

SUPREME COURT OF NIGERIA
8TH MAY, 2009 SC. 246/2002
CORAM: - A. I. KATSINA-ALU, A. M. MUKHTAR,
W. S. N. ONNOGHEN, P. O. ADEREMI,
C. M. CHUKWUMA-ENEH, JJSC

CHIEF EMMANUEL EZE ONWUKA APPELLANT
AND
ENGINEER SAMUEL ONONUJU & ORS. RESPONDENTS

APPEALS - Grounds - Invalidity - Allegation of - Need for Clarity - Appellant's submissions in these respects are clumsy - He seems to approbate and reprobate - As rightly found by the Court of Appeal (H1)

APPEALS - Records - Binding effect - The court is bound by the record - Which in this case does not bear out the claim of the appellant - That he raised and argued insufficient particulars of grounds - At the Court of Appeal (H2)

APPEALS - Fresh issues on appeal - Propriety of - They cannot be raised without prior leave of court - Else submissions in regards to them go to no issue (H3)

PRACTICE & PROCEDURE - Appeals - Preliminary objections - Manner of raising - It may be set out in the brief of argument - But applicant must also file a formal notice thereof - And move same - Or it will be deemed waived (H4)

RULES OF COURT - Proceedings during vacation - Propriety of - O. 26 r. 9 (2) High Court Rules of Anambra State - Issue of want of jurisdiction cannot be a ground - For hearing application for discontinuance during vacation (H5)

COURT PROCESSES - Taken contrary to the law - Effect - It is a nullity - For which the affected party is at liberty to set aside *ex debito justitiae* (H6)

PRACTICE & PROCEDURE - Discontinuance - Application to discontinue - Initiation of - During vacation - It must be brought either with the consent of the parties - Or by reason of some urgency (H7)

PRACTICE & PROCEDURE - Application to withdraw - Based on urgency - Need for affidavit of urgency - It should be filed to verify the facts of urgent nature of the matter - But appellant failed to do so (H8)

PRACTICE & PROCEDURE - Proceedings during vacation - Proof of urgency - Burden of - Appellant had the onus of proving urgency - But failed to discharge the burden (H9)

FACTS

The plaintiff/appellant sued the defendants/respondents before the High Court of Anambra State claiming declaration of title to the land in dispute, damages for trespass and perpetual injunction. The land was subject to a customary right of occupancy. Subsequently, following some Supreme Court decisions, appellant realised that the High Court lacked jurisdiction to entertain a claim in respect of land the subject of a customary right of occupancy.

Consequently, while the court was on the Statutory annual vacation, appellant brought an application to discontinue the suit before the vacation judge. The application was granted. Upon service of the application on respondents, their counsel had written the court objecting to no avail to the application being heard during vacation. After the vacation, respondents applied to the trial court to have the discontinuance order set aside, which application was refused. Aggrieved, respondents appealed against the discontinuance order and the order refusing their application to set aside. The Court of Appeal allowed the appeal. This is an appeal by appellant against the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

“1. Whether the Court below was right in holding that grounds 6, 7, 8 and 9 of the grounds of appeal without particulars and issues drawn from competent grounds of appeal namely grounds 3, 4, and 5 are competent

2. Whether in determining the issue of competence of grounds 6, 7, 8 and 9 of the grounds of appeal based on want or absence of

particulars, the Court below was right in considering the objection on the basis of sustainability of the whole appeal by the presence of one competent ground of appeal.

3. Whether the Court below was right in setting aside the order of the trial Court made on 26/8/98 on the ground that the order was void having been made during vacation in a manner that does not warrant urgent attention within the meaning of order 26 Rule 9(2) (b) and (c) of the Anambra State High Court Rules.

4. Whether the Court below was right in setting aside the trial Courts order dated 21st day of January, 2000 on the ground that the order was not made judicially and judiciously.

5. Whether the Court below was right in setting aside the trial Courts orders of 26/8/98 and 21/1/2000 when the orders did not occasion a miscarriage of justice and no injustice was suffered by the respondents.”

HELD (Unanimously dismissing the appeal per **CHUKWUMA-ENEH JSC**)

APPEALS - Grounds - Invalidity - Allegation of

1. The appellant has even then not stated the factors invalidating the respondents’ grounds of appeal. And the court should not speculate on that question. There can be no doubt that the appellant’s submissions in these respects are clumsy as he has seemed to approbate and reprobate on the issue of competency of the notice of appeal and the fate of the appeal itself; in other words, the court below rightly found that the appellant is blowing hot and cold at the same time as clearly borne out by the above abstracts. (p. 1408 G)

APPEALS - Records - Binding effect

2. The court is bound by the record of appeal and the appellant has not challenged it in any manner. In this case, the court is bound to examine the state of the record on the conflicting claims as regards the appellant’s assertions that he has raised and argued the question of no particulars or insufficient particulars to grounds 2, 6, 7, 8 and 9. The appellant’s claim in this regard after a thorough perusal of the instant record is not so borne out by the record, that is, to the effect that grounds 1, 2, 6, 7, 8 and 9 have no or insufficient particulars; this is not part of his case as per his brief of argument before the court

below. (p. 1409 A)

Fresh issues on appeal - Propriety of

3. The appellant not having complained against any of the grounds of appeal filed by the respondents in the court below for having no particulars or insufficient particulars as required by Order 3 Rule 2(2) and (3) of the CAR 2002 cannot be allowed to do so at this stage of the proceedings in this court without leave of court being first obtained for being fresh issues on appeal. And so I make bold to say that the appellant's submission in this regard goes to no issue. (p. 1409 F)

Appeals - Preliminary objections - Manner of raising

4. Although an objection can be set out in the brief of argument; it is also incumbent on the applicant as appellant here to file a formal notice of preliminary objection stating the grounds therefore at least 3 days to the hearing of the appeal. And more importantly it has to be moved otherwise it is deemed waived. (p. 1410 B)

Proceedings during vacation - Propriety of

5. The trial court from the foregoing quotation has made the issue of want of jurisdiction of the trial court as of urgent nature to ground applying to discontinue the instant suit during the court's annual vacation. Thus the trial court has exercised its discretion in favour of the appellant in my opinion wrongfully under Order 26 Rule 9(2) (c) supra. (p. 1411 F)

COURT PROCESSES - Taken contrary to the law - Effect

6. It is settled that any process taken contrary to the provisions of the law is a nullity for which the affected party is at liberty to set aside *ex debito justitiae*. I agree with the respondents / submission that if a decision is a nullity it is no ground for refusing to set it aside that this decision would have been the same without the nullifying circumstances. (p. 1412 A)

Application to discontinue - During vacation

7. The application to discontinue has to be initiated upon fulfillment of the conditions precedent to the exercise of jurisdiction in the case

- that is to say by complying with the provisions of sub-rule (b) by applying to discontinue with the consent of the parties to the suit or cause and under sub-rule (c) by the application to discontinue the suit or cause being dictated upon by the urgent nature of the application. (p. 1414 A)

B

Application to withdraw - Based on urgency

8. It must be noted that the plaintiff (appellant) has not supported his application to withdraw this suit with affidavit as would otherwise be the case where as here he has alleged that discontinuance of the suit is premised on some urgent nature. C

To justify the exercise of court's discretion to grant such an application an applicant as the appellant here must go the extra distance of filing an affidavit of urgency to verify the facts of the urgent nature of the matter so as to take hearing of the matter out of its normal turn which in the instant case is 5/10/98. (p. 1415 D/F) D

