

SUPREME COURT OF NIGERIA
17TH JULY, 2009. SC. 348/2002
CORAM:- A. I. KATSINA- ALU, M. MOHAMMED,
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, JJSC

1. CHIEF BROWN UZUDA
2. MR. DANIEL OWOBO APPELLANTS
3. MR. JACOB FRANK

(For themselves and as representing
the Umudor-Ewho family of Okogbe
in Ahoada Local Government Area)

AND

1. MR. EZEKIEL EBIGAH
2. MR. MATHIAS EMEDEM RESPONDENTS
3. MR. SUNDAY JEREMIAH

(For themselves and as representing
the Umu-Ogwu family of Uyakama
in Ahoada Local Government Area)

JUDICIAL PRECEDENTS - Distinguishing - Jamgbadi case - It is distinguishable from this case - In that unlike in Jamgbadi the Court of Appeal failed to make any finding on appellant's case - Both in the main appeal and the cross appeal (H1)

JUDGMENTS - Treatment of parties' cases - Need to be evenhanded - Court of Appeal failed to treat the parties' respective cases - With evenhandedness - As expected of appellate courts - Thereby shirking its statutory responsibility (H2)

APPEALS - Trial court - Exercise of discretion - Interference - Duty of appellate court - It is incumbent on appellate court to show that the discretion - Has been exercised arbitrarily - And has occasioned miscarriage of justice (H3)

ORDERS OF COURT - Cross appeal - Order for rehearing it alone - Propriety - Dismissal of main appeal would render cross appeal nugatory - Justice demands that both appeals be reheard de novo - By

FACTS

The plaintiffs/respondents had sued the defendants/appellants claiming declaration of title to the land in dispute, damages for trespass and injunction. Appellants, as plaintiffs in a cross-action also claimed similar reliefs against respondents. The two suits were consolidated for hearing in the manner here constituted. Appellants filed an application for interlocutory injunction to restrain respondents from entering the land, which application was heard and granted. Respondents did not react to the order of injunction until one year after it was made. Respondents then brought an application praying the court to vary the order to restrain both parties. The court refused the prayer on the ground that it had become *functus officio* in respect of the order.

Aggrieved, respondents appealed to the Court of Appeal. Dissatisfied, appellants also filed a cross-appeal against some points in the ruling of the trial court. In its decision in the matter, Court of Appeal allowed the appeal without making any finding on the case of the appellants in both the main appeal and the cross-appeal. Indeed, the court made no mention whatsoever of the fate of the cross-appeal in its judgment. Aggrieved, appellants have brought this appeal against the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

(i) *“Whether the Court of Appeal gave full and dispassionate consideration to all the issues raised in the Appeal and Cross-Appeal.*

(ii) *Whether the Court of Appeal was right in allowing the appeal considering the over one year delay by the respondents in filing the motion to vary, and if the status quo ought to have been maintained.”*

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

JUDICIAL PRECEDENTS - Distinguishing - Jamgbadi case

1. The instant case is dissimilar to the cited case as it stands on a different footing to the case of JAMGBADI V. JAMGBADI (1963) NSCC (Vol.3) 281; where this court has found that the trial judge dismissed a cross-petition without referring to or making a finding on

the allegation of desertion or the evidence in its support thereof. This court has found that the appellant was entitled to have the allegation of desertion considered and that the cross-petition should go back to be reheard on that issue by the High Court and that the judgment of the trial court in so far as it had to do with issue of desertion be set-aside. And so the principle in that decision is not helpful in this matter.

However, in this matter the court below has failed to make any finding on the case of the appellant both in the main appeal and cross-appeal. That is the big difference between the two cases; i.e. the cited case and this case. (p. 2197 H)

Treatment of parties' cases - Need to be evenhanded

2. I cannot agree more as postulated in paragraph 5.2 of the appellants' (defendants) brief of argument that the judgment of the court below has not treated the parties respective cases with the deserving even handedness of approach to their cases as per their briefs as expected of an appellate court. As conceded by the defendants and their Counsel the court below merely considered the case of the defendants only thus respectfully shirking its statutory responsibility and so has fallen into a grave error in this regard.(p. 2198 D/F)

APPEALS - Trial court - Exercise of discretion

3. One other crucial deduction as evidenced from the above abstracts has culminated in a settled mind of the court below to interfere with the trial court's exercise of its discretion in granting the instant interlocutory injunction. In that case, it is incumbent on the court below to show that the discretion has been exercised arbitrarily, not grounded on credible evidence before the court and therefore has occasioned a miscarriage of justice. The court below it must be said has formed the said mind to interfere with the trial court's exercise of its discretion as evidenced in its decision without a balanced consideration of the evidence and other materials placed before it by both parties in this matter. There can be no doubt therefore from the foregoing reasoning of a failure of justice and a denial of fair hearing. (p. 2200 G)

Cross appeal - Order for rehearing it alone

4. The defendants (Respondents) have asked that the cross-appeal should be sent back to the court below for rehearing on that issue and that the main appeal should be dismissed in favour of the defendants (Respondents). I think that to do that would leave the cross-appeal completely nugatory, if not a mere academic exercise. I also think on the merits that the justice of this matter demands that both appeals ought to be reheard by the court below de novo.
(p. 2201 B)

C REPRESENTATION

Chief F. A. Eneawaji for the Appellants.
M. C. Wilcox for the Respondents.

