

SUPREME COURT OF NIGERIA
14TH JANUARY, 2011. SC. 35/2001
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN,
F. F. TABAI, I. T. MUHAMMAD, M. S.
MUNTAKA-COOMASSIE, JJSC

AFRICAN CONTINENTAL BANK PLC APPELLANT
AND
1. DAMIAN IKECHUKUKWU NWAIGWE
2. TONY EGWUATU RESPONDENTS
3. OGBONNA MBAGWU

WORDS & PHRASES - Abuse of court processes - Definition - It includes the improper use of judicial process by a party - To annoy an opponent - Or interfere with the administration of justice (H1)

ACTIONS - Institution of - Whether abuse of process - It amounts to such when instituted - During the pendency of another action - Between the same parties and on the same subject matter (H2)

PRACTICE & PROCEDURE - Abuse of process - Two actions raising different issues - Effect - It does not matter that the issues are not the same - If the effect is the same - There is abuse of court's process (H3)

PRACTICE & PROCEDURE - Abuse of process - Simultaneous proceedings - Resultant status - It is the later proceedings that constitute an abuse of process - But where it is already concluded - The pending proceedings should be discontinued (H4)

CERTIORARI - Remedy of - Relation to right of appeal - Where the remedy is available to a party - As well as an option to appeal - He may only choose between the two options (H5)

FACTS

The plaintiff/1st respondent had instituted two separate actions against the rest of the parties hereto before the Upper Area Court in Adamawa State, challenging his arrest and detention by the

police at the behest of other defendants. The two actions were consolidated and proceeded to trial. After 1st respondent closed his case, the matter was adjourned for defence, defendants and their counsel failed to turn up and the court consequently closed the case for the defence. Subsequently, the court took the address of 1st respondent's counsel and adjourned for judgment. Defendants then filed a motion for leave to open their defence but it was refused. Judgment was eventually given to 1st respondent. Thereafter, appellant filed a motion before the trial court to have the judgment set aside as having been given without jurisdiction, but the motion was equally refused.

Aggrieved, appellant filed an appeal before the High Court of Adamawa State in its appellate jurisdiction. While the appeal was pending, appellant applied for leave to apply for an order of certiorari to issue and bring before the High Court, the decision of the trial court for the purpose of being quashed. The leave was granted but the substantive application was eventually refused. Appellant then returned to continue the prosecution of its pending appeal but the 1st respondent filed a preliminary objection contending that the appeal was an abuse of court's process in the circumstance. The appellate High Court upheld the objection and dismissed the appeal. Dissatisfied, appellant appealed to the Court of Appeal which dismissed the appeal. Still dissatisfied, appellant has come on a further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

“ 1. *Whether or not the appellant's appeal to the High Court of Adamawa State sitting in its appellate jurisdiction, amounts to an abuse of court process.*

2. *Whether or not the prerogative writ/order of certiorari, is an alternative to constitutional right of appeal.*

3. *Whether or not the court below considered all the issues raised, especially the issue of estoppel and whether the court was right in affirming the judgment of the High Court sitting on appeal”*

HELD (Unanimously dismissing the appeal per **ONNOGHEN JSC)** ***Abuse of court processes - Definition***

1. Abuse of court processes has been variously defined by this court over the years and includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his

opponent and to interfere with the administration of justice. Where two or more similar processes are issued by a party, against the same party/parties in respect of the exercise of the same right and same subject matter or where the process of the court has not been used bona fide and properly. (p. 9 C)

ACTIONS - Institution of - Whether abuse of process

2. In the case of Adesokan vs Adegorolu (1991) 3 NWLR (Pt. 293) 297, it was held that to institute an action during the pendency of another one, claiming the same reliefs amounts to an abuse of process of court. It does not matter whether the matter is an appeal or not, for as long as the previous action has not been finally decided, the subsequent action constitutes an abuse of process of the court - see the authorities earlier cited. It is not the existence or pendency of a previous suit that causes the problem but the institution of a fresh action between the same parties and on the same subject matter when the previous suit has not been disposed of that constitutes abuse of process of court. (p. 9 F)

