

**SUPREME COURT OF NIGERIA**  
9TH DECEMBER, 2011. SC. 115/2009  
**CORAM:-M. MOHAMMED, C. M . CHUKWUMA-ENEH, M.**  
**S. MUNTAKA-COOMASSIE, J. FABIYI, B. RHODES-**  
**VIVOUR, JJSC**

1. UYAEMENAM NWORA  
2. ERIC OZUMBA  
3. EMESI OKEKE  
4. GABRIEL OKOYE ..... PLAINTIFFS/APPELLANTS  
(For themselves and as  
representing Okpuloji  
Abba Town)

AND

1. NWEKE NWABUNZE  
2. PHILIP OKORO ..... 1<sup>ST</sup> SET OF DEFENDANTS/  
RESPONDENTS

3. REUBEN IFEKA

AND

1. NWOYE OFOEDU  
2. EKEMEKA OMOGU  
3. ICHIE TITUS OKEKE  
4. EUGENE OTUNABO ..... 2ND SET OF DEFENDANTS/  
RESPONDENTS

(For themselves and on  
behalf of Oranto Akpu  
Village, Ukpò)

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COURTS - Appeals - Notice of appeal - Court is bound to take judicial notice of all processes filed in a matter before it (H1)

JURISDICTION - Fundamentality of - Appeals - When an issue of jurisdiction is raised - It is proper to dispose of that question first - As to do otherwise may be time wasting (H2)

APPEALS - Issues - Striking out - Effect - Where substantive matter from which other applications arise has been dismissed - Then the said applications are equally liable to be dismissed (H3)

**APPEALS** - Orders of court - Binding effect - Since there is no appeal against the order in suit no CA/E/30/2009 - The order remains valid and binding on the parties until it is set aside (H4)

**APPEALS** - Issues - Determination of - Court should refrain from discussing or making an order - Which will not affect the legal interests of the parties (H5)

### **FACTS**

The High court of Anambra State, Awka Judicial Division had in the consolidated suit nos. AA/53/75 and AA/11/77 entered judgment against appellants/applicants in this matter. Being dissatisfied, applicants appealed to the Court of Appeal, Enugu, by a notice of appeal filed on 18<sup>th</sup> November 1999. They also sought and obtained unconditionally a stay of execution of the said trial court's decision. The order of stay of execution still subsists. However, by the instant application dated 22<sup>nd</sup> September, 2005 brought pursuant to Orders 3 Rule 1 and 20 (1) of the Court of Appeal Rules, section 16 of the Court of Appeal Act and under the inherent jurisdiction of the court as preserved by Section 6(6) of the 1999 Constitution, applicants sought before the Court of Appeal, Enugu as follows - An order directing the Chief Judge of the trial High court to assign consolidated suit nos. AA/53/75 and AA/11/77 to a judge of the trial High court for retrial or trial de novo and an order directing accelerated hearing of the retrial/trial de novo of the consolidated suits.

Applicants' contention is that they properly filed their notice of appeal and also fulfilled all stipulated conditions and made sufficient funds available for compiling and transmitting the record of proceedings to the Court of Appeal, Enugu. They further stated that upon failure of the High court registry to compile and transmit the records, they secured an order of Supreme Court on 10<sup>th</sup> April 2005 compelling the registry to compile and transmit the record within thirty days. Despite the service of the said order on the registry, the records were neither compiled nor transmitted. The reason adduced was that the entire record book containing the minutes/manuscripts of the trial judge is missing and cannot be traced. The court in its ruling struck out the application. Aggrieved, applicants have filed an appeal to Supreme Court. 1<sup>st</sup> and 2<sup>nd</sup> sets of respondents have filed notices of

preliminary objection to the hearing of the application.

***HELD*** (Unanimously upholding the preliminary objections and striking out the interlocutory appeal per **CHUKWUMA-ENEH JSC**)

***Notice of appeal - Court is bound to take judicial notice of***

1. There is no answer to the situation created by the order of 3/3/2009 striking out the notice of appeal in this matter. This is so as the Applicants herein have not appealed the decision and I take judicial notice of it and the fact that there is no appeal pending against it. It is trite law that a court is bound to take judicial notice of all the processes filed in a matter before it as the instant supplementary record. (p. 2730 C)

***JURISDICTION - Fundamentality of***

2. This matter has raised an issue of jurisdictional competence. It is therefore, proper to dispose of that question first as to do otherwise may be particularly time wasting. And as alleged by the Respondents being an order dealing with jurisdictional competence it stands to reason that no matter how well the cause is otherwise conducted it comes to naught if upheld and I agree. And rightly in my view, it would be a fruitless effort to go the whole hog as to the merits of this matter based on the other grounds of the objection in the face of such a fundamental vice as raised by the Respondents that has clearly the profundity to destroy the main appeal, the substratum of the instant matter. (p. 2730 F)

***3. Issues - Striking out - Effect***

It is trite that where the substantive matter from which any other applications or appeals stem has been struck out or dismissed as the case may be then the said other applications or appeals on whatever based are liable to be struck out or dismissed equally, since the live wire connecting the two causes has been severed and there is no way those applications or appeals can survive it independently. There is also a pending Appeal No. SC. 418/2010 between the same parties in this court.