Proceedings during vacation - Proof of urgency - Burden of

9. The appellant has not proffered evidence of any detriment or irreparable injury the appellant would otherwise have suffered if the suit were not discontinued during the court's annual vacation. E

The urgency of an application under Order 26 Rule 9 (2) (c) (ibid) may in the outermost of the question be a matter of mixed law and fact which ever case it is, the onus of proving the fact of urgency of the application is on the appellant. The appellant has not discharged this burden in this matter. (p. 1416 D/F) F

REPRESENTATION

Tochukwu Onwugbufor SAN with Nkem Okoro and Aghadiuno Uchenna for the appellant. G

CASES REFERRED TO

SADIKWU V. DALORI (1996) 5 NWLR (Pt.447)

OYEDIRAN V. EGBOTOLA (1997) 5 NWLR (Pt.507) H

IDAAYOR V JIGIDAN (1995) 2 NWLR (Pt 377) 359

ATUYELE V ASHAMU (1987) 1 NWLR (Pt 49) 267 at 281 - 2

KOYA V UBA (1997) NWLR (Pt 481

NSIRIM V. NSIRIM (1990) 3 NWLR (Pt 138)

HAYES V HAYES (2000) 3 NWLR (Pt 648)

UGO V OBIEKWE (1989) 1 NWLR (Pt 99) 566 at 580

AMADI V ORISAKWE (1997) 7 NWLR (Pt 511) 161 at 170

BRAWAL SHIPPING CO. V ONWUDIKE (2000) 11 NWLR (Pt 687) 387 at 404

^B OFORKIRE V. MADUIKE (2003) FWLR (Pt.147) 1090

FAGBULE V. RADEIGUES (2003) FWLR (Pt.137) 117 at 1173.

ARORI & ORS. V. ELEMO & ORS. (1993) 1 - 3 SC. 13 at 16-17

^C **STATUTES & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, ss. 33 & 241
High Court Law of Anambra State, ss. 38 & 72

Court of Appeal Rules, 2002, O. 3 r. 15 (1)

High Court of Anambra State (Civil Procedure) Rules 1988, O. 26,

^D r. 9 (2) (c)

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

This appeal is from the decision of the Court of Appeal,

^E Enugu Division on a Notice of appeal filed on 11/7/2002 in this matter. The appellant (the plaintiff) has instituted this action against the respondents (the defendants) in the High Court, Ihiala Judicial Division, Anambra State claiming inter alia as per the amended Statement of Claim as follows:

^F *"The plaintiff for himself and on behalf of Umuezegwumpi Umuofor Community Enterprise otherwise called Umuezegwumpi Umuofor Community Development claims against the defendants jointly and severally as follows:-*

^G (a) *A declaration that the defendants are not the owners of and/or possessors or holders/occupiers of the piece and parcel of land situated at Akabo Umuohi in Okija and which is described in the Customary Right of Occupancy granted to the plaintiff on the 27th day of April, 1989 and registered as No. 1 at page 1 in volume 1274*
^H *at the land Registry, Enugu.*

(b) *A further declaration that the plaintiff for himself and on behalf of Umuezegwumpi Umuofor Community otherwise Umuezegwumpi Umuofor Community Development is the present holder and/or occupier of the said land.*

(C) N250,000.00 (two hundred and fifty thousand Naira) damages against the defendants jointly and severally for their acts of trespass on the said land.

(d) A perpetual injunction to restrain the defendants, their servants, agents and/or privies from committing further acts of trespass on the land now in dispute”

B

This action has been filed on 29/3/90 as Suit No. HH/22/90. Upon an application filed for leave to discontinue the said action by the plaintiff; the suit has been struck out on 26/8/98 during the court's annual vacation by the vacation Judge on the ground that the trial Court has no longer any original jurisdiction to deal with land in dispute being subject to customary rights of occupancy. This has arisen from the Supreme Court's decisions in SADIKWU V. DALORI (1996) 5 NWLR (Pt.447) and OYEDIRAN V. EGBOTOLA (1997) 5 NWLR (Pt.507), both decisions have ousted the original jurisdiction of the High Court over lands subject to Customary Rights of Occupancy - that is lands situate in rural areas.

C

The speed at which the matter has been proceeded with before the trial court is simply electric. The application to discontinue the suit has been filed on 18/8/98 within the vacation, served on defendants' counsel on 20/8/98 within the vacation, fixed for hearing on 26/8/98 within the vacation, finally heard and granted on 26/8/98. Sequel to striking out the suit, the appellant has commenced by a writ of summons dated 28/8/98 an action substantially for the same reliefs against the defendants/respondents in the Customary Court of the Ihiala Territorial limit. The suit has been mentioned on 2/9/98 fixed for hearing on 16/9/98 and final judgment in the matter has been given on 28/9/98. In a matter of one month and two days the matter has been done and concluded. One of the quickest proceedings!

E

F

G

By an application filed on 5/10/98 the defendants have inter alia prayed the trial court to set aside its ruling of 26/8/98 being null and void for not having been made in accordance with Order 26 Rule 9 of the High Court Rules of Anambra State; and relist the suit for hearing as the ruling of 26/8/98 is void ab initio being an order having been made during the court's annual vacation when urgent matters only are entertained with the consent of the parties and particularly as the plaintiffs application upon which the ruling is predi-

H

cated does not require any urgency. The trial court has struck out the application for want of jurisdiction with cost of N1000.

Aggrieved by the orders of 26/8/98 and 21/1/2000 the defendants/respondents have appealed to the Court of Appeal (Court below) which after hearing the appeal allowed it and set aside the two orders of 26/8/98 and 21/1/2000. The plaintiff is the appellant while the defendants are the respondents in this court. Further facts of this matter appear in the body of the judgment.

The plaintiff, dissatisfied with the decision of the Court below has appealed the matter to this Court by a notice of appeal filed on 11/7/2002 containing 2 grounds of appeal, which has been enlarged to 9 grounds of appeal on the whole by a notice of additional grounds of appeal filed on 19/12/2002.

The parties have filed and exchanged their respective briefs of argument. The plaintiff (appellant) has distilled five issues for determination as follows:-

“1. Whether the Court below was right in holding that grounds 6, 7, 8 and 9 of the grounds of appeal without particulars and issues drawn from competent grounds of appeal namely grounds 3, 4, and 5 are competent

2. Whether in determining the issue of competence of grounds 6, 7, 8 and 9 of the grounds of appeal based on want or absence of particulars, the Court below was right in considering the objection on the basis of sustainability of the whole appeal by the presence of one competent ground of appeal.

3. Whether the Court below was right in setting aside the order of the trial Court made on 26/8/98 on the ground that the order was void having been made during vacation in a manner that does not warrant urgent attention within the meaning of order 26 Rule 9(2) (b) and (c) of the Anambra State High Court Rules.

4. Whether the Court below was right in setting aside the trial Courts order dated 21st day of January, 2000 on the ground that the order was not made judicially and judiciously.

5. Whether the Court below was right in setting aside the trial Courts orders of 26/8/98 and 21/1/2000 when the orders did not occasion a miscarriage of justice and no injustice was suffered by the respondents.”

The defendants have filed a joint respondents’ brief of argu-

ment which they have adopted and relied upon at the oral hearing of the matter. The defendants/respondents have, on their part, raised four issues for determination as follows:

“1, Whether the Court below was right in holding that the appellants’ preliminary objection was “baseless” and consequently “ignored” same.

