

**SUPREME COURT OF NIGERIA**  
5TH MARCH, 2010. SC. 248/2002  
**CORAM:- D. MUSDAPHER, G. A. OGUNTADE, F. F. TABAI,**  
**I. T. MUHAMMAD, O. O. ADEKEYE, JJSC**

THE YOUNG SHALL GROW  
MOTORS LIMITED ..... APPELLANT  
AND  
1. AMBROS O. OKONKWO  
2. INNOCENT ONYEBUCHUKWU ..... RESPONDENTS

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APPEALS - Withdrawal - After exchange of briefs - Effect - After briefs have been exchanged - Whereby issues are crystallized - A withdrawal at that point must lead to dismissal - As an inflexible rule (H1)

LEGAL PRACTITIONERS - Authority to bind client - Duration of - A client is presumed to have confidence in a counsel he has briefed - This confidence will continue till the case ends - Unless the brief is withdrawn (H2)

***FACTS***

The plaintiff/1st respondent sued appellant and 2nd respondent as 1st and 2nd defendants respectively, claiming damages against defendants jointly and severally for damage done to his Mercedes Benz Lorry 911. After service of the statement of claim, learned counsel for 1st defendant appellant filed a notice of motion praying trial court *inter alia* for an order dismissing the suit for being statute barred or striking out appellant's name from the suit in that it was not a person known to law. After hearing the motion, the learned trial judge dismissed the motion. Dissatisfied, appellant appealed to Court of Appeal against the ruling of trial court. But subsequently, on 9th November 1999, learned counsel for appellant applied to withdraw the appeal and consequently the court struck out the appeal.

Two years later, a motion to re-list the appeal was filed by another counsel for appellant. Court of Appeal heard the motion and dismissed it for lack of merit. The court held that the appeal cannot be re-listed as the order of striking out earlier made was tantamount to a dismissal of the appeal. Aggrieved, appellant has ap-

1192 Young Motors Ltd. v. Okonkwo (2010) 3 KLR (pt. 279) 1191; appealed to Supreme Court against the judgment of Court of Appeal.

### **ISSUE FOR DETERMINATION**

Under what circumstances can an appeal struck out be relisted, and whether the court below was right in refusing to relist the appeal struck out by it on the 9<sup>th</sup> of November, 1999.

### **HELD** (Unanimously dismissing the appeal per **MUHAMMAD JSC**) **APPEALS - Withdrawal - After exchange of briefs - Effect**

1. It follows, therefore, that in the absence of any provision in the Court of Appeal Rules on the matter, the principles governing withdrawal of an appeal on the date fixed for hearing or any time, thereafter, must take a cue from the principle of discontinuance of actions at the trial court after the action has been fixed for hearing. In other words, after briefs of argument have been exchanged by the parties whereby issues, between them became crystallized LITIS CONTESTATIO can be deemed to have been reached. A withdrawal of an appeal from that point in time must, as an inflexible rule, lead to the dismissal of the appeal. (p. 1203 A)

### **LEGAL PRACTITIONERS - Authority to bind client**

2. While ruling on the contents of the above depositions in paragraph 5 [a] - [f] of the Affidavit in support of the application the court below, per OLAGUNJU, JCA, [of blessed memory] made a very long observation which culminated in the following words:

*“The survey of the legal position shows that learned counsel for the applicant is on sticky wicket in his contention about the authority of the former counsel for the applicant to withdraw the applicant’s appeal single-handed.*

*The spectre of the rickety argument of learned counsel for the applicant can be laid to rest by the succinct statement of the principle in Edozien v. Edozien, supra, at page 178, where Olatawura, JSC, reflected that:*

*A client who briefs a counsel is presumed to have confidence in the counsel. This confidence will continue for the entire duration of the case unless the brief is withdrawn.*

*On the applicant’s own showing the brief of his counsel was not withdrawn until long after the withdrawal of the applicant’s appeal by the learned counsel. Therefore, it is idle contesting author-*

*ity of the counsel.*

I entirely agree with Olagunju, JCA, in his comments as above.  
(p. 1204 A/C/G)

### **NOTABLE POINT OF INTEREST** **MUHAMMAD JSC**

*1. Appeal may be withdrawn before it is called for hearing*

Thus, an appellant may at any time before the appeal is called on for hearing, serve on the parties to the appeal and file with the court's registry a notice to the effect that he does not intend to further prosecute the appeal [Order 3 Rule 18(1)]. This period, I think, covers the period between when the Notice of Appeal is filed, when the appeal is entered and before it is called for hearing. Thus, from the moment the appeal is merely brought as distinguished from when it is entered, the appellant can withdraw his appeal. (p. 1200 G)

### **REPRESENTATION**

No appearance by Parties and Counsel.

