A. Ogunlola, Esq. and W. Kasali, Esq.) for the Appellant

Ricky Tarfa, SAN (with him, O. I. Opara, [Mrs.] and M.T. Ngalan, Esq.) for the 1st Respondent

Victor Nwadigo, Esq. for the 2nd Respondent

Olatunde Adejuyigbe, Esq. (with him, O.A. Adejuyigbe, Esq.) for the 3rd Respondent

CASES REFERRED TO

Ogunkunle v. Eternal Sacred Order (C&S) (2001) 12 NWLR (Pt. 127) 359 at 372

Yoye v. Olubode (1974) 10 SC 209

Ude v. Ojechemi (1995) 8 NWLR (Pt. 412) 152

Bakare v. Apena (1986) 4 NWLR (Pt. 33) 1

Gwandu v. Gwandu (2004) 17 WRN 76 at 93

Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546 at 590

Udeze v. Ononuju (2001) 3 NWLR (Pt.700) 216 at 226

Shola Coker & anor v. Rufai Sanyaolu (1976) 9-10 S.C. 209 at 223

Hadkinson v. Hadkinson (1952) 2 All ER 567

Rossek v. ACB Ltd. (1993) 8 NWLR (Pt.312) 382

Eliochin (Nig.) Ltd. v. Mbadiwe (1986) 1 NWLR (Pt.14) 47

Ajomole v. Yaduat (No.2) (1991) 5 NWLR (Pt.191) 266
Ijale v. Leventis & Co. Ltd. (1959) SCNLR 255
Dabup v. Kolo (1993) 9 NWLR (Pt. 317) 254
Kotoye v. CBN (1989) 1 NWLR (Pt.98) 419 at 446-447

B STATUTE & RULES REFERRED TO

Evidence Act, ss. 54, 73 and 150
Judgment Enforcement Rules, Cap 56, Revised L. F. N., 2004, O. VII
r. 7 (2)
C Court of Appeal Rules, O. 3 r. 15 (1)

BOOK REFERRED TO

Halsbury's Laws of England 4th Edition 527

D LEAD JUDGMENT BY MUHAMMAD JCA

The first respondent in this appeal, as liquidator/receiver of Alpha Merchant Bank Plc, instituted suit No. FBFM/ZTN/CV/34/97 at the Lagos Zone of the Failed Banks (Recovery of Debts) and Financial Malpractices Tribunal against the 2nd, 3rd respondents and the
E appellant herein for the recovery of the sum of one million four hundred and twenty one thousand, and eighty six dollars (\$ 1,421,086.00) and one hundred and ninety million, two hundred and eighty two thousand, four hundred naira (190,282,400.00) respectively owed
F to the ailing bank by the 2nd respondent. 1st and 2nd respondents reached an amicable settlement and following the terms of settlement executed by both, the tribunal on 18th March, 1998 entered a consent judgment thereon.

The 1st respondent as the judgement creditor/applicant, by a
G motion on notice pursuant to order 9 rules 1 and 2, order 43 rule 7(2) of the lower court's rules and order 7 rule 2 of the Judgement (Enforcement) Rules asked for the lower court's orders for the enforcement of the consent judgement of the tribunal. Having found the application meritorious, the court on 19th December, 2003, ordered thus:
H

"That leave is hereby granted to the applicant/judgment creditor to execute the judgment of the tribunal delivered in this case on the 18th of March, 1998 by way of a writ of possession commanding the Sheriff of this court to enter the 3rd respondent/judgment Debtor's

hotel project made up of 400 rooms located at Plot A, Victoria Island Shopping Complex, Ahmadu Bello way, Lagos delineated and shown verged RED on survey plan No. LD/D/LD/204A at the Lands Registry, Alausa, Lagos in compliance with the terms of the consent judgment entered into on 18th March, 1998 and give possession thereof to the applicant/judgment creditor herein who by virtue of the judgment of the Tribunal dated 18th March is entitled to possession of the premises. That the Sheriff of this court is further directed to, in furtherance of vesting possession of the premises in the applicant/judgment creditor on behalf of the 3rd respondent/judgment debtor herein, execute all necessary deeds, documents or instrument for the transfer of title in the property to the applicant/judgment creditor.”

Being dissatisfied with these orders, the 3rd respondent to the application has appealed from same on an amended notice containing two grounds.