2. Whether the lower Court was right in holding that the trial Court lacked the requisite adjudicatory powers and jurisdiction to entertain the appellants’ motion for discontinuance of the suit, during the statutory annual vacation period, contrary to Order 26, Rule 9(2)(c) of the High Court of Anambra State (Civil Procedure) Rules 1988 and Sections 38 and 72(1)(d) of the High Court law.

3. Whether the Court below was right in setting aside the order of the trial Court made on 21st January, 2000 which sustained the earlier order of the trial Court during the statutory annual vacation period.

4. Whether the lower Court was right in holding that the trial Court exercised its jurisdiction illegally when it never had the jurisdiction to so exercise.”

The appellant vis-à-vis the respondents’ brief of argument has filed a reply brief. I shall deal with it anon. The case of each side to this matter as per their respective briefs borders on the construction and meaning and application of the Order 26 Rule 9(2) (b) and (c) of the Anambra State High Court Rules; and I shall deal with the same succinctly anon. -

Firstly, arguing issues one and two together, the appellant (plaintiff) has submitted that under Order 3 Rule 2(2) of the Court of Appeal Rules a ground of appeal on misdirection or error in law is incompetent without particulars although some grounds of appeal may have the particulars embodied or incorporated in them. Vide, IDAAYOR V JIGIDAN (1995) 2 NWLR (Pt 377) 359, ATUYELE V ASHAMU (1987) 1 NWLR (Pt 49) 267 at 281 - 2, KOYA V UBA (1997) NWLR (Pt 481); NSIRIM V. NSIRIM (1990) 3 NWLR (Pt 138)-; HAYES V HAYES (2000) 3 NWLR (Pt 648) -. In this regard, he submits that if the court below has examined the plaintiff’s challenge based on the correct principles and alongside the provisions of Order 3 Rule 2(2) of CAR 2002 it could have discovered that grounds 1, 2, 6, 7, 8 and 9 have no particulars and that as the respective particu-

lars of errors are not in-built in them, they are therefore incompetent. The point has also been taken that issues have to be raised from competent grounds of appeal, and that issues raised from incompetent grounds of appeal or from both competent and incompetent grounds of appeal are incompetent and liable to be struck out. See B UGO V OBIEKWE (1989) 1 NWLR (Pt 99) 566 at 580, AMADI V ORISAKWE (1997) 7 NWLR (Pt 511) 161 at 170, BRAWAL SHIPPING CO. V ONWUDIKE (2000) 11 NWLR (Pt 687) 387 at 404. It is submitted that ground 1, a valid ground has been argued with the incompetent ground 6 as issue No. 1 while the incompetent grounds C 2, 3, and 9 have been argued together with ground 1 as issue No. 2 and that issue No. 4 has been distilled from grounds 4, 5, 8 and 9 an admixture of competent and incompetent grounds of appeal. He has therefore opined that the Court below ought to have struck out D the incompetent grounds and issues so distilled from them. Also that the same goes for all the issues raised by the defendants excepting in issue No. 7, the only competent issue as conceded by the defendants/respondents in the appeal. On the issue of costs it is submitted as having been raised not in compliance with the provision of E S.241(2)© of the 1979 Constitution is liable to be struck out. Furthermore, that the Court is enjoined to ensure that issues for determination distilled from incompetent grounds or from competent and incompetent grounds of appeal in circumstances where severance is F not possible as here are liable to be struck out. He then has posited that the Court below has proceeded on the mistaken basis that the plaintiffs complaint is on the sustainability or validity of the appeal qua appeal i.e. by virtue of some competent grounds of appeal in the notice of appeal but that his complaint is questioning the validity G of some grounds of appeal with no particulars or insufficient particulars and issues raised from competent and incompetent grounds of appeal; thus making the issues void. The Court below, it is urged, ought to have struck out the appeal itself on this basis.

Issue 3 is on whether the Court below is right in setting aside H the order of the trial court made on 26/8/98 on the ground that the order is void having been made during vacation in a manner that does not warrant urgent attention within the meaning of Order 26 Rule 9(2)(b) and (c) of the Anambra State High Court Rules which has enjoined the Court to hear only applications or causes with the

parties consent or applications of urgent nature during the court's annual vacation. He submits that upon the decisions of this Court in SADIKWU V DALORI (supra) and OYEDIRAN V. EGBOTOLA (supra) the original jurisdiction of the trial Court i.e. Ihiala High court in this instance has been ousted as the subject matter (i.e. the land in dispute) is situate in the rural area within the meaning of the Land Use and the Declaration of Urban Area Order of Anambra State and so is subject to Customary Rights of Occupancy. The jurisdiction to deal with Customary Rights of Occupancy is vested in the Customary Court. And that albeit, the appellant by an application has applied to discontinue the suit during the Court's annual vacation. Although, the defendants have been served the plaintiffs application, they have not, however, appeared at the hearing of the application; according to them the application cannot be heard or entertained without their concurrence under sub-rule (2) (b) Rule 9 of Order 26 (ibid) or it has to come within meaning of urgent matters as contemplated under Order 26 Rule 9(2)© of Rules (ibid) and that there is no urgency surrounding the application.

The plaintiff contends that the application comes under Order 26 Rule 9(2)© and not Order 26 Rule 9(2)(b). The plaintiffs case is that what has been in issue in the suit has been one of want of original jurisdiction of the trial court which requires timeous and expeditious dispatch in determining the same and upon which basis the trial court has rightly struck out the suit even more so during the court's annual vacation. In support of this stance the cases of ONYEAMA V. OPARA (1987) 3 NWLR (Pt 60) 259, ATTORNEY-GENERAL. LAGOS STATE V DOSUMU (1989) 3 NWLR (Pt 111) have been referred to and relied upon. It is contended that the decisions in SADIKWU and OYEDIRAN have only come to the appellant's notice about 1998 hence the immediate filing of the application for leave to discontinue the instant suit during the Court's annual vacation. The appellant has therefore argued that in the circumstances, he has acted timeously as the issue of lack of jurisdiction of the trial court is an urgent factor that has intervened in the proceedings even though it is about 8 years since the matter has been pending; and even more so considering the surrounding circumstances of this case. And that in any event the plaintiff should not be visited with the negligence of his Counsel in dealing with this issue. See ATTORNEY-GENERAL

OF THE FEDERATION V AIC LTD. (1995) 2 NWLR (Pt.378). The appellant has further contended that by setting aside the order of 26/8/98 it would mean relisting without more the suit that has already been struck out and the continued pendency of the suit in the trial Court to no benefit to either parties.

B On issue 4, the appellant has argued on whether the Court below rightly has the power to set aside the ruling of 21/1/2000 by Nwizu J. refusing to set aside the order of 26/8/98 by Nwankwo J. upon which is predicated the application to discontinue the substantive suit for want of original jurisdiction in the trial court to deal with it. . .

C Sequel to the decision of Sadikwu's case by this court; the appellant (plaintiff) has contended that the interference with the trial court's exercise of its discretion in striking out the suit by the court below is unfounded as it has not been showed to be manifestly wrong, arbitrary or reckless or on any other ground; but that the court below has to do so where the discretion has been exercised based on wrong principles or on misapplication of law or facts. See: UNIVERSITY OF LAGOS V. AIGORO (1985) 1 NWLR (Pt.143); UNIVERSITY OF LAGOS V. OLANIYAN (1985) 1 NWLR (Pt.156); CEEKAY TRADERS LTD. V. GENERAL MOTORS (1992) 2 NWLR (Pt.222) 1332 at 156 and OYEKANU V. NEPA (2000) 15 NWLR (Pt.609). It is further opined that where the issue of jurisdiction is the reason for discontinuance of an action as here, that the only option open to the court is one of striking out the suit which in this case has occasioned no injustice and that the court below has acted in error to have set aside the ruling of 21/1/2000.

