

SUPREME COURT OF NIGERIA

25TH MARCH, 2011. SC. 21/2010

**CORAM:- D. MUSDAPHER, M. MOHAMMED, F. F. TABAI,
C. M. CHUKWUMA-ENEH, B. RHODES-VIVOUR, JJSC**

1. ALL PROGRESSIVE GRAND
ALLIANCE (APGA)

2. CHIEF CHEKWAS OKORIE APPELLANTS
AND

1. CHIEF VICTOR UMEH

2. ALHAJI ABDULLAHI SANI SHINKAFI

3. DR. INNOCENT EKWU

4. DR. MIC ADAMS II

5. MRS. ELLA EZEANYA

6. ALHAJI SADIQ MASALLA

7. MR. BERNARD AKOMA RESPONDENTS

8. CHIEF CHRIS NDIGWE

9. PRINCESS H.P.J. NJEMANZE

10. ALHAJI MOHAMMED KUBTI

11. MR. OGOMETU UKPENETUS

12. ALHAJI HABIB GAJO

13. CHIEF EMEKA OFOEKI

14. ENGR. DR. EZEKIEL IZUOGU

APPEALS - Issues raised - Legitimacy - Any issue mentioned in a judgment - Which has no bearing on the complaints before the court - Is an orbiter dictum - And cannot legitimately arise on appeal against the judgment (H1)

COURTS - Findings of fact - Validity of 2nd appellant's expulsion - From his political party - Basis - It was appellants who by their relief - Asked the court to pronounced on same (H2)

APPEALS - Issues - Argument of counsel - Propriety - Issue of immediate delivery of judgment - Did not feature significantly before the Court of Appeal - So argument of appellants' counsel on the point did not arise for determination (H3)

JUDGMENTS - Decisions not appealed - Binding nature - Such decision not complained against - Like that of trial court closing the issue of address - Is deemed to have been accepted by appellant (H4)

FACTS

The appellants, and two other persons, as plaintiffs, sued defendants/respondents before the High Court of the Federal Capital Territory, holden at Abuja. Appellants' claims were for sundry reliefs by which they sought to expel respondents from the All Progressive Grand Alliance (APGA) with effect from 12th January, 2005, and to nullify the 2nd, 3rd and 4th plaintiffs' expulsion from APGA. During the prolonged trial of the suit that spanned for 3 years, it appeared there were some interlocutory applications and rulings thereon. For after the parties have closed their cases, and the learned trial judge had ordered for final written addresses in February, 2008, appellants filed an application asking for stay of proceedings pending appeal. The learned trial judge heard and refused the application for stay of proceedings, closed the issue of final written addresses, and appellants having failed to file their final address, he adjourned the matter for judgment on 7th April, 2008.

However, on the date of judgment, appellants brought an application to discontinue with the matter. After taking arguments on the application, the court adjourned to 16th April, 2008, for ruling thereon. On that date, the court, by its ruling, refused the application to discontinue and thereafter proceeded to deliver its judgments on the substantive suit and dismissed the suit as lacking in merit. Aggrieved, appellants appealed to the Court of Appeal against the ruling and judgment, which appeal was dismissed on both points. Still dissatisfied, appellants have come on a further and final appeal to the Supreme Court, contending inter alia, that the Court of Appeal erred in upholding the procedure adopted by trial court in delivering judgment on the substantive suit immediately after its ruling on the application to discontinue. Appellants also contend that, Court of Appeal was wrong to have confirmed trial court's finding of fact that 2nd appellant was validly expelled from APGA, when nobody had sought for such relief.

ISSUES FOR DETERMINATION

(1) whether the Court of Appeal was right in affirming the

decision of the learned trial judge, to refuse the application for the discontinuance of the suit.

(2) whether the decision of the learned trial judge as confirmed by the court below, was right that the respondents had validly dismissed or removed the 2nd appellant, when no body sought that relief.

HELD (Unanimously dismissing the appeal per **MUSDAPHER JSC**)
APPEALS - Issues raised - Legitimacy

1. I have alluded and reproduced the issues formulated and submitted to the Court of Appeal, for the determination of this appeal. The decision of the Court of Appeal at the tail end of its judgment was only to dismiss the appeal as lacking in merit. In order to fully appreciate the issues that could legitimately arise in this appeal, it may be necessary to again reproduce the issues submitted by the appellants at the Court of Appeal:-

“1. Was the learned trial judge right when he refused the appellant’s application for the discontinuance of the case and proceeded to enter judgment against the appellants?”

2. Was the learned trial judge right when he held that the 2nd appellant was validly expelled from the party, when no such relief was sought by the parties.”

In my view, these are the only matters upon which the Court of Appeal was called upon to make a decision. Any other issue discussed at hearing of the appeal or mentioned in the judgment, has no direct bearing with the complaints of the appellants before the Court of Appeal. Any other issue or issues raised, were orbiter dicta and had nothing to do with the crucial issues properly raised by the appellants for the determination of the appeal. (p. 763 G)

COURTS - Findings of fact - Validity of

2. Upon a careful examination of the issue as formulated by the appellants, his complaint is that no one claimed this finding as a relief in this matter, since the respondents did not counter-claim. It is claimed that both courts were wrong to have decided that the 2nd appellant was validly expelled from the party.