D CASES REFERRED TO

EFFIONG V. NYONG (1975) 2 SC. 71 at 80
WOLUCHEM V. GUDI (1981) 5 SC. 291 at 294
JAMGBADI V. JAMGBADI (1963) NSCC Vol.3 at 281
ATANDA V. AJANI (1989) 3 NWLR (Pt 111) 511 at 539
E OYEDIRAN V. ANISE & ORS. (1970) 1 All NLR 313 at 317
THE QUEEN V. ADARO (1991) NWLR (Pt.586) 330 at 332
Nwokoro v. Osuma (1990) 3 N.W.L.R. (Pt. 136) 22 at 32 - 33
OKU LATE V. AWOSANYA (2000) 2 NWLR (Pt. 646) 53 at 546
F AFOLAYAN V. OGUNRINDE (1990) 1 NWLR (Pt. 127) 369 at 383
AKAPO V. HAKEEM HABEEB (1992) 6 NWLR (Pt. 247) 266 at 273
UKPA OREWERE & ORS. V. REV. MOSES ABI OGBE & ORS. (1973) 9/10 SC.1 at 6

G STATUTES REFERRED TO

Evidence Act, s. 151
Supreme Court Act, s. 22

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

H In this matter the plaintiffs in suit No.AHC/52/86 has claimed against the defendants jointly and severally a declaration of right of occupancy, damages for trespass and injunction in regard to the land in dispute situate in Ahoada Judicial Division. The defendants as plaintiffs in a cross-action No.AHC/107/86 have also claimed similar reliefs

against the plaintiffs as in Suit No. AHC/52/86 as defendants, in respect of the same land in dispute as in the aforementioned suit. The two suits have been consolidated.

The defendants in AHC/52/86 have filed an application for an interlocutory injunction to restrain the plaintiffs from entering the land in dispute. Sequel to its ruling on this application, the trial court on 16/10/87 has acceded to the application, thus restraining the plaintiffs from entering the land in dispute. However, the plaintiffs have not reacted immediately to the order of injunction until 31/10/88 when by an application they have prayed the trial court to vary the order of interlocutory injunction to restrain both parties to the suit. In a considered ruling the trial court refused their prayer declaring that it has become functus officio in respect of the matter. The plaintiffs have felt aggrieved by the decision and have appealed to the Court of Appeal (court below) on a Notice of Appeal containing 7 grounds of appeal as per a Notice of Appeal dated 1/6/89. The defendants also being dissatisfied with some aspects of the trial court's decision have cross-appealed to the Court of Appeal upon a Notice of Appeal dated 2/6/97 in which they have raised two grounds of appeal.

As events in this appeal will show the issues formulated from these two grounds of appeal have become the *causa causans* in this appeal, and so I have set them out below without their particulars as follows:

“Ground 1 - Error in law: The learned trial Judge erred in Law by assuming jurisdiction over a motion it had become functus officio by virtue of its decision dated 16th October, 1987 thereby occasioning a miscarriage of justice.

Ground II: Error in law: The learned trial Judge erred in law by assuming the jurisdiction of an Appellate Court”.

The issues for determination raised from these grounds of appeal have been set out below. These grounds of appeal have raised substantial issues of law for determination; that is to say, in the context of the issue for determination distilled from them which are no push-overs. As will become obvious anon they have not been considered at all in the appeal before the court below.

Coming back to the sequence of events in this matter the court below on 11/7/2002 has handed down its decision in the matter by allowing the appeal with no mention whatsoever of the fate of the

cross-appeal in its judgment as I shall show anon. The defendants (the respondents) in the Court of Appeal thus aggrieved that the court below has not inter alia considered all the issues they have raised for determination in their cross-appeal, have filed if I may repeat their Notice of Appeal containing 7 grounds of appeal against the said decision. In this court the plaintiffs are the respondents while the defendants are the appellants.

In compliance with the Rules of this court both parties have filed and exchanged their respective briefs of argument in this appeal.