F The court is urged to allow the appeal and set aside the decision of the court below.

G The defendants/respondents have responded in their brief to the plaintiff/appellant's issues 1 and 2 to the effect that the appellant has gotten mixed up in arguing on the one hand that the notice of Appeal is incompetent for want of any competent ground of appeal contained therein and on the other hand that grounds 3, 4 and 5 contained in the Notice of Appeal are competent grounds of appeal. The defendants therefore submits that the court below ignoring the contradictory submissions has rightly found all the grounds of Appeal in the Notice of Appeal as competent.

The appellant is charged with raising without leave an entirely new case from the one it has raised and argued in the lower court by contending here for the first time that grounds 2, 6, 7, 8 and 9 are incompetent for having no or insufficient particulars as required by Order 3 Rule 2(2) and (3) of the CAR 2002 and as settled in the decisions of ADEGOKE MOTORS LTD V. ADESANYA (1989) 3 NWLR (Pt.109) 250. AGU V. IBEKWE (1991) 3 NWLR (Pt.80) 385; STOOL OF ABINABINA VS. ENGMADU 12 WACA 171; KATE ENTERPRISES LTD. V. DAEWO NIG. LTD (1985) 2 NWLR (Pt.5) 116; EJIOFODUI V. OKONKWO (1982) 11 SC 74 AND OGBOMA V. ATTORNEY GENERAL IMP STATE (1992) 1 NWLR (Pt.229 - 647 and that the fresh issues raised without leave being incompetent are liable to be struck out. See: STANDARD PRINTING AND PUBLISHING CO. LTD. V. N.A.B. LTD. (2003) FWLR (Pt.37 1097 at 1099. The defendants have also challenged the plaintiffs case on the preliminary objection as having been raised not by a formal notice of motion and furthermore for not having been raised in accordance with the mandatory provisions of Order 3 Rule 15 (1) of the CAR 2002. See: NSIRIM V. NSIRIM (1990) 5 SCNJ 174 AT 182-180.

Issue 2: is on whether the trial court is without jurisdiction to entertain the appellant's motion for discontinuance of the suit during the court's annual vacation as required under Order 26 Rule 9 (2) © (ibid) and Sections 38 and 72 (1) (d) of the High Court law.

The Respondents (Defendants) have maintained that the discontinuance of suit No. HIH/22/90 has not required the urgent action it has received by the trial court. In this regard, they have adverted to Sections 38 and 72 (1) (d) (ibid) and Order 26 Rule 9(2) (ibid) as having prescribed the conditions precedent for entertaining any cause or matter during the court's annual vacation; in other words, as constituting conditions precedent to the exercise of the trial court's jurisdiction to entertain the instant application and so make the Order of 26/8/98. See: MADUKOLU V. NKEMDILIM (1962) 1 ANLR 587, GOVT. OF AKWAIBOM STATE V. POWERCOM LTD & ANOR. (2005) FWLR (Pt.246) 1353 at 1356. And as regards Order 26 Rule 9(2) © that the fact of urgency of the instant application has to be established as one of the conditions precedent for granting the application and that the date of the plaintiff/appellant becoming aware of the Sadikwu's case is not a ground of urgency in the circumstances of

in the matter. They submit therefore that the appellant has not made out a case of any urgency for applying during the court's annual vacation to discontinue this case.

On issue 3 and 4: i.e. on whether the court below has rightly set aside the order of 21/1/2000; the defendants submit that the order of 26/8/98 being an illegal order that the trial court has by the Order of 21/1/2000 purported to sustain it and so has itself rightly been set aside by the court below. They have argued that want of jurisdiction in the trial court in this instance to deal with the suit has not the character of any urgency as to justify the application to discontinue the suit during the court's annual vacation and even more so cannot be any basis to justify hearing this matter behind the defendants/respondents thus violating their rights to fair hearing as per Section 33 of the 1999 Constitution. See: IKWEKI V. EBELE (2005) 6 AFWLR (pt.257) 1401 at 1410, SALEH V. EGEIBON (1994) 6 NWLR (Pt.348) 23, NDUKIDEM V. OKO (1986) 5 NWLR (Pt.45) 909, UNTHMB V. NNOLI (1994) 8 NWLR (Pt.363) 376; BAMGBOYE V. UNIVERSITY OF ILORIN (1999) 10 NWLR (Pt.662) 290. And that the defendants have rightly alleged denial of their fundamental rights to canvass for a dismissal of the suit; a right which the Order of 26/8/98 has denied them. They have therefore submitted that the trial court is wrong for refusing to set aside its decision of 26/8/98 as a void decision and offending the plaintiffs constitutional rights and so that the order of 21/1/2000 which has purported to sustain a void order is itself equally void as there is no substratum upon which to sustain the said order of 21/1/2000.

The court is urged to dismiss the appeal and affirm the decision of the Court below.

The plaintiff/appellant has in his reply brief of argument more or less repeated the points dealt with in their main brief of argument particularly on the question of having urged contradictory submissions concerning the notice of appeal being invalid for want of any competent ground of appeal vis-a-vis the submission that grounds 3, 4, and 5 are competent grounds as contained in the same notice of appeal; and the question of competent and incompetent issues having been raised from these grounds of appeal; also on the question of having raised no particulars or insufficient particulars to grounds 2, 6, 7, 8 and 9, which the defendants/respondents have tagged a new

issue raised without leave and the question of non-compliance with the provisions of Order 3 Rule 15 (1) of the CAR 2004. I need not detail these questions any further.

On urgency of the application, the plaintiff/appellant has relied on Order 26 Rule 9(2) © to contend that the application has been rightly entertained during the court's annual vacation. He debunks the submission that the issue of urgency should only be determined from the age of the case and should not be based on the mistake or inadvertence as to the time the plaintiff/appellant or his counsel has become aware of the decision in *Sadikwu*. He argues that the issue of urgency can be a question of fact or law or both and so could be an issue of jurisdiction as in this case where the trial court has rightly exercised its discretion to entertain the case during the court's vacation. He refers to and relies on paragraphs 5 and 6 of the plaintiffs affidavit in support of the application on the issue of urgency and that as the suit has been pending for 8 years it justifies urgent action as per the instant Order of 26/8/98, thus to enable the plaintiff to file a fresh suit in appropriate court to determine the rightful owner of the land in dispute as the decision in *Sadikwu*'s case has occasioned an inordinate delay again, thus affecting the rights of the plaintiff. He submits that the facts of urgency outlined herein do not admit of being termed a self induced urgency.

On issue 3 and 4; the plaintiff has discussed fair hearing in the context of this matter and the court's duty to provide level playing ground for the parties in this case to ventilate their cases and that the court is not obliged to do more. He urges the court to allow the appeal and set aside the decision of the court below.