It cannot be doubted that the two sets of Respondents in this appeal have to my mind by their objections raised a fundamental

question that goes to the root of this appeal. In other words, if I may observe, there can be no essence in chasing the shadows of an already fatally flawed interlocutory appeal, as it were, by dealing with the merits of the other grounds of objection raised in the Respondents' statements of objection against it. This is so as here where the  
B interlocutory appeal has been characterized on its peculiar facts as a process in academic exercise in that it is based on a subsisting order of the lower court in Suit No.CA/E/30/2009 made on 3/3/ 2009 (not appealed against) by which the notice of appeal in the substantive  
C appeal in the consolidated Suits Nos.AA/53/75 and AA/11/77, the very substratum sustaining the said Interlocutory appeal now before this court has been struck out. There can be no justification in the circumstances of undertaking any further steps where the substantive objection as contemplated has challenged the jurisdictional compe-  
D tence of the court to entertain the cause.

The sum total of both sets of Respondents' contention in my view is that the instant Interlocutory appeal being no longer a live issue is not worthy of dissipating any energy upon. The said Interlocutory appeal cannot therefore, stand on nothing as the rug has  
E been pulled from underneath it. I agree that dealing the said interlocutory appeal any further is an academic exercise. It has been completely prompted by striking out of the notice of appeal in Suits Nos. AA53/75 and AA/11/77. (p. 2731 A)

F    ***Orders of court - Binding effect***

4. It therefore bears to reiterate further that as per record (which has not been challenged) filed in this court on 7/1/2010, that in compliance with the provisions of Order 8 Rule 1, the Assistant Chief Litiga-  
G tion Officer of the trial court has certified to the lower court that the Appellants (i.e. the Instant Applicants) in the consolidated Suits No.AA/ 53/75 and AA/11/77 and have not complied with the requirements of order 8 Rule 1, Hence, the order of 3/3/2009 striking out the appeal. And more importantly, there is no appeal against the order  
H in CA/E/30/2009. It is therefore to all intents and purposes a competent order made by the lower court. The effect of the order is that even if it were to be a nullity it is still a subsisting and valid order of a court of competent jurisdiction and it must therefore not be ignored or discountenanced without its being first set aside; it has not been set

aside up till now.

Where as in the circumstances a party has not formally challenged a record of appeal be it the original or supplementary record by way of filing an affidavit; the court has the undoubted jurisdiction to look at those records of appeal before it in the matter - it binds the court and the parties. Otherwise on the peculiar facts of this matter, this court bound by the supplementary record would be seen as labouring in vain in pursuing this appeal any further. (pp. 2731 H/2733 B)

### ***Issues - Determination of***

5. It is trite law that the court ought not to make an order in futility or which serves only academic purpose as it will not affect the rights of the parties in the matter. Any order therefore in this appeal save of course of striking it out the Interlocutory appeal will be futile and in vain as it will serve only academic interest. And as a trite principle of law, courts have no jurisdiction to make findings that are outside the record of appeal if I may reiterate. The supplementary record here bears out the fact that the interlocutory appeal has been struck out. And that has finally sealed this matter. The stance taken in this matter on this point is further strengthened by the opinion of Achike, JSC; (of blessed memory) with which I agree where he held in *Adelaja v. Alade* (1999) 4 S.C. 81; (1999)6 NWLR (Pt.608) 544 the “*all courts are enjoined to adjudicate between parties in relation to their competing legal interests and never to engage in a mere academic questions or argument or discourse no matter how erudite or beneficial it may be...*” In other words, the competing interests of parties in matter as the instant one must relate to live issues between the parties.

In the result, I hold the view that once the competing legal interests of the parties in an appeal have ceased to be live issues as I have found albeit with the striking out of the notice of appeal in Suits Nos.AA/53/75 and AA/11/77 in this matter; the instant interlocutory appeal in this court as per Suit No.SC.115/2009 ceases to have any real relevance or meaning and any further discourse of the appeal degenerates into mere exercise in futility and academic exercise which should not be the business of the court as any pronouncements on the instant interlocutory appeal will not affect the legal interests of the parties herein. (pp. 2733 D/2734 A)

**REPRESENTATION**

Dr. Dapo Olanipekun with U. Ozurumba, for Appellants/Applicants.  
Dr. J. O. Ibik, SAN, with P. Agu and O. J. Ibik, for 1st  
set of Respondents

Chief J. K-. Gadzama, SAN, with Sola E. Olusanmi, F. S.

- B Olumabiyi, Afam Osigwe, C. P. OH and J. M. Ugbeji, for 2nd set of  
Respondents

**CASES REFERRED TO**

- C Engineering Enterprise v. A.G Kaduna (1987) 2 NWLR (Pt.57) 381  
FBN Plc. v. May Med. Clinics (2001) 4 S.C. (Pt. I) 108  
Okochi v. Animkwo (2003) 2-3 S.C. 65  
Nwana v. FCDA (2007)4 S.C. (Pt. II) 1  
Sken consult (Nig.) Ltd. v. Ukey (1981) 1 S.C. 6  
D Madukolu v. Nkemdilim (1962) 2 SCNLR 341  
Mack v. Eke (1997) 11 NWLR (Pt. 529) 501  
Unipetrol (Nig.) Ltd. v. Bukar (1997) 2 NWLR (Pt.488) 472  
Habib Nigeria Bank Ltd v. Opomulero (2000) 15 NWLR (Pt. 190)  
315  
E Rossek v. A.C.B. Ltd (1993) 8 NWLR (Pt.312) 382  
Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt.81) 129  
Babatunde & Ors. v. Olatunji & Anor. (2000) 2 S.C. 9  
Alhaji Isiyaku Yakubu Enterprises Ltd. v. Omolaboje (2006) 1 S.C.  
(Pt. III) 1  
F Ojo v. INEC (2008) 13 NWLR (Pt. 1105) 577  
Obimonure v. Erinsho (1966) 2 SCNLR 228