It is the appellants who under paragraph “J” of the amended statement of claim, sought the relief in these terms:-

(j) *A declaration that the defendants' purported suspension and/or expulsion of the 2nd, 3rd and 4th Plaintiffs from the 1st Plaintiff, is illegal, null, void and of no effect, as same was done without capacity, and in flagrant violation of the constitution of the 1st Plaintiff and without due process."*

B As can be seen, it is manifest that it was the appellants who asked the court to decide and pronounce on the issue. The Court of Appeal in my view rightly agreed with the finding and consequently the appellants, having asked the court for the relief in the manner it was couched as reproduced above, cannot now claim that nobody
C prayed for it. (p. 765 H)

APPEALS - Issues - Argument of counsel - Propriety

3. Before I discuss the submissions of the learned counsel for the
D respondents, it is important to keep in mind the crucial issue as argued by the appellants in the Court of Appeal. The main complaint of the appellants in the Court of Appeal, centered on the proprietary or otherwise of the trial court in refusing the application for discontinuance. The issue of the immediate and simultaneous delivery of
E the judgment did not feature significantly. So, all the arguments of counsel for the appellants as narrated above, did not actually arise for the determination by the Court of Appeal. Most of the arguments bordering on fair hearing and in miscarriage of justice were not actually argued or submitted, what was argued by the learned counsel
F for the appellants, was that the learned trial judge was in error to have delivered the judgment on the merits instead of striking out the suit, after he had refused the application to discontinue the suit as filed. (p. 767 G)

G **JUDGMENTS - Decisions not appealed - Binding nature**

4. At the time the judgment was read, the issue of address was closed and obviously there was nothing left except to read the judgment. The appellants have failed to complain in an appeal, against the
H decision to refuse their application for adjournment and/or for an extension of time to file the final address, or for the closure of the address. Having not appealed, the appellants must be deemed to have accepted the decision made by the trial court, to have closed the issue of address and they cannot be heard to complain at this stage.

(p. 769 B)

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. Appeals - Issues must arise from grounds

Infact, the Respondents' issue 'B' is not an issue at all for determination or arising from any ground of appeal filed by the Appellants, as even the Respondents themselves have not attempted to relate it to any ground of appeal. It is merely a question providing the basis or stepping stone for the Respondents to advance their arguments, on the position of an appeal on concurrent findings of fact of two courts below. The law on the formulation of issues by a Respondent is well settled. It is to the effect that any issue formulated for determination of an appeal by the Respondent, must relate to the grounds of appeal filed by the Appellant. However, for the Respondent in an appeal to validly raise any issue not related to or arising from the grounds of appeal filed by the Appellant, such Respondent must file a cross-appeal or file a Respondent's notice. (p. 771 B)

CHUKWUMA-ENEH JSC

2. Parties cannot change their case on appeal

It is settled, that a party cannot be allowed to depart from his case as set out at the lower court in this case, by discussing of any of the factual issues as encompassed in issues 1 to 3 in the instant appeal not so raised thereat. This conclusion is consistent with the holdings in *Jumbo v. Bryanko International Ltd.* (1995) 6 NWLR (Pt. 403) 545 at 5556 (*sic*) and *Horizon Fibres Nig. Plc. V. M.V. Baco Kiner & Ors.* (2002) 8 NWLR (Pt. 769) 466 at 489, both cases have held that a party ought to be consistent in the case he pursues from one stage to another, so as to avoid springing surprises on the opposite party and this is so much more in an appeal being as a continuation of the original suit. (p. 776 G)

REPRESENTATION

Chris Uche SAN with him Gordy Uche, M. Igwe, K. Okafor, N. Ben Nwakanma, C. Norman Obi., J. Aloba for the Appellants.

Pl.N. Ikwueto SAN, with C. I. Mbaeri, I. G. Ogugua, Miss. N. Nwatarali, C. K. Alabi, Adelayo Adu (Miss.) for the Respondents.

CASES REFERRED TO

- NYA VS. EDEM (2005) 4 NWLR (916) 345
 IHOM VS. GAJI (1997) 6 NWLR (Pt. 509) 526
 AKWA VS. C.O.P. (2003) 4 NWLR (Pt. 811) 461
 B SALAMI VS. ODOGUN (1991) 2 NWLR (Pt. 173) 291
 AYISA VS. AKANJI & ORS. (1995) 7 NWLR (406) 129
 AMOUGH VS. ZAKI (1998) 3 NWLR (Pt. 542) 484 at 491
 AG. ANAMBRA VS. OKEKE (2002) 12 NWLR (Pt. 782) 575
 C AKABOGU & ORS. VS. AKABOGU (2003) 9 NWLR (826) 445
 SOL FOND FOODS LTD. VS. ELEREWE (1996) 8 NWLR (465)
 248 at 253
 EGWU VS. UNIVERSITY OF PORT HARCOURT (1995) 8 NWLR
 (Pt. 414) 419
 D BABATUNDE VS. PAN ATLANTIC SHIPPING TRANSPORT AGEN-
 CIES LTD. & 2 OTHERS (2007) 3 NWLR (Pt. 1050) 113 at 165

RULES REFERRED TO

- High Court (Civil Procedure) Rules of the FCT High Court, O. 27 r.
 E 3

LEAD JUDGMENT BY MUSDAPHER JSC

- In the High Court of the Federal Capital Territory Holden at
 F Abuja and in suit No. FCT/HC/CV/278/2005, the appellants herein
 and two others commenced this suit against the respondents as the
 defendants jointly and severally and claimed against them in their
 Amended Statement of Claim as follows:

- G “(a) A DECLARATION that the defendants are no longer mem-
 bers/and or National Officers of ALL PROGRESSIVE GRAND ALLI-
 ANCE (the 1st Plaintiff) as they stand expelled from the party with
 effect from January 12, 2005, in accordance with the Constitution of
 the All Progressive Grand Alliance.

- H (b) A DECLARATION that the 2nd, 3rd and 4th Plaintiffs are
 the duly and only recognized and authentic National Chairman,
 Deputy National Chairman (North) and Deputy National Chairman
 (South) respectively of ALL PROGRESSIVE GRAND ALLIANCE (1st
 Plaintiff)

- (c) A DECLARATION that the 1st Defendant is not the Na-

tional Chairman or Acting National Chairman of ALL PROGRESSIVE GRAND ALLIANCE (the 1st Plaintiff) and is not competent to parade himself as such.