I think I should start discussing this matter from the standpoint of the preliminary objection raised by the appellant as encompassed under issues 1 and 2 of his brief of argument. The issues are as set forth above. Just as they have been argued together in the said brief they are taken together in this judgment. The appellant has contended of a total misapprehension by the court below of his complaints in the appeal, which is not as regards the validity of the appeal qua appeal but as to the issue of the validity of some grounds of appeal i.e. grounds 3, 4 and 5 otherwise competent grounds of appeal as against grounds 2, 6, 7, 8 and 9, otherwise incompetent grounds of appeal for having no particulars or insufficient particulars

in their expatiation vis-a-vis the issues for determination distilled therefrom or from both competent and incompetent grounds thus making the issue or issues raised for determination in the appeal void. The respondents have submitted in this regard that the appellant has shifted grounds in presenting his case as proffered in this court vis-a-vis his case in the court below. Hence I have adverted to p. 82 of the record with particular reference to paragraph 4 = 2 of the appellant's brief of argument in the court below, wherein the appellant has submitted thus:

"I would like to argue that grounds 1, 2, 6, 7, 8 and 9 of the notice and grounds of appeal are incompetent in that the Notice of Appeal has no grounds of appeal as required by law. The appeal in those circumstances is defective and incompetent".

There can be no misgivings as to the import of the foregoing abstract to the effect that the notice of appeal contains no valid ground of appeal as required by law. And so, the notice of appeal as decided in GLOBAL TRANS. OCEANICO S.A. V. FREE ENT. (NIG.) LTD. (2001) 2 SC. 154 is defective for want of any competent and valid ground of appeal and ought to be struck out.

As if to compound the foregoing submission on the notice of appeal being incompetent for containing no competent and valid ground of appeal, the appellant even more clearly at paragraph 4 = 4 of his brief at page 82 of the record has proceeded to submit in a most contradictory manner thus:

"———the defendants/appellants in their first, second, third, forth, and fifth questions have mixed up the grounds of appeal both competent and incompetent with the issues for determination to the extent that it is not easy to differentiate which is now competent and which is not."

The clear position of the notice of appeal in this matter on the appellant's submission above runs contrary to the appellant concession that grounds 3, 4 and 5 are competent. ***The appellant has even then not stated the factors invalidating the respondents' grounds of appeal. And the court should not speculate on that question. There can be no doubt that the appellant's submissions in these respects are clumsy as he has seemed to approbate and reprobate on the issue of competency of the notice of appeal and the fate of the appeal itself; in other words,***

the court below rightly found that the appellant is blowing hot and cold at the same time as clearly borne out by the above abstracts.

It must be remarked that ***the court is bound by the record of appeal and the appellant has not challenged it in any manner. In this case, the court is bound to examine the state of the record on the conflicting claims as regards the appellant's assertions that he has raised and argued the question of no particulars or insufficient particulars to grounds 2, 6, 7, 8 and 9. The appellant's claim in this regard after a thorough perusal of the instant record is not so borne out by the record, that is, to the effect that grounds 1, 2, 6, 7, 8 and 9 have no or insufficient particulars; this is not part of his case as per his brief of argument before the court below.*** However it is trite that the appellant is not allowed during the expatiation on some points in his brief of argument at the oral hearing of the appeal to wander out of his brief or seize the opportunity to raise fresh issues based on new complaints not encompassed in his grounds of appeal. There is nowhere in the record that shows the appellant as having taken any formal objection to the respondents' grounds 1, 2, 6, 7, 8 and 9 for or insufficient particulars of errors. The appellant's foregoing submissions therefore are totally misconceived and baseless. The instant notice of appeal is competent and sustainable even on grounds 3, 4 and 5 admitted by the appellant to be competent grounds of appeal. Respectfully, this objection appears to have been raised in vacuo and clearly a waste of the time of the court.

Furthermore, I agree with the respondents that ***the appellant not having complained against any of the grounds of appeal filed by the respondents in the court below for having no particulars or insufficient particulars as required by Order 3 Rule 2(2) and (3) of the CAR 2002 cannot be allowed to do so at this stage of the proceedings in this court without leave of court being first obtained for being fresh issues on appeal.*** See: ARAKA V. EJEAGWU (2000) 12 S.C. (Pt.I) 99. ***And so I make bold to say that the appellant's submission in this regard goes to no issue.*** It is trite that fresh issues or points thereby raised without leave as in the instant case are incompetent and ought to be struck out, more so, as the court has no business dealing with such

issues without its leave. See: STANDARD PRINTING AND PUBLISHING CO LTD. V. N.A.B. LTD. (2003) FWLR (Pt.137) 1097 at 1099 and FLORENCE OLUSANYA V. OLOUFEMI OLUSANYA (1983) 1 S.C. NLR. 134.

The circumstances of this case have showed that the appellant
 B has also failed to comply with the provisions of Order 3 Rule 15(1) of
 the CAR 2007 - which deals with the requirements of raising preliminary
 objections. ***Although an objection can be set out in the
 C brief of argument; it is also incumbent on the applicant as ap-
 pellant here to file a formal notice of preliminary objection
 stating the grounds therefore at least 3 days to the hearing of
 the appeal. And more importantly it has to be moved other-
 wise it is deemed waived.*** See: NSIRIM V. NSIRIM (supra) O.S.H.C.
 V. OGUNSOLA (2000) 14 NWLR (Pt.687) 431 at 440; ARORI &
 D ORS. V. ELEMO & ORS. (1993) 1 - 3 SC. 13 at 16-17. It must be
 emphasized that the Rules of court in this regard as in other cases are
 meant to be obeyed. See: OFORKIRE V. MADUIKE (2003) FWLR
 (Pt.147) 1090 and FAGBULE V. RADEIGUES (2003) FWLR (Pt.137)
 117 at 1173.

The appellant has raised the instant preliminary objection in
 his brief of argument and so far as this step is to put the respondent
 on due notice there can be no doubt that the requirement has been
 satisfied. See: AGBAKA V. AMADI (1998) 11 NWLR (Pt.572) 164
 F and MAGIL V. UNI. AGRIC. MAKURDI (2005) 19 NWLR (Pt.959)
 211 at 238. And apart from giving the respondents three clear days
 the appellant has contended he has moved the application and has
 relied on the proceedings at page 89 of the record for so contending.
 The record does not bear out the fact that the application has been
 G so moved. However, the court has ignored these shortcomings and
 has all the same duly considered the application and has found no
 merit whatsoever in the same.

Concluding as regards these issues, I agree with the court be-
 low that all the grounds of appeal filed by the respondents in the
 H court below in this matter are competent grounds of appeal and ca-
 pable to sustain the notice of appeal and therefore the appeal itself.

Again, all the submissions as to grounds 2, 6, 7, 8 and 9 as
 having no particulars or insufficient particulars have no basis being
 fresh issues raised without leave and therefore are incompetent. Ac-

cordingly, the preliminary objection is lacking in merit and is hereby overruled.

The next crucial question is whether the two orders of 26/8/98 and 21/1/2000 have been rightly made on the basis that the order of 26/8/98 has been made without jurisdiction. The above poser has necessarily raised the question of whether the trial court has the jurisdiction to entertain and determine the appellant's application to set aside a pending matter during the court's annual vacation.

In other words whether the discontinuance of suit No. HHH/22/90 required the urgent action given to it by the trial court at the time based on the application for striking it out. To answer these questions one has to have recourse to Order 26 Rule 2 of the High Court (Civil Procedure) Rules of Anambra State 1988.

In dealing with this issue the trial court at p. 57 of the record held as follows:

"Order 26 Rule 9(2) © of the High Court Rules permits a litigant to bring an interlocutory application that requires urgency and as already stated a litigant who discovers that his case has been pending in a court that has no jurisdiction to entertain his action should not rest on his oars but should act timeously and urgently to discontinue his case from such court and go to the appropriate court that has jurisdiction. The defendants who are in no way prejudiced by such discontinuance should not hold him to ransom in that court when the whole exercise is in futility as stated by Irekife JSC in PEENOCKS INVESTMENT LTD. V. PEENOCK LTD. (1982) 12 SC. 1 at 30."