Abuse of process - Two actions raising different issues - Effect

3. It is the argument of learned senior counsel for the appellant that the parties to the two actions and the issues calling for determination therein are different which cannot be correct in substance. The judgment, appellant sought to set aside by appeal or to quash by certiorari is between the same parties and to me, it does not matter whether the grounds for seeking to quash the judgment are fewer than the grounds of appeal seeking to set aside the said judgment. The effect is clearly the same, that is, nullifying the said judgment. It is clear that appellant maintained parallel actions or proceedings aimed at achieving the same end of nullifying the judgment in question simultaneously, thus committing a clear case of abuse of court process. As had been held by this court in the case of Adesokan vs. Adegorolu supra, it does not matter whether the matter is an appeal or not, for as long as the previous action has not been finally decided, the subsequent action could constitute an abuse of process of the court. (p. 10 H)

Abuse of process - Simultaneous proceedings

4. Incidentally in the instant case, the process that was filed subse-

quent to the appeal and decided by the court was the certiorari proceedings; that was the proceedings in abuse of court process. However, the said process was not struck out as it should have but was allowed to run its full course in the High Court of Adamawa State. The decision arrived at in the said proceeding remains valid until set aside by a court of competent jurisdiction. As at now, there is no appeal against the decision dismissing the application for certiorari. So, legally and strictly speaking, the process in abuse is the application for certiorari not the appeal but as the latter has been determined to allow the appellant to have a second bite at the cherry or apple would be unfair as both of the processes cannot be allowed to exist side by side. Since the application for certiorari has been concluded, to continue with the appeal will sure be an abuse of process of the court and ought not to be allowed or encouraged. (p. 11 D)

CERTIORARI - Remedy of - Relation to right of appeal

5. Learned senior counsel for the appellant has referred the court to Order 43 Rule 3(6) of the High Court (Civil Procedure) Rules of Adamawa State which provides thus:-

“ *Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings, which is subject to appeal and as time is limited for the bringing of the appeal, the court may adjourn the application for leave until the appeal is determined or the time for appealing has expired*”.

The above provision of the rule is very much in accord with the decision in *Re: Umuolu Village Group Court, Ex Parte Macaulay*, 20 NLR 111 at 113, where it was held that where there is a right of appeal from the decision of the court that made the order, a party who is dissatisfied with the order may nevertheless apply for a writ of certiorari instead of appealing but he cannot do so until the statutory time for appealing has lapsed.

The above decision clearly shows that an appeal is an alternative remedy for an order of certiorari; the same is supported by order 43 rule 3 (6) supra. The above clearly show that you cannot have both at the same time or one after the other. You must choose between the two. (p. 11 G)

NOTABLE POINTS OF INTEREST**ONNOGHEN JSC***1. Judicial review is concerned with legality of proceedings*

Judicial review is the supervisory jurisdiction of the High Court, exercised in the review of the proceedings, decisions and acts of inferior courts and tribunals and acts of governmental bodies. The remedies available are for orders of mandamus, certiorari and prohibition and also the writ of Habeas corpus. In judicial review, the court is usually concerned with the legality and not with the merit of the proceedings, decisions or acts of the affected inferior court, tribunal or governmental body. (p. 13 A) B
C

2. Appellate jurisdiction is different from that of judicial review

The jurisdiction of the High Court to quash the judgment, order or proceeding of an inferior tribunal on the face of the record is not an appellate jurisdiction. D

The appellate jurisdiction of the High Court and its jurisdiction to award certiorari are two distinct and separate jurisdictions. Therefore, the absence or existence of a right of appeal or limitation of that right where it exists, is irrelevant to the right of the High Court to issue certiorari. E

A party aggrieved by a tribunal's decision may apply for and be granted an order of certiorari even though an alternative remedy may be available to him. (p. 13 B) F

REPRESENTATION

Appellant not represented though allegedly sent hearing notice on 10th April, 2010.

1st respondent was also sent hearing notice on 10th April, 2010. Emeka Okpoko Esq. for the 2nd and 3rd respondents. G

CASES REFERRED TO

Diel v. Iwuno 1996 4 NWLR part 445 page 445

Nnana vs Nwanebe (1991) 2 NWLR (Pt. 172) 181 H

Saraki vs Kotoye (1992) 9 NWLR (Pt. 264) 156 at 188

Arubo Vs Aiyeleru (1993) 3 NWLR (Pt. 280) 126 at 142

CBN Vs Ahmed (2000) 11 NWLR (Pt. 724) 369 at 504

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

STATUTE & RULES REFERRED TO

- Gongola State High Court (Civil Procedure) Rules, O. 43 r. 3(6)
High Court (Civil Procedure) Rules of Adamawa State, O. 43 r. 3(6)
B Constitution of the Federal Republic of Nigeria, 1999, s. 241

BOOK REFERRED TO

- Judicial Review of Administrative Action by S. A. De Smith, 3rd edition, page 376
C

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at Jos in appeal NO. CA/J/13/98 delivered on the 12th day of July, 1999 in which the court dismissed the appeal of the appellant and affirmed the judgment of the High Court of Adamawa State, sitting in its appellate jurisdiction, in suit NO. ADSY/28A/98 delivered on the 4th day of December, 1996.