(d) *A DECLARATION that the 1st to 11th Defendants are no longer national officers of the 1st Plaintiff, having been constitutionally and duly expelled from the Plaintiff by the 1st Plaintiff.* B

(e) *A DECLARATION that the 1st to 14th Defendants are no longer members of ALL PROGRESSIVE GRAND ALLIANCE [the 1st Plaintiff] having been constitutionally and duly expelled from the Party.*

(f) *AN ORDER of perpetual injunction restraining the 1st Defendant from parading himself or continuing to parade himself as the National Chairman or Acting National Chairman of the ALL PROGRESSIVE GRAND ALLIANCE, including issuing press statement purporting to be acting as the National Chairman of the 1st Plaintiff, D or summoning, convening and/or holding any meetings in such capacity.*

(g) *AN ORDER of perpetual injunction restraining the 1st to 11th Defendants from parading themselves or continuing to parade themselves as national officers or acting national officers of the ALL PROGRESSIVE GRAND ALLIANCE or issuing press statements purporting to be acting in such capacities or summoning, convening and/or holding any meetings in such capacities.* E

(h) *AN ORDER of perpetual injunction restraining the 1st to 14th Defendants from parading or continuing to parade themselves as members of the All PROGRESSIVE GRAND ALLIANCE or holding any meetings in such capacities.* F

(i) *AN ORDER of perpetual injunction restraining the Defendants whether by themselves, their agents or privies from using the G official logo, letter-headed papers or other stationeries or symbols of the ALL PROGRESSIVE GRAND ALLIANCE (1st Plaintiff) in any correspondence, meeting, conference or any gathering whatsoever and for any purpose whatsoever and in any manner howsoever.*

(j) *A DECLARATION that the Defendants' purported suspension and/or expulsion of the 2nd, 3rd and 4th Plaintiffs from the 1st Plaintiff, is illegal, null, void and of no effect, as same was done without capacity, and in flagrant violation of the constitution of the 1st Plaintiff and without due process."* H

During the prolonged and protracted trial that spanned 3 years after the parties called evidence and closed their cases, the learned trial judge ordered written address to be filed by each of the defendants and the plaintiffs respectively. The order for address was made on 23/1/2008 and the matter was adjourned to 25/2/2008 for the adoption of the final address. On the 25/2/2008 the plaintiffs filed applications asking for stay of proceedings pending appeal. The learned trial judge refused the applications for the stay of proceedings thereafter the learned trial judge closed the issue of final written address since the plaintiffs have failed to file any written address ordered since January and the matter was adjourned for judgment to 7/4/2008. On the 7/4/2008 when the matter resumed, the learned counsel for the appellants herein filed a motion to discontinue with the matter already earlier on adjourned for judgment. After hearing arguments of counsel in the matter, the learned trial judge adjourned the matter for ruling on the application to discontinue with the suit to the 16/4/2008. On the 16/4/2008, the learned trial judge refused the application to discontinue with the suit and thereafter proceeded to deliver his judgment in the substantive suit. Whereat he dismissed the plaintiffs' suit as lacking in merit.

The appellants herein felt dissatisfied with the Ruling and the Judgment of the trial court and appealed to the Court of Appeal. At the Court of Appeal, learned counsel for the appellants therein who are also the appellants herein, formulated and submitted two issues for the determination of the appeal. The issues were:-

"Issue I.

Was the learned trial judge right when he refused the appellants application for discontinuance of the case and proceeded to enter judgment against the appellants?

Issue II.

Was the learned trial judge right when he held that the 2nd appellant was validly expelled from the party when no such relief was sought by the parties."

In its determination of the issues submitted to it, the Court of Appeal held that the learned trial judge exercised his discretion properly in refusing to allow the application to discontinue the matter having regard to the stage the matter had reached. On the second issue, the court also found that on the evidence adduced by the par-

ties, the learned trial judge was right to have dismissed the appellants' suit before him. The appellants still fell unhappy with the decision of the Court of Appeal and filed a further appeal to this court.

Now in his brief for the appellants, the learned counsel has identified and formulated five issues arising for the determination of the appeal and the issues are:-

"(1) Whether the learned justices of the court below were right in coming to the conclusion that the learned trial judge was right in holding that the 2nd appellant was validly suspended/expelled as the National Chairman of the 1st appellant when same was not done in accordance with the express provisions of the Constitution of the party, binding on the parties.

(2) Whether the learned justices of the Court of Appeal were right in holding that the findings of the learned trial judge on allegation of embezzlement and anti-party activities against the 2nd appellant were consistent with the evidence before the court when there was no such proof beyond reasonable doubt.

(3) Whether the learned justices of the Court of Appeal did not misdirect themselves by holding that the trial court, properly resolved conflicting evidence before it when it ignored and failed to review the evidence of the appellants.

(4) Whether the learned justices of the Court of Appeal properly directed themselves on the appropriate course of action to be taken by the trial court upon refusal to grant an application for discontinuance.

(5) Whether the learned justices of the Court of Appeal directed themselves properly in holding that the trial court was right in declaring in favour of the respondents that the 2nd appellant was properly expelled from the party rather than merely dismissing the claims of the appellants. "

I have alluded and reproduced the issues formulated and submitted to the Court of Appeal, for the determination of their appeal. The decision of the Court of Appeal at the tail end of its judgment was only to dismiss the appeal as lacking in merit. In order to fully appreciate the issues that could legitimately arise in this appeal, it may be necessary to again reproduce the issues submitted by the appellants at the Court of Appeal:-

“1. Was the learned trial judge right when he refused the appellant’s application for the discontinuance of the case and proceeded to enter judgment against the appellants?”

2. Was the learned trial judge right when he held that the 2nd appellant was validly expelled from the party, when no such relief was sought by the parties.”