Parties have filed and exchanged briefs and same have been adopted as arguments in the appeal. Counsel also addressed court orally thereby highlighting particular points in parties' briefs. A lone issue has been formulated in the appellant's brief as having arise for the determination of the appeal. The issue reads:

“Whether it was proper for the trial judge in the Federal High Court Lagos to have changed, amended or altered on the 19th of December, 2003 a judgment delivered almost six years earlier by changing the parties i.e. (1st respondent judgment/debtor to read 3rd respondent) and by christening the 3rd respondent as a judgment/debtor when no award was made against the 3rd respondent and who did not sign or consent to the terms of settlement made on 10th February, 1998,”

A single issue has similarly been formulated in the 1st respondent's brief of argument considered to have arisen for the determination of the appeal. The issue reads:

“Whether the learned trial judge is empowered to grant leave to the 1st respondent herein an applicant to execute the judgment of the court dated 18th March, 1998 by way of writ of possession and directing the sheriff of the court to execute all necessary deeds, documents or instruments for the transfer of title in the property to the 1st respondent herein as applicant/judgment creditor.”

The 2nd respondent in the appeal, the judgment debtor and

signatory to the terms of settlement leading to the consent judgment of 18th March, 1998, has adopted the issue formulated in the appellant's brief as having arisen for the determination of the appeal.

The issue formulated in the 3rd respondent's brief for the determination of the appeal however, reads:

B *"Whether the learned trial judge was right in making orders for the enforcement of the consent judgment dated 18th March, 1998 against the appellant as 3rd respondent/judgment debtor when the appellant is neither a consenting party to the terms of settlement nor made liable under the judgment."*

C Learned senior counsel for the appellant's argument of the appeal has been full of zest and gusto. The argument of the lone issue has been from two perspectives.

D Firstly, counsel contends that a consent judgment based on terms of settlement binds only consenting parties to the terms of settlement. Even though the appellant was a party to the proceedings wherein the consent judgment was entered, appellant was not bound, not being a party to the terms of settlement on the basis of which the consent judgment was ordered. Counsel relies particularly on the E Supreme Court's judgments in *Vulcan Gases Limited v. G.F. Indu AC* (2001) 9 NWLR (Pt. 719) 610 at 639; *Ogunkunle v. Eternal Sacred order (C&S)* (2001) 12 NWLR (Pt. 127) 359 at 372 and *Halsbury's Laws of England* 4th Edition 527.

F Secondly, it is argued that the scope of the Failed Bank Tribunal's ruling and the reference therein to the parties to the terms of settlement is as clear as it can possibly be. Judgment was entered for the applicant by the tribunal against the 1st respondent therein. The two are the 1st and 2nd respondents respectively in the instant appeal. G The tribunal's judgment is clearly restricted to the two who were signatories to the terms of settlement. Nowhere in the judgement has appellant been called, referred to or christened a judgment debtor such that the consent judgment binds it. In 1st respondent's application leading to the lower court's ruling of 19th November, 2003 H appealed from, the 1st respondent in the instant appeal had admitted that the property covered by certificate of occupancy No. 52 at page 52 volume 1989 A was not the property of Alpha Sofitel Hotels Plc, the 2nd respondent herein. There never was any dispute that certificate No. 52/52/1989A belonged to the appellant. It is fundamentally

wrong, therefore, for the lower court in obliging the 1st respondent the reliefs it sought to refer to the appellant as 3rd judgment debtor/respondent. It is further argued that it is wrong to appoint and authorize the Chief Registrar of the court to represent the appellant in the execution of all deeds of transfer of the latter's property. By doing so, the court was amending its judgment after same had been delivered. B The court was functus officio and estopped from re-opening a matter it had already determined. Counsel referred to the following: Yoye v. Olubode (1974) 10 SC 209 and Ude v. Ojechemi (1995) 8 NWLR (Pt. 412) 152. Again it was submitted that once a court's judgment C had been delivered and correctly represents the court's decision, the court cannot lawfully vary the operative and substantive parts of its very decision. Further reliance has also been placed in this regard on: Minister of Lagos Affairs & Another v. Akin Olugbade & other (1974) 1 All NLR (Pt. 2) 226 at 233, Commissioner of Lands Mid-Western State of Nigeria v. Edo Osagie & others (1973) 6 S.C. 155 and Bakare v. Apena (1986) 4 NWLR (Pt. 33) 1. D

Appellant's senior counsel urged us to allow the appeal because of the foregoing, set-aside the order of the lower court of 19th December, 2003 and any transfer or purported transfer of title made E in consequence of the order.