### **CASES REFERRED TO**

ERONINI V. IHEUKO [1989] 20 NSCC [pt. 1] 503  
Adeagbo v. Yusuf (2001) 12 NWLR pt. 728 pg. 77  
EDOZIEN V. EDOZIEN [1993] 1 NWLR [pt. 272] 678  
ADEAGBO V. YUSSUF [1990] 6 NWLR [pt.158] 588  
GEOSOURCE [NIG.] LTD. V. BIRAGBARA [2000] 13 NWLR [pt. 684] 355  
MILITARY ADMINISTRATOR, BENUE STATE V. ULEGEDE (2001) 17 NWLR [pt. 741] 194  
SHUGABA V. UNION BANK OF NIGERIA PLC. [1999] 11 NWLR [pt.627] 459 at 488CD  
NWACHUKWU V. NZE [1955] 15 WACA 36  
SONEKAN V. SMITH [1967] 1 ANLR 129  
RODRIGUES V. PUBLIC TRUSTEES [1977] 4 SC 29  
SOETAN V. TOTAL NIGERIA LIMITED [1972] 1 ANLR 1, 3  
NZEKWU V. NZEKWU [1993] 5 NWLR [pt. 292] 246  
EZOMU V. ATTORNEY GENERAL OF BENDEL STATE [1986] 17 NSCC 1154

**STATUTE & RULES REFERRED TO**

Court of Appeal Act, Cap 75 L. F. N; 1990, s. 16

Court of Appeal Rules, 1981, O. 3 r. 18

**LEAD JUDGMENT BY MUHAMMAD JSC**

B At the High Court of Justice of Anambra State, holden at Newi  
[trial court], the plaintiff was claiming damages against the defen-  
dants jointly and severally in respect of damages caused to the plaintiff's  
Mercedes Benz Lorry 911. After service of the statement of claim, the  
C learned counsel for the 1<sup>st</sup> defendant filed a notice of motion praying  
the trial court for the following reliefs:

“(1) *An order dismissing the above named suit in its entirety  
or striking it out on the ground that it is statute barred.*

(2) *IN THE ALTERNATIVE, an order setting aside the service  
D of the Writ of summons and other processes in the above suit on the  
first defendant.*

(3) *Striking out the first defendant from the Writ of Sum-  
mons and other processes in the above suit on the ground that the  
first defendant is not known to law and therefore, cannot sue nor be  
E sued.”*

After having considered arguments from learned counsel for  
the respective parties along with the affidavit evidence, the learned  
trial judge dismissed the application. Dissatisfied with that ruling, the  
defendants/applicants appealed to the Court of Appeal, Enugu, Divi-  
F sion [court below].

On the 9<sup>th</sup> of November, 1999, learned counsel for the appel-  
lant at the court below applied to withdraw the appeal. The court  
below, accordingly, struck out the appeal. On the 9<sup>th</sup> of November,  
G 2001, a motion to relist the appeal struck out on 9<sup>th</sup> of November,  
1999, was filed. The court below considered the motion on Notice,  
found no merit in it and dismissed it. This is what brought about this  
appeal to this court.

H Briefs of argument were settled by the learned counsel for the  
respective parties. Learned counsel for the appellant formulated the  
following issues for this court's determination. They are as follows:

“[1] *Was the Court of Appeal right when it treated and ap-  
plied its earlier order striking out an appeal as amounting to a dis-  
missal of the said appeal with the result that same cannot be relisted?*

*[2] (a) Was the Court of Appeal correct when it treated the main issue of considering the merit of the application for relistment of the said appeal as a “non-issue”?*

*(b) Was the refusal of the court of Appeal to relist or restore the said appeal for hearing on the merits justified in law?”*

Learned counsel for the 1<sup>st</sup> respondent distilled the following B issues:

*“[1] Is there a legal distinction between an order of striking out and one of dismissal of an appeal where such appeal is withdrawn upon application to that effect after briefs of argument have been filed and exchanged on a date the appeal was fixed for hearing? Put in other words, what is the legal effect or consequence when an appeal is withdrawn on a hearing date after briefs of argument therein have been filed and exchanged?”* C

*[2] Was the Court of Appeal right when it refused to relist D the appeal struck out on 9/11/99?”*

In the submissions he made in his brief of argument on issue No. 1, the learned counsel for the appellant stated that the court below fell into grave errors as it was not sitting on appeal over the order of UBAEZONU, JCA, dated 9<sup>th</sup> of November, 1999, which struck out the appeal. The court below, he contended, was not called upon to examine the said order to see whether it was correctly/validly made. Only the court with appellate jurisdiction over the said order of the 9<sup>th</sup> of November, 1999, he said, could do so. He relied on the case of MILITARY ADMINISTRATOR, BENUE STATE V. ULEGEDE (2001) 17 NWLR F [pt. 741] 194.

