

**SUPREME COURT OF NIGERIA**  
18TH DECEMBER, 2009. SC. 12/2005  
**CORAM: - A. I. KATSINA-ALU, M. MOHAMMED,**  
**W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH,**  
**M. S. MUNTAKA-COOMASSIE, JJSC**

TOMTEC NIGERIA LIMITED ..... APPELLANT  
AND  
FEDERAL HOUSING AUTHORITY ..... RESPONDENT

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ORDERS OF COURT - Striking out order - Made upon withdrawal of an application - Challenge procedure - It is the duty of appellant to have appealed against it - If he disagrees with the order - As the order is a decision by Court of Appeal (H1)

PRACTICE & PROCEDURE - Decisions of court - Challenge through objection - Propriety - It is wrong to challenge decision of a court - Under the guise of preliminary objection - Since a court becomes functus officio - When it hands down a decision (H2)

JUDGMENTS - Decisions of court - Failure to appeal - Effect - Where a party fails to appeal against any decision - He is deemed to have accepted it - He is consequently bound by it (H3)

COURT PROCESSES - Abuse - Similar subsequent motion - While the first is pending - As the first was withdrawn before the second was moved - There is no abuse under the circumstance (H4)

EVIDENCE - Signature - Genuineness of - Where in dispute - Court has power to compare the disputed one with an undisputed version - The alleged owner of the signature need not swear to any affidavit to deny it (H5)

JUDGMENTS - Decisions of court - Found to be nullity - Power to set aside - Courts of record have inherent jurisdiction - To set aside their decisions - Found to be nullity - As rightly done by Court of Appeal (H6)

### ***FACTS***

Before the High Court of the Federal Capital territory Abuja, plaintiff/appellant sued defendant/respondent claiming *inter alia*, damages for breach of contract, balance due and payable on work done. The trial court eventually gave judgment to appellant in default of defence. Aggrieved, respondent appealed to Court of Appeal vide a notice of appeal dated 26th. October, 2001. But subsequently, a notice of withdrawal of appeal was filed in September, 2002, and in January, 2003, the appeal was dismissed upon the motion for withdrawal being moved. When appellant sought to enforce the judgment of trial court, serving a garnishee order Nisi on respondent, the latter went back to Court of Appeal and filed a motion for an order setting aside the notice of withdrawal by which the appeal was previously withdrawn, the proceedings in which the order was made, as well as the order of withdrawal. Respondent also prayed for an order re-listing the appeal for hearing.

During the pendency of respondent's motion, respondent filed yet another motion seeking similar reliefs. Both motions came up for hearing on 26<sup>th</sup> April 2004. On that day, respondent first moved for withdrawal of the earlier motion, whereupon the court struck out the earlier motion without objection from appellant. Appellant was consequently granted an adjournment to file a counter affidavit to the second motion. On the date on which the second motion was to be heard, appellant raised an oral objection to the withdrawal of the earlier motion, which objection was taken together with arguments on the second motion. Court of Appeal overruled the objection and granted the motion for re-listment. Dissatisfied, appellant has brought this appeal against that ruling of Court of Appeal. It is appellant's contention that the second motion filed during the pendency of the earlier motion was an abuse of court process.

### ***ISSUES FOR DETERMINATION***

*1. Whether it was competent for the Court of Appeal to have entertained the respondent's second motion for relistment filed on the 22<sup>nd</sup> day of April 2004, when the earlier motion filed by the respondent for the same relief had been withdrawn by the respondent's counsel at the point of contest, and when the sworn affidavits supporting the two applications were irreconcilably at variance with each other.*

2. *Whether the Court of Appeal acted correctly in relisting the respondent's appeal NO. CA/A/60/2002, given the facts and circumstances of the respondent's motion on notice praying for relistment of the withdrawn and dismissed appeal.*

***HELD*** (Unanimously dismissing the appeal per **ONNOGHEN JSC**)  
***Striking out order - Challenge procedure***

1. The lower court reached a decision upon application by counsel for the present respondent to withdraw a motion filed on 13<sup>th</sup> October, 2003 by striking out same as the withdrawal was not opposed. Learned counsel for the appellant may be under no legal obligation to oppose the application to withdraw the motion as has been argued but I am of the considered view that the lower court having reached a decision to strike out the motion, it is the duty of the appellant, if he disagrees with the order striking out the motion instead of dismissal to have appealed against same simpliciter. In the instant case, there is no such appeal. (p. 2482 D)

***Decisions of court - Challenge through objection - Propriety***

2. A party who disagrees with the decision of a court, has the right to appeal against same either of right or with the leave of court, except the decision is that of this court, which is considered final; it is wrong to challenge the decision of a court of law under the guise of a preliminary objection, whether written or oral since the lower court, by striking out the motion of 13<sup>th</sup> October, 2003, became *functus officio* and cannot entertain any further proceedings in respect of the appropriateness of the order made therein. (p. 2482 G)

***Decisions of court - Failure to appeal - Effect***

3. It is settled law that where a party fails or decides not to appeal against any decision of a court of law, he is deemed to have accepted that decision and is consequently bound by it.