The Appellants (Defendants) in their brief of argument have distilled two issues for determination and they are as follows:

- (i) *"Whether the Court of Appeal gave full and dispassionate consideration to all the issues raised in the Appeal and Cross-Appeal."*
- (ii) *"Whether the Court of Appeal was right in allowing the appeal considering the over one year delay by the respondents in filing the motion to vary, and if the status quo ought to have been maintained."*

The Respondents (Plaintiffs) have in their respondents' brief of argument distilled two issues to wit:

- (i) *"Whether the court below properly appreciated the facts placed before it by the respondents before arriving at a decision in their favour."*
- (ii) *"Whether the court below should have considered the cross-appeal."*

At the oral hearing of this appeal before this court both parties have adopted and relied on their arguments as contained in their respective briefs of argument to support their respective cases. The defendants have urged the court to allow the appeal, set aside the judgment of the court below and affirm the ruling of the trial court dated 30/5/89; the plaintiffs on the other hand have urged that the appeal be dismissed for want of merit and that the cross-appeal not having been heard by the court below should be sent back to that court for hearing.

The Defendants (Appellants) in their brief of argument have contended that the court below has not given a full and dispassionate consideration to all the issues raised in the Appeal and Cross-Appeal as articulated in their issue one and have relied for support

for so submitting on the cases of ATANDA V. AJANI (1989) 3 NWLR (Pt 111) 511 at 539 per Obaseki JSC, AFOLAYAN V. OGUNRINDE (1990) 1 NWLR (Pt. 127) 369 at 383, OWUDUNMI V. REGISTERED TRUSTEES OF CELESTIAL CHURCH OF CHRIST & ORS. (2000) 6 SCNJ 399 at 405. They have made the point that an appellate court as the court below is bound to consider the arguments in expa- B
tiation of the issues raised in the appeal before it as a matter of constitutional and statutory duty; that is to say - it is a legal duty it is enjoined to perform. They submit that the trial court on having delivered the ruling of 16/10/87 restraining the plaintiffs from entering C
the land in dispute has thus become functus officio of the matter and so have further submitted that the plaintiffs' appeal to the court below based on the rulings of 16/10/87 and 30/5/89 is a nullity and have referred to and relied on the cases of D. E. OKUNAGBA & ANOR. V. OMOSOHWOFA EBOH (1974) 1 NMLR 318 at 330, UKPA D
OREWERE & ORS. V. REV. MOSES ABI OGBE & ORS. (1973) 9/10 SC.1 at 6. They have described the proceedings for the variation of the order of injunction of the trial court as attempting to review its earlier ruling, albeit irregularly and which should be set aside. They have alleged of their not having gotten justice and fair hearing as E
regards the said proceedings in that the status quo should have been maintained. They have urged this court to exercise its powers under Section 22 of the Supreme Court Act to do the evaluation or review of the parties cases in the appeals in the face of the court below F
having failed to discharge its duty in this regard.

On issue two it is the Defendants' (Appellants) case that the plaintiffs have been guilty of delay lasting over one year in reacting to the said ruling of 16/10/87, thus defeating their reason for the belated reaction to the order of injunction. And being an equitable relief that their reaction has not been timeous, just as their conduct so far has been "reprehensible" without expatiating on the point. The Defendants/Appellants have also charged the Plaintiffs/Respondents of standing by all this while; and have relied on Section 151 of the Evidence Act to contend that before the rulings of 16/10/87 and 30/ G
5/89, the Defendants/Appellants have been in exclusive possession of the land in dispute undisturbed by the Plaintiffs/Respondents and so the status quo ought not to have been disturbed by the decision of H
the court below particularly as they, the defendants have no other

land to farm on as against the plaintiffs/respondents who have their farmlands at Okogbe their village. The defendants have made the point that the status quo ante bellum is the state of affairs before the beginning of hostilities i.e. before in the instant case the dispute leading to the rulings of 16/10/87 and 30/5/89. And they also have submitted that they ought to have been allowed on the justice of the application to live, cultivate and harvest the said land pending the determination of the substantive suit which is still pending at the trial court. They rely on *AKAPO V. HAKEEM HABEEB* (1992) 6 NWLR (Pt. 247) 266 at 273, *MADUBUIKE V. MADUBUIKE* (2001) 9 NWLR (Pt. 719) 698 at 701, *THE QUEEN V. ADARO* (1991) NWLR (Pt. 586) 330 at 332, *THE GOVERNOR OF LAGOS STATE V. OJUKWU* (1986) 1 NWLR (Pt. 18) 621 and *AYORINDE V. ATTORNEY-GENERAL OF OYO STATE* (1996) 3 NWLR (Pt. 434) 20 for so submitting. On the question of balance of convenience as between them and the plaintiffs they have alleged that the same has been in their favour as they stand to lose both beneficially and financially if this appeal is not allowed. They make the point that the plaintiffs/respondents have not truly applied for interlocutory injunction against them in both lower courts but have otherwise raised an application to vary the order of injunction granted against them because as has been found by the trial court:

“.....by the order the Defendants/Respondents in the consolidated suits are the only persons now using the land while the plaintiffs have no access to it.”