He further argued that, all that the lower court had to do was to give effect to the express, clear and unambiguous order of 9<sup>th</sup> November, 1999, which struck out the appeal sought to be relisted. Learned G counsel submitted that in construing the said order, the Court of Appeal could give the words used therein their literal meanings and refrain from reading into the said order what it did not say or contain. He referred to the case of SHUGABA V. UNION BANK OF NIGERIA PLC. [1999] 11 NWLR [pt.627] 459 at 488CD. He contended further that there H was no justification for interpreting an unequivocal order striking out an appeal as having the effect of one dismissing the appeal. He submitted that the court below was influenced by the decisions it relied upon such as NWACHUKWU V. NZE [1955] 15 WACA 36, ERONINI

V. IHEUKO [1989] 20 NSCC 503, SONEKAN V. SMITH [1967] 1 ANLR 129, RODRIGUES V. PUBLIC TRUSTEES [1977] 4 SC 29; SOETAN V. TOTAL NIGERIA LIMITED [1972] 1 ANLR 1, 3, in which the facts and issues were dissimilar to those of the present case.

Learned counsel relied on the cases of IKEAKWU V. NWANKPA [1967] NMLR 224, GEOSOURCE [NIG.] LTD. V. BIRAGBARA [2000] 13 NWLR [pt. 684] 355 to say that a matter or appeal struck out could always be relisted. He urged this court to confirm the principle enunciated in the cases he cited above and to hold that the appeal struck out on the 9<sup>th</sup> of November, 1999 could be relisted.

The Submissions of learned counsel for the 1<sup>st</sup> respondent on his issue No. 1 which has not differed in any material particular from that of the appellant can be summarized as follows: The chief issue which arose in the court below was not necessarily how to construe the earlier order striking out but what is the legal effect or consequence when an appeal is withdrawn regardless of how the court order is couched. He cited order 3 Rule 18 of the Court of Appeal Rules, 1981 which provided for withdrawal of appeals before it is called for hearing, upon which the lower court made a finding of fact. The present appeal, he said, was withdrawn after it had repeatedly been fixed for hearing after briefs of argument had been filed and exchanged. Learned counsel submitted that the legal effect of withdrawing an appeal is that the appeal stands dismissed and ceases to exist irrespective of whether before, when or after the matter is called for hearing. Learned counsel cited and relied on the cases of NKANU V. STATE [1980] 12 NSCC 114 at 116 lines 15 - 25; EDOZIEN V. EDOZIEN 24 NSCC part 1, 133 at 147 14 - 16; 153 lines 29- 34 and 149 lines 22- 32. He posited that this must be so because it is a case of a well calculated, premeditated and deliberate decision to withdraw in the face of the contest when all that was required of the appellant was to adopt his brief dated 26<sup>th</sup> of June, 1998. The situation in the present appeal is a far cry from the situation contemplated by the Court of Appeal Rules, especially order 3 Rules [20] and [25] in that in the appeal on hand, the appellant was present and decided to withdraw the appeal. No application was made to the lower court which may have necessitated the deliberate withdrawal. At the time it was withdrawn, a point of litis contestatio had been reached and a withdrawal of the appeal at that stage disentitles the appellant from having the matter

re-entered for hearing. Learned counsel went on in his further arguments to distinguish between an order of striking out and one of dismissal.

Learned counsel submitted that the lower court did not sit on appeal over the order made on 9<sup>th</sup> of November, 1999, by the Court of Appeal, Enugu as constituted by a different panel, but was moved by the appellant's application to exercise its discretion whether to relist the appeal or not. B

I think a very solid ground for the consideration of issue No. 1 is the proceedings, conducted by the Court of Appeal, Enugu Division, whose Panel consisted of: C

HON. JUSTICE E.C. UBAEZONU, JCA

HON. JUSTICE S. A. OLAGUNJU, JCA

HON. JUSTICE M. D. MOHAMMED, JCA ,

In appeal No. CA/E/131/98 of 9<sup>th</sup> day of November, 1999. D  
The proceedings was between:

*"The Young Shall Grow Motors Ltd.*

vs.