In my view, these are the only matters upon which the Court of Appeal was called upon to make a decision. Any other issue discussed at hearing of the appeal or mentioned in the judgment, has no direct bearing with the complaints of the appellants before the Court of Appeal. Any other issue or issues raised, were orbiter dicta and had nothing to do with the crucial issues properly raised by the appellants for the determination of the appeal. It must be remembered that it was the appellants herein and others who first went to the trial court claiming the reliefs reproduced at the beginning of this judgment, there was no counter-claim by the defendants, the respondents herein and the sum total of the judgment of the trial court as affirmed by the Court of Appeal was that the claims of the appellants were dismissed as lacking in merit. Accordingly any other issues or findings made by the courts were for no moment. Hence not all the issues now raised by the appellants in this appeal, five of them are relevant or legitimately arose from the complaints of appellants before the Court of Appeal. It has been held time and time again that it is not every error or mistake that can be made a complaint in an appeal, the complaint or error must arise from and affect the crucial issues discussed at the decision. In the final analysis, both the trial court and the Court of Appeal merely dismissed the reliefs sought by the appellants.

Accordingly, the only relevant issues that arise legitimately for the determination of the appeal before this court are two, (1) whether the Court of Appeal was right in affirming the decision of the learned trial judge to refuse the application for the discontinuance of the suit and (2) whether the decision of the learned trial judge as confirmed by the court below was right that the respondents had validly dismissed or removed the 2nd appellant when no body sought that relief.

In this appeal, I shall first deal with the issue of whether the learned trial judge was justified in holding that the 2nd appellant was

finding as a relief in this matter, since the respondents did not counter-claim. It is claimed that both courts were wrong to have decided that the 2nd appellant was validly expelled from the party.

Again, I have alluded to the claims and the reliefs sought by the appellants in this matter and I have reproduced them at the beginning of this judgment. **It is the appellants who under paragraph “J” of the amended statement of claim, sought the relief in these terms:-**

(j) A declaration that the defendants’ purported suspension and/or expulsion of the 2nd, 3rd and 4th Plaintiffs from the 1st Plaintiff, is illegal, null, void and of no effect, as same was done without capacity, and in flagrant violation of the constitution of the 1st Plaintiff and without due process.”

As can be seen, it is manifest that it was the appellants who asked the court to decide and pronounce on the issue. The Court of Appeal in my view rightly agreed with the finding and consequently the appellants, having asked the court for the relief in the manner it was couched as reproduced above, cannot now claim that nobody prayed for it. It was the appellants prayer for the court to determine one way or the other whether the 2nd appellant was validly expelled or removed from the party and the court by relying on the evidence adduced came to the inescapable conclusion, that the 2nd appellant was validly removed as the chairman of the party.

As mentioned above, it was the appellants who went to court seeking for certain reliefs, there was no counter-claim and at the end of the day, the trial court and as confirmed by the Court of Appeal merely affirmed the decision of the trial court in dismissing the appellants’ suit as it was devoid of any merit. The crucial decision of both courts was that of the dismissal of the appellants’ claims and no more. Accordingly all the arguments of counsel go to no legitimate issue. I accordingly resolve this issue against the appellants. I will now discuss the question of the application of discontinuance as the last issue. This is the appellants’ issue No. 4 which reads:-

“Whether the learned justices of the Court of Appeal properly directed themselves on the appropriate course of action to be taken by a trial court upon refusal to grant an application for discontinu-

ance.”

The learned counsel for the appellants maintains that the learned trial judge ought to have called upon the appellants to address the court before proceeding to read the judgment after refusing the application to discontinue. Learned counsel referred to *BABATUNDE VS. PAN ATLANTIC SHIPPING TRANSPORT AGENCIES LTD. & 2 OTHERS* (2007) 3 NWLR (Pt 1050) 113 at 165. It is submitted that final address is fundamental to a proper adjudication learned counsel referred to and relied on *SOL FOND FOODS LTD. VS. ELEREWE* (1996) 8 NWLR (465) 248 at 253, *AYISA VS. AKANJI & ORS* (1995) 7 NWLR (406) 129, *SALAMI VS. ODOGUN* (1991) 2 NWLR (Pt. 173) 291, *AKABOGU & ORS. VS. AKABOGU* (2003) 9 NWLR (826) 445 and *IHOM VS. GAJI* (1997) 6 NWLR (Pt. 509) 526. B
C

The learned counsel further argued that the delivery of the judgment immediately after refusing the application for the discontinuance of the suit without asking the appellants to address the court amounted to denial of the right of fair hearing. Learned counsel referred to the case of *AMOUGH VS. ZAKI* (1998) 3 NWLR (Pt. 542) 484 at 491; *NYA VS. EDEM* (2005) 4 NWLR (916) 345; *AG. AN-AMBRA VS. OKEKE* (2002) 12 NWLR (Pt.782) 575; *AKWA VS. C.O.P.* (2003) 4 NWLR (Pt.811) 461. D
E

It is again submitted that Order 27 rule 3 of the High Court (civil procedure) Rules of the FCT High Court is inapplicable to the circumstances of this case, and both the trial court and the Court of Appeal acted erroneously in holding that the learned trial judge could dismiss the case rather than strike out the claims of the appellants. The delivery of the judgment under the circumstances on the merits negated the principles of fair hearing. Learned counsel referred to the case of *EGWU VS. UNIVERSITY OF PORT HARCOURT* (1995) 8 NWLR (Pt. 414) 419. F
G

Before I discuss the submissions of the learned counsel for the respondents, it is important to keep in mind the crucial issue as argued by the appellants in the Court of Appeal. The main complaint of the appellants in the Court of Appeal, centered on the proprietary or otherwise of the trial court in refusing the application for discontinuance. The issue of the immediate and simultaneous delivery of the judgment did not feature significantly. So, all the arguments of counsel for the ap- H

pellants as narrated above, did not actually arise for the determination by the Court of Appeal. Most of the arguments bordering on fair hearing and in miscarriage of justice were not actually argued or submitted, what was argued by the learned counsel for the appellants, was that the learned trial judge was in error to have delivered the judgment on the merits instead of striking out the suit, after he had refused the application to discontinue the suit as filed.