And even then when the trial court has also found that:

“This no doubt is the natural sequence of events following from the order and cannot be a ground for asking the court to vary the order. They are not supervising acts but acts resulting from the order made against the Plaintiffs/Applicants.”

And that on these premises the court below has no power to award to the plaintiffs/respondents even then that which they have not asked for. See: *EFFIONG V. NYONG* (1975) 2 SC. 71 at 80, and *ODOFIN V. AGU* (1992) 3 NWLR (Pt. 229) 350 at 369-373. Finally, the court is urged to set aside the decision of the court below as having been given in error and for having occasioned a miscarriage of justice.

The defendants i.e. respondents it must be stated from the on

set in the concluding paragraph of their briefs of argument in this appeal apparently have conceded issue 2 raised by the defendants/appellants to the effect that the cross-appeal has never been heard by the court below and so that that issue should be resolved in the defendants' favour. The plaintiffs further have opined that the main appeal against the judgment of the court below ought to be dismissed for want of merit; the cross-appeal for not having been heard by the court below should be sent back to the court below for hearing. B

As an aside, to experience this rare gesture of knowing when to throw in the towel unto the arena of contesting parties in a dispute as the instant one otherwise gracefully and neatly for that matter is one of the hallmarks of good advocacy. In this regard, I think the senior counsel and his team for the plaintiffs (respondents) in this matter must be commended highly as having demonstrated what good advocacy under the rule of law encompasses; this underscores the fact that the senior counsel and his team are true officers of the court. They have played the game with their cards face upwards. Win or Lose taking a position as this on the peculiar facts of the matter, serves the interest of justice apart from saving the time of the court - it is worthy of emulation by counsel generally. C D E

Coming back to this matter, it must be said that in the light of this development in this appeal, this court has to grapple with a set of new issues of whether to accede to the plaintiffs/respondents' application to decide the main appeal in their favour (that is to consider it as unrelated to the cross-appeal) and so to remit the cross-appeal only to the court below for hearing or to stop so far in this matter and dispose of the appeal as a whole by remitting the same to be reheard by the court below for failure of justice. The concession, viewed from another angle has also raised a further question of whether it has not otherwise completely undermined this matter as a whole as the issues for determination raised in both appeals are similar thus underscoring the point that the main appeal and the cross-appeal having been founded on the same substratum that neither of them can really be dealt with distinctly separately as the discussion of one must necessarily involve the other and so to proceed to decide on the main appeal as has been urged by the defendants cannot be conveniently undertaken. See: JAMGBADI V. JAMGBADI (1963) NSCC Vol.3 at 281. F G H

The instant case is dissimilar to the cited case as it stands

on a different footing to the case of JAMGBADI V. JAMGBADI (1963) NSCC (Vol.3) 281; where this court has found that the trial judge dismissed a cross-petition without referring to or making a finding on the allegation of desertion or the evidence in its support thereof. This court has found that the appellant
B was entitled to have the allegation of desertion considered and that the cross-petition should go back to be reheard on that issue by the High Court and that the judgment of the trial court in so far as it had to do with issue of desertion be set-
C aside. And so the principle in that decision is not helpful in this matter.

However, in this matter the court below has failed to make any finding on the case of the appellant both in the main appeal and cross-appeal. That is the big difference between
D the two cases; i.e. the cited case and this case.

But, firstly, **I cannot agree more as postulated in paragraph 5.2 of the appellants' (defendants) brief of argument that the judgment of the court below** started at pages 1 to 3 on introduction/setting out the issues for determination. From pages 4
E to 5 of the record have reproduced the salient paragraphs of the affidavit of the respondents in support of the respondents' case. From pages 6 to 8 of the record the court below has commenced its review of the respondents' case when it has not even as much as adverted its mind to the plaintiffs' counter-affidavit as well as the submissions of
F their Counsel on the issues raised for determination not to mention of paying commensurate attention to the defendants' case in this matter. In short, it has not treated the parties respective cases with the deserving even handedness of approach to their cases
G as per their briefs as expected of an appellate court. As conceded by the defendants and their Counsel the court below merely considered the case of the defendants only thus respectfully shirking its statutory responsibility and so has fallen into a grave error in this regard. See: POLYCARP OGOBUE &
H ANOR V. AJE NNUBIA (1972) 6 SC.27 and OYEDIRAN V. ANISE & ORS. (1970) 1 All NLR 313 at 317.

It must be stated clearly that the judgment of the court below is not being attacked because of its method of assessing evidence of the parties nor on the ground of the trait or style of its dealing with the

judgment of the court below. To illustrate the point, in the case of OKU LATE V. AWOSANYA (2000) 2 NWLR (Pt. 646) 53 at 546 where the court's duty on balancing of the cases of the parties before it has been considered this court said:

"As I understand it, so long as a judge does not arrive at his judgment merely by considering the case of one of the parties before considering the case of the other, his judgment if right will not be set aside simply on the method of assessment of the evidence or approach to the entire case he might have adopted. It can be no cause for worry that different judges adopt varied approaches. There are those who even begin with the defence case. And they may be able to properly cope with that approach provided it is always remembered that it is the plaintiff who must prove his case on the balance of probabilities."