**STATUTES & RULES REFERRED TO**

- G Court of Appeal Act, s. 16  
Constitution of Federal Republic of Nigeria 1999, s. 6(6), 233(3),  
243 (b)  
Court of Appeal Rules, O. 3 r. 1, O. 8 r.1, O. 20(1)  
Supreme Court Rules, O. 7 r. 6, 7(1), (3) and (4)  
H

**LEAD JUDGEMENT BY CHUKWUMA-ENEH JSC**

The Anambra State High Court of Justice in the consolidated  
Suit Nos. AA/53/75 and AA/1 1/77 entered judgment against Appel-  
lants/ Applicants in this matter. In a two pronged reaction to the said

decision, the Applicants herein have appealed the decision to the Court of Appeal, Enugu, by a notice of appeal filed on 18/11/99. They have also sought and obtained unconditionally a stay of execution of the said trial court's decision. The order of stay of execution still subsists. No wonder the case more or less has stood practically still ever since the said order of stay even as the Defendant's/Respondents' effort have failed in the lower court to set it aside. B

However, by the instant application dated 22/9/2005 brought pursuant to Order 20 (1); Order 3 Rule 1 of the Court of Appeal Rules, section 16 of the Court of Appeal Act and under the inherent jurisdiction of the court as preserved by Section 6(6) of the 1999 Constitution, the Plaintiffs/Appellants/Applicants in this court have sought before the Court of Appeal to wit: C

*"(i) An order directing the Chief Judge of Anambra State High Court to assign consolidated Suit Nos. AA/53/75 and AA/11/77 to a judge of the Anambra State High Court, Awka Judicial Division for retrial or trial de novo and*

*(ii) An order directing accelerated hearing of the retrial/trial de novo of consolidated Suit Nos. AA/53/75 and AA/11/77."*

Subjoined to the foregoing prayers are the five grounds of application to wit: E

*"(1) Judgment was given against the Plaintiffs/ Appellants/Applicants on 12th November, 1999 by the Anambra State High Court presided over by Nwazota, CJ.*

*(2) Plaintiffs/Appellants/Applicants immediately thereafter appealed against the said judgment to the Court of Appeal, particularly as per their notice and grounds of appeal dated 17<sup>th</sup> November, 1999.* F

*(3) Plaintiffs/Appellants/Applicants fulfilled all conditions of appeal as stipulated by the registry of the lower court and made sufficient funds available for the typing, compilation and transmission of the record of proceedings to the Court of Appeal.* G

*(4) When the lower court registry failed and neglected to compile and transmit the record, Plaintiffs/Appellants' Applicants secured an order of this court on 10/04/05 compelling the registrar/registry of the lower court to compile and transmit the record of proceedings within 30 days.* H

*(5) Despite the service of the enrolled order of this court on the registrar/registry of the lower court, the record of proceedings*

*has not been compiled and transmitted on the ground that the entire record book containing the minutes/ manuscripts of Nwazota, CJ, is missing and cannot be traced.”*

To further expatiate on and support the application in this court the Applicants have filed among others the following processes to  
B wit;

1. An affidavit of 31 (thirty-one) paragraphs sworn to by one Honourable Peter Igbo, a businessman of Okpuloji Village Abba in Njikoka Local Government Area of Anambra Slate.

C 2. A brief of argument dated 30/12/2009 filed on 8/9/2009;  
and

3. A reply brief to the brief of the 1st and 2<sup>nd</sup> sets of Respondents filed on 12/10/2010.

The Appellants’ response to the Respondents’ objections are  
D contained in the Appellants’ reply brief.

The gist of the Applicants’ case as gathered from the foregoing processes in a paraphrase is that the trial court record book containing the minutes of the trial judge- Nwazota, CJ., (as he then was) is missing and cannot be traced; even as the Awka High Court Registry  
E has been duly mobilized, as it were, by funds and other enabling logistics as alleged by the Applicants for compiling and transmitting the record of court proceedings in the consolidated Suit Nos AA/53/75/ and AA/11/77 within 30 days. And not even on having served  
F the said registry the enrolled order thereof, the record of appeal is yet to be compiled and transmitted as ordered and as has been alleged by the Appellants, on the ground that the entire record book containing the minutes/ manuscripts of Nwazota, CJ., in the matter is missing and so cannot be traced.