The trial court from the foregoing quotation has made the issue of want of jurisdiction of the trial court as of urgent nature to ground applying to discontinue the instant suit during the court's annual vacation. Thus the trial court has exercised its discretion in favour of the appellant in my opinion wrongfully under Order 26 Rule 9(2) (c) supra. It is common ground that the case of SADIKWU V. DALORI (1996) 5 NWLR (Pt.447) 151 has been decided on 23/4/96 and OYENIRAN V. EGBETOLA (1997) 5 NWLR (Pt.504) 122 has been decided on 9/5/97. The question that has arisen therefore is whether the appellant rightly has alleged that inordinate delay in deciding this suit has been caused by the two aforesaid cited cases howbeit when it has taken

him over one year to react to the decisions by the instant application to discontinue the case. The issue of jurisdiction of the High Court to deal with land subject to Customary Rights of Occupancy has been finally put to rest in ADISA V. OYINWOLU (2000) 10 NWLR (Pt.674) 116. And ***it is settled that any process taken contrary to the provisions of the law is a nullity for which the affected party is at liberty to set aside ex debito justitiae. I agree with the respondents / submission that if a decisions is a nullity it is no ground for refusing to set it aside that this decision would have been the same without the nullifying circumstances.*** See RASAKI V. EGEIBEN (1994) 6 NWLR (Pt.348) 23 at 44. The grounds for interfering with exercise of such discretion by the trial court on appeal is settled; in other words, where the court has acted arbitrarily or illegally or has taken into account extraneous consideration it should not have taken or has omitted to take into account relevant matters. See: RESIDENT IBADAN V. LAGUNJU (1984) 14 WACA 599, and ENEKEBE V. ENEKEBE (1964) 1 ANLR 102; (1964) NWLR 42. The narrow issue in this case for this court to resolve is whether the court below rightly interfered with the said discretion of the trial court when he held:

“whether or not an application is of such urgent nature is a question of fact. In the instant case the question to answer is whether the application for the termination of suit No. HIIH/22/90 required the immediate action it received from the lower court at the time it did. One thinks not. The suit is commenced on the 1st March, 1990 and took more than eight years for pleadings to be exchanged and 5th October slated for hearing. Given these underlying facts there was nothing about the fate of such an application in the course of the conduct of a suit which had taken this long time to mature for hearing for the lower court to have justifiably dealt with it in the context of Rule 9 (2) @ supra.....”

On the grounds of the foregoing findings, the court below has intervened judicially to set aside the decision of the trial court.

It is on the basis of the above postulations that I have to critically examine the submissions of the appellant and the respondents in order to resolve whether the court below rightly interfered with discretion of the trial court in this matter. However, my overview of this case has showed that the court below rightly interfered with the

exercise of the trial court's discretion in the face of obvious misapprehension and misapplication of the provisions of Order 26 Rule 9(2) (ibid). These provisions have been improperly construed. I shall come to this question anon.

As an aside it is important to recall at this stage that the appellant by an application dated 12/8/98 has sought for leave of the trial court to discontinue the instant pending suit. The application as well as granting of the same has fallen within the period of the court's annual vacation during which period the court by Order 26 Rule 9(2) is only enabled to entertain applications or causes with the concurrence of the parties to the suit or on the ground of urgent nature of the interlocutory applications. As can be seen, it is setting aside of the instant suit during the court's annual vacation that is also at the root of this case. The appellant has contended that the application for discontinuance of the suit has been predicated on the trial court having lost its original jurisdiction to deal with the suit and is of urgent nature to warrant being entertained by the trial court during the court's annual vacation. The respondents have submitted to the contrary, and have debunked the submission by contending otherwise that the issue of jurisdiction per se cannot be one of the conditions precedent to discontinuing this suit under Order 26 Rule 9(2) (ibid) and being an extraneous matter has wrongly been taken into account by the trial court in dispensing its discretion on this matter. I now examine the said order.

Order 26 Rule 9(2) of the Rules provides as follows: "9(2) - During the annual vacation -

- (a) not applicable
- (b) actions may be heard by consent of parties;
- (c) interlocutory application of urgent nature may be dealt with.
- (d) for purposes of paragraphs (b) and (c) of the sub-rules, the Chief Judges may direct one or more judges to sit as vacation judges in the judicial division specified in the said direction.

Reading sub-rules (b) and (c) of Order 26 together they have unambiguously stated the manner of approaching the court during the court's annual vacation period for court business. It is clear that unless the party as the applicant in this case has followed the manner so prescribed under the said sub-rules, otherwise the preconditions for a successful application of discontinuance, in a matter as in this

case it may not have been initiated competently thus robbing the court of the necessary jurisdiction to hear and determine the application to discontinue the suit. What I am trying 'to say here is that ***the application to discontinue has to be initiated upon fulfillment of the conditions precedent to the exercise of jurisdiction in the case - that is to say by complying with the provisions of sub-rule (b) by applying to discontinue with the consent of the parties to the suit or cause and under sub-rule (c) by the application to discontinue the suit or cause being dictated upon by the urgent nature of the application.***

One fact which is common to both sides in this matter is that the application to withdraw this suit has not been proceeded with the consent of both parties. The respondents by a letter to the trial court has reminded the trial court of the consequences of taking the application during the court's annual vacation and to no avail. This has ruled out the provisions of Order 26 Rule 9 (2) (b) supra, applying to this matter. The appellant's case can therefore only succeed if it scales the hurdle of the pre-conditions as provided as per Order 26 Rule 9 (2) (c) supra by showing the urgent nature of the application. I have to come back to this question later on. In short, the application has to be initiated by due process of law. See: MADUKOLU V. NKEMDILIM (1962) 1 ANL 2, 587, GOVT. OF AKWA IBOM STATE V. POWERCOM LTD & ANOR. (2005) AFWLR (Pt.246) 1353 at 1356.

However, I digress to say that the instant discontinuance of this suit has indeed accorded with the provisions of Order 47(1) of the High Court of Anambra State (Civil Procedure) Rules 1988. And in this regard I refer to the 2nd leg of the said Rule as that part of the Rule is more relevant to this matter and it provides as follows:

".....
If in any other case the plaintiff desires to discontinue a suit or withdraw any part of his claim or if a defendant desires to discontinue his counter-claim or withdraw any part thereof, such discontinuance or withdrawal may be allowed on such terms as to cost and as to any subsequent suit or otherwise as to the court may seem just."