It is apt at this stage to capture how in the lead judgment of the Court of Appeal the matter was resolved. At page 1432 Vol. iv of the record it is provided:-

“On the 23/1/2008 the trial court closed the case of the 4th defendant after refusing his application for adjournment. Consequently, the Learned Senior Counsel for 1st, 2nd, 5th – 14th defendants took 3 days to deliver this final address, counsel for the 3rd and 4th defendants took her statutory days while counsel for the plaintiffs now appellants took 21 days. The court then adjourned to 25/2/2008 for the adoption of the final (written) address (see page 1061 of the records).

However on 25/2/2008, counsel for the plaintiffs/appellants instead of the adoption of his address brought two applications for stay of proceedings which were taken and dismissed by the learned trial judge, (see page 1070) 1074 of the record.

Upon the dismissal of the plaintiffs/appellants’ applications for stay of proceedings, learned counsel for the plaintiffs/appellants sought for adjournment to enable the plaintiffs respond to the address of the defendants. The application was objected to and the trial court ruled as follows:

“The parties seeking adjournment were ordered by this court on 23/1/2008 xxxxxx to file their written address before today. That was not done and no reason has been tendered as an inhibiting factor xxxxxxxxxxxxxxxxx. Accordingly there is no cogent reason for adjournment the final address is closed and the case is adjourned for judgment. The judgment is adjourned to 7/4/2008.”

“It is important to point out that there is no appeal against the refusal to grant the stay of proceedings nor the application sought on the 25/2/2008. However on 7/4/2008, the judgment could not be delivered because counsel for the plaintiffs/appellants referred to the

trial court to a fresh application filed to discontinue the case. The application was taken and ruling was fixed for 16/4/2008. On that day leave (to discontinue) was refused and the judgment of the court was delivered."

I have examined the record and this clearly was what had transpired before the trial Court. In my view, the arguments for counsel reproduced above clearly go to no legitimate issue. ***At the time the judgment was read, the issue of address was closed and obviously there was nothing left except to read the judgment. The appellants have failed to complain in an appeal against the decision to refuse their application for adjournment and/or for an extension of time to file the final address, or for the closure of the address. Having not appealed, the appellants must be deemed to have accepted the decision made by the trial court to have closed the issue of address and they cannot be heard to complain at this stage.***

As mentioned above these are the only two legitimate issues arising for the determination of the appeal, all the other issues and arguments of counsel are irrelevant. This appeal is clearly unmeritorious and frivolous. The judgments of the lower courts in dismissing the claims of the appellants is also affirmed. The appeal is accordingly dismissed. The 2nd appellant is to pay costs of N50,000.00 to the respondents.

MOHAMMED JSC

This appeal is against the decision of the Court of Appeal Abuja delivered on 13th January, 2010 dismissing the Appellants' appeal against the judgment of the Federal Capital Territory High Court of Justice given on 16th April, 2008 upholding the expulsion of the 2nd Appellant from the 1st Appellant, All Progressive Grand Alliance (APGA). This decision of the trial Court was made after the dismissal of the Appellants' application to discontinue with the case after hearing evidence from the parties and the case adjourned for judgment when the Appellants had declined to deliver their final address as the Plaintiffs.

The issues identified in the Appellants' brief of argument for the determination of the appeal are -

B “(1) Whether the learned Justices of the Court below were right in coming to the conclusion that the learned trial Judge was right in holding that the 2nd Appellant was validly suspended/expelled as the National Chairman of the 1st Appellant when same was not done in accordance with the express provisions of the Constitution of the Party, binding on the parties (Arising from Ground 1).

C (2) Whether the learned Justices of the Court of Appeal were right in holding that the findings of the learned trial judge on the allegations of embezzlement and anti-party activities against the 2nd Appellant were consistent with the evidence before the Court when there was no such proof beyond reasonable doubt (Arising from Grounds 2 and 3).

D (3) whether the learned justices of the Court of Appeal did not misdirect themselves by holding that the trial Court properly resolved conflicting evidence before it when it ignored and failed to review the evidence of Appellants (Arising from Ground 4).

E (4) whether the learned Justices of the Court of Appeal properly directed themselves on the appropriate course of action to be taken by a trial Court upon refusal to grant an application for discontinuance (Arising from Grounds 5 and 6).

F (5) whether the learned Justices of the Court of Appeal directed themselves properly in holding that the trial Court was right in declaring in favour of the Respondents that the 2nd Appellant was properly expelled from the party rather than merely dismissing the claims of the Appellant (Arising from Ground?). ”

However, in the Respondents’ brief of argument, the three issues submitted for determination are -

G “a. Are there concurrent findings of fact on the radical question of whether the suspension and expulsion of the 2nd Appellant and others from A.P.G.A as claimed by the Plaintiff/Appellant in the Amended Statement of Claim filed in the suit (see Grounds 1, 2, 3, 4 & 7).

H b. If the answer to (a.) above is negative are there justifiable grounds for this Honourable Court to interfere with the said concurrent findings of fact.

c. Was the Court of Appeal right in affirming the correctness of the learned trial (sic) Court’s exercise of discretion in this suit after the conclusion of evidence/address and the suit set down for the delivery

of judgment (see Grounds 5 and 6)."