G In the Appellants/ Applicants’ brief of argument filed in this application they have from the grounds of appeal condensed 3 (three) issues for determination in this matter as follows:

H “(i) *Whether or not by summarily striking out the Appellants’ motion as done by it on 13th January, 2009, the lower court was not in error by overruling itself on the earlier orders made by it in respect of and concerning the said motion - Ground 1.*

(ii) *Was the lower court not in grave error by striking out the Appellants’ motion dated 22nd September, 2005 on the ground that the condition precedent to taking an appeal before it was/is not com-*



*plete because there was/is no record of proceedings transmitted to the court? - Grounds 2 and 3.*

*(iii) Whether by summarily striking out the Appellants' motion aforesaid, the lower court has not breached foreclosed Appellants' constitutional right of appeal - Ground 4."*

They (1st set of Respondents) have reacted to the application, and have in their response to the affidavits in support of the application filed a counter-affidavit. They have also raised notices of preliminary objection on some four areas of the Appellants/Applicants' case that is to say, firstly on the non-service of the notices of appeal on the 1st set of Defendants/Respondents personally. Secondly, on the subsisting order of the Court of Appeal in CA/E/30/2009 dated 3/3/2009 striking out the appeal in the consolidated Suits Nos. AA/53/75 and AA/ 11/77; thirdly, on the record of appeal in SC. 195/2009 being incompetent for contravening of Order 7 Rules 6, 7(1), (3) and (4) of the Supreme Court Rules, fourthly on the incompetent grounds of appeal Grounds 1, 2 and 3.

They have in the alternative raised a sole issue for determination in this appeal as follows:

*"Whether the lower court was right in striking out the Plaintiffs/Appellants' motion dated 2nd September, 2005 and filed on 11th November, 2005 for there being no record of appeal placed before it."*

They, the 2nd set of Respondents have also reacted to the Appellants/Applicants' application by filing a counter-affidavit. They also raised a notice of preliminary objection to the effect that the instant interlocutory appeal has been rendered an academic exercise and therefore has become incompetent as the lower court has struck out the main appeal before it.

And I should reiterate further that the lower court has struck out the notice of appeal filed by the Appellants upon which the instant appeal is predicated for non-compliance with the conditions imposed on the Applicants as per Order 8 Rule 1 of the court of Appeal Rule. I shall come to discuss this fundamental objection anon.

All the same, the 2<sup>nd</sup> set of Defendants/Respondents have in the alternative raised 3 issues for determination as follows:

*"(1) Whether an appellate court before which an appeal has not been entered could rightly make an order for re-trial or trial de-*

*novo, and if the answer is in the negative whether the lower court could have ordered a retrial in the circumstance of this case, without having a look at any record of appeal from the trial court. (This issue relates to Grounds Two and Three of the notice and grounds of appeal).*

B (2) *Whether the lower court's striking out of the Appellant's motion dated 22nd September, 2005 and filed on 11th November, 2005, breached their constitutional rights of appeal, expressly stated in Section 243 (b) of the 1999 Constitution of the Federal Republic of Nigeria, to be exercised in accordance with rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal. (This issue relates to Grounds One and Four of the notice and grounds of appeal).*

C (3) *Whether the decisions reached by the Supreme Court in the cases of "Engineering Enterprise v. A.G Kaduna (1987) 2 NWLR (Pt.57) 381 at 387-391; FBN Plc. v. May Med. Clinics (2001) 4 S.C. (Pt.1) 108; (2001) 18 NWLR (Pt. 717) 28; Okochi v. Animkwo (2003) 2-3 S.C. 65; (2003) 18 NWLR (Pt. 851) at 17-29 and Nwana v. FCDA (2007) 4 S.C. (Pt.11) 1; (2007) 11 NWLR (Pt.1044) 59 at 71-83, are to the effect that in every case where there is no record of appeal, a retrial de novo has to be ordered. (This issue relates to Ground One of the notice and grounds of appeal)."*

F As per the foregoing, I have set out in a nutshell the case of each of the parties in line with the processes filed by each one of them respectively in this matter. I now proceed to examine firstly the preliminary objections filed by the 1st and 2nd sets of Respondents vis-a-vis the responses to the same as contained in the Appellants' reply brief filed thereof. The Respondents have raised their state-  
G ments of objection as per their notices of preliminary objection before hearing the appeal with a view as a settled principle that if the objections are successfully taken and upheld, the appeal terminates automatically in limine. Okafor v. Nwude (1999) 7 (Pt. 1) 106.

H They, the 1st set of Respondents have raised four statement of preliminary objection that is to say, firstly of non-the notice of appeal on them. In this regard, it is submitted that none of the named 1st set of Respondents on record notice of appeal in this matter in the manner prescribed as per Order 2, Rules 3(1) (b) and 4 of the rules of this court being an originating process in this appeal, which enjoins

personal service. That failure to serve notice of appeal in that jurisdiction of an appellate struck out for not having been initiated by due process. They rely on *Sken consult (Nig.) Ltd. v. Ukey* (1981) 1 S.C. 6; (1981) 1 S.C. (Reprint) 4; *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Mack v. Eke* (1997) 11 NWLR (Pt.529) 501; *Unipetrol (Nig.) Ltd. v. Bukar* (1997) 2 NWLR (Pt.488) 472 and *Habib Nigeria Bank Ltd v. Opomulero* (2000) 15 NWLR (Pt. 190) 315 at 330 Paragraphs E-H. B

Secondly, that by striking out the main appeal in the consolidated Suit Nos .AA/53/75 and AA/ 11/ 77 as per the ruling in Suit No. CA/E/30/2009, the lower court has destroyed the substratum of the instant Appeal No. SC.115/2009 pending in this court as it has no leg on which to stand. C