Section 318 of the 1999 Constitution defines “decision” as follows:-

*“decision” means, in relation to a court, any determination of that court and includes judgment, act, order, conviction, sentence or recommendation”.*

It is very clear that the order of the lower court striking out the

motion of 13<sup>th</sup> October, 2003 falls within the above definition and consequently appealable. The appellant not having appealed against that decision cannot now be heard to complain against it.  
(p. 2483 C)

**B COURT PROCESSES - Abuse - Similar subsequent motion**

4. It is clear and I hold the considered view that the motion of 22<sup>nd</sup> April, 2004 cannot, under the circumstance and having regards to the law applicable to the issue of abuse of court process, be said to be in abuse of court process. It would have been an abuse of court process if the motion of 13<sup>th</sup> October, 2003 had not been withdrawn and struck out i.e. if both motions had been allowed to continue to exist in the court file side by side and at the time the motion of 22<sup>nd</sup> April, 2004 was heard. In this case, the motion of 13<sup>th</sup> October, 2003 had ceased to exist as at 26th April, 2004 when it was withdrawn and struck out, leaving the coast clear for the motion of 22<sup>nd</sup> April, 2004 to be moved and either granted or refused by the court. (p. 2485 A)

**E Signature - Genuineness of - Where in dispute**

5. It is settled law that a court of law faced with disputed signature has the power to compare the disputed signature with any signature agreed to be an undisputed or genuine signature. In such a circumstance, I hold the view that the owner of the disputed signature need not swear to any affidavit, or testify to deny the purported signature particularly as there exists before the court, his genuine signatures to be compared with the disputed signature, as in the instant case.  
(p. 2489 A)

**G Decisions of court - Found to be nullity - Power to set aside**

6. The next-sub-issue to be determined is whether the lower court has the power to set aside its earlier order dismissing the appeal based on a purported notice of withdrawal.

H It is settled law that courts of record have the inherent jurisdiction to set aside their judgments/decision/order) in appropriate cases or under certain circumstances.

In the instant case and as found by the lower court, the notice of withdrawal of the appeal which formed the basis of the dismissal of

the appeal by the lower court was a forgery thereby rendering that decision a nullity. In the circumstance, it is clear and I hold that the lower court was right in setting aside the decision of 23<sup>rd</sup> January, 2003 and restoring appeal NO. CA/ A/60/2002 on the cause list to be dealt with on the merit. (p. 2489 H)

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### **REPRESENTATION**

No appearance for the appellant though sent hearing notice on 5th March, 2009.

J.O. ADESINA (MRS.) for the respondent with her is GLORIA BAIYE (MISS). C

### **CASES REFERRED TO**

Ngene (2002) 1 NWLR (Pt.748) 278 at 298

Edozien vs Edozien (1993) 1 NWLR (Pt.272) 678

D

Ezeanah vs Alta (2004) 7 NWLR (Pt 873) 468 at 481

Igwe vs Kalu (2002) 14 NWLR (Pt. 787) 436 at 453-454

Odofin vs Olabanji (1996) 3 NWLR (Pt .435) 126 at 133

Okomalu vs Akinbode (2007) 2 JNSC (Pt. 31) 171 at 191

Saraki vs Kotaye (1992) 9 NWLR (Pt. 264) 156 at 188-189

E

Dickson vs Okon (2003) 16 NWLR (Pt 846) 397 at 413 – 414

Mohammed vs Hussein (1989) 14 NWLR (Pt. 584) 108 at 144

Okafor vs Nweke (2007) 10 NWLR (Pt. 1043) 521 at 530 - 531

University of Lagos vs Olaniyan (1985) 7 NWLR (Pt. 1) 156 at 763

F

Balogun vs E.O.C.B (Nig) Ltd [2007] 5 NWLR (Pt 10281) 584 at 600

Young Shall Grow Motors Ltd vs Okonkwo (2002) 16 NWLR (Pt.794) 536 at 569-570

General & Aviation Services Ltd vs Thanal (2004) 10 NWLR (Pt.880) G 50 at 90-91

Mobil Producing Nig Unlimited vs Chief Monokpo (2003) 18 NWLR (Pt. 852) 346 at 430 - 431

### **STATUTES & RULES REFERRED TO**

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Constitution of the Federal Republic of Nigeria, 1999, s. 233

Court of Appeal Rules, 2002, O. 3 rr. 15 and 18

Supreme Court Rules 1985, O. 8 r. 12

***LEAD JUDGMENT BY ONNOGHEN JSC***

This is an appeal against the ruling of the Court of Appeal, Holden at Abuja in Appeal NO.CA/A/60/2002 delivered on the 11<sup>th</sup> day of November, 2004 relisting the appeal of the respondent earlier  
B *‘withdrawn’* and consequently dismissed.