*Ambrose O. Okonkwo*

*Mr. A. Anazor for the appellant.* E

*Mr F. A. Andi for the 1<sup>st</sup> respondent.*

*Mr. Anazor applies to withdraw the appeal.*

*Mr. Andi does not oppose.*

*COURT: Appeal struck out. No order as to costs.* F

*Signed*

*E. C. Ubaezonu*

*Justice, Court of Appeal"*

It is to be noted that this simple proceedings took place on the 9<sup>th</sup> of November, 1999. There was no appeal filed against the orders contained in the above proceedings. Rather, a Motion on Notice dated 7<sup>th</sup> day of November, 2001 was filed on 9<sup>th</sup> of November, 2001 by Obi Akpudo Esq., on behalf of the defendant/appellant /applicant. The motion prayed for: G

*"[a] An order relisting this appeal which was struck out on the 9<sup>th</sup> of November, 1999 and for same to be heard on merits* H

*[b] Such further or other orders as the Honourable Court shall deem fit to make in the circumstances"*

The same Division of the Court of Appeal, though differently,

constituted, heard the application. Members of the Panel now consisted of:

Hon. Justice J. T. Akpabio, JCA.

Hon. Justice S. A. Olagunji, JCA.

Hon. Justice M. D. Muhammad, JSC.

B The application was heard on the 4<sup>th</sup> day of December, 2001. At the end of the hearing, the court below reserved its ruling which was delivered on the 11<sup>th</sup> day of February, 2002. The application was dismissed as it was without merit. This means that the earlier  
C ruling of the Court of Appeal per UBAEZONU, JCA, was still extant and that the appeal withdrawn by the appellant stood struck out and dismissed as relistment was refused.

I think what is fundamental before this court now, in my view, is to consider under what circumstances can an appeal struck out be  
D relisted, and whether the court below was right in infusing to relist the appeal struck out by it on the 9<sup>th</sup> of November, 1999.

By looking at the proceedings of 9<sup>th</sup> of November, 1999, it is clear that the learned counsel for the appellant made an oral application for the withdrawal of his appeal. Learned counsel for the 1<sup>st</sup>  
E respondent did not oppose the or application and the court without much ado granted the oral application and struck out the appeal. This, to my understanding, shows that the court's order of striking out the appeal was done with the consent of the parties. This further,  
F shows that the parties were satisfied with the manner or mode of presenting the application as well as the mode of terminating the appeal.

The bone of contention now is what effect does the phrase "Struck out" have on Appeal No. CA/E/131/98? Is it struck out temporarily to allow for something to happen before it is struck out completely and permanently with no hope of ever being re-presented before that court or any court for that matter?

'Striking out', a thing, simpliciter, means to remove that thing by drawing a line through it, that is, crossing it out. Striking out a suit  
H /case in its general connotation is the act of discontinuance or termination of the life span of that suit/case either temporarily or permanently. Pending suits in our Magistrate/High Courts may generally be discontinued by the plaintiff as may be provided by the Rules of Court. Discontinuance may or may not be with the leave of court



depending at what stage of the proceedings the suit /case is to be discontinued. In many of our High Courts, the Rules make provisions where the plaintiff may, without the leave of court, discontinue a suit before the date fixed for the hearing of the suit. But from and beyond such date, the plaintiff can discontinue only with the leave of the court and subject to conditions that may be imposed by the court. <sup>B</sup>  
See: PROPERTIES CO. LTD. V. ALEGBELEYI NLR 101 [10 NLR 77]. It is also permissible for the plaintiff to discontinue his suit against all the defendants or he may discontinue against some of the defendants and proceed against the rest. Similarly, the plaintiff may decide <sup>C</sup> to discontinue the entirety of his suit or he may withdraw a part or parts of his claim and proceed with the rest of the claim. The discontinuance or withdrawal may be such that some claims are dropped altogether or as against some defendants or that some parties are dropped from the suit altogether or in respect of some claims. Further, where the plaintiff abandons part of his claim, the defendant is <sup>D</sup> entitled to an order directing actual discontinuance of the abandoned claim. The grant or refusal of leave to discontinue a suit is in the discretion of the court. The leave should be refused in the following circumstances: <sup>E</sup>

[a] Where granting it will serve no useful purpose as where the suit ought to be dismissed,

[b] Where if granted, it may work injustice to the defendants. The plaintiff must not be allowed to evade this situation of any device such as amendment or otherwise, <sup>F</sup>

[c] The plaintiff cannot be allowed to use discontinuation to bring about indirectly that which cannot be affected directly. However, where a suit is discontinued and was struck out, it may afterwards, if circumstances warrant, be relisted where discontinuance meant to suspend the action on certain conditions. Parties may agree that the suit be discontinued. <sup>G</sup>