It is further submitted that the judgment of the lower court in Appeal No.CA/E/30/2009 being an order of a court of competent jurisdiction is binding on the parties and the court unless and until set aside. They rely on *Rossek v. A.C.B. Ltd* (1993) 8 NWLR (Pt.312) 382; *Aladegbemi v. Fasanmade* (1988) 3 NWLR (Pt.81) 129; *Babatunde & Ors. v. Olatunyi & Anor.* (2000) 2 S.C. 9; (2000) 2 NWLR (Pt.646) 557 at 568 and *Alhaji Isiyaku Yakubu Enterprises Ltd, v. Omolaboje* (2006) 1 S.C. (Pt. 111) 1; (2006) 3 NWLR (Pt.966) 195 at 203 Paragraph B; and that by Section 287(2) of the 1999 Constitution this court is also bound to recognize the said order even moreso as the said order has not been appealed against. D E

Thirdly, that the record of appeal in SC. 11 5/2009 is incompetent for contravening the provisions of Order 7 Rules 6.7(1), (3) and (4) of the rules of this court. F

It is further submitted that the instant appeal being interlocutory in nature, the Applicants have not complied with Order 7 Rule 7(1) as the record of appeal has been filed outside 14 days period as prescribed under the said rules without first having sought and obtained extension of time to do so nor the leave of this court to rely on the incompetent record at the hearing. G

And, fourthly, on the incompetent Grounds 1, 2 and 3, that is specifically Grounds one and two do not arise from the decision appealed against as they do not attack the ratio decidendi of the said ruling. See *Egbe v. Alhaji* (1990) 3 S.C. (Pt.I) 63, (1990) 1 NWLR (Pt. 28) 546; *Attorney General of Oyo State v. Fairlakes Hotel Ltd. &* H

Anor. (1988) 12 S.C. (Pt.I) 1; (1988) 5 NWLR (Pt.92) 1; Saraki v. Kotoye (1992) 9 NWLR (Pt.264) at 184 Paragraphs A-E; Management Enterprises v. Otusanya (1987) 2 NWLR (Pt. 162) 265 and Adesanya v. President of Nigeria (1981) 5 S.C. 112; (1981) 5 S.C. (Reprint) 69; (1981) 1 NCLR 358 and also that Ground three raises  
 B questions of mixed law and facts and has been filed without leave of court first sought and obtained as prescribed under Section 233(3) of the 1999 Constitution; and therefore, that the issues raised from those grounds are also incompetent. See Sadiku v. Attorney General  
 C Lagos State (1994) 2 NWLR (Pt.355) 235 and that Ground Four is academic in view of the binding decision as per the ruling in CA/E/30/2009 given by the lower court; and from which stems the instant interlocutory appeal.

They i.e. the 2nd set of Respondents have raised one state-  
 D ment of objection which is on all fours with the 1st set of Respondents' 2nd statement of objection as set out above, albeit, that it is an academic exercise in that there is no valid notice of appeal by Appel-  
 lants to sustain the appeal against the Awka High Court judgment that is to say, subsisting at the moment as the lower court has on 3/3/  
 E 2009 struck out the Appellants' appeal against the consolidated Suits Nos.AA/53/75 and AA/11/77 as their notice of appeal has been struck out upon a certificate of non-compliance with the conditions of ap-  
 peal imposed on the Applicants as "would -be Appellants."

F Both sets of Respondents have each urged the court to uphold their respective objections and to strike out the instant appeal in lim-  
 ine as being fatally faulted.

The Appellants/Applicants have in reaction to the 1st set of  
 Respondents submitted of their (i.e. the 1st set of Respondents) hav-  
 G ing taking steps in the proceedings in this matter against the back-  
 ground of their aware of the alleged irregularity, and so they cannot  
 now complain as they have waived that right. See Ojo v. INEC (2008)  
 13 NWLR (Pt. 1105) 577; Obimonure v. Erinsho (1966) 2 SCNLR  
 228 and Guinness Nig. Plc, v. Ufot (2008) 2 NWLR (Pt.1070) 51

H On the said order of the lower court striking out the notice of  
 appeal in CA/E/30/2009, the Applicants have submitted as miscon-  
 ceived as it does not form part of the inside record of appeal in this  
 matter and so cannot sustain the objection.

On non-compliance with Order 7 Rules 6, 7(1), (3) and (4) of

the Supreme Court Rules it is submitted that the appeal is a final decision as it has determined finally the rights of the parties and so that Order 7 Rules 6, 7(1), (3) and (4) does not apply to a final decision as there is nothing left to be decided as between the parties' rights in the case after the final order for retrial or trial de novo.

On the alleged incompetent grounds of appeal, that is to say, on Grounds 1 and 2 the Appellants/Applicants have submitted that the grounds read with their particulars have showed them as emanating from the said ruling appealed against and that Ground 3 being a question of law alone requires no leave under Section 233(3) (supra).

On the question that the appeal is academic as raised by both sets of Respondents the Applicants have posited that the order of 3/3/2009 has no bearing on this appeal being irrelevant and should be ignored; again that it is not part of the instant record of appeal. The court is urged to overrule the objections of both sets of Respondents respectively as totally misconceived and as the means to stall the appeal.