The facts of the case include the following:

By a letter dated 8<sup>th</sup> May, 1997, the appellant was awarded a contract valued at N66, 601,099.92 (*sixty-six million, six hundred and one thousand, ninety-nine naira, ninety-two kobo*) to erect some  
C buildings, which contract was terminated on the 12<sup>th</sup> day of July, 2000 on the ground that appellant abandoned the site. Appellant was not happy with the termination and instituted suit NO.FCT/HC/CV/715/2000 on the 21<sup>st</sup> day of September, 2000 at the High Court  
D of the Federal Capital territory, Abuja claiming the following reliefs:

*“(1) A declaration that having regard to the provisions of the Building Contract NO. GWA-0241 dated 23<sup>rd</sup> December, 1997, the level of construction attained by the plaintiff, the conduct of the parties since the commencement of the project, and all other surrounding circumstances of the case, the purported termination by the defendant of the said contract is an unjustifiable breach of contract and a fraud on the plaintiff.*

*(2) The sum of N65, 000,000.00 (sixty-five million naira only) as general and aggravated damages for breach of contract.*

*(3) The sum of N3, 438,141.20 (three million, four hundred and thirty-eight thousand, one hundred and forty-one naira, twenty kobo only) being the outstanding balance of payment due on payment certificate NO.05 dated 28<sup>th</sup> September, 1998.*

*(4) The sum of N1, 394,805.05 (one million, three hundred and ninety-four thousand, eight hundred and five naira, five kobo only) being amount due but held back by the defendant as “retention” under the contract*

*(5) Interest, at Bank rate (i.e 30% [thirty percent] per annum) on all the above sums until final liquidation.*

*(6) (1) (a) special damages in the sum of N1,019,521.81 (one million and nineteen thousand, five hundred and twenty-one naira eighty-one kobo only) representing bank charges paid by the plaintiff on its loan/overdraft account with Inland Bank (Nig) Plc on*

this matter;

(b) alternatively, the said sum of N1,019,521.81 (one million and nineteen thousand five hundred and twenty-one naira, eighty-one kobo only) as direct loss and/or expenses on financing charges under the parties building contract NO. GWA-085, as of the 9<sup>th</sup> August 2000. B

(2) Interest on the said sum of N1,019,521.81 (one million and nineteen thousand, five hundred and twenty-one naira, eighty-one kobo only) at the rate of 30% [thirty percent] per annum compounded monthly from the 12<sup>th</sup> July, 2000 until final liquidation thereof. C

(7) The sum of N500, 000.00 (five hundred thousand naira only) being the value of the plaintiffs materials forcefully taken over by the defendant and the plaintiffs' sites.

(8) The sum of N750, 000.00 (seven hundred and fifty thousand naira only) representing the plaintiffs solicitor's fee for this suit.

(9) Costs of this action"

In the course of the proceedings at the trial court both parties filed their pleadings though alleged by the respondent to have been done out of time. On the 17<sup>th</sup> day of May, 2001, the appellant, by order of court, amended its- statement of claim but failed, according to the respondent; to pay the necessary filing fees. The respondent was granted consequential amendment of its statement of defence which was subsequently filed on the 15<sup>th</sup> day of June, 2001. E

On the 26<sup>th</sup> day of July, 2001, the appellant, as plaintiff filed an application at the trial court praying for an order;- F

(a) Striking out the defendant/respondent's purported statement of defence filed on the 13<sup>th</sup> February, 2001 as incompetent.

(b) Admitting the plaintiff/appellant to final judgment in default of a defence, as per the plaintiff/applicant's claims contained in paragraph 33 of its Amended Statement of claim dated the 17<sup>th</sup> day of May, 2001. G

The application was granted on the 22<sup>nd</sup> day of October, 2001 without calling for evidence in proof. The present respondent was dissatisfied with the grant of the application and consequently appealed against the judgment vide a Notice of Appeal dated the 26<sup>th</sup> day of October, 2001. H

On the 26<sup>th</sup> day of September, 2002 a Notice of Withdrawal

of appeal was purportedly filed by the respondent in this appeal and on the 23<sup>rd</sup> day of January, 2003, one Michael Asibe appeared in the lower court and withdrew the appeal, which appeal was consequently dismissed. It is the contention of the respondent that the withdrawal of the appeal was never brought to its attention until some-  
 B time in 2003 when the respondent was served with a copy of garnishee Order Nisi by the trial court consequent upon the service of the said Order Nisi, the respondent retained the services of the firm of solicitors of Kayode & Co to conduct the appeal as a result of  
 C which the firm filed a motion on the 13<sup>th</sup> day of October, 2003 at the lower court praying for the following reliefs:

- (a) *An order setting aside the Notice of Withdrawal of Appeal dated the 26<sup>th</sup> day of September, 2002.*
- (b) *An order setting aside the proceedings of the court of the*  
 D *23<sup>rd</sup> day of January, 2003.*
- (c) *An order vacating the dismissal of the appeal pursuant to the purported Notice of Withdrawal dated 26<sup>th</sup> September, 2002.*
- (d) *An order relisting Appeal NO. CA/A/49/2002; CA/A/M/2002 struck out/dismissed on 23<sup>rd</sup> January, 2003 pursuant to No-*  
 E *tice of Withdrawal dated and filed 26th September, 2002 in CA/A/M/2/2002.*

On the 22<sup>nd</sup> day of April, 2004 the respondent, then appellant filed another motion in the lower court in which it prayed the court  
 F for an order

- (i) *Setting aside the Notice of Withdrawal of appeal dated 26<sup>th</sup> September, 2002.*
- (ii) *Setting aside the proceedings of the court of 23<sup>rd</sup> January, 2003.*
- (iii) *Vacating the dismissal of the appeal pursuant to the Notice of*  
 G *Withdrawal dated 26<sup>th</sup> September, 2002 and*
- (iv) *Relisting appeal NO, CA/A/60/2002 dismissed on 23rd January, 2003 pursuant to the Notice of Withdrawal of 26<sup>th</sup> Sep-*  
*tember, 2002.*

H Both motions came up for hearing on 26<sup>th</sup> April, 2004. However, on that day, learned counsel for the present respondent withdrew the earlier motion of 13<sup>th</sup> October, 2003 which was accordingly struck out by the court as counsel for the present appellant did not oppose same. The present appellant then sought for and was granted

adjournment to enable it file its response to the new motion which he subsequently did by filing a counter affidavit on the 16th September, 2004.