To appreciate the position of withdrawal or discontinuance of an appeal in an appellate court such as the court below, one would now have a look at the Rules of practice in that court although the application strictly speaking, subject of the current appeal, was not premised on any provision of the Rule of practice in that court *that* is, Court of Appeal Rules 1981 [as amended] but on the general section s. 16 provided by the Court of Appeal Act. That not withstand- <sup>H</sup>

ing however, I need to examine the Rules of practice of the court below. Under Order 3 Rule 18, of the Court of Appeal Rules, 1981, as amended, the following provisions were made:

[1] *An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend further to prosecute the appeal.*

[2] *If all parties to the appeal consent to the withdrawal of the appeal without order of the court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the Registrar and in such event any sum lodged in the court as security for the costs of the appeal shall be paid out to the appellant.*

[3] *The withdrawal of an appeal with the consent of the parties under paragraph [2] of this rule shall be a bar to further proceedings on any application made by the respondent under rule 14 of this Order.*

[4] *If all the parties do not consent to the withdrawal of an appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or other wise remaining outstanding between the parties, including any application made by the respondent under rule 14 of this Order, and for the making of an order as to the disposal of any sum lodged in court as security for the cost of appeal*

[5] *An appeal which has been withdrawn Under this rule, whether with or without an order of the court, shall be deemed to have been dismissed.*

Although the above rules of Order 3 of the Court of Appeal Rules have made adequate provisions for terminating an appeal temporarily or permanently, there appears to be no Rule for relistment if an appeal is struck out. Thus, an appellant may at any time before the appeal is called on for hearing, serve on the parties to the appeal and file with the court's registry a notice to the effect that he does not intend to further prosecute the appeal [Order 3 Rule 18(1)]. This period, I think, covers the period between when the Notice of Appeal is filed, when the appeal is entered and before it is called for

hearing. Thus, from the moment the appeal is merely brought as distinguished from when it is entered, the appellant can withdraw his appeal. See: EDOZIEN V. EDOZIEN [1993] 1 NWLR [pt. 272] 678. However, once an appeal has been called on for hearing, the appellant, cannot, unless leave is granted him by the Court of Appeal, withdraw his appeal. See: NZEGWU V. NZEGWU [1993] 5 NWLR [pt. 292] 246, EZOMU V. ATTORNEY GENERAL OF BENDEL STATE [1986] 17 NSCC 1154. Order 3 Rule 18 [2] of the Rules, allows the appellant to withdraw his appeal without order of court where all the parties to the appeal consent to the withdrawal of the appeal. The appellant may file in the Registry of the court the document or documents signifying such Consent and signed by the parties or by their legal representatives. See: ADEAGBO V. YUSSUF [1990] 6 NWLR [pt. 158] 588. When this kind of withdrawal is filed the appeal is thereupon deemed to have been dismissed and is struck out of the list of appeals and it will be a bar to further proceedings.

The consequential effect of such a withdrawal is that even where the appellant wants to renege from the withdrawal he cannot succeed as the withdrawn and struck out appeal is deemed dismissed. This is so whether there is an order of dismissal or not made by the Court of Appeal. [Order 3 Rule 18] [5]. The wisdom behind this rule, I believe, as I said earlier, is to prevent the uncertainty with which a respondent may be confronted or on the other hand the abuse to which this procedure could be subjected to if an appellant, after the withdrawal of his appeal shall be at liberty to refile the appeal.

I found it necessary to go that length in order to afford me a clear vision of the nature of the withdrawal of the appeal which is sought to be relisted. An order, to re-list refusal thereof, must hang on the nature of the withdrawal.

No provision has been made by the Rules of practice in the Court of Appeal for relistment of an appeal struck out. The Court of Appeal, where it wants to entertain an application for relisting a struck out appeal, has to invoke its general powers conferred by section 16 of its Act of 1973, Cap 75 LFN, 1990. This is with a view to filling in the lacunae found in the practice Rules in relation to relistment of appeal struck out. For elucidation, I have to fall back on some earlier decisions of this court on the subject matter of relistment of a withdrawn and struck out appeal which was sought to be relisted. In a