I have gone through the arguments of both sides in the preliminary objections and moreso the grounds as raised by both sets of Respondents and I think I can without much ado say that I find respectfully the statements of objections as raised by the two sets of Respondents in regard to the fact that the instant interlocutory appeal is no longer a live issue and should be struck out most apt and fundamental; that is to say, it has to be dealt with at once as is the case with threshold issues touching on issues jurisdictional competence of an appeal and on the powers of the court to entertain the same. There is however, before the court a supplementary record of appeal filed on 7/1/2010 dealing with the proceedings of 3/3/2009 on the cause of "*Certificate as to non-compliance with the conditions imposed upon a would-be Appellants*" (underlining for emphasis). It is interesting that by the certificate of non-compliance filed in this matter before this court, the Applicants are still designated as "would-be Appellants" do not intend even then to take any question of their being so described any further in this judgment. I leave it there as it is a non-issue presently. The relevant proceedings of that date being rather terse and crucial in resolving this matter I set them out in full as follows:

*“CA/E/30/2009*

*Between: Uyaemenam Nwora & Ors.*

*And Nweke Nwabueze & Ors. Parties absent.*

*The Registrar has issue (sic) a notice of non-compliance with the Rules and there is no pending application for departure from the Rules. The appeal is therefore struck out.*  
Sgd. A.G Omaxe JCA 3/3/09”

The above proceedings speak for themselves. The inference that arises therefrom is that the appeal against the decision of the Awka High Court in Suits Nos.AA/53/75 and AA/11/77 has been brought to a terminal end.

***There is no answer to the situation created by the order of 3/3/2009 striking out the notice of appeal in this matter. This is so as the Applicants herein have not appealed the decision and I take judicial notice of it and the fact that there is no appeal pending against it. It is trite law that a court is bound to take judicial notice of all the processes filed in a matter before it as the instant supplementary record.*** The authorities on this point are galore including Texaco Nig. Plc, v. Lukoko (1992) 6 NWLR (Pt.501) 761, Nwanosike V. Udose (1933) 4 NWLR (Pt.200) 684; Abraham v. Olorunfemi (1991) 1 NWLR (Pt.165) 533 and Saraki v. Kotoye (2001) 48 WRN 1 at 350. Also see. Hubbard v. Vosper (1972) 2 Q.B 84 at 96 per Lord Denning.

I have already made the point that there is before this court a supplementary record filed on 17/1/2009 from which is culled the foregoing abstract of the proceedings of 3/3/2009 before the court below.

***This matter has raised an issue of jurisdictional competence. It is therefore, proper to dispose of that question first as to do otherwise may be particularly time wasting. And as alleged by the Respondents being an order dealing with jurisdictional competence it stands to reason that no matter how well the cause is otherwise conducted it comes to naught if upheld and I agree. And rightly in my view, it would be a fruitless effort to go the whole hog as to the merits of this matter based on the other grounds of the objection in the face of such a fundamental vice as raised by the Respondents that has clearly the profundity to destroy the main appeal, the substra-***

**tum of the instant matter.** See Egbe v. Adefarasin (1987) 1 NSCC (Vol. 18) 1. ***It is trite that where the substantive matter from which any other applications or appeals stem has been struck out or dismissed as the case may be then the said other applications or appeals on whatever based are liable to be struck out or dismissed equally, since the live wire connecting the two causes has been severed and there is no way those applications or appeals can survive it independently. There is also a pending Appeal No. SC. 418/2010 between the same parties in this court.***

***It cannot be doubted that the two sets of Respondents in this appeal have to my mind by their objections raised a fundamental question that goes to the root of this appeal. In other words, if I may observe, there can be no essence in chasing the shadows of an already fatally flawed interlocutory appeal, as it were, by dealing with the merits of the other grounds of objection raised in the Respondents' statements of objection against it. This is so as here where the interlocutory appeal has been characterized on its peculiar facts as a process in academic exercise in that it is based on a subsisting order of the lower court in Suit No.CA/E/30/2009 made on 3/3/ 2009 (not appealed against) by which the notice of appeal in the substantive appeal in the consolidated Suits Nos.AA/53/75 and AA/11/77, the very substratum sustaining the said Interlocutory appeal now before this court has been struck out. There can be no justification in the circumstances of undertaking any further steps where the substantive objection as contemplated has challenged the jurisdictional competence of the court to entertain the cause.***

***The sum total of both sets of Respondents' contention in my view is that the instant Interlocutory appeal being no longer a live issue is not worthy of dissipating any energy upon. The said Interlocutory appeal cannot therefore, stand on nothing as the rug has been pulled from underneath it. I agree that dealing the said interlocutory appeal any further is an academic exercise. It has been completely prompted by striking out of notice of appeal in Suits Nos. AA53/75 and AA/11/77.***

***It therefore bears to reiterate further that as per record***

**(which has not been challenged) filed in this court on 7/1/2010, that in compliance with the provisions of Order 8 Rule 1, the Assistant Chief Litigation Officer of the trial court has certified to the lower court that the Appellants (i.e. the Instant Applicants) in the consolidated Suits No.AA/53/75 and AA/11/77 and have not complied with the requirements of order 8 Rule 1, Hence, the order of 3/3/2009 striking out the appeal. And more importantly, there is no appeal against the order in CA/E/30/2009. It is therefore to all intents and purposes a competent order made by the lower court. The effect of the order is that even if it were to be a nullity it is still a subsisting and valid order of a court of competent jurisdiction and it must therefore not be ignored or discountenanced without its being first set aside; it has not been set aside up till now.**