What is quite clear and plain from the above provisions is that discontinuance under the 2nd leg of the above rule must be with leave of court. Where as in this case, pleadings have been filed and exchanged between the parties so that issues have been joined it is

settled on the decisions in OLAYINKA RADRIGUES & ORS. V, THE PUBLIC TRUSTEE & ORS. (1917) 4 SC 29, EROIUNI V. IHENKO (1989) 2 NWLR (Pt.101) 46 & A.F. SONEKAN V. F.G. SMITH (1967) 1 ANLR 329, that leave of court must be sought and obtained before the suit can be discontinued. Even on this premise alone, the instant case has already been set down for definite hearing on 5/10/98, thus making discontinuance of this suit by leave of court an imperative one. B

It follows therefore that the application to discontinue the suit from all the circumstances has to be discontinued under the 2nd leg of Order 47(1) (ibid) that is to say, with leave of court. And so, the plaintiff being minded to discontinue this suit has rightly sought to do so under the 2nd leg of Order 47(1) of the said Rules with leave of court. C

The appellant has made strenuously efforts in this matter to D articulate of the urgent nature surrounding discontinuing the matter during the court's annual vacation and so bring such discontinuance within the ambit of the provisions of sub-rule © of Order 26 Rule 9(2) supra. ***It must be noted that the plaintiff (appellant) has not supported his application to withdraw this suit with affidavit*** albeit distinct from the instant supporting affidavit expatiating E on the urgent circumstances of the matter ***as would otherwise be the case where as here he has alleged that discontinuance of the suit is premised on some urgent nature.*** F

It is my respectful view that it is a condition of sine qua non for a successful application of this nature under sub-rule 2 (c) of Order 26 Rule 9 (2). ***To justify the exercise of court's discretion to grant such an application an applicant as the appellant here must go the extra distance of filing an affidavit of urgency to verify the facts of the urgent nature of the matter so as to take hearing of the matter out of its normal turn which in the instant case is 5/10/98*** and if I may express it in local parlance just a couple of days away from 26/8/98 when it is fixed for hearing of the suit so as to warrant hearing it during the court's annual vacation. On that date i.e. 5/10/98 the issue of original jurisdiction of the trial court to entertain in the suit and in the event the nature of consequential orders to be made thereto would have come up properly for hearing and determination. This is even more so as the respondents have G H

now rightly abandoned their argument that the trial court ab initio lacked the jurisdiction to hear and determine the matter. See: ADISA V. OYINWOLU (supra).

One cannot find from the surrounding circumstances any cogent facts to warrant the urgent nature of the application to discontinue the suit during the court's annual vacation. This is a matter which commenced on 1/3/90 and has progressed at snail's pace to reach the stage of filing and exchange of pleadings, leading to setting down of the case for 5/10/98 for a definite hearing after 8 years of the suit. There is therefore no verifiable ground to sustain the claim of urgency in the matter. The appellant has failed to bring the application to discontinue the suit within the ambit of the pertinent provisions of Order 26 Rule 9 (2) © and it is fatal to his case.

Besides, the filing of pleadings in this matter has closed with the filing of Defence on 14/6/90; between that date and the start of the court's annual vacation, the plaintiff/appellant has not taken any steps to move the case any forward. It is against this setting that the appellant's case of urgent nature of the application to discontinue the suit has to be further considered. In fact, ***the appellant has not proffered evidence of any detriment or irreparable injury the appellant would otherwise have suffered if the suit were not discontinued during the court's annual vacation.*** Following from my reasoning above I cannot see the basis for the appellant's depositions in paragraphs 5 and 6 of his supporting affidavit that it is to have the ownership of the land in dispute determined by a court of competent jurisdiction and so determine the true owner thereto that has accentuated the urgent nature to discontinue the suit during the court's annual vacation. ***The urgency of an application under Order 26 Rule 9 (2) (c) (ibid) may in the outermost of the question be a matter of mixed law and fact which ever case it is, the onus of proving the fact of urgency of the application is on the appellant. The appellant has not discharged this burden in this matter.*** I must observe that it could have been a different kettle of fish if adverse interests and/or illegal dealings with the land in dispute have been set in to threaten the rights of the appellant to the land in dispute during the court's annual vacation. Suffice it to say that the matter of the application's urgent nature should not be a question for the court to speculate upon.

I now come to the appellant's most crucial contention that the application to discontinue the suit lies in the trial court losing of its original jurisdiction to deal with lands subject to customary rights of occupancy and with particular reference to the land in dispute in the instant case. In any event, simply put, want of jurisdiction in the court in a case denotes lack of enabling power to entertain and deal with a matter before it. Having scrutinized the provisions of Order 26 Rule 9 (2) supra upon which the application to discontinue this case has been premised the issue of jurisdiction as a matter of urgent nature is a far cry from being one of the pre-conditions to be met in order to bring the provisions of Order 26 Rule 9 (2) (b) and (c) into play. It is the urgency of a matter or cause that is pivotal and what may constitute urgent circumstances cannot be exhaustively defined. Each case has to be considered on as it arises. It could have been a different matter as I said above earlier on if it were the appellant's case of the presence of adverse interests and/or illegal dealings with the said land during the court's annual vacation. I can find no basis to accede to the submission that want of jurisdiction of the trial court in the suit, an extrinsic factor in the circumstances to the application is a necessary ground of urgency for discontinuing this suit during the court's annual vacation.

My reasoning in these respects has come to this - that the discontinuance of this suit during the court's annual vacation has been granted by the trial court against the clear import of the provisions of Order 26 Rule 9 (2) (b) and (c) supra and therefore incompetent and is liable to be set aside *ex debito justitiae*. In other words the order of 26/8/98 is manifestly void. This is moreso as hearing of the application to discontinue this suit *ex parte* has thus denied the defendants fair hearing in the matter. In other words for not offering an opportunity to the respondents to urge even for dismissal of the suit or other conditions for recommencing a fresh suit or on other matters. See: *OBIMONURE V. ERINOSHO & ANOR.* (1966) 1 ANLR 250. Following from my reasoning above the order of 21/1/2000 which is founded on the order of 26/8/98 is itself without any legal substratum to sustain it and so must collapse. The court below rightly set aside both orders as incompetent orders.

In conclusion, the court below for all I have found above rightly interfered with the trial court's exercise of its discretion in discontinu-

ing this matter during the court's annual vacation. There can be no gain-saying that the trial court has exercised its discretion perversely in that it has taken into account irrelevant matters (as the trial court having lost its jurisdiction to deal with the matter) into consideration and has not taken relevant matters into account and has miscon-
 B construed the purport of the provisions of Order 26 Rule 9 (2) supra, which is in the thick and thin of this matter. The court below rightly has intervened to avert a total miscarriage of justice by setting aside both void orders. And I so hold

C In the final analysis I find no merits in the appeal it is accordingly dismissed. The judgment of the court below is hereby affirmed. The respondents are entitled to the costs of the appeal fixed at N50,000.00.

D

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Chukwuma-Eneh, JSC in this appeal. I agree with it and for the reasons he has given, I also dismiss
 E the appeal with -N=50,000.00 costs in favour of the Respondents.

MUKHTAR JSC

F I have had the advantage of reading in advance the lead judgment delivered by my learned brother Chukwuma-Eneh JSC. The facts of the case are as set out in the lead judgment. In the appeal before this court, the appellant formulated five issues for determination in their brief of argument. In my view the issues that form the
 G crux of this appeal are issues (3), (4), and (5), and they are interwoven. The all important and all embracing issues are as follows:-

*"3. Whether the court below was right in setting aside the orders of the trial court made on 26/8/98 on the ground that the order was void having been made during vacation in a matter that does
 H not warrant urgent attention within the meaning of order 26 Rule 9(2)(b) and (c) of the Anambra State High Court Rules.*

4. Whether the court below was right in setting aside the trial court's order dated the 21st day of January, 2000 on the ground that the order was not made judicially and judiciously.

5. *Whether the court below was right in setting aside the trial court's orders of 26/8/98 and 21/1/2000 when the orders did not occasion a miscarriage of justice and no injustice was suffered by the respondents.*"

The reliefs sought by the plaintiff in the trial court were amongst others

"(a) A declaration that the defendants are not the owners and/or possessors or holders/occupiers of the piece and parcel of land situate at Akabo Umuohi in Okija and which is described in the customary Right of Occupancy granted to the plaintiff on the 27th day of April, 1989 and registered as No. 1 at page 1 in volume 1274 at the Land Registry, Enugu.