Counsel to the 1st respondent had given notice of preliminary objection on the competence of this appeal pursuant to order 3 rule 15 (1) of the rules of this court. Arguments pertaining to the objection are contained at pages 6-9 of the 1st respondent's brief. Therein, F it is argued that the two grounds contained in the appellant's amended notice of appeal do not derive from or relate to the judgment of the lower court. The grounds as well as the lone issue formulated from them are incompetent. The entire appeal which is predicated on incompetent grounds should accordingly be struck out and discountenanced. Counsel relied on, inter alia, Gwandu v. Gwandu (2004) 17 WRN 76 at 93; Reckitt and Colman Ltd. v. Gongoni Co. Ltd. (2001) 8 NWLR (Pt. 716) 592 ; Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546 at 590 and Udeze v. Ononuju (2001) 3 NWLR (Pt. 700) 216 at H 226.

The response of appellant's senior counsel to 1st respondent's preliminary objection was made orally in the course of his reply on point of law at the hearing of the appeal. Counsel submitted that this

court had already pronounced on the competence of the appeal. 1st respondent's counsel cannot relitigate the same issue all over again. One readily agrees with appellant's counsel on this issue. By Ss. 73 and 74 of the Evidence Act, it is incumbent to take judicial notice of the proceedings of this court. The decision of this court of 7th June, B 2004 clearly removes the bottom off the senior counsel to the 1st respondent's argument on the competence of the instant appeal. The decision is a conclusive proof of the facts therein decided between the parties. Neither party would be allowed to further raise the very issue in subsequent proceedings where same facts that had been C previously decided become relevant. In sum, the instant appeal for the very reasons articulated in the earlier ruling of this court, is competent. The preliminary objection of the 1st respondent accordingly fails. See: Shola Coker & anor v. Rufai Sanyaolu (1976) 9-10 S.C. D 209 at 223 and Jacob Oyerogba & anor v. Egbewole Olaopa (1998) 13 NWLR (Pt.583) 509.

In arguing the appeal, learned senior counsel to the 1st respondent referred to pages 182-187 of vol. B3 of the record of appeal and submitted that the appellant in the instant appeal was the E 5th respondent in the 1st respondent's application for the recovery of the debts from the 2nd respondent herein in suit FBM/L/2111/W/34/1997 at the failed banks tribunal. In the suit, appellant had been averred to be a shareholder of the principal debtor, the 2nd F respondent in this appeal. It was also averred that appellant had transferred its interest in and over the parcel of land measuring 1,656 hectares under Lagos State Certificate of Occupancy No. 525271989A dated 1989 as its share contribution in 2nd respondent. 2nd respondent expended the money sought to be recovered on the very land. G Vol. B3 of the record of appeal, it is submitted, contain copy of the power of attorney donated by the appellant to the 2nd respondent. Appellant who though served chose not to attend trial at the tribunal where the consent judgement was eventually entered in accordance with the terms of settlements between the 1st and 2nd respondents H herein. Appellant, it is argued, was privy to the suit wherein the consent judgment was decreed. On the basis of all the materials placed before the lower court, the court was right to have ordered the execution of such a valid subsisting judgment of a competent court. It did not matter that the appellant was described as a judgement debtor in

the court's decision since the appellant had divested its rights in the property and transferred same to the principal debtor. Counsel relies on *WAB Ltd. v. Savannah Ventures Ltd.* (2002) 10 NWLR (Pt. 775) 401 at 428-9.

In further argument, learned senior counsel contends that the instant appeal is an abuse of the process of this court as appellant and the other respondents herein are maintaining suit No. FHC/L/ CS/ 64/2001 seeking to set aside the Failed Banks tribunal decision. The instant appeal should accordingly be struck out. Counsel relies on *Nteogwuile v. Otuo* (2001) 16 NWLR (Pt.738) 58, (2001) 6 S.C. at 216 and *Oto v. Adojo* (2003)7 NWLR (Pt. 820) 636.