And as held in the case of Jimoh Akinfolarin & Ors. v. Solomon Oluwole Akinola (1994) 4 SCNJ 30 at 46: *“An order or judgment of a court of competent jurisdiction remains valid and binding on the parties concerned and privies until it is set aside by due process of law..... Accordingly it must enjoy the legal presumption of regularity and must remain valid and binding on the parties concerned and their privies until it is set aside by due process of law.”*

**This court in the circumstances is bound to give effect to the said order, notwithstanding the Applicants’ contention of not having been aware of the order. Even then the supplementary record since filed in this court and served on them has brought that fact home to the Applicants.**

**The position presently with regard to the said order is that it has not been appealed against nor set aside and so, it is binding on the instant parties concerned.**

I have taken this discussion to this height in view of the stance of the Appellants/Applicants as per Paragraph 2.16 Page 12 of their reply brief to the 1st and 2nd sets of Respondents’ brief wherefore they have contended that and I quote *“..... If there was any such order at all - it is irrelevant to this appeal. It did not form part of the record of this appeal. This honourable court cannot even look at it let alone using same as a basis or ground to sustain this objection.”*



Respectfully, I think the Applicants have missed the point here and that is, that the order is still subsisting and binding on them and this court takes judicial notice of the order. I must say respectfully that by the foregoing stance of the Applicants, they have also misconceived the purport of the supplementary record served on them, which they have not challenged in any manner whatever and its binding effect and that of the ruling in CA/E/30/2007 on the instant parties concerned. **Where as in the circumstances a party has not formally challenged a record of appeal be it the original or supplementary record by way of filing an affidavit; the court has the undoubted jurisdiction to look at those records of appeal before it in the matter - it binds the court and the parties. Otherwise on the peculiar facts of this matter, this court bound by the supplementary record would be seen as labouring in vain in pursuing this appeal any further. It is trite law that the court ought not to make an order in futility or which serves only academic purpose as it will not affect the rights of the parties in the matter. Any order therefore in this appeal save of course of striking it out the Interlocutory appeal will be futile and in vain as it will serve only academic interest. And as a trite principle of law, courts have no jurisdiction to make findings that are outside the record of appeal if I may reiterate. The supplementary record here bears out the fact that the interlocutory appeal has been struck out. And that has finally sealed this matter.**

**The stance taken in this matter on this point is further strengthened by the opinion of Achike, JSC; (of blessed memory) with which I agree where he held in Adelaja v. Alade (1999) 4 S.C. 81; (1999)6 NWLR (Pt.608) 544 the “all courts are enjoined to adjudicate between parties in relation to their competing legal interests and never to engage in a mere academic questions or argument or discourse no matter how erudite or beneficial it may be...” In other words, the competing interests of parties in matter as the instant one must relate to live issues between the parties.** See Union Bank v. Edonseri (1988) 2 NWLR (Pt.74) 93 and Julius Berger (Nig.) Ltd. v. Femi (1993) 5 NWLR (Pt.295) 612 at 563 Paragraphs E-F.

A crucial question upon which the above abstract is premised,

is the question of the legal interests to be served by pursuing this matter any further - there is none. It is on this ground that I express the surprise that the Applicants have doggedly taken this appeal thus far; as it lacks substance.

***In the result, I hold the view that once the competing legal interests of the parties in an appeal have ceased to be live issues as I have found albeit with the striking out of the notice of appeal in Suits Nos.AA/53/75 and AA/11/77 in this matter; the instant interlocutory appeal in this court as per Suit No.SC.115/2009 ceases to have any real relevance or meaning and any further discourse of the appeal degenerates into mere exercise in futility and academic exercise which should not be the business of the court as any pronouncements on the instant interlocutory appeal will not affect the legal interests of the parties herein.*** See also *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.* (2006) 6 S.C. 21; (2006) 13 NWLR (Pt.997) 276 at 292, Paragraph F.

In the final analysis these objections, if I may repeat, have pulled the rug from underneath the instant interlocutory appeal, meaning that it has no leg any longer on which to stand in this court, I uphold the preliminary objections of both sets of Respondents as eloquently articulated above by both senior counsel. Consequently, I hereby strike out this interlocutory appeal in its entirety as serving no further purpose and indeed an exercise in futility. I make no order as to costs.

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### MOHAMMED JSC

The ruling of my learned brother, Chukwuma-Eneh, JSC., which has just been delivered was read by me before today. I entirely agree with him that the Appellants' interlocutory appeal must be terminated on the preliminary objection to its competence raised by the two sets of Respondents to the appeal. The interlocutory appeal arose from the ruling of the Enugu Division of the Court of Appeal delivered on 13th January, 2009, striking out the Appellants' motion for an order directing the Chief Judge of Anambra State High Court to assign the consolidated Suits Numbers AA/53/75 and AA/11/77 to a judge of the Anambra State High Court in Awka Judicial Division, for

retrial or trial de novo. The motion or notice was heard between the parties while the Appellants substantive Appeal Number CA/7E/30/2009 against the decision of the Anambra State High Court of Justice in the same consolidated Suits Numbers AA/53/75 and AA/11/79, was pending and awaiting hearing when the records of appeal were filed and served. B

From the supplementary record of appeal filed in this court in the interlocutory appeal, it was revealed and confirmed that the substantive appeal between the same parties in Appeal Number CA/E/30/2009 pending at the Enugu Division of the Court of Appeal which gave rise to the Interlocutory appeal filed by the Appellants in this court, had since 3rd March, 2009, been struck out by the Court of Appeal on a notice of non-compliance by the Appellants with the conditions of appeal in relation to the preparation and filing of the records of appeal. Thus, the foundation or root of the Appellants' Interlocutory appeal having been uprooted since 3rd March, 2009 with the striking out of the substantive appeal, the present appeal certainly has no legs to stand upon let alone move around following its demise also on the same date. The preliminary objections are indeed strong ground. C D E

Accordingly, the appeal is hereby struck-out with no order on costs.