The facts of the case include the following:-

- E Sometime in 1993, a company known as Road Construction Company of Nigerian Limited, based in Numan went into liquidation as a result of which its equipments were put up for sale. The 1st respondent, a customer of the appellant at its Yola Branch, obtained a loan of N1.5million (N1,500,000.00) from the appellant for
F the purchase of the equipments of the liquidated company out of which the sum of N1. million (N1,000,000.00) was paid over to the said company while the balance of five hundred thousand naira (N500,000.00) was allegedly shared by officers in the employ of the
G appellant at the material time. The 1st respondent sold some of the equipments and made a refund of about N900,000.00 (nine hundred thousand naira) of the principal sum of N1.5million (N1,500,000.00) but later started to divert the proceeds of the sale into an account with Afribank as a result of which the 2nd and 3rd
H respondents contacted the police who sealed up the business premises of the 1st respondent and carted away some of the goods of the 1st respondent who was also arrested and detained. Upon being released from detention, he instituted an action against the appellant and two of its staff (officers) and joined the Commissioner of Police in

charge of Adamawa State at the Upper Area Court NO. 2, Yola in suit NO. UAC2Y/CV/F1/47/94 claiming some reliefs. However, on the 22nd July, 1994, the name of the appellant was struck out of the suit upon application by the other defendants.

On the 13th day of December, 1994, the 1st respondent took out another writ of summons against the earlier parties including the appellant which action was later consolidated and proceeded to trial. The 1st respondent closed his case on 25th April, 1996 and the matter was adjourned for defence which never took place as the trial court closed the case for the defence on the date fixed for same, due to the absence of counsel and party and heard address from counsel for the 1st respondent on 4th June, 1996. The matter was then adjourned to 27th June, 1996, for judgment, though appellant maintained that it was never put on notice of the proceedings from the time the trial court refused to grant an adjournment to enable appellant open its defence. A motion was later filed for leave to defend the action which was allegedly heard in chambers and refused, and the judgment was delivered on 17th July, 1996.

Following the delivery of the said judgment, appellant and other defendants filed a motion before the court praying for an order setting aside the judgment which they contended was given without jurisdiction which application was refused, as a result of which appellant appealed to the High Court of Adamawa State against the judgment of the Upper Area Court while the 1st respondent cross appealed.

While the appeal was pending, appellant applied for leave to apply for an order of certiorari to issue bring before the High Court the decision of the said Upper Area Court for the purpose of being quashed, which leave was granted but the substantive application was refused by the court. After failing on its bid to quash the decision by way of certiorari, appellant then filed an application before the High Court praying for an order that it be granted leave to file additional grounds of appeal which resulted in the 1st respondent filing a preliminary objection contending that the appeal was an abuse of process in view of the application for an order of certiorari to quash the same decision, which objection was taken and upheld by the court and the appeal dismissed. Appellant was dissatisfied with that verdict and appealed to the Court of Appeal, holden at Jos, which

dismissed same resulting in the instant further appeal, the issues for the determination of which have been identified by learned senior counsel on the appellant, G. OFODILE OKAFOR ESQ, SAN, in the appellant brief of argument filed on the 28th day of November, 2005 as follows:-

B “ 1. *Whether or not the appellant’s appeal to the High Court of Adamawa State sitting in its appellate jurisdiction, amounts to an abuse of court process.*

 2. *Whether or not the prerogative writ/order of certiorari, is an alternative to constitutional right of appeal.*

C 3. *Whether or not the court below considered all the issues raised especially the issue of estoppel and whether the court was right in affirming the judgment of the High Court sitting on appeal”.*