(b) A further declaration that the Plaintiff for himself and on behalf of Umuezegwumpi Umuofor Community Development is the present holder and/or occupier of the said land."

At the High Court of Anambra State holden at the Ihiala Judicial Division, were two sets of defendants, as per the statement of claim, bearing the 1st set of defendants, and 6th-11th defendants as the 2nd set of defendants. Then the plaintiff/appellant filed and moved the following motion:-

"**TAKE NOTICE** that this Honourable Court will be moved on Wednesday the 26th day of August, 1998 at the hour of 9 o'clock in the forenoon or so soon thereafter as the Applicant or Counsel on his behalf can be heard praying the court for leave to discontinue the above suit....."

In support of the motion are the following depositions in the affidavit :-

"2. That the subject matter of the above suit is a piece of land lying and situate at Okija which is a rural community within Ihiala Local Government.

3. That my Principal counsel advised me and I verily believed him that the High Court has no original jurisdiction to entertain this suit.

4. That it is the customary court which has original jurisdiction.

5. That am desirous to have ownership of this land determined by a court of competent jurisdiction.

6. That as long as this case is pending in this court, it will not be possible to determine who is indeed the owner of the land.

7. *That the proper and only course open to me is to discontinue the action, I was so advised and I agree."*

The motion was moved and ruled upon on 26/8/98 during the courts vacation. The learned trial judge granted the application and struck out the case. Prior to the date of ruling i.e. 21st August 1998, the 2nd defendant's learned senior counsel addressed a letter to the Assistant Chief Registrar of the trial court. The content of the letter reads thus:-

"A motion in the above suit was delivered to my chambers yesterday. Your registry stamp shows that it was filed on 18th August 1998 and you fixed it for hearing on 26th August, 1998. The motion itself was dated 12th August, 1998, The courts are on vacation in August. I shall not attend the court on the 26th August, 1998. In fact that is the day the conference of the Nigerian Bar Association opens in Abuja and I shall be there. You will fix the motion for hearing after the vacation but in the unlikely event of the court hearing the motion on the 26th instant the proceedings will be a nullity".

In spite of the above letter the court proceeded to hear the motion filed on 12/8/98. As a result of this the learned senior advocate filed and moved a motion which contained the following prayer:-
"Setting aside the order striking out the above suit made by the court on the 26th day of August, 1998 in the absence of the defendants and during the annual statutory vacation."

The learned trial judge refused the application. The Court of Appeal set aside the decision of the trial court, refusing the setting aside. The application for discontinuance, as I have said earlier was filed and moved during the court's vacation, applications during such period are governed by Order 26 Rule 9(2) of the Anambra State High Court Rules, which stipulates thus:-

"9(2) During the annual vacation -
(b) actions may be heard by consent of all parties;
(c) thereto interlocutory applications of urgent nature may be dealt with; and
(d) for the purpose of para (b) and (c) of the sub-rules, the Chief Judge may direct one or more judges to sit as vacation judges in the judicial division, specified in the said direction."

Paragraphs (b) and (c) clearly sets out what I will describe as pre condition that must be met before any matter involving litigation

can be taken by a judge during the annual vacation. I have looked most carefully at the application for discontinuance together with its supporting affidavit, but I fail to see that there was any element of urgency in it. The matter was fixed for October, after which the period of vacation would have been over. The application with due respect could have waited until that October before it was taken. It was not an application for an order of injunction or stay of execution, the delay of which may foist the court with fait accompli, or the destruction of the res. Even though this is a matter involving jurisdiction of the trial court, that is not to say that it would not been taken on the adjourned date, or even at any stage of the proceedings. See *Shell Petroleum Development Co. (Nig.) Ltd v. Isaiah* 2001 1 NWLR part 723 page 168, and *Adebayo v. Q. A. U. T. H. C. M. B.* 2009 NWLR part 673 page 585. B
C

In this wise, I definitely agree with the lower court, when, in referring to the order made by the learned trial judge on the discontinuance of the suit it said:- D

“Where a court had exercised jurisdiction where it had none, a decision arrived at consequent upon such an illegal assumption of jurisdiction crumbles on appeal.” E

On the issue of the requirement of consent of both parties required in paragraph (b) of the rules supra. That condition has also not been complied with, even though I am of the view that paragraph (c) is more apt to the present exercise, the matter which culminated into this appeal being an interlocutory one. F

It is with the above reasoning and the fuller ones in the lead judgment of my learned brother Chukwuma-Eneh JSC, that I dismiss this appeal. I agree with the lead judgment, and abide by the consequential orders made therein. G

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother CHUKWUMA-ENEH, JSC. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed. H

The main issue in the appeal is whether the lower court is right in setting aside the decision of the trial court by holding that there

was no urgency involved in the application to discontinue the suit during legal vacation, particularly on the 20th day of August 1998. In other words, is the lower court right in holding that the trial court lacked the jurisdiction to entertain the motion for discontinuance of the suit during annual vacation contrary to Order 26, Rule 9(2) (c) of the High Court of Anambra State (Civil Procedure) Rule 1988.

There is no dispute at all that the motion for discontinuance of the suit was filed, argued and granted during the annual legal vacation of the High Court of Anambra State, by a vacation judge. Equally not in dispute is the fact that by the provisions of order 26 Rule 9(2) of the Anambra State High Court (Civil Procedure) Rules the trial court is empowered to entertain applications or causes or matters during vacation only with the consent or concurrence of the parties thereto or on the ground that the suit/matter/cause is urgent

From the relevant facts as detailed in the lead judgment of my learned brother CHUKWUMA-ENEH, JSC there was nothing urgent about the application to discontinue the suit which had earlier been fixed for hearing, before the hearing date. I therefore agree with the reasoning and conclusion of the lower court that the trial court did not exercise its discretion judicially and judiciously when it failed to set aside the order of discontinuance of the suit particularly as there was nothing urgent about the application thereby denying the trial court of the requisite jurisdiction to entertain the interlocutory application.

I therefore dismiss the appeal and abide by the consequential orders contained in the lead judgment, a draft of which I have had the privilege of reading before now, including the order as to costs. Appeal dismissed.

G

ADEREMI JSC

I have been privileged with a preview, in draft form, of the judgment of my learned brother, Chukwuma-Eneh JSC. I agree with his reasoning and conclusion that the appeal is unmeritorious.

The central issue for determination in this appeal is whether the court below was right in setting aside the decision of the trial court by holding that there was nothing urgent in the application to discontinue the suit which was taken and granted on the 20th of August

1998, a date that fell into the period of the annual legal vacation of the court contrary to Order 26 rule 9 (a)(c) of the High Court of Anambra State (Civil Procedure) Rules 1988 and Sections 38 and 72 (1) of the Anambra State High Court Law. 2

The facts which constitute the foundation of the case have been well set out in the lead judgment. Suffice it to say that by the Rules, during the Annual Vacation of the court, no civil matter or application shall be entertained by the judex unless, on the face of it, it is seen to be urgent or both parties to the case agree that the case or application be entertained. Where the other party refuses to grant his consent, the court has no jurisdiction to entertain the suit or the application unless, as I have said, the application is on the face of it, an urgent one. I make bold to say that there was nothing urgent in an application to discontinue a suit particularly when it is realised that the suit had earlier been set down for hearing. I also agree with the court below for so holding.

For this little contribution but most especially for the exhaustive reasoning contained in the lead judgment, I would also dismiss the appeal. I abide by all the consequential orders made in the lead judgment including the order as to costs.

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