case which is almost similar to the present appeal; RODRIGUES V. PUBLIC TRUSTEES [1977] 4 SC. 29, the plaintiffs/appellants counsel, applied for leave to withdraw the suit he filed for declaration that under the will of their father, the defendants were not entitled to be registered as the free-hold proprietors of certain properties in the Register of titles. His grounds for the withdrawal consisted among others, that “certain vital documents were unprocurable and that his principal witness was out of the country.” The learned trial judge dismissed the action. On appeal to this court, there was a scrutiny of whether all the circumstances of the case were weighed which involved a tricky, complex issue of balancing the interest of the parties including the disadvantages that might have arisen from a sudden confrontation with the option on the plaintiffs’/appellants’ decision to discontinue the action with the freedom to bring a fresh action at will and the need to harmonize those considerations with the wider interest of justice. This court held, that the dismissal of plaintiffs’/appellants’ action was a proper exercise of judicial discretion by the learned trial judge that met the justice of the case. A case which has been withdrawn and subsequently struck out/dismissed when the point of litis contestatio has been reached cannot be relisted for another bite on the cherry. In ERONINI V. IHEUKO [1989] 20 NSCC [pt. 1] 503, at the trial stage, after a few halting steps with the first witness for the plaintiff, the plaintiff’s counsel who was taken aback by the witnesses evidence which was at variance with the plaintiffs pleading, stopped the witness from concluding his evidence and applied to the trial court to discontinue the case. The application was granted and the case struck out. On appeal against the order striking out the action, the Court of Appeal affirmed the decision of the trial court. On further appeal to this court, the decision of the trial court which was affirmed by the Court of Appeal was reversed and an order dismissing the action substituted therefore, on the ground that at the time the plaintiff discontinued his action LITIS CONTESTATIO had been reached. Nnaemaka Agu, JSC, commented, inter alia:

“In my view the rationale of the rule i.e. In *Soetan’s* case, is that once issues have been joined to be tried and the stage set for the conflict, then once a certain state has been reached the plaintiff is no longer DOMINIS LITIS and cannot be allowed to escape through the back door to enter again through another action.”

***It follows, therefore, that in the absence of any provision in the Court of Appeal Rules on the matter, the principles governing withdrawal of an appeal on the date fixed for hearing or any time, thereafter, must take a cue from the principle of discontinuance of actions at the trial court after the action has been fixed for hearing. In other words, after briefs of argument have been exchanged by the parties whereby issues, between them became crystallized LITIS CONTESTATIO can be deemed to have been reached. A withdrawal of an appeal from that point in time must, as an inflexible rule, lead to the dismissal of the appeal.***

Learned counsel for the appellant gave the reasons why he wanted the appeal to be relisted in paragraph 5 [a] - [f] of the affidavit in support:

*"5. That the managing Director of the defendant/appellant/applicant Chief Vincent Obianodo informs me and I verily believe him as follows:*

*[a] On 9/11/99 when this appeal was struck out the defendant/appellant/applicant's representative was not in court but that the defendant/appellant/applicant was represented by counsel.*

*[b] that the defendant/appellant/applicant was not aware that the matter had been struck out until a few months ago.*

*[c] that when after the proceedings of 9/11/99 the defendant/appellant/applicant sought to find out the fortunes of this appeal from counsel then appearing for it, the said counsel claimed that the appeal has terminated in the defendant/appellant/applicant'*

*[d] in consequence of the fore-going, the defendant/appellant/applicant, thinking that the appeal had ended, rested on its oars only to be re-awakened by reports from its friends and associates that the substantive suit was still being called up at the High Court Nnewi and stood chances of being heard and determined in its absence*

*[e] it was then that the defendant/appellant/applicant briefed Obi Akpudo Esq. who, on inquiry at the registry of this Honourable court, discovered Exhibit "A" to this affidavit which speaks for itself.*

*[f] at no time did the defendant/appellant/applicant desire to discontinue with the prosecution of this appeal neither did it instruct anybody to withdraw same."*

**While ruling on the contents of the above depositions in paragraph 5 [a] - [f] of the Affidavit in support of the application the court below, per OLAGUNJU, JCA, [of blessed memory] made a very long observation which culminated in the following words:**

B ***"The survey of the legal position shows that learned counsel for the applicant is on sticky wicket in his contention about the authority of the former counsel for the applicant to withdraw the applicant's appeal single-handed.***  
 C ***That also settles the applicant's grouse about the misrepresentation of the outcome of the appeal by her former counsel which is unsubstantiated and the challenge of his judgment and authority to withdraw the appeal which runs counter to the judicial authorities on the matter. The spectre of the rickety argument of learned***  
 D ***counsel for the applicant can be laid to rest by the succinct statement of the principle in Edozien v. Edozien, supra, at page 178, where Olatawura, JSC, reflected that:***  
***A client who briefs a counsel is presumed to have confidence in the counsel. This confidence will continue for the***  
 E ***entire duration of the case unless the brief is withdrawn.***