In arguing Issue 1, learned senior counsel for the appellant D submitted that appellant’s appeal before the High Court was not an abuse of process; that an abuse of process of court is when a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice, e.g. where two similar processes are issued against the same E party(ies) in respect of the exercise of the same right and same subject matter - relying on *Arubo Vs. Aiyeleru* (1993) 3 NWLR (Pt. 280) 126 at 142; *CBN Vs. Ahmed* (2000) 11 NWLR (Pt. 724) 369 at 504; *Saraki vs. Kotoye* (1992) 9 NWLR (Pt. 264) 156 at 188 - 189; *Diet vs. Iwuno* (1996) 4 NWLR (Pt. 445) 622 at 630; *N. V. Scheep vs. Mv F “S”*. *Araz* (2006) 15 NWLR (Pt. 691) 622 at 664; that appellant has not done anything that can be considered an abuse of the process of the court; that the parties in the appeal and the application for certiorari are not the same neither are the proceedings similar in nature; G that the processes were not taken out simultaneously; that as at the time the appeal was being pursued, the proceeding on certiorari had been concluded; that even if the application for certiorari was still pending, it can exist side by side with the appeal relying on order 43 rule 3(6) of the Gongola State High Court (Civil Procedure) Rules; H page 376 of *Judicial Review of Administrative Action* by S. A De-Smith, 3rd edition.

It is the further submission of learned senior counsel that the appellant was exercising its constitutional right of appeal by filing the said appeal and as such it cannot be said to be abusing the process of

the court by exercising that right, relying on Saraki vs. Kotoye (supra) at 189, and 194; CBN vs. Ahmed supra at 409-410. Learned senior counsel urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the 1st respondent, CHARLES OBISHAI ESQ., submitted that what the appellant did by pursuing the two processes, amounts to an abuse of court process; that order 43 rule 3(6) supra applies when a party is seeking leave to apply for an order of certiorari, not after obtaining the leave; that the only option open to the appellant upon the dismissal of its application for certiorari was to appeal against the decision, not to resort to an alternative remedy. Finally, learned counsel urged the court to resolve the issue against the appellant.

Abuse of court processes has been variously defined by this court over the years and includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice. Where two or more similar processes are issued by a party, against the same party/parties in respect of the exercise of the same right and same subject matter or where the process of the court has not been used bona fide and properly -see Saraki vs. Kotoye (1992) 9 NWLR (Pt. 264) 156 at 188; Okorodudu vs. Okoromadu (1977) 3 S. C 21; Okafor vs. A-G Anambra State (1991) 6 NWLR (Pt. 200) 63 at 681; Nnana vs. Nwanebe (1991) 2 NWLR (Pt. 172) 181; COP vs. Fasehan (1997) 9 NWLR (Pt. 507) 171; Olutinrin vs. Agaka (1998) 6 NWLR (Pt. 554) 366.

In the case of Adesokan vs. Adegorolu (1991) 3 NWLR (Pt. 293) 297, it was held that to institute an action during the pendency of another one, claiming the same reliefs, amounts to an abuse of process of court. It does not matter whether the matter is an appeal or not, for as long as the previous action has not been finally decided, the subsequent action constitutes an abuse of process of the court - see the authorities earlier cited. It is not the existence or pendency of a previous suit that causes the problem but the institution of a fresh action between the same parties and on the same subject matter, when the previous suit has not been disposed of that con-

stitutes abuse of process of court- see Okafor vs. A-G Anambra State supra court.

There is no dispute that following the judgment of the Upper Area Court, appellant filed a motion before that court seeking to set aside that judgment, on the ground that it was a default judgment which was refused by the court. Equally not disputed is the fact that appellant proceeded to file an appeal against the said judgment and that while that appeal was pending before the Adamawa State High Court, appellant filed an application seeking leave to apply for an order of certiorari, to bring up to the High Court for the purpose of its being quashed, the very decision of the said Upper Area Court, subject of the pending appeal; that the application for leave was granted but the subsequent application on notice for the order of certiorari was dismissed by that court resulting in the appellant turning round to pursue the appeal which was still pending, by filing an application for leave to file additional grounds of appeal. It was at the hearing of the said application that learned counsel for the 1st respondent raised an objection to the hearing of the appeal, The High Court held at page 13 of the record, inter alia, as follows:-

“Having failed [in the application for an order of certiorari, the best the appellants could have done was to appeal against the order of dismissal of their application at the Court of Appeal Jos, than to now come by way of appeal.

We feel this is a proper example of an abuse of due process of the law”

The above decision resulted in an appeal to the Court of Appeal which affirmed the decision of the High Court supra in the following terms:-

“In the first place, commencing the certiorari proceedings while an appeal was pending to nullify the same decision of the same court between the same parties, to my humble mind, is an abuse of court process. Secondly, to seek to set aside the same judgment of the same court between the same parties on the same subject-matter is frowned at by the law as being an abuse of its process “.