It is observed that issues a. and b. above in the Respondent's brief raising the question of whether in the circumstances of the present appeal there are grounds for this Court to interfere with the concurrent findings of fact of the trial Court and the Court of Appeal, do not arise from any of the grounds of appeal filed by the Appellants. Infact ^B the Respondents' issue b. is not an issue at all for determination or arising from any ground of appeal filed by the Appellants as even the Respondents themselves have not attempted to relate it to any ground of appeal. It is merely a question providing the basis or stepping stone ^C for the Respondents to advance their arguments on the position of an appeal on concurrent findings of fact of two Courts below. The law on the formulation of issues by a Respondent is well settled. It is to the effect that any issue formulated for determination of an appeal by the Respondent must relate to the grounds of appeal filed by the Appellant. However, for the Respondent in an appeal to validly raise ^D any issue not related to or arising from the grounds of appeal filed by the Appellant, such Respondent must file a cross-appeal or file a Respondent's Notice. See *Momodu v. Momoh* (1991) 1 N.W.L.R. (Pt. 169) 608 and *Ossai v. Wakwah* (2006) 4 N.W.L.R. (Pt. 969) ^E 208. In the instant case therefore, the Respondents not having filed a cross-appeal or a Respondent's Notice, have no business formulating issues not arising from the grounds of appeal filed by the Appellants. However, in their response to the appeal on the 2 valid issues out of ^F the 5 issues raised in the Appellants brief of argument in addition to their single valid issue c. which clearly arose from the grounds of appeal filed by the Appellants, the Respondents are not precluded from pursuing their argument that this appeal having arisen from ^G concurrent findings of fact of the two Court below, there are no justifiable grounds warranting this Court to interfere with the concurrent findings.

Going back to the Appellants' brief of argument, it is quite plain from the 2 valid issues out of the 5 issues raised therein, the complaint of the Appellants in this appeal revolves squarely on ques- ^H tions of facts on the credible evidence led by the parties before the trial Court and the application of the provisions of the Constitution of the 1st Appellant to the facts established by evidence.

The case of the 2nd Appellant from the record of this appeal

seem to be that he was relying on the provisions of Article 18(1) of the Constitution of the party which states -

“18(1) The founder of the Party, Chief Chekwas Okorie shall hold the office of the National Chairman of the Party for an initial period of four years and may hold the office for a second term of four years if he so desires.”

To argue that he could not have been suspended or expelled from the party founded by him having regard to Article 18(1) of the Constitution of the party.

The Respondents however are saying that having regard to the conduct of the 2nd Appellant, the steps taken by the National Working Committee of the Party to suspend and later to expel the 2nd Appellant from the party, was quite in order by virtue of the provisions of Articles 19(3) and 21(2)(d) of the Constitution of the Party. Article 19(3) of the Constitution of the party for example reads -

“19(3) Removal from Office Special circumstances. Any officer of the party who is indicted for any criminal offence bothering on fraud, embezzlement, conduct likely to bring the image of the Party to ridicule and disrespect shall be deemed to have been expelled from the Party.”

Close examination of the evidence led by the parties and the careful evaluation of the same by the learned trial Judge which the Court below also agreed with, the findings of the two Courts below that the 2nd Appellant was rightly suspended and later rightly expelled from the Party in accordance with the express provisions of the Constitution of the party which are binding on the parties, are indeed on very strong ground. I therefore entirely agree with my learned brother Musdapher, JSC in his leading judgment that the appeal has no snow ball chance of surviving in hell, in succeeding in this Court. Accordingly I also dismiss the appeal and abide by the orders made in the leading judgment including the order on costs.

H

TABAI JSC

I have read, in the draft, the lead judgment prepared by my learned brother, Musdapher, JSC. I agree with the reasoning and conclusion therein.

By way of emphasis however, I wish to comment briefly on the

Appellant's issue 4. The issue is "Whether the learned Justices of the Court of Appeal properly directed themselves on the appropriate course of action to be taken by a trial Court upon refusal to grant an application for discontinuance."

Before embarking on the resolution of this issue, it is necessary to state briefly the relevant facts about the progress of the case at the time the application was brought. The writ of summons dated the 31st of January, 2005 was filed at the High Court of the Federal Capital Territory on the 1st of February, 2005. The Appellants and two others were the Plaintiffs. The Defendants are the Respondents here in. In both the writ of summons and paragraph 18 of the Statement of Claim, the Appellants claimed declaratory and injunctive reliefs. The Defendants filed their Statement of Defence. The matter then proceeded to trial and evidence concluded. The trial court ordered the submission of written addresses.

The matter had progressed to the very concluding stage when the Appellants filed a motion for Notice of Discontinuance. In fact the matter was reserved for judgment when the application was filed. The motion dated 27th of March, 2008 was filed on 28th of March, 2008. The Defendants (except the 3rd and 4th) reacted by filing a 14 paragraph counter-affidavit deposed to by one Alhaji Abdullahi Sani Shinkafi. In paragraph thereof the Defendants/Respondents deposed:

"That in view of the stage at which this application is made and from the chequered and protracted history of this suit, it is desirable that the Honourable Court pronounces on the merits of the issues already raised by the parties in order to finally determine the rights of the parties after more than 4 years of trial."

On 16th of April, the trial court delivered its judgment. In the concluding paragraph, the trial Court said in part:-

"That being the case, the report of the disciplinary committee which recommended this suspension and subsequent expulsion of the defendants is null and void and if is set aside. On the other hand, the expulsion of the 2nd Plaintiff and co-travellers was in my view in accordance with the provisions of the Constitution of APGA and I have no reason to interfere with it. In specific terms, the case of the Plaintiffs lacks merit and it is dismissed."

The Appellants were dissatisfied and proceeded on appeal to

the court below. The Notice of Appeal raised 20 grounds of appeal. Therein the Appellants formulated two issues, the first of which was:-

“Was the learned trial judge right when he refused the Appellant’s application for discontinuance of the case and proceeded to enter judgment against the Appellant.”