***On the applicant's own showing the brief of his counsel was not withdrawn until long after the withdrawal of the applicant's appeal by the learned counsel. Therefore, it is idle contesting authority of the counsel. Moreover, the appeal having been shown***  
 F ***to be withdrawn at a point when litis contestatio had been reached the proper order to be made by this court is by operation of law one of dismissal. And since the order of dismissal banishes any hope for resurrection of the appeal an application for its relistment is a wild-goose***  
 G ***chase, a forlorn pursuit."***

**I entirely agree with Olagunju, JCA, in his comments as above.** I venture to add, that even where an appeal struck out qualifies for relistment, I think the law requires that cogent and convincing materials, not porous, must be placed before the court for it to consider whether to grant it or not, Granting such an application is not a mere matter of course. On the other hand, where an appeal which is ripe for hearing with briefs of argument settled by the parties, has, for some reasons, been withdrawn by the appellant, it stands to reason to allow the owner of the corpse, as it were, to carry his own corpse

to wherever he wants to deposit it. A court of law cannot compel an unwilling horse to drink water although it might have properly been directed to the river. The court is always loathe in compelling an appellant to prosecute his appeal where he shows reluctance to do so. Even where the court does so, the appellant may refuse to go on. So, the best in such a situation is to strike out the appeal with the consequential effect of debarring the same appellant from, relitigating same where, as in the present appeal, briefs were already settled by the parties [paragraph 7 of the affidavit]. It is naive to say that the appellant and his counsel in this appeal, do not appreciate the legal consequences of such withdrawal which they ought to have contemplated. It appears too late now to show regret over such inevitable legal consequences. I, therefore, answer issue No. 1 in the affirmative and in favour of the respondent.

I do not consider it necessary to answer the twin issues embedded in issue No. 2 formulated by the appellant as they were made contingent upon the answer given to issue No. 1. Since my answer to issue No. 1 is in the positive, there is no need to delve into these alternative issues.

In answer to respondents' issue No. 2 which is germane, I will only state that what the court below did was in my view, perfectly in order. The court below had a comprehensive review of the case before it. There was no appeal before it on the appeal' struck out on the 9<sup>th</sup> of November, 1999. Thus, all the court said must be in relation to the application for relistment which was the only subject matter before it.

In conclusion, I Find no merit in this appeal. I accordingly dismiss the appeal with N50,000.00 in favour of the respondent.

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### **MUSDAPHER JSC**

I have read before now the judgment of' my Lord Muhammad, JSC just delivered with which I agree. It is trite law that when an appeal is set for hearing after briefs of argument are filed and the appellant withdraws the appeal, the striking out of the appeal amounts to the dismissal of the appeal. See order 11 rule 5 of the Court of Appeal Rules 2007. That is why, I too dismiss the appeal and abide by the Order for costs as contained in the aforesaid judgment.

### **OGUNTADE JSC**

I have had the advantage of reading in draft the lead judgment by my learned brother Muhammad J.S.C. I agree with his reasoning and conclusion that this appeal has no merit. I would also  
B dismiss it. I subscribe to the order made on costs.

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### **ADEKEYE JSC**

C I was privileged to read in draft the judgment first delivered by my learned brother I. T. Muhammad, JSC. I agree with his reasoning and the conclusion reached after a meticulous consideration of the issues distilled for determination in this appeal. By way of emphasis the issues for determination are as follows:-

D 1) Was the court of Appeal right when it treated its earlier order striking out an appeal as amounting to a dismissal of the said appeal with the result that same cannot be relisted?

If the answer to the above is in the negative then;

E 2) (a) Was the court of Appeal correct when it treated the main Issue of considering the merit of the application for relistment of the said appeal as a non-issue?

(b) Was the refusal of the Court of Appeal to relist or restore the said Appeal for hearing on the merits justified in law?

F This appeal emanated from the decision of the Court of Appeal, Enugu Division refusing to relist the applicant's appeal which was withdrawn and struck out on the 9<sup>th</sup> Of November, 1990.

The relevant portion of the judgment of the Court of Appeal reads:-

G *Let me recapitulate the conclusions Which emerged from the two issues canvassed in this application, Firstly, the legal effect of withdrawing an appeal on the date it is fixed for hearing is that the appeal is dismissed regardless of how the court order is, couched and the corollary is that such an appeal cannot again be re-listed".*

H The court below obviously interpreted the striking out order of the court on the 9<sup>th</sup> of November to have the same effect as a dismissal which has the effect of barring the court from relisting the same appeal in the court.