The question is whether the lower courts are right in their holdings?

It is the argument of learned senior counsel for the appellant that the parties to the two actions and the issues calling for determination therein are different which cannot be

correct in substance. The judgment appellant sought to set aside by appeal or to quash by certiorari is between the same parties and to me it does not matter whether the grounds for seeking to quash the judgment are fewer than the grounds of appeal seeking to set aside the said judgment. The effect is clearly the same, that is, nullifying the said judgment. It is clear that appellant maintained parallel actions or proceedings aimed at achieving the same end of nullifying the judgment in question simultaneously thus committing a clear case of abuse of court process. As had been held by this court in the case of Adesokan vs. Adegorolu supra, it does not matter whether the matter is an appeal or not, for as long as the previous action has not been finally decided, the subsequent action could constitute an abuse of process of the court.

Incidentally in the instant case, the process that was filed subsequent to the appeal and decided by the court was the certiorari proceedings; that was the proceedings in abuse of court process. However, the said process was not struck out as it should have but was allowed to run its full course in the High Court of Adamawa State. The decision arrived at in the said proceeding remains valid until set aside by a court of competent jurisdiction. As at now, there is no appeal against the decision dismissing the application for certiorari. So, legally and strictly speaking, the process in abuse is the application for certiorari not the appeal but as the latter has been determined to allow the appellant to have a second bite at the cherry or apple would be unfair as both of the processes cannot be allowed to exist side by side. Since the application for certiorari has been concluded, to continue with the appeal will sure be an abuse of process of the court and ought not to be allowed or encouraged.

Learned senior counsel for the appellant has referred the court to order 43 rule 3(6) of the High Court (Civil Procedure) Rules of Adamawa State which provides thus:-

“Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings, which is subject to appeal and as time is limited for the bringing of the

appeal, the court may adjourn the application for leave until the appeal is determined or the time for appealing has expired”.

The above provision of the rule is very much in accord with the decision in Re: Umuolu Village Group Court, Ex Parte Macaulay, 20 NLR 111 at 113, where it was held that where there is a right of appeal from the decision of the court that made the order, a party who is dissatisfied with the order may nevertheless apply for a writ of certiorari instead of appealing but he cannot do so until the statutory time for appealing has lapsed.

The above decision clearly shows that an appeal is an alternative remedy for an order of certiorari; the same is supported by order 43 rule 3 (6) supra. The above clearly show that you cannot have both at the same time or one after the other. You must choose between the two.

On issue 2, learned senior counsel for the appellant submitted that the procedure or system of judicial review is radically different from that of appeal because in appeal, the court is concerned with the merit of the decision on appeal, while the court is concerned with the legality of the administrative act or order of an inferior court or tribunal when embarking on judicial review; that right of appeal is statutory/constitutional while judicial review is embedded in the common law; that the right of appeal conferred by section 241 of the 1999 Constitution cannot be taken away by the common law principle of the doctrine of election of remedies, relying on *Muhammed vs. Husseini* (1998) 14 NWLR (Pt. 584) 108 at 140.

On his part, learned counsel for the respondents submitted that where an alternative remedy is available, certiorari will not be granted, relying on *District Officers vs. The Queen* (1961) 1 SON LR 83 at 88- 89: *Judicial Review of Administrative Action* by S. A De Smith, 3rd edition page 376.

He urged the court to resolve the issue against the appellant. In the case of *Oredoyin vs. Arowolo* (1989) 4 NWLR 172 at 211, an appeal is defined as an invitation to a higher court to review the decision of a lower court, to find out whether on the proper consideration of the facts placed before it, and the applicable law, that court arrived at a correct decision.