On the 21st day of September, 2002 when the motion of 22<sup>nd</sup> April, 2004 for relistment came up for hearing, learned counsel for the appellant raised an objection orally to the withdrawal of the earlier motion of 13<sup>th</sup> October, 2003 which objection was taken together with arguments on the motion for relistment and the ruling reserved.

In the ruling delivered by the lower court on the 11<sup>th</sup> day of November, 2004, the appellant's objection was overruled while the respondent's application for relistment etc. was granted as prayed. This appeal is therefore against that decision of the lower court.

In the appellant's brief of argument filed on the 15<sup>th</sup> day of July, 2007 and adopted in argument of the appeal, learned counsel for the appellant, YAKUBU MAIKYAU ESQ., formulated two issues for the determination of the appeal. These are as follows:-

*1. Whether it was competent for the Court of Appeal to have entertained the respondent's second motion for relistment filed on the 22<sup>nd</sup> day of April 2004, when the earlier motion filed by the respondent for the same relief had been withdrawn by the respondent's counsel at the point of contest, and when the sworn affidavits supporting the two applications were irreconcilably at variance with each other.*

*2. Whether the Court of Appeal acted correctly in relisting the respondent's appeal NO. CA/A/60/2002, given the facts and circumstances of the respondent's motion on notice praying for relistment of the withdrawn and dismissed appeal.*

In arguing issue 1, learned counsel for the appellant submitted that the withdrawal of the first application on the 26<sup>th</sup> April, 2004 after issues had been joined by the parties in the affidavits, amounted to an admission of defeat by the respondent thereby disentitling the respondent to any second chance; that notwithstanding how the order of the court was couched, the termination of the application in the circumstances amounted to a dismissal of same thereby depriving the lower court of jurisdiction to entertain any further application for similar reliefs; that the second application, in so far as it sought the same reliefs as the earlier one amounted to an abuse of process which ought to have resulted in a dismissal of the latter application; that the

second motion was filed while the earlier one was pending thereby rendering the second application an abuse of process; that the withdrawal of an appeal is within counsel's ordinary authority to prosecute an appeal and does not require the client's express approval to make such a withdrawal effective in law, relying on Adewunmi vs Plastex Ltd (1986) 3 NWLR (Pt.32) 767; Ezomo vs A-G Bendel State (1986) 4 NWLR (Pt. 32) 448; Edozien vs Edozien (1993) 1 NWLR (Pt.272) 678; that the fact that the lower court struck out the earlier motion instead of dismissing same is of no moment as the effect is the same as dismissal, relying on the Young Shall Grow Motors Ltd vs Okonkwo (2002) 16 NWLR (Pt.794) 536 at 569-570.

Elaborating on the issue as to whether the second application was in abuse of process, learned counsel submitted that where a party duplicates a court process by filing a new process to seek the same relief which is the subject matter of an already pending process, the more recent of the two processes constitutes an abuse of court process, and is to be dismissed, relying on African Re-insurance Corp. vs JDP Construction (Nig) Ltd (2003) 13 NWLR (Pt. 838) 609 at 635 - 636; Mobil Producing Nig Unlimited vs Chief Monokpo (2003) 18 NWLR (Pt. 852) 346 at 430 - 431. Onyeabuchi vs Independent National Electoral Commission (2002) 8 NWLR (Pt. 768) 417 at 444.

By way of an alternative argument on the issue of *functus officio* learned counsel relied on the provisions of Order 3 Rule 18(5) of the Court of Appeal Rules, 2002 to submit that the effect of a withdrawal is that the proceedings Stand dismissed from the date of withdrawal whether the court pronounced same or not or whether the withdraw was by way of an oral or written application and that it does not matter whether counsel for the appellant objected to the application to withdraw the motion or not as there is no legal duty on the counsel for the appellant to object; that consent to withdraw does not alter the legal consequences flowing from the withdrawal in the circumstances of the case and urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent, J. O. ADESINA (MRS.) in the respondent's brief deemed filed on the 6<sup>th</sup> day of February, 2008 stated that when the application to withdraw the earlier motion was made, appellant's counsel did not object; that learned counsel rather objected to the hearing of the motion filed on 22<sup>nd</sup>