See also: WOLUCHEM V. GUDI (1981) 5 SC. 291 at 294. The court below has not only failed to review the defendants' case it has not weighed it as it must, against the plaintiffs' case to see which is more probable. The defendants/appellants have therefore every justification of complaining against that decision.

To further illustrate respectfully of this slant in the treatment of the plaintiffs' case I have to refer to P.6 of the Record where the court below has considered the preponderance of the defendants' (Respondents') case (not side by side the appellants' case) it has thus observed as follows:

"Strictly speaking is the one sided order of restraint justifiable? In other words did the court consider the facts averred by the appellants in their application for the variation of the order having regards to the disquieting implication of that order by the court? It must be pointed out that the object of injunction in a matter such as the one before us is to ensure that justice based on what can be said to be fair to all disputants in litigation is meted and not to punish one or sacrifice the interests of the other. Where a court conceives that an injustice might occur to any side and true justice as empirically conceived would suffer irremediably then such an order ought not be made. It is essential and I dare say imperative that the fundamental premise for the grant of order is made from behaving in an party against whom the order is made from behaving in an unconscionable manner or manifesting such unwelcoming idiosyncrasies which when

viewed properly would readily damage the interest of the other party and a sorry state of affairs would be institutionalized or allowed to exist which would render any future decision useless or might in all probability cause a damage that cannot be easily cured by way of compensation."

B Again, indeed before the above abstract, the court below at P4 of the Record last paragraph in justifying the substantiality and weight of the respondents' case as per their depositions has made the following findings, to wit:

C *"These to my mind are the relevant averments in their affidavit. It therefore goes to show that the court below by allowing the Respondents the leave and licence to be exclusively in this land has given the Respondents the right to do whatever they wanted whether their acts might undermine the interest of the Applicants that is the*
D *Appellants. The court in its ruling has said as follow in respect of the allegation of the supposedly repellent acts of the Respondents on the land.... They are not supervening acts but acts resulting from the order made against the Plaintiffs/Applicants. The order of the court is not conditional. In other words he did not say that Defendant/Re-*
E *spondent should not carry out certain acts on the land in respect of which an order of interlocutory injunction was made against the Plaintiff/Applicants. "These abstracts speak for themselves.*

Nowhere in the record is it showed of equal treatment of the defendants' case notwithstanding that they have filed a counter affidavit
F challenging the plaintiffs' application to vary the order of injunction. It is therefore a grave error of the court below not to have considered the Defendants' case, I dare say not only in regard to the cross-appeal but also on the main appeal itself.

G I have deliberately highlighted the above abstracts of the judgment of the court below to underscore as well as to lend credence to the plaintiffs' contention of a total failure on the part of the court below to consider the plaintiffs' case.

One other crucial deduction as evidenced from the above
H ***abstracts has culminated in a settled mind of the court below to interfere with the trial court's exercise of its discretion in granting the instant interlocutory injunction. In that case, it is incumbent on the court below to show that the discretion has been exercised arbitrarily, not grounded on credible evidence***

before the court and therefore has occasioned a miscarriage of justice. The court below it must be said has formed the said mind to interfere with the trial court's exercise of its discretion as evidenced in its decision without a balanced consideration of the evidence and other materials placed before it by both parties in this matter. There can be no doubt therefore from the foregoing reasoning of a failure of justice and a denial of fair hearing.

The defendants (Respondents) have asked that the cross-appeal should be sent back to the court below for rehearing on that issue and that the main appeal should be dismissed in favour of the defendants (Respondents). I think that to do that would leave the cross-appeal completely nugatory, if not a mere academic exercise. I also think on the merits that the justice of this matter demands that both appeals ought to be reheard by the court below de novo.

In the result, there is merit in this appeal. It is allowed and the judgment of the court below in its entirety is hereby set aside. It is the order of this court that the appeals both the main-appeal and cross-appeal be and are hereby sent back to the court below to be heard expeditiously by a different panel of the court below.

The Appellants are entitled to the costs of N50,000.00.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Chukwuma-Eneh JSC. I agree with it, and for the reasons that he gives I also allow the appeal with N50,000.00 costs in favour of the appellants. I abide by the consequential order made therein.

MOHAMMED JSC

I have had the privilege of reading in draft the lead judgment of my learned brother Chukwuma-Eneh JSC just delivered. I entirely agree with him that this appeal is meritorious and therefore ought to succeed.