Finally, learned senior counsel argues that so much fuss had been made that the trial judge from whose decision the instant appeal emanated had become *functus officio* and that it was not lawful for him to open a case that had fully been determined. The lower court, it is submitted, only ordered execution of a valid subsisting judgment. Counsel contends that all the authorities relied upon by the appellants do not apply to the instant case. The lower court per order VII rule, 7(2) of the judgment enforcement rules Cap. 56 Revised Law of the Federation 2004 has the power to grant the relief it lawfully gave which order should be sustained.

1st respondent urged us to dismiss this appeal.

The 2nd respondent in this appeal has, not surprisingly, adopted both the summary of facts set out and the lone issue formulated in the appellants brief. Learned counsel to the 2nd respondent also adopted the arguments advanced by the appellant in the prosecution of the appeal and submitted that on the facts and on the law the appeal should be allowed. Counsel reiterated that the consent judgment entered by the failed Banks Tribunal only affected the 1st and 2nd respondent herein. The Lower Court is accordingly wrong in its approach to the matter as if parties other than the 1st and 2nd respondents were bound by the decision. The lower court had wrongly exercised its discretion in ordering the execution of the consent judgment in terms that bound persons who were not parties to the judgment. Learned counsel urged that the appeal be allowed.

In his arguing the issue formulated in 3rd respondent's brief, his counsel also identified himself with and adopted the submissions made by appellant's counsel. Relying on the decisions in *Talabi v.*

Adeseye (1972) 1 All NLR 255 and *Vulcan Gases Ltd. v. G.F. Indu AG* (2001) 9 NWLR (Pt.719) 610 at 649 learned counsel emphasized that consent judgment only binds parties to the terms of settlement on the basis of which the judgment evolved. Lower Courts orders making appellant liable are illegal and should be set aside.

B It appears to me that the real issue this appeal raises is *whether the lower court has the power to grant the leave it did for the execution of the judgment decreed by the Failed Bank Tribunal on 18th March, 1998 and if the powers have been appropriately exercised.*

C Appellant's major concern is the effect of the exercise of the court's discretionary powers of enforcement of the judgment that seems to be the cause of appellant's grief. Is the grief, the appeal that is, sustainable?

D It is not impossible to agree on certain basic facts same having manifested themselves in the record as being beyond dispute.

Firstly, the consent judgment of the failed Bank Tribunal decreed on the basis of the terms of settlement between the 1st and 2nd respondents herein still subsists. The judgment is valid and enforceable until it has been set aside. See: *Hadkinson v. Hadkinson* E (1952) 2 All ER 567; *Babatunde v. Olatunji* (2000) 2 NWLR (Pt.646) 557, (2000) FWLR (Pt. 5) 874 and *Rossek v. ACB Ltd.* (1993) 8 NWLR (Pt.312) 382. The judgement is enforceable because, by the operation of s. 150 of the Evidence Act, it is ex-fade regular, lawful and enforceable. Again given s. 54 of the same law, it is conclusive F proof against the parties to the Judgment as to what they agreed upon and by virtue of the orders of the tribunal as matters actually decided and appearing from the judgment itself on which it was based.

G It is helpful to state at this juncture what the operative and substantive part of the consent judgment entails, Following the admission of indebtedness by the 2nd respondent to the 1st respondent herein, the official receiver/liquidator of Alpha Merchant Bank, and the resolve to off-set same by the 2nd respondent, the two agreed H and the tribunal resultantly decreed that the debt be recovered upon

"the sale of the first respondent's (2nd respondent herein) 400 Bedroom Victoria Island Hotel project referred to at (sic) paragraph 6(e) of the application for the recovery of the debt.... that if the project is not sold within three months of the execution hereof, the first re-

spondent (2nd respondent herein) shall assign the project to the applicant (1st respondent herein) and the applicant shall accept the same, in full and final discharge of all claims against the 1st respondent (2nd respondent herein). ”(italics supplied for emphasis)

The bulk of appellant’s complaint in this appeal is to the effect that these orders are illegal since by them the property of the appellant who was not a party to the terms of settlement on the basis of which the consent judgment was decreed has become affected. This is all the more so when in the lower court’s orders the appellant has been referred to as 3rd respondent/judgment debtor years after the substantive judgment had been given.