day of April, 2004 on the ground that he had not been given sufficient time to respond on the basis of which the motion was adjourned to 3<sup>rd</sup> June, 2004; that appellant filed no Notice of Objection against the hearing of the motion filed on 22<sup>nd</sup> day of April, 2004 as required under Order 3 Rule 15 of the Court of Appeal Rules 2002 but moved the lower court upon an oral application which rendered the objection incompetent as held by the lower court - relying on *Balogun vs E.O.C.B (Nig) Ltd [2007] 5 NWLR (Pt 10281 584 at 600: Ogunleye vs Oni (1990) 2 NWLR (Pt 1351 745; Lewis & Peat (N. R. I) Ltd vs Akhimien (1976) 7S.C 157*; that Rules of court are meant to be obeyed, relying on *C.O.P vs Fasheun (1997) 6 NWLR (Pt.507) 170: Ezeanah vs Alta (2004) 7 NWLR (Pt 873) 468 at 481*; that the motion filed on 13<sup>th</sup> day of October, 2003 was yet to be ruled upon when it was withdrawn on 26<sup>th</sup> April, 2004 and that the order striking out the same was an interlocutory order, relying on *Ajuta II vs Ngene (2002) 1 NWLR (Pt.748) 278 at 298*: that the lower court was not *functus officio* as it had not, at the time it struck out the motion fulfilled its duty with regards to the matter before it; that the cases cited and relied upon by learned counsel for the appellant on the issue under consideration are not relevant to the determination of the issue and proceeded to distinguish them. B C D E

On the sub-issue as to whether the motion of 22<sup>nd</sup> April, 2004 is in abuse of court processes, learned counsel cited and relied on *NV Scheep vs MV "S Araz" (2000) 15 NWLR (Pt. 691) 622 at 664; Okafor vs A-G Anambra State (1991) NWLR (Pt. 2000) 059 at 681; Saraki vs Kotoye ( 1992) 9 NWLR (Pt. 264) 156 at 188-189* in submitting that the motion of 22<sup>nd</sup> April, 2002 did not violate any of the principles laid down in *Saraki vs. Kotoye (Supra)*. F

On the effect of Order 3 Rule 18 of the Court of Appeal Rules, 2002 learned counsel submitted that the Rule in question envisages a substantive appeal, not an application that a matter struck out can be brought back as there is a clear difference between an order striking out a matter and the one dismissing a matter; and urged the court to resolve the issue against the appellant. G H

To begin with, it is important to reproduce the proceedings of 26<sup>th</sup> April, 2004, which deals with the withdrawal and consequent order of striking out of the motion of 13<sup>th</sup> October, 2003. It is as follows:-

*"J. O. Adesina (Mrs.) for the appellant with Miss A. Adebiyi.*

*A.O. Ebong for the respondent.*

*Mrs. Adesina: I apply to withdraw motion filed on 13/10/03.*

*Mr. Ebong; Not objecting.*

*Court: Motion filed on 13/10/03 and withdrawn by the applicant is*  
B *hereby struck out.*

*Mrs. Adesina: I filed another motion of same reliefs as the one struck out It was filed on the 22nd April, 2004. The respondent has been duly served.*

*C Mr. Ebong: We have been served. We ask for time to respond.*

*Court: Motion adjourned to 3<sup>rd</sup> day of June, 2004 for hearing.*

*Sign*

*26th April, 2004".*

The above record of the lower court is very clear and unambiguous. **The lower court reached a decision upon application by counsel for the present respondent to withdraw a motion filed on 13<sup>th</sup> October, 2003 by striking out same as the withdrawal was not opposed. Learned counsel for the appellant may be under no legal obligation to oppose the application to withdraw the motion as has been argued but I am of the considered view that the lower court haven reached a decision to strike out the motion, it is the duty of the appellant, if he disagrees with the order striking out the motion instead of dismissal to have appealed against same simpliciter. In the instant case, there is no such appeal.** Rather learned counsel, for the appellant on the date fixed for the hearing of the motion filed on 22<sup>nd</sup> April 2004 raised a preliminary objection which in effect among others, attacked the propriety of the order striking out the earlier motion thereby calling on the lower court to review its decision as to the appropriate order to make in the circumstance. The same posture has been taken and maintained by the appellant before this court.

This is obviously erroneous. **A party who disagrees with the decision of a court, has the right to appeal against same either of right or with the leave of court, except the decision is that of this court, which is considered final; it is wrong to challenge the decision of a court of law under the guise of a preliminary objection, whether written or oral since the lower**

**court, by striking out the motion of 13<sup>th</sup> October, 2003, became *functus officio* and cannot entertain any further proceedings in respect of the appropriateness of the order made therein.** The only court competent to do so is an appellate court which can only review the decision upon a proper appeal against same. B

Appellant could have appealed against the above decision of the lower court under either section 233(2) or 233(3) of the 1999 Constitution depending on whether his appeal falls within the category of appeals as of right or with leave of the courts but he did not utilize that opportunity. **It is settled law that where a party fails or decides not to appeal against any decision of a court of law, he is deemed to have accepted that decision and is consequently bound by it.** C

**Section 318 of the 1999 Constitution defines “decision” as follows:-** D

**“decision” means, in relation to a court, any determination of that court and includes judgment, act, order, conviction, sentence or recommendation”.**

**It is very clear that the order of the lower court striking out the motion of 13<sup>th</sup> October, 2003 falls within the above definition and consequently appealable. The appellant not haven appealed against that decision cannot now be heard to complain against it.** E

The above notwithstanding, is the lower court *functus officio* in respect of the motion of 22<sup>nd</sup> April, 2004 haven struck out the motion of 13<sup>th</sup> October, 2003? It is not disputed that as at the time the motion of 13<sup>th</sup> October, 2003 was withdrawn and consequently struck out, it had not been heard and a decision on the merit taken by the court. A decision on merit is one rendered after argument and investigation and a determination as to which of the parties is in the right, as distinguished from a judgment or decision rendered upon some preliminary or formal part or by default and without trial - see UTC vs Pamote & Ors. (1989) 1 NSCC 523 or (1989) 2 NWLR (Pt 103) 244; Mohammed vs Hussein (1989) 14 NWLR (Pt. 584) 108 at 144; Ukachukwu vs UBA (2005) 18 NWLR (Pt. 956) at 60. There was no decision by the lower court on the prayers on the motion of 13<sup>th</sup> October, 2003 at all. It follows therefore that the argument on F G H

the issue of the court being *functus officio* in respect of the matter is misconceived.