The land dispute between the parties in this appeal involves

action and a cross-action at the trial High Court of Justice of Rivers State Ahoada, for claims of declaration of title, damages for trespass and injunction. The Appellants' action was accompanied by an application for interlocutory injunction restraining the Respondents from entering the land in dispute pending the hearing and determination of their action. The application was heard and granted by the trial Court. More than one year after the grant of this application, the Respondents brought their application to vary the order of interlocutory injunction by restraining both parties and keeping them out of the land in dispute, pending the determination of the actions. The learned trial Judge after hearing the parties in his ruling of 30th May, 1989, refused to vary his earlier order of injunction against the Respondents. It is apparent from the records of this appeal that both parties were not happy with this ruling of the trial Court and had therefore appealed against it in an appeal by the Respondents and a cross-appeal by the Appellants. Both appeal and the cross-appeal were heard on their respective briefs of argument filed by the parties. In the judgment of the Court below delivered on 11th July, 2002, the appeal was allowed and the ruling of the trial Court of 30th May, 1989, was set aside and replaced with an order of interlocutory injunction restraining both parties from entering the land in dispute. Although the Appellants' cross-appeal was also heard along with the Respondents' appeal, there was no consideration or determination of the cross-appeal by the Court below in its judgment now on appeal.

The main issue in this appeal, in my view, is the effect of the failure of the Court below in its judgment to consider and pronounce on the determination of the cross-appeal. The law is well settled that the judgment of a Court which must demonstrate a thorough and painstaking reflection and balancing of the case of the parties, cannot be vitiated simply because of the Judges' style of writing. See *Okulate v. Awosanya (2000) 2 N.W.L.R. (Pt. 646) 530*. However where a Court fails to give full consideration and determination of the case of a party, it is a situation touching on the violation of the party's right to fair hearing. It is trite that where there is a breach of a party's constitutional right to fair hearing, then the proceedings are vitiated thereby requiring the intervention of an appellate Court on a complaint of the affected party. See *Amadi v. Thomas Aphin & Co. Ltd. (1972) 1*

All N.L.R. (Pt. 1) 409, Adigun v. Attorney-General, Oyo State (1987) 1 N.W.L.R. (Pt. 53) 678 and Nwokoro v. Osuma (1990) 3 N.W.L.R. (Pt. 136) 22 at 32 - 33.

In the present case, the failure of the Court below to consider and determine the Appellants' cross-appeal is certainly a breach of the right of fair hearing of the Appellants warranting the setting aside of the judgment of the Court below. Accordingly I also allow the appeal and abide by the orders made in the lead judgment including the order on costs.

C

ONNOGHEN JSC

It is not in doubt that the lower court failed to consider the case of the appellants as put forward in respect of the main appeal and their cross appeal; that the decision of the lower court in the appeal was based on the case presented by the respondents only. The facts contained in the counter affidavit of the appellants were totally ignored by the court in coming to its decision in the main appeal even though it considered the facts put forward by the respondents.

Throughout the judgment of the lower court nothing was said by that court about the fate of the cross appeal filed and argued by the present appellants.

I therefore agree with the submission of learned counsel for the appellants that the decision of the lower court in the circumstances of the case amounts to a denial of the right of fair hearing constitutionally guaranteed the appellants and has consequently led to a miscarriage of justice.

It is for the above and the more detailed reasons contained in the lead judgment of my learned brother, *CHUKWUMA-ENEH, JSC* that I agree that the appeal has merit and ought to be allowed. I therefore order accordingly.

In view of the non-consideration of the case put forward by the appellants both in the main appeal and their cross appeal by the lower court, it is hereby ordered that the judgment of the lower court be and is hereby set aside and the appeal remitted to the lower court for proper consideration and determination by another panel of justices with costs as ordered in the said lead judgment.

Appeal allowed.

MUNTAKA-COOMASSIE JSC

This appeal involves the determination of a narrow issue of whether the lower court was right in allowing the appeal filed before it by the Respondent based on the facts and issues presented by the Respondent alone without considering the case presented by the Respondent, who is the appellant before us.

The Appellants who were the plaintiffs at the trial High Court, commenced this action for a declaration of title to some piece of land at Abodhi Village in Port-Harcourt, Rivers State. By a motion dated 18/7/86, the appellants prayed for an Order of Interim Injunction restraining the defendants/Respondent from entering the disputed land pending the determination of the Motion on Notice. The application was granted on the 21/7/86 and on the 16/10/87 an application for interlocutory application was granted.

By an application dated 28/10/88, the defendants/Respondents filed an application before the trial court seeking to vary the interlocutory Order granted on the 16/10/87 apparently due to the delay in hearing the substantive matter. The trial court in a considered ruling delivered on the 30/5/89 refused the application. As a result, the defendants/respondents appealed to the Court of Appeal, Port-Harcourt, herein after called the lower court with the leave of court. The plaintiffs/Appellants also filed a cross-appeal. Both parties filed and exchanged all the necessary briefs of argument in respect of both the appeal and cross-appeal.