The argument and submission of the appellant is that the court



below fell into grave errors with this conclusion. The Court of Appeal, in the application to relist the former appeal struck out, was not expected to sit on appeal over the said order, but all it has to do was to give effect to the express, clear and unambiguous order of the 9<sup>th</sup> of November, 1999 which struck out the appeal sought to be relisted. In construing the said order, the Court of Appeal would give the words used therein their literal meaning and refrain from reading into the said order what it does not say or contain. B

Alhaji Audu Shugaba v. Union Bank of Nigeria Plc (1999) 11 NWLR (pt. 627) pg. 459 at pg. 488

I also agree that the core or germane issue to consider in this appeal is, under what circumstances can an appeal struck out be relisted and whether the court below was right in refusing to relist the appeal struck out by it on the 9<sup>th</sup> of November, 1990. An order to re-list or refusal thereof must surely hang on the nature of the withdrawal - whether it is a dismissal or a striking out strictu sensu. C D

An order of dismissal or striking out will be reached by a court after a judicious assessment of the facts before it. In the application made on the 9<sup>th</sup> of November 1999, at page 33 of the Record, the learned counsel for the appellant applied to withdraw the appeal, as learned counsel for the respondent did not oppose the application – the court struck out the appeal. E

From the court proceedings of that day, there was no reason given by the learned counsel to back up the application for withdrawal – and there was no comment by the court before striking out the appeal. I regard this as curious as this withdrawal was at a stage when parties have exchanged briefs and the appeal was set down for hearing. F

The application to relist was dated the 7<sup>th</sup> of November, 2001. G The Court of Appeal Rules 1981 as amended makes provision for withdrawal of an appeal in Order 3 Rules 18 as follows:

1. Rule 18 (1) An appellant may at anytime before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend to further prosecute the appeal. H

2. If all parties to the appeal consent to the withdrawal of the appeal without the order of the court, the appellant may file in the Registry the document or documents signifying such consent and

signed by the parties or by their Legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the Registrar. In such event any sum lodged in court as security for costs of the appeal shall be paid out to the appellant.

B 3. The withdrawal of an appeal with the consent of the parties under paragraphs 2 of this Rule shall be a bar to further proceedings on any application made by the respondent under Rule 14 of this Order.

C 4. If all the parties do not consent to the withdrawal of an appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties including any application made by the Respondent under Rule 14 of this order, and for the making of an order as to the disposal of any sum lodged in court as a security for the cost of appeal.

5. An appeal which has been withdrawn under this Rule, whether with or without an order of the court, shall be deemed to have been dismissed.

E From the provision of the Rule 18, a notice of withdrawal conveying an intention not to further prosecute an appeal may only be filed before the appeal is called on for hearing and before the appeal is consequently struck out from the list by the Registrar who has power to do so, a document signifying the consent of the parties or their Legal representatives to the withdrawal must be duly signed and filed in the registry.

F By virtue of Order Rule 18 (5) of the Court of Appeal Rules 1981 as amended once an appeal is withdrawn under Rule 18 order G 3 with or without the consent of the parties, it stands dismissed.

An order of Dismissal creates a bar to subsequent suits and the judgment operates as estoppel per rem judicatam. The foregoing Order 3 Rule 18 (5) of the court to appeal Rules cannot be said to have adequately made provision for the appeal withdrawn or discontinued at the point of H *litis contestatio* - that is when an appeal has been entered and literally when the stage is set and both parties are battle ready and apply to relist same thereafter. It is the view that if at that stage an appellant declines to fight, it amounts to admission of defeat and the order which, meets the justice of the case is one of dismissal of his action.

*Eronini v. Iheuko (1989) 2 NWLR pt 101 pg. 46.*

Though based on Order 3 Rule 18 (5) of the Court of Appeal Rules 1981 as amended in the case of Adeagbo v. Yusuf (2001) 12 NWLR pt. 728 pg. 777; it was held that the proper order to make on an application to withdraw an appeal after briefs have been filed and exchanged by parties is to dismiss the appeal. B

A decision to grant leave to discontinue an appeal is discretionary and the discretion must be exercised not only judicially but judiciously, taking the competing interests of both parties and weighing them in order to arrive at a fair or just decision. The appeal was struck out in November 1999, and the application to relist was filed exactly two years thereafter in November 2001. The affidavit in support of the application show clearly lack of interest on the part of the applicant to pursue the appeal as well as undue delay in applying for relisting. C D

On the foregoing, and with full reasons given in the leading judgment, I agree that the legal effect of the withdrawal of the appeal by the learned counsel for the appellant on 9/11/99 where the point of litis contestatio had been reached was one of dismissal of the appeal regardless of the fact that the order of the court was that the appeal was struck out. I adopt the consequential orders made in the leading judgment as mine. E

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