On the other hand, judicial review is the supervisory jurisdiction of the High Court exercised in the review of the proceedings, decisions and acts of inferior courts and tribunals and acts of governmental bodies. The remedies available are for orders of mandamus, certiorari and prohibition and also the writ of habeas corpus. In judicial review, the court is usually concerned with the legality and not with the merit of the proceedings, decisions or acts of the affected inferior court, tribunal or governmental body. B

The jurisdiction of the High Court to quash the judgment, order or proceeding of an inferior tribunal on the face of the record is not an appellate jurisdiction - see R v. Northumberland Compensation Appeal tribunal, Ex Parte Shaw (1952) 1 KB 338; RV Paddington North and St. Marylebone Rent Tribunal Ex Parte Perry (1959) 1 QB 229. C

The appellate jurisdiction of the High Court and its jurisdiction to award certiorari are two distinct and separate jurisdictions; therefore, the absence or existence of a right of appeal or limitation of that right where it exists is irrelevant to the right of the High Court to issue certiorari see R vs. Umuolu Village Group Court, Ex Parte Macaulay, supra. A party aggrieved by a tribunal's decision may apply for and be granted an order of certiorari even though an alternative remedy may be available to him:- see R vs. District Officer, Ex Parte Atem (1961) ALL NLR 51. However, the question is whether the party so aggrieved can employ both remedies simultaneously for the purpose of seeking redress of the unacceptable decision. D E F

I had earlier stated that certiorari is an alternative remedy to any appeal and consequently, both remedies cannot be resorted to by an aggrieved party simultaneously as was done in the instant case. To do so is a clear case of abuse of process of the court. When something is said to be an alternative to another, it means you cannot have both of them at the same time or at all. G

The argument that appellant's constitutional right of appeal cannot be taken away by the common law right of judicial review is misconceived, as no one has denied the appellant the exercise of its right of appeal in the instant case. It actually filed an appeal against the decision in question but while that appeal was pending, he filed an application for certiorari against the said judgment/decision. It was after losing the application for certiorari that it returned to the court H

to pursue the appeal. It should be kept in mind that no one has also denied appellant its right to appeal against the decision of the High Court dismissing its application for certiorari, which appellant has the right to do. No one has therefore denied appellant its constitutional right of appeal. It is rather the appellant who has made its choice of
 B remedy and should have no one else to blame.

The third issue is really not relevant in view of the resolution of the two issues earlier considered. The objection was simply that the High Court having dismissed the application for certiorari, the
 C appeal of the appellant seeking to achieve the same thing as the certiorari, had become an abuse of process of the court. That objection was sustained and I see nothing indicating a denial of appellant's right of fair hearing or of appeal, which appellant has with regards to the decision dismissing the application for an order of certiorari. In
 D any event, the lower court adequately dealt with the issue at pages 157 -158 of the records where it held thus:-

*"This argument does not seem to impress me because whatever method was used, the purport of it all was to set aside or quash the judgment of the Upper Area Court. Either the appeal or the
 E certiorari proceedings would achieve the same end. Consequently, in my humble view, certiorari is an alternative to appeal. I think the lower court put the position succinctly when it said at page 133 of the record as follows:-*

*Exhibit D attached to the counter affidavit which is a ruling of
 F this court in the application for certiorari, is a judgment of this court whose appeal can only lie to the Court of Appeal. This court sitting in its appellate jurisdiction is now not competent to hear the matter having earlier stated that the appellants having failed in their bid for
 G judicial review to quash the decision of the Upper Area Court, Yola, cannot now come by way of appeal before us. They are therefore stopped from pursuing this appeal'.*

*The appellants in their brief had also submitted that they could not have been said to have waived or lost their right merely because,
 H before the hearing of the appeal, they had applied for certiorari to quash the judgment. But it is clear that from the decisions cited above, it is not in dispute that certiorari proceedings and as appeal achieve the case result (sic). This is the important thing. The two invite the superior court to examine the proceedings of an inferior court with a*

view to setting it aside in favour of the aggrieved party. What the High Court did was to decline to allow the appellants to use the appeal process after the certiorari application had failed.”

In conclusion, I find no merit in the appeal which is consequently dismissed with costs assessed at N50,000.00 to the 1st respondent.

Appeal dismissed.

MUKHTAR JSC

I have had the advantage of reading in draft, the lead judgment of my learned brother, Onnoghen JSC. The issues that call for determination in this appeal, as set out in the appellant's brief of argument are as follows :-

1. Whether or not the appellant's appeal to the High Court of Adamawa State sitting in its appellate jurisdiction amounts to an abuse of court process.

2. Whether or not the prerogative writ/order of certiorari is an alternative to constitutional right of appeal.

3. Whether or not the court below considered all the issues raised, especially the issue of estoppel and whether the court was right in affirming the judgment of the High Court sitting on appeal.