In the determination of the appeal the lower court quoted copiously the averments of the defendants/Respondents in their affidavit in support of the application to vary the Order of the interlocutory injunction granted by the trial court without any reference to the plaintiffs/Appellants' counter-affidavit. The lower court did not even consider the cross-appeal at all in its judgment. In its conclusion, the lower court allowed the appeal and Ordered as follows:

"I hereby make an Order by which both parties are restrained by themselves, agents, and privies from entering into the land until the matter is disposed off. I further order that the matter be given accelerated hearing".

It is against this decision that the appellants had appealed to this court on six grounds of appeal contained in the Notice of appeal.

In compliance with the Rules of this court, the Appellants filed a brief of argument dated 17/7/06 which was served on the Respondents.

In their brief of argument, the Appellants formulated two issues which were fully stated in the lead judgment.

The learned counsel to the Appellants submitted in his brief of argument that the lower court erred in law in failing to consider the facts contained in the counter-affidavit and in fact for totally failing to consider the cross-appeal before it arrived at its decision. The cases of Atanda Vs. Ajani (1989) 3 NWLR (pt. 111) 511 at 539, Afolayan Vs. Oguniade (1990) 1 NWLR (pt.127) 269 at 283; Owodunmi Vs. Registered Trustees of Celestial church of Christ (2004) 6 SCNJ 399 at 405 were cited. B
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On the second issue the learned counsel contended that the application to vary the Order of interlocutory Order, being an equitable one it must be brought timeously, thence, for the respondents to have waited for one year and a month before filing the application and this amounts to a sufficient reason for the trial court to refuse the application. He therefore urged the court to allow the appeal. D

With due respect, I have carefully gone through the judgment of the lower court and I found as submitted by the learned counsel to the appellants that neither case put forward by the appellant's respondents in the main appeal nor the cross-appeal was considered. No doubt in considering the age of the case and the fact that the main claim is still lying before the trial court un-decided after 25 years, the lower court's order would have been appropriate and unassailable but the fact that it failed, by reasons of omission to consider the case put forward by other party amounts to a breach of the principles of fair hearing as provided by Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999. E
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My lords, courts are supposed to be courts of law but they are equally courts of justice. Substantial justice cannot be done unless courts of justice strain to ensure that all the facts and issues put before them by both parties cases are considered before arriving at their decision. The effect of not considering the case put forward by a party before the court that decided the case amounts to a complete black out of the un-heard party. A party to a dispute must be heard before the determination of his rights by a court of competent juris- H

diction, without let or hindrance from the beginning to the end. The right to a fair hearing in a suit is not only a common law requirement in Nigeria but also a statutory and constitutional requirement. This principle is fundamental to all court procedure and proceedings. Thus when a party submits an issue to a court for determination that court must consider and make pronouncement on it; unless if such amounts to hypothetical or academic issue. Where such issues amount to mere hypothetical and academic issue, the court would not have jurisdiction to hear it. In the case of *Opuioy vs. Omoni Wari* (2007) 6 SCNJ 131 recently decided by this court it was held thus:

“As a matter of law, a court has the duty to consider the issues submitted to it for adjudication. Where a court failed to consider and adjudicate on such issues, it is usually an error of law because the omission constitutes a denial to the party complaining of his right of fair hearing as enshrined in the constitution”. Per Oguntade JSC at P. 138.

(Italics mine for emphasis)

The lower court being an intermediate court, whose judgment is not final as compared to this court’s decision it has the duty to decide all issues submitted to it for adjudication unless where some issues can be subsumed under another one, or where the court framed its own issue that encompassed all the issues placed before it, or as I have said before, where the issue amounts to mere hypothetical or academic issues. In the case of *Brawal Shipping Vs. Onwudiko Co.* (2000) 6 SCNJ 508 at 522, my learned brother Uwaifo JSC stated the general principles as follows:

*“It is no longer in doubt that this court demands of and admonishes the lower courts to pronounce as a general rule on all issues properly placed before them for determination in order, apart from the issue of fair hearing, not to risk the possibility that the only issue or issues decided by them could be faulted on appeal. It has made this clear in its observations in several cases including *Oyediran Vs. Anise* (1970) 1 All NLR 313 at 317, *Ojobue Vs. Nnubia* (1972) 6 SC 27, *Atanda Vs. Ajani* (1989) 3 NWLR (pt. 111) 511 at 539, *Okonji Vs. Njokama* (1991) 7 NWLR (pt. 202) 131 at 150, 151, 152; *Titiloye Vs. Olupo* (1991) 7 NWLR (pt 205) 519 at 529. *Katto Vs Central Bank of Nigeria* (1991) 9 NWLR (pt 214) 126 at 149. Failure to do so may lead to a miscarriage of justice and certainly will have that*

result if the issues not pronounced upon are crucial. Consequently there could be avoidable delay since it may become necessary to send the case back to the lower court for those issues to be resolved.