B In its judgment on the 13th of January, 2010, the court below resolved this issue in favour of the Respondents and dismissed the appeal. It relied on a number of Supreme Court and Court of Appeal authorities in reaching its decision. In *Abayomi Babatunde Vs Pan Atlantic Shipping and Transport Agencies Ltd and 2 others* (2001) C 13 N.W.L.R. (pt. 1050) 113 at 163-164, this Court per Ogbuagu, JSC spoke on the matters to be considered in an application for discontinuance. He said:-

“When an application for discontinuance of an action is made, D one of the things to be considered by a trial Court is at what age the said application is made. If it is made before a hearing date has been fixed, it seems to me that it is now firmly settled that the proper order to make is one of striking out. This is because there is no litis contestato and a determination of the merit has not been made after hearing E evidence of either the whole or some fundamental part of the claim. If the application is made after hearing has commenced, the trial court must weigh and consider all the case in the interest of justice and thus balance the interest of the parties involved including the balance of convenience and disadvantage which might be suffered F by any of the parties concerned.”

I agree entirely with the above reasoning. If an application for the discontinuance of a suit is made before the actual hearing commences, what I consider to be the appropriate order should be one G striking out the suit. But where it is made after some considerable progress in the hearing has been made, leave to discontinue with a mere striking out order would no longer be automatic. The court would, in the exercise of its discretion consider the competing interests of the parties. Where as in this case, the application is made at H the close of evidence and the matter adjourned for judgment, the discretion would almost certainly be exercised to dismiss the suit. And as the Court of Appeal pointed out, an appellate court would not normally interfere with a lower court’s exercise of its discretion simply because faced with a similar situation, it would have exercised the

discretion differently.

After a careful consideration of the facts and circumstances of this case, I have come to the conclusion that the Court of Appeal was perfectly in order not to interfere with the trial court's dismissal of the suit. A striking out order would not have been appropriate in the circumstances of this case. B

In the light of the foregoing considerations and the detailed discussion of the other issues in the lead judgment, I also dismiss the appeal. I adopt the order on costs in the lead judgment also as mine. C

CHUKWUMA-ENEH JSC

I adopt the facts of this matter as set out in the leading judgment. The issues that have been formulated by the appellants are as follows: D

“(1) Whether the learned justices of the court below were right in coming to the conclusion that the learned trial judge was right in holding that the 2nd appellant was validly suspended/expelled as the National Chairman of the 1st appellant when same was not done in accordance with the express provisions of the Constitution of the party, binding on the parties. E

(2) Whether the learned justices of the Court of Appeal were right in holding that the findings of the learned trial judge on allegation of embezzlement and antiparty activities against the 2nd appellant were consistent with the evidence before the court when there was no such proof beyond reasonable doubt. F

(3) Whether the learned justices of the Court of Appeal did not misdirect themselves by holding that the trial court properly resolved conflicting evidence before it when it ignored and failed to review the evidence of the appellants. G

(4) Whether the learned justices of the Court of Appeal properly directed themselves on the appropriate course of action to be taken by the trial court upon refusal to grant an application for discontinuance. H

(5) Whether the learned justices of the Court of Appeal directed themselves properly in holding that the trial court was right in declaring in favour of the respondents that the 2nd appellant was properly expelled from the party rather than merely dismissing the

claims of the appellants.”

The foregoing issues particularly issues 1, 2 and 3 above will form the hub of my discussion in this matter anon. In doing so I have put in proper perspectives in the body of this contribution so much of the background to discussing issues 1, 2 & 3 of the appellants’
 B brief in this matter. I find and in this regard I agree with the lead judgment that issues 1, 2 and 3 of the appellants’ brief of argument as being groundless in the context of the appeal before this court as they go to no issue in the sense that they do not relate to the matters
 C upon which the appellants have challenged the trial court’s decision in the lower court as encompassed by the two issues for determination as raised thereat and thereby, they are setting up an entirely new case in this court.

What I am saying in other words is that issues 1 to 3 of the
 D appellants’ brief have raised issues on the matters not raised as issues nor discussed before the lower court. Meaning, not in so many words that the appellants have not maintained a consistent case in this court as before the lower court, to wit, on the issues of the suspension/
 E the party’s funds and anti-party activities and proving these indictments beyond reasonable doubt being criminal in nature as well as failing to resolve otherwise the conflicting evidence which as alleged by the appellants the lower court has also ignored in considering,
 F even then of the appellants’ case in this matter. In short the appellants by casting about in this matter as has been showed above and thus having raised the foregoing issues before this court have as it were tried to widen the ambit of their case beyond what it has been as per the two issues as raised and argued at the lower court. How-
 G ever it is settled that a party cannot be allowed to depart from his case as set out at the lower court; in this case by discussing of any of the factual issues as encompassed in issues 1 to 3 in the instant appeal not so raised thereat. This conclusion is consistent with the holdings in *Jumbo v. Bryanko International Ltd.* (1995) 6 NWLR (Pt.403)
 H 545 at 5556 (*sic*) and *Horizon Fibres Nig. Plc. V. M.V. Baco Kiner & Ors.* (2002) 8 NWLR (Pt.769) 466 at 489, both cases have held that a party ought to be consistent in the case he pursues from one stage to another so as to avoid springing surprises on the opposite party and this is so much more in an appeal being as a continuation of the

original suit. That being so the parties must be confined in this court to their respective cases as presented and fought in the lower court, and this is not what the appellants have embarked upon by raising issues 1 to 3 and they should not be allowed to be chopping and changing their case at every stage of the matter. It simply means that in this respect the factual issues to be raised from the judgment of the lower court in this court cannot be at large. This case has not been fought at the lower court on the bases of the issues now resurrected and discussed at length as the appellants' issues 1 to 3. The instant appellants have fallen into the same error as the appellants in *Ajide v. Kelani* (1985) 2 NWLR (pt.12) 248; (1985) 2 NSCC (Vol.16) 1298 at 1316. The principle as I have reasoned above has been graphically set out in the cited case thus:

"A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in his pleadings then turn summersault during trial; then assume nonchalant attitude in the Court of Appeal, only to revert to his case as pleaded in the Supreme Court. Justice is much more than a game of hide and seek. It is an attempt, our human imperfections notwithstanding, to discover the truth. Justice will never decree anything in favour of so shippery (sic, slippery) a customer as the present defendant/appellant"

per Oputa JSC.