It is beyond argument that an order for the enforcement of a valid judgement of a court of law must address exactly what the judgment being enforced decided. The exact terms of the judgment cannot be varied and must be enforced in exactly the same tenor as was determined. Indeed beyond the issue of enforcement of judgments, wherever a trial Judge without anything on the record supporting it makes an order and that order is challenged as incompetent because parties never addressed on it, that order as held in *Fawehinmi Cons Co. Ltd. v. OAU* (1998) 6 NWLR (Pt. 553) 171 at 182 is incompetent and liable to be set-aside on appeal.

Certainly learned senior advocate for the appellant is on a firm terrain in his submission that no court has the power of varying its judgment or that of a court of co-ordinate jurisdiction which is a correct representation of the particular decision. The power of varying the substantive and operative part of a valid subsisting judgment to have in its place a substitute different in form is not enjoyed even by the Supreme Court. See further: *Ude v. Ojechemi* (1995) 8 NWLR (Pt. 412) 152 at 173; *Umunna v. Okwuraiwe* (1978) 6-7 S.C. 1 and *Orukumkpor v. Itehu* 15 WACA 39.

In the instant case, the operative and substantive part of the consent judgment of the Failed Bank Tribunal has sanctioned the sale and/or the assignment of the 2nd respondent’s hotel project to the 1st respondent in satisfaction of the debt the former by terms of settlement leading to the judgment, admitted owing to the latter. Appellant insists that it is illegal to execute such a judgment because he owns the land on which the hotel project is erected and he is not a party to the consent judgment. He surmises that the lower court has

facilitated the execution of the consent judgement he never was a party to when the court referred to the appellant as the 3rd respondent/judgment debtor. It appears to me that there is some misapprehension here.

The significant fact the learned senior counsel for the appellant
 B either refuses to accept or glosses over, is that the sale and/or assignment of the Hotel project to the 1st respondent is being “facilitated” not because the lower court had referred to the appellant as a judgment debtor in the course of its 19th December, 2003 ruling. No.
 C The stark truth is that execution is to be effectuated because the substantive and operative part of the subsisting consent judgment decreed on 18th March, 1998 by the Failed Bank Tribunal has so sanctioned. The orders of the lower court being appealed from in the instant case are simply for the implementation of the tribunal’s judgment.
 D Appellant’s grief certainly is with the tribunal’s decision that gave the terms of settlement between 1st and 2nd respondents herein the legal backing, the teeth, so to say, with which appellant would be bitten and injured. The remedy to appellant’s impending injury and probable grief lies in frontally dealing with the source of such injury
 E and grief rather than the orders of the lower court that would not have been asked for and obtained if the tribunal’s judgment had never existed in the first place for same to be implemented. It is the tribunal’s decision that gives the terms of settlement between 1st and
 F 2nd respondents the force and validity of a judgment which must be complied with by parties and if either party refuses to comply, the other, on application to the court would have same enforced. And this is what exactly happened in the instant case. But for the tribunal’s orders, it would have been impossible for the 1st respondent to invoke the lower court’s powers in compelling the 2nd respondent to fulfill its part of the bargain the two had struck. In the decision in respect of which the instant appeal rages, it is the effectuation of the tribunal’s consent judgment that comes through rather than the amendment or variation learned senior appellant’s counsel submitted it is. Law aside, common sense dictates that it is the judgment that wrongly makes the appellant liable, that should be addressed and not the decision that merely gives effect to the one which imposes on the appellant the liability he asserts is not his own. If learned senior advocate for the appellant had adverted his attention to Supreme

Court's decision in *Woluchem v. Dr. Charles Inko-Tariah Wokoma* (1914) 3 S.C. 153 at 166-167, the futility of the instant appeal would have dawned on him. The apex court's decision therein fully defines what a consent judgment is. It also clarifies its scope and import. Above all it provides the basis of resolving the issue raised in the instant appeal. What one imbibed from the *Woluchem's* case *supra* is that ***where a party in a suit in which the matter in controversy was resolved pursuant to a consent judgment following terms of settlement to which the party was not a signatory, the remedy available to the party the consent judgment so wrongly affected is to appeal against the judgment with leave of court. Alternatively, by a fresh action appellant can have the judgment set aside by a court of competent original jurisdiction.*** See: *Jonesco v. Beard* (1930) AC 298 and *Edun v. Odan Community* (1980) 8-11 SC. 103.