The obvious exceptions are when an order for retrial is necessary or the judgment is considered a nullity, in which case there may be no need to pronounce on all the issues which could arise at the retrial or in a fresh action as the case may be”. ^B

(Underlining mine for emphasis)

Ogwuegbu JSC was of the same view in the case of 7 up Bottling Co. Ltd Vs. Abiola and Sons Bottling Co. Ltd (2001) 6 SCNJ 18 ^C at 49 when he said:

“The Court of Appeal being an intermediate appellate court, its decisions do not enjoy the finality as those of Supreme Court by virtue of Section 235 of the constitution. Whereas the Supreme Court can determine an appeal on one of the issues submitted to it in an appeal, the Court of Appeal cannot afford to ignore other issues properly placed before it since its decision on one or some of the issues may be faulted on a further appeal to this court. Where, however, an intermediate appellate court rests its decision on one of the issues, it should also express its views and pronounce on the other issues identified for its determination. Even where the intermediate court is of the settled view that the sole issue on which its decision is anchored will be upheld by the Supreme Court, it is prudent to express an alternative view”. ^E

In the instant case, apart from the issue of fair hearing, the failure of the lower court to consider the cross-appeal has also robbed this court of the duty to determine whether the cross-appeal has merit or not. The proper order to make in the circumstances is that allowing the appeal and remitting the case back to the lower court to hear ^F afresh. In Ukengbu Vs. Nwowo (2009) 1 SCNJ 49 at 88 my learned brother Ogbuagu JSC clearly stated circumstances where this court may remit a case to the lower court for fresh hearing as follows:- ^G

“Although an appellate court has a discretion whether or not to order a retrial but where this court comes to the conclusion that the court below exercised its decision on wrong principles e.g. if the exercise on it was manifestly wrong and contrary to justice. It will interfere”. ^H

In the case at hand, it is manifest that the lower court did not

only exercise its discretion wrongly but also deprived the appellant the opportunity of fair hearing as guaranteed by the constitution.

It is quite disheartening to note that this matter which was commenced in 1986 about 25 years ago has not even been heard on merit let alone the trial High Court giving its decision, due mainly to interlocutory appeals which again are being remitted to the lower court for retrial. Who knows whether after the lower court might have retried and given its decision a further appeal will again come to this court. Can this court lawfully stop further appeal to it if any of the parties is dissatisfied with the decision of the lower court? Definitely no, since it is a right conferred by the constitution. But I would like to say, to dissipate energy on interlocutory appeals, which does not affect the right being disputed in the substantive claim for a period of 23 years, which may still be elongated with this order of retrial, unless the parties have a rethink and withdraw this appeal and concentrate on the substantive matter it does not help in dispensing of justice. This, with respect, is sad. In this regard I am going to restate the position of my learned brother Niki Tobi JSC in *Abubakar Vs. Chuks* (2007) 12 SCNJ 1 at 16, faced with a similar situation as in the instant case. Hear his Lordships statement:

“Appeal on this matter was filed in the Court of Appeal on 3rd March 2000. Today is 14th December 2007. It has taken more than seven years to fight the admissibility of an exhibit, an issue which could have been taken at the end of the case after final judgment. In order to save litigation time and money of litigants it is my view that all interlocutory appeal must stop at the Court of Appeal. This will involve the amendment of Section 241 of the 1999 Constitution”.

I will join my learned Lord in calling on all the authorities and all the stake-holders vested with the powers to make laws and to amend the constitution to, as a matter of urgency put in-place machinery to amend the constitution to this effect so that our justice delivery system could be reformed to see to the quick dispensation of justice without any interlocutory appeal constituting an obstacle. If I may ask, can the substantive matter be heard and determined in spite of this interlocutory appeal? It is on record that no order for stay of proceedings was applied for or granted. It is also not in dispute that this appeal does not relate or affect whatever may be the outcome of the substantive matter. In my view, where an interlocutory

appeal does not affect the outcome of the determination of the substantive matter before the trial court, or based on fundamental issue like, jurisdiction, the trial court is enjoined to continue the hearing and determination of the substantive matter pending before it in order to hasten or quicken the dispensation of cases and have the rights of the litigating parties determined within a reasonable time. B

After reading the illuminating lead judgment of my learned brother Chukwuma-Eneh JSC I find that I have no option but to agree with his Lordship. Consistently with his reasons and conclusions I also hold that this appeal has a lot of merit and same is hereby allowed by me. The decision of the lower court dated 11/7/07 is hereby set aside. I abide by the consequential orders adumbrated in the lead judgment including that of costs. C

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