The foregoing quote has said it all as it applies to this case in the circumstances- the above cited case and this case are on all fours on this point - in which the appellants here having assumed a nonchalant attitude in prosecuting their case in the court below have reverted in this court to their case as pleaded and fought at the trial court. This lack of consistency in prosecuting their case is no doubt fatal to their case in this appeal. They will not be allowed to raise these issues without more as I have tried to show anon.

By not having taken issues on these matters as per issue 1 to 3 before the lower court boils down to one conclusion - that they (the appellants) are satisfied and have accepted the findings of the trial court on those issues and will not now be seen to revert to and resurrect those issues so late in this court even so without the leave of court. They do not seem to be serious over this case.

This is so as their case on issues 1 to 3 cannot be founded on

their case on the two issues as raised by the appellants and as considered by the lower court. The two issues raised by the appellants before the lower court are as follows:

“Issue 1.

Was the learned trial judge right when he refused the appellants’ application for discontinuance of the case and proceeded to enter judgment against the appellants?

Issue II.

Was the learned trial judge right when he held that the 2nd appellant was validly expelled from the party when no such relief was sought by the parties.”

By examining the above two issues alongside issues 1 to 3 raised before this court has thereby borne out my conclusion of the appellants’ inconsistent case at the lower court and in this court as issues 1 to 3 have raised indeed, have resurrected factual issues as to whether the 2nd appellant has been validly suspended/expelled from APGA as well as the findings on the issue of embezzlement and anti-party activities against the 2nd appellant as has been hotly contested at the trial court.

From my reasoning above I agree with the lead judgment that a party as the appellants in this court are precluded from canvassing the three issues on the matters not canvassed in the lower court and they go to no issue. This question is further compounded as no attempt has been made to come by way of raising of fresh issues not raised in the lower court. They have to be discountenanced in this court. And I so hold.

On issues 4 and 5, they are on the propriety of the trial court dismissing the appellants’ case upon the appellants’ application to discontinue their case in this matter even as at the advance stage of the final addresses of the parties in the proceedings in the trial court and their bizarre allegation of denial of fair hearing thereof on having overruled of their application to discontinue the suit and the eventual dismissal of the entire suit. These issues have been comprehensively treated in the lead judgment of my learned brother Musdapher JSC, which I have read before now and there is nothing more to add.

Therefore for the above reasons and so much more contained in the lead judgment, I agree with the conclusions therein that this appeal is unmeritorious and should be dismissed. I dismiss it and

abide by the orders contains therein.

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the judgment of my learned brother Musdapher, JSC. I am in complete agreement with the judgment. I propose, though to add only a few observations. Issue No. 4 reads as follows: B

Whether the learned justices of the Court of Appeal properly directed themselves on the appropriate course of action to be taken by the trial court upon refusal to grant an application for discontinuance. C

This issue is important in that if the procedure adopted by the learned trial judge is found to be wrong, the appellant would be correct to say that he was denied fair hearing. In the trial court the appellant was the plaintiff. On 23/1/08 the learned trial judge closed the case. D Learned counsel for the parties were to prepare their addresses. The court adjourned to 25/2/08 for adoption of final addresses.

On 25/2/08 rather than adopt his address learned counsel for the appellant (plaintiff) brought applications for stay of proceedings which were taken and dismissed. He then sought an adjournment to enable him respond to the address of the defendants. E

Opposing counsel objected. This is what the learned trial judge had to say:

“The parties seeking adjournment were ordered by this court on the 23rd January, 2008 (more than a month earlier) to file their written address before today. That was not done and no reason has been tendered as an inhibiting factor..... F

Accordingly there is no cogent reason for adjournment. The final addresses is closed and the case is adjourned for judgment. The judgment is adjourned to 7/4/08.” G

On 7/4/08 judgment was not delivered. This was due to the fact that learned counsel for the appellant filed an application to discontinue the case. The application to discontinue the case was taken and Ruling fixed for 16/4/08. On that day leave to discontinue was refused, and the judgment of the court was delivered. The stage at which an application to discontinue a case is brought is very important. If the application is brought before a hearing date is fixed, the suit would be struck out. This is so because at that stage the case has H

not been contested on the merit, but if brought after trial commences or at the end of trial, as in this case it shall be the duty of the trial judge to ensure that the ends of justice are met and in that regard the balance of convenience must be diligently considered. The trial judge would be justified to refuse leave and order the plaintiff to continue with his case, thereby refusing the application to discontinue if satisfied that it is in the interest of justice to so order. In my view the interest of justice and balance of convenience were properly considered by the learned trial judge before he refused to grant leave to discontinue the case. The Court of Appeal was also correct to agree with the learned trial judge.

To grant or refuse to grant leave to discontinue a case is entirely at the discretion of the trial judge. The grant of adjournment is also discretionary. An appellant court will not interfere with the way the trial judge exercise his discretion but would interfere if satisfied that it is in the interest of justice to do so, or the exercise was tainted with some illegality or irregularity. See

Udabuchi v. Edigbo 2000 4 SC pt.11 p. 124

Odusote v. Odusote 1971 ANLR p. 221

Okoiko v. Esedalue 1974 3 SC p. 15

University of Lagos v. Aigoro 1985 1 NWLR pt.1 p. 143

Once a discretion is exercised judicially and judiciously, that is to say, with correct and convincing reasons the exercise of discretion would be held to have been properly exercised. I am satisfied that the learned trial judge exercised his discretion properly by refusing to grant an adjournment and refusing to grant permission to discontinue the, case. The appellant was thus not denied fair hearing since his case was decided on the merits and he was given every opportunity to present his case.

For this, and the much fuller reasoning in the leading judgment I dismiss the appeal and award costs in the sum of N50,000 in favour of the respondents. The 2nd appellant shall pay the costs.

H