The facts of the case and what has led to the appeal before this court, has already been amply stated in the lead judgment. Perhaps I should consider circumstances that will give rise to an abuse of court process at this juncture, before proceeding to deal with the issue (1) supra, as per content of some legal authorities. An abuse of court process will arise when:-

1. A party institutes several actions against the same party on the same subject matter, and the same issues.

2. A party institutes different actions between the same parties in different courts at the same time, the grounds being different, notwithstanding. See *Saraki v. Kotoye* 1992 9 NWLR part 264 page 156, *Diel v. Iwuno* 1996 4 NWLR part 445 page 445, and *WY Scheep v. MV'S Araz* 2000 15 NWLR part 691 page 622.

The learned counsel for appellant has argued that the parties in this case were not the same, and the appeal and certiorari are not similar in form or in substance and both were not taken out simulta-

neously, and that both can co-exist. He referred to order 43 rule 3 (6), and S. A. Smith's Judicial Review of Administration Act, 3rd Edition, page 376. It is however the argument of the learned counsel for the 1st respondent that the said rule of court supra is inapplicable. I will at this juncture reproduce the provision of the said order 43 rule 3 (6) of the High Court Civil Procedure Rules of Adamawa State. It reads:-

"where leave to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the court may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

In order to determine the applicability or propriety of the above rule to the instant case, it is imperative that one peruses the record of proceedings vis a vis the sequence of events of the decision, appeal and application for certiorari in the lower courts. As can be gathered from the record, the decision of the Upper Area Court No. 71 Yola, that is the bone of contention was on 17/7/96, and the notice of appeal against the said decision to the Adamawa State High Court was filed on 26/7/96 or thereabout. The appellant/defendant filed an application for leave to apply for an order of certiorari on 5/8/96, a few days after the filing of an appeal. The learned judge of the High Court expeditiously delivered his ruling on the application for certiorari on 25/11/96, dismissing same. Some days after the ruling, the appeal filed on 26/7/96 was heard by the Adamawa State High Court sitting in its appellate jurisdiction. It is clear therefore that the appellant took the option of playing safe by filing the notice of appeal almost immediately after the judgment to meet the provision of order 43 rule 3 supra, bearing in mind the fact that the time for filing the appeal was limited but thereafter again filed an application for leave to apply for an order of certiorari. The appellant's action was for all intent and purpose was an abuse of courts process, as found by the Court of Appeal in its judgment, which reads:-

"In the first place, commencing the certiorari proceedings while an appeal was pending to nullify the same decision of the same court" between the same parties, to my humble mind is an abuse of court process. Secondly, to seek to set aside the same judgment of the

same court between the same parties on the same subject-matter is frowned at by the law as being an abuse of its process.”

I think the court did not erred by its holding above.

Having filed the notice of appeal, the appellant should have stuck to it and waited till the appeal is determined before the order of certiorari. This was definitely an abuse of court process. In this light, and the fuller treatment of the appeal in the lead judgment, I am in full agreement with my learned brother, that the appeal has no merit and should be dismissed. I hereby dismiss the appeal and abide by the consequential orders made in the lead judgment.

MUHAMMAD JSC

I have had the advantage of reading in advance the judgment just delivered by my learned brother, Onnoghen, JSC. I am in agreement with him that the appeal be dismissed. I shall dismiss this appeal because when I look at certiorari and an appeal, they appear to me to be birds of same feathers. Both aim, almost, at same thing. Both invite the superior court, as in this case, to examine the proceedings of an inferior court with a view to setting it aside in favour of the aggrieved party.

The trial court in this appeal declined to allow the respondents to use the appeal process after the certiorari application had failed.

Now, to allow the two processes to operate side by side in the same case, between same parties and same subject matter would, in my view, amount to abuse of court processes irrespective of the number of issues any of them may have raised. Courts of law do not allow such flagrant abuse of their processes to stand.

In view of the fuller reasons given in the lead judgment, I, too dismiss this appeal as unmeritorious. I abide by the consequential orders, including that of costs, made by my learned brother, Onnoghen, JSC.

MUNTAKA-COOMASSIE JSC

I was privileged to have a preview of the lead judgment just delivered by my learned brother, Walter Onnoghen JSC. I considered the issues, the reasons and the conclusions of my learned brother,

Walter Onnoghen JSC and found myself un-able to disagree. I too, for the reasons adduced by him, hold that the appeal lacks merit same is hereby dismissed. The Court of Appeal has done not only good job but also arrived at a correct decision.

I endorse the order as to costs.

B Appeal dismissed.

C

D

E

F

G

H