The tribunal's judgment has not, from the records available to us, been appealed against. At least the instant appeal is not against the judgment more than six years after same had been delivered. And the judgment has not been set aside. Appellant must discharge the burden of displacing the presumption that the tribunal's orders which affected it in spite of the fact that it was not a signatory to the terms of settlement were correct. Until the appellant has appealed against the tribunal's subsisting consent judgment, or filed a fresh action to that end, he cannot be heard to question the tribunal's judgment on appeal. There being no appeal against the judgment, its correctness or otherwise cannot be raised in the instant appeal. See *Ijale v. Leventis & Co. Ltd.* (1959) SCNLR 255; *N.B.C. v. integrated Gas (Nig) Ltd.* (2005) All FWLR (Pt. 250) 1 at 20; (2005) 4 NWLR (Pt.916) 617; *Dabup v. Kolo* (1993) 9 NWLR (Pt. 317) 254 and *Kotoye v. CBN* (1989) 1 NWLR (Pt.98) 419 at 446-447. As this is not the appropriate platform for the appellant to discharge the onerous burden, same continues to be its cross!

Some final words. Senior counsel to the 1st respondent had asked us to discountenance the briefs of the 2nd and 3rd respondents herein. They cannot identify with the appellant. Their is to support and not to oppose the judgment being appealed against. Counsel has relied on *Kotoye v. CBN supra*. It has been countered that order

6 rule 4 of the rules of this court allows them to make any concession to the appellant if the two respondents choose to. And in any event, 1st respondent's counsel still has the appellant's argument to contend with. The 2nd limb of this submission is unassailable.

It is true that the rules of court appear to allow respondents to concede to the appellant such points they choose to. It is however never open for a respondent to totally concede to appellant in the appeal. While in answering "all the material points contained in the appellant's brief the respondent may in his brief concede such points he chooses to, the brief must, in spite of the concession, contain reasons why the appeal ought to be dismissed. The Supreme Court has defined what the traditional role of a respondent in an appeal is: a respondent who has neither filed a cross-appeal nor a respondent's notice will not be allowed to file a brief or proffer oral argument attacking the decision being appealed against. Kotoye v. CBN relied upon by senior counsel to the 1st respondent is apposite. See also Oguma Associated Co. Ltd. v. IBWA Ltd. (1988) 1 NWLR (Pt. 73) 658; Eliochin (Nig.) Ltd. v. Mbadiwe (1986) 1 NWLR (Pt. 14) 47; N.B.C & 1 v. Integrated Gas (Nig.) Ltd. (2005) All FWLR (Pt. 250) 1 at 20, (2005) 4 NWLR (Pt. 916) 617 and Ajomole v. Yaduat (No. 2) (1991) 5 NWLR (Pt. 191) 266. We are bound by these decisions. Accordingly, the briefs and oral arguments filed and proffered by the 2nd and 3rd respondents in the course of this appeal, being incompetent, have been struck out and discountenanced. The appeal has been a straight duel between the appellant and 1st respondent only.

On the whole, the lone issue in the appeal is resolved in favour of the respondent. The lower court had the power to grant the reliefs it did to the 1st respondent. If the reference the court made to the appellant as a judgment debtor was a mistake, as no injustice had been caused the appellant, the mistake is hereby discounted. This appeal is without merit. It is resultantly dismissed. The orders of the lower court of 19th December, 2003 for the execution of the Failed Banks Tribunal's consent judgment of 18th March, 1998 are hereby affirmed. Cost of the appeal is assessed at N10,000. 00 against the appellant in favour of 1st respondent.

OGUNBIYI JCA

Before now, I have been opportuned to read in draft, the judgment of my learned brother, Muhammad JCA. I agree with the conclusion arrived at in the judgment that the appeal lacks merit and should be dismissed. B

The sole issue on which my brother considered the lead judgment is succinct and unambiguous and by way of reiteration, is that which raises the question whether the lower court had the power to grant the leave it did for the execution of the judgment decreed by the Failed Bank Tribunal. It is not in dispute that the complaint, the subject matter of this appeal was a product of a judgment which was not the making of the lower court. It also follows and correct to say that the extent of involvement of the lower court relates to the execution which same power could have been within the prerogative executory powers of the tribunal itself. There is also no indication exhibiting that the lower court went outside the powers in respect of which the exercise of its jurisdiction was sought and granted. C D

It is pertinent for purposes of recapitulation that the learned trial judge never by any stretch of reason opened up any issue decided by the tribunal for purpose of further reconsideration of the earlier judgment. It had rather been consistent in the measure of the execution by ensuring that the same should be strict and in terms of the said judgment of the 18th March, 1998. E

The judicial powers of the courts are explicit as defined by section 6(6)(b) of the Constitution of the Federal Republic of Nigeria 1999 which same reproduced states: F

“6(6) The judicial powers vested in accordance with the foregoing provisions of this section: G

(a)

(b) *shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that persons;”* H

From all indications, the order made by the lower court on the 19th December, 2003 at page 108 of the record, Bundle A, was in respect of the same Hotel project the subject matter of the tribunal's consent judgment made up of.