On the issue as to whether the motion filed on 22<sup>nd</sup> April, 2004 was in abuse of court process, it is important to note that the circumstances in which an abuse of judicial process can be said to exist have been stated in a number of decisions of this court including Saraki vs Kotaye (1992) 9 NWLR (Pt. 264) 156 at 188-189 to include the following:-

“(a) *Instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues, or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.*

(b) *Instituting different actions between the same parties simultaneously in different courts even though on different grounds.*

(c) *Where two similar processes are used in respect of the exercise of the same right, for example a cross appeal and a respondent notice.*

(d) *Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issues of fact, already decided by courts below.*

(e) *Where there is no iota of law supporting a court process or where it is premised on frivolity or recklessness.”*

From the facts disclosed on record, it is clear that though as at the time the court sat on 26<sup>th</sup> April, 2004 there existed two different motions pending before the lower court seeking the same reliefs - one filed on 13<sup>th</sup> October, 2003 and the other on 22<sup>nd</sup> April, 2004 - the one filed on 13<sup>th</sup> October, 2003 was withdrawn by learned counsel for the respondent herein and consequently struck out, as disclosed in the proceedings of 26<sup>th</sup> April, 2004 earlier reproduced in this judgment. By the withdrawal and consequent striking out of the motion of 13<sup>th</sup> October, 2003 that motion ceased to exist in law in the proceedings. The only motion that existed subsequent to the striking out of the motion of 13<sup>th</sup> October, 2003 is the one filed on 22<sup>nd</sup> April, 2004 which was adjourned for hearing to the 3<sup>rd</sup> June, 2004. It is clear from the record that as at 3<sup>rd</sup> June, 2004 the only motion that existed and was heard on that day is the motion filed on 22<sup>nd</sup> April, 2004; the motion of 13<sup>th</sup> October 2003 haven been withdrawn and consequently struck out. It no longer existed side by side with

the motion filed on 22<sup>nd</sup> April, 2004.

***It is clear and I hold the considered view that the motion of 22<sup>nd</sup> April, 2004 cannot, under the circumstance and having regards to the law applicable to the issue of abuse of court process, be said to be in abuse of court process. It would have been an abuse of court process if the motion of 13<sup>th</sup> October, 2003 had not been withdrawn and struck out i.e if both motions had been allowed to continue to exist in the court file side by side and at the time the motion of 22<sup>nd</sup> April, 2004 was heard. In this case, the motion of 13<sup>th</sup> October, 2003 had ceased to exist as at 26th April, 2004 when it was withdrawn and struck out, leaving the coast clear for the motion of 22<sup>nd</sup> April, 2004 to be moved and either granted or refused by the court.***

Learned counsel for the appellant has submitted that under the provisions of Order 3 Rule 18(5) of the Court of Appeal Rules 2002, the motion haven been withdrawn at the stage in which it was withdrawn the proper order is not striking out but dismissal. While it is correct that under the provisions of the above Rule an appeal withdrawn with or without an order of the court shall be deemed to have been dismissed, the provision does not apply to a motion filed in the Court of Appeal to relist an appeal earlier dismissed. The motion filed on 13<sup>th</sup> October, 2003 which was withdrawn and struck out was not seeking leave to appeal or extension of time to appeal which, by the operation of the Rules of the court would have been treated as being the same as an appeal. In any event, I have earlier found that appellant never appealed against the order striking out the motion filed on 13<sup>th</sup> October, 2003 particularly as the instant appeal is also not against the legal effects of the said withdrawal and consequent striking out. The proper and legitimate issue in this appeal is simply whether having regards to the facts and circumstances of the case the lower court exercised its discretion in granting the motion of 22<sup>nd</sup> April, 2004 judicially and judiciously, as the decision of that court striking out the motion of 13th October, 2003 which was withdrawn without objection can only be challenged by way of an appeal, not by preliminary objection either written or oral, as the appellant has tried labouriously to do in this case.