“400 rooms located at plot A Victoria Island Shopping Complex, Ahmadu Bello Way, Victoria Island, Lagos particularly delineated and shown verged RED on survey plan No. LD/D/LA/204A attached to the Certificate of Occupancy dated 10th February, 1989 and registered as No. 52, Page 52 Volume 1989 A at the Land Registry, Alausa, Lagos.”

To my mind, the fact that the lower court designated the premises as that of the 3rd respondent/judgment debtor instead of the 2nd respondent/judgment debtor did not change or have adverse effect on the subject matter affected. In fact it could have done so to anyone else as long as the subject matter remains the same; in other words the mere designation to a particular person different had no effect whatsoever.

It is unfortunate therefore that the appellant is now complaining against the lawful duty undertaken by the lower court and in respect of which, there was no evidence to the contrary. It is too late in the day especially where there is no appeal against the consent judgment.

Consequently, and as rightly arrived at by my learned brother in the lead judgment there is no merit in this appeal which same I hereby also dismiss and abide by the consequential orders made therein inclusive of that as to costs.

F **GARBA JCA**

I have read in draft, the lead judgment written by my learned brother Muhammad J.C.A.

His lordship has adequately considered the only issue that calls for determination in this appeal.

However, I would like to emphasise that all that Federal High Court ordered in the ruling appealed against was, for execution of the consent judgment in respect of the Hotel Project situate at Plot ‘A’ Victoria Island Shopping Complex, Ahmadu Bello Way, Victoria Island, Lagos. It is not in dispute that the said project belongs or was owned by Alpha Sofitel Hotels Plc, the 2nd respondent. It is also common ground that the 2nd respondent was a party to and signed the terms of settlement that were entered by the then tribunal, as the consent judgment. It has been conceded on all the authorities cited

by the learned senior counsel for the appellant and more that parties and only parties to consent judgments are bound by the terms set out therein. Now since the 2nd respondent was a party to the consent judgment, the terms of that judgment binds it to the end of satisfying the judgment. One of the terms of settlement entered as consent judgment was in the following terms: - B

“2. The first respondent agrees with the applicant that the aforesaid sums are to be paid to the applicant upon the sale of the first respondents 400 room Victoria Island hotel project, referred to at paragraph 6(e) of the application for the recovery of debt herein: -..” C

The 1st respondent referred to in the terms is 2nd respondent in the present appeal. So the agreement by the parties and consent judgment was to the effect that 2nd respondent’s hotel project at Victoria Island was to be sold to pay the debt it owned. That was all that Federal High Court ordered to be done in the ruling appealed D against.

In my respectful view, the fact that the certificate of occupancy or title to the piece of land on which the hotel project was built was or is in the name of any other party than the 2nd respondent, would invalidate or abort any order for execution of a subsisting judgment E of a competent court against the property thereon.

However, I agree that the Federal High Court has no power, authority, or jurisdiction to change the terms of the consent judgment entered by the defunct tribunal to make 3rd respondent who F was not a party thereto, be bound by that judgment. It was an error on the part of that court to have used the term “3rd respondent/ judgment debtor’s hotel project” in its order. The correct and proper party and order should have been “2nd respondent/judgment debtor’s hotel project” as set out in the consent judgment. G

Let me quickly say that the above error did not change the terms since the property set out in the terms remains the 400 room hotel project located at plot A Victoria Island Shopping Complex, ‘Ahmadu Bello Way, Victoria Island, Lagos, which is the property of the judgment debtor under the consent judgment and in respect of H which the lower court order was issued.

For all the reasons given in the lead judgment, I agree that the lower court’s order was in the terms of the consent judgment and that the appeal be dismissed

I dismiss it and abide by the consequential orders contained
in the lead judgment.

Appeal dismissed

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