On issue 2, learned counsel for the appellant submitted that

- though it is the law that appellate courts are usually reluctant in questioning the exercise of discretion by the lower court, the courts will intervene when it is clear that the exercise of the discretion by the lower courts was “*manifestly wrong, arbitrary, reckless, injurious*” relying on University of Lagos vs Olaniyan (1985) 7 NWLR (Pt. 1) 156 at 763; Eze vs A-G Rivers State (2001) 18 NWLR (Pt. 746) 524 at 545; General & Aviation Services Ltd vs Thanal (2004) 10 NWLR (Pt.880) 50 at 90-91; that the relistment of the appeal of the respondent was done contrary to well established principles; that the respondent did not prove the allegation of forgery which was the foundation for the motion for relistment either beyond reasonable doubt or at all; that the affidavit evidence in support of the application was bedeviled with falsehood, insincerity, inconsistency and suppression and misrepresentation of facts that no reasonable tribunal could have granted the application; that the doubts created by the low-grade evidence of the respondent ought to have been resolved in favour of the appellant; that by virtue of the provisions of Order 8 Rule 12(2) of the Supreme Court Rules 1985 and by virtue of the authority of Okomalu vs Akinbode (2007) 2 JNSC (Pt. 31) 171 at 191; Global Transport Oceanico S.A vs Free Enterprises (Nig)) Ltd (2001) 5 NWLR [Pt. 706] 426 at 442; Eze vs Rivers State supra at 544 etc, this court has the power to carry out a complete review of the respondent’s application in this matter, and to make any orders thereon which ought to have been made by the lower court having regards to the facts and the applicable law as the examination of the affidavit evidence does not involve any question as to the demeanor of witnesses. Finally, learned counsel urged the court to resolve the issue in favour of the appellant and allow the appeal.
- On her part, learned counsel for the respondent submitted that having regards to the facts of the case relevant to the application, there was no valid notice of withdrawal of the appeal and that the lower court has the vires to set aside its order fraudulently obtained by a party before it. By way of elaboration, learned counsel cited and relied on the provisions of Order 3 Rules 18(2) and (4) of the Court of Appeal Rules, 2002 and submitted that a closer reading of the provisions does not support the interpretation that once an appeal is withdrawn, the withdrawal operates as a bar to further proceedings by the appellant; that it rather operates as “*a bar to further*

*proceedings on any application made by the respondent under Rule 14 of the Order*"; submitting in the alternative, learned counsel submitted that Notice of Withdrawal filed on 26<sup>th</sup> September, 2002 was not franked in accordance with the decision of the court in *Okafor vs Nweke* (2007) 10 NWLR (Pt. 1043) 521 at 530 - 531 particularly as the name of the "appellant" or its legal representative was not spelt out as the respondent acts through agents being a corporate entity; that a court is competent to set aside its own judgment under certain circumstances as decided in *Dickson vs Okon* (2003) 16 NWLR (Pt. 846) 397 at 413 – 414; *NS Eng. Co. Ltd vs Ezenduka* (2002) 1 NWLR (Pt. 748) 468 at 493; *Igwe vs Kalu* (2002) 14 NWLR (Pt. 787) 436 at 453-454; *Ebe vs Ebe* (2004) 3 NWLR (Pt. 860) 215 at 243; *Odofin vs Olabanji* (1996) 3 NWLR (Pt. 435) 126 at 133; that there were many irregularities in the matter such as:

(a) that the default judgment of the trial court was a nullity as there was no statement of claim properly so called before that court;

(b) the notice of withdrawal of appeal purportedly filed by the appellant was not signed by the appellant as alleged, as none of the agents of the respondent through whom it could have acted in the process executed the notice of withdrawal; that the purported oral application to withdraw the appeal by one Michael Asibe on 23<sup>rd</sup> of January, 2003 did not conform with the provisions of Order 3 Rule 18 of the Court of Appeal Rules, 2002 neither did it comply with the decision in *Okereke vs NDIC* (2003) 2 NWLR (Pt. 804) 218 and urged the court to resolve the issue in favour of the respondent and dismiss the appeal.

It is the case of the appellant that the respondent failed to prove the case of forgery of the Notice of Withdrawal beyond reasonable doubt as the allegation is criminal in nature; that Bob Ezech whose signature is said to have been forged was never called to testify as to the falsity of the signature on the notice of withdrawal of appeal; that there was no evidence upon which the lower court could arrive at the conclusion that the signature on the Notice of Withdrawal was not that of C.B. Ezech Esq.

However, going through the ruling of the lower court, the court made certain fundamental findings of fact on the application which includes the following:-

(a) that Mr. Bob Ezeh was counsel for the appellant in that court at the time material to the notice of withdrawal;

(b) that Mr. Michael Asibe of counsel was counsel who represented the appellant in that court in the proceedings of 23<sup>rd</sup> January, 2003 as evidenced in Exhibit FHA11;

B (c) that appellant before that court denied ever instructing Mr. Ezeh or Mr. Asibe to withdraw the appeal;

C (d) that a comparison of the signature on Exhibit FHA10 with the undisputed signature of Mr., Bob Ezeh on Exhibits tt10 and its annexure show clearly that the signature on Exhibit FHA10 is way off from and vastly different from the undisputed signature of Mr. Ezeh in Exhibit tt10 and on the statement of defence/counter claim;

D (e) that there is no similarity between Exhibit FHA10 and any of the undisputed signatures of Mr. Ezeh on Exhibit tt10 and the statement of defence/counter claim.

The lower court consequently held thus:

E *“I therefore hold that the appellant has satisfactorily proved beyond reasonable doubt that the signature on Exhibit FHA10 on which the proceedings of the court on 23<sup>rd</sup> January, 2003 were based was an attempted forgery of the signature of Mr. Bob Ezeh of counsel who was retained by the appellant for the purposes of this appeal.*

F *In the event, even if Mr. Michael Asibe was a counsel in the chambers of Mr. Bob Ezeh, he could not properly have appeared in the proceedings of this court in the Appeal NO. CA/A/60/2002 based on a Notice of Withdrawal of appeal which the appellant did not give instructions for and on which the signature of instructed counsel was forged and a nullity”*

G I have carefully gone through the affidavit evidence on record and have come to the conclusion that the findings and conclusion of the lower court on the relevant facts and issues cannot be faulted. The court compared the specimen signature of Mr. Ezeh of counsel on the disputed notice of withdrawal of appeal with the undisputed  
H signature of the said Mr. Ezeh on the statement of defence/counter claim which was exhibited by the present appellant and came to the emphatic conclusion that there was no similarity between them and that the purported signature of Mr. Ezeh on the Notice of Withdrawal of appeal is a forgery.

***It is settled law that a court of law faced with disputed signature has the power to compare the disputed signature with any signature agreed to be an undisputed or genuine signature. In such a circumstance, I hold the view that the owner of the disputed signature need not swear to any affidavit, or testify to deny the purported signature particularly as there exists before the court, his genuine signatures to be compared with the disputed signature, as in the instant case.*** B

It should be noted that from the passage quoted from the ruling of the lower court, the basis of the conclusion of that court on the application before it is simply that the signature of Mr. Ezeh, of counsel for the appellant before that court, on the Notice of Withdrawal of the appeal which formed the basis of the withdrawal and consequent dismissal of the appeal by that court is a forgery and consequently a nullity. It therefore does not matter whether Mr. Michael Asibe who appeared in court to withdraw the appeal based on the said forged notice of withdrawal was counsel in the chambers of Mr. Bob Ezeh or not. The fact is that he appeared in court on that day, the 23<sup>rd</sup> January, 2003, and did move the court on the forged notice of withdrawal. E

It follows therefore that the argument of learned counsel for the respondent that the notice of withdrawal of appeal was incompetent or null and void because it was signed by a non existent legal practitioner etc, has no foundation in the ruling of the lower court. It should be noted that there is no respondent's notice calling on this court to affirm the decision of the lower court on any other ground other than what has been stated by the court in its ruling neither is there any cross appeal by the respondent in this appeal, in which the issue could have been raised. F G

It follows therefore, in my opinion, that the argument of learned counsel for the respondent in that respect is very much misconceived and of no consequence. The decision of this court in the case of Okafor vs Nweke supra is therefore irrelevant to the facts of this case having regards to the ruling of the lower court on appeal the grounds of appeal and the issues arising therefrom. H

***The next sub-issue to be determined is whether the lower court has the power to set aside its earlier order dismissing the appeal based on a purported notice of withdrawal.***

***It is settled law that courts of record have the inherent jurisdiction to set aside their judgments/decision/order) in appropriate cases or under certain circumstances*** which include:

*When:*

- B (i) *the judgment is obtained by fraud or deceit either in the court or of one or more of the parties;*
- (ii) *the judgment is a nullity;*
- (iii) *it is obvious that the court was misled into giving judgment under a mistaken belief that the parties consented to it;*
- C (iv) *the judgment was given in the absence of jurisdiction;*
- (v) *the proceedings adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication;*
- (vi) *where there is fundamental irregularity. See Igwe vs Kalu (2002) 14 NWLR (Pt. 787) 436 at 453-454; Ebe vs Ebe (2004) 3 NWLR (Pt. 860) 215 at 243; Odofin vs Olabanji (1996) 3 NWLR (Pt. 435) 126 at 133.*
- D

***In the instant case and as found by the lower court, the notice of withdrawal of the appeal which formed the basis of the dismissal of the appeal by the lower court was a forgery thereby rendering that decision a nullity. In the circumstance, it is clear and I hold that the lower court was right in setting aside the decision of 23<sup>rd</sup> January, 2003 and restoring appeal NO. CA/ A/60/2002 on the cause list to be dealt with on the merit.***

In conclusion, I find no merit whatsoever in this appeal which is accordingly dismissed with N50,000.00 (fifty thousand naira) costs against the appellant.

- G I affirm the decision of the lower court in its ruling delivered on the 11<sup>th</sup> day of November, 2004.
- Appeal dismissed.

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H **KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment delivered by my learned brother Onnoghen JSC. I totally agree with it, and for the reasons he gives, I also find no merit whatsoever in this appeal which is accordingly dismissed with N50, 000.00 costs against

the appellant.

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***MOHAMMED JSC***

I have read before now the judgment just delivered by my learned brother Onnoghen, JSC with which I entirely agree. I respectfully adopt the reasoning and conclusion in resolving the issues arising in the appeal as mine. I find no merit whatsoever in the appeal which is hereby dismissed. B

I abide by the orders made in the leading judgment including the order on costs. C

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***CHUKWUMA-ENEH JSC***

I read in advance the judgment of my learned brother Onnoghen JSC just delivered and I agree with his reasoning and conclusions that the appeal should be dismissed. D

I also dismiss it and abide by the order contained in the lead judgment. E

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***MUNTAKA-COOMASSIE JSC***

I agree entirely with the lead judgment of my learned brother Onnoghen JSC which he has just delivered in this appeal. My Lord has taken a very serious position vis-à-vis the appeal before us. With tremendous respect I adopt his reasoning and conclusions as mine. I have nothing more useful to add. Hence I too hold that the appeal lacks merit and I dismiss it. I affirm the decision of the lower court delivered on the 11th day of November, 2004, I endorse the order as to costs. F G