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### **MUNTAKA-COOMASSIE JSC**

The Appellants herein were the Plaintiff's in the trial court that was the High Court of Justice Anambra State of Nigeria in a land matter. There were two suits which were consolidated. The suits were really protracted one and on the 12th day of November, 1999, judgment was entered against the Plaintiffs whose claims were dismissed and the claims of the 1st and 2nd sets of Defendants were granted. The Plaintiffs appealed to the Court of Appeal. The record of proceedings of the Awka High Court of Anambra State somehow got lost. The registry of that court since then could not trace the record. The Court of Appeal, Enugu Division up till now could not receive the same record of proceedings of the High Court of Justice Awka. F G H

The Court of Appeal on 13/1/2009 per Oimage, JCA., struck out the motion filed by the Applicants for an order directing the Chief

Judge of the Anambra High Court to assign the said 15 consolidated suits to a judge in Anambra State High Court, Awka Judicial Division for trial de novo and order for accelerated hearing. The Court of Appeal ordered counsel to file and exchange written addresses, which they did.

B On 13th January, 2009, when the motion came up for positive hearing before another constituted panel of the Court of Appeal (Omage, Tsamiya and Ariwoola, JJCA) that court *brevi manu* struck out the motion without considering the written addresses already filed and exchanged by counsel.

C The Appellants' Uyaemenam Nwora, appealed against the above ruling of the lower court to this court by filing a notice of appeal containing four grounds of appeal. Both parties filed their respective briefs of argument which they accordingly adopted on D 19/9/11.

I have had the privilege of reading in advance the leading ruling rendered by my learned brother, Chukwuma-Eneh, JSC., I am in total agreement with his lordship that the appeal should be struck out for the reasons adumbrated in the leading ruling, I too struck out E the appeal. I endorse the orders as to costs.

### ***FABIYI JSC***

F I have had a preview of the ruling just handed out by my learned brother, Chukwuma-Eneh, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the preliminary objections raised on behalf of both sets of Respondents should be sustained, consequent upon which this interlocutory appeal must be G struck out.

The Appellants appealed from the trial court's judgment to the Court of Appeal. No record of appeal could be compiled as the trial chief judge's minutes of proceedings were not traced despite all efforts made by the trial court's registry.

H The Appellants filed an application at the Court of Appeal for an order directing the trial court to re-hear the suit afresh. The same was struck out. On 3rd March, 2009, the Court of Appeal also struck out the appeal before it for non-perfection of the conditions of appeal.

The Appellants/Applicants filed an application before this court which precipitated the preliminary objections taken by both sets of Respondents.

The main point that can be gathered from the preliminary objection taken by the 1st set of Respondents with which the 2nd set of Respondents aligned themselves relates to the fact that the instant interlocutory appeal is no longer issue and deserves to be struck out. It touches on the competence of the appeal and by implication, jurisdiction to entertain it.

By the order of the court of Appeal made on 3<sup>rd</sup> March, 2009, the appeal thereat was struck out on the ground that the registrar of the trial court issued a notice of non-compliance with the rules of court and 'there is no pending application for departure from the rules. Thus, there is nothing upon which this interlocutory appeal can rest. One cannot put something upon nothing. See: UAC Ltd. Mcfoy D (1962) AC 150 at 160. The Applicants are deemed to be aware of the order of the court below made on 03/03/2009 as same is extant in the supplementary record which they are aware of. The order is subsisting and binding on the Applicants as they have not appealed against it.

On this score, the preliminary objections rest on a firm and solid ground. For the above reason and the lucid reasons adumbrated in the leading ruling, I feel that the preliminary objections should be sustained. I order accordingly and hereby strike out the interlocutory appeal, as well.

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### ***RHODES-VIVOIR JSC***

I read in draft the leading ruling of my learned brother, Chukwuma-Eneh, JSC. I agree entirely with his lordship that the preliminary objection be sustained and the interlocutory appeal struck out.

The facts are these. In two consolidated Suits to wit: AA/53/75 and AA/11/77 heard in the Anambra State High Court, the Appellants as Plaintiffs in a land matter lost. They appealed and were able to obtain a stay of execution. In the Court of Appeal, the Appellants filed a motion on notice seeking:

(a) An order directing the Chief Judge of the Anambra State

High Court to assign Suits Nos. AA/53/75 and AA/11/77 to a judge of the Anambra State High Court Awka Judicial Division for retrial or trial de novo and

(b) An order directing accelerated hearing of the retrial/ trial de novo of consolidated Suits Nos: AA/53/75 and AA/L1'77.

B The Appellants filed the motion supra because the record of proceedings and the record book could not be found.

The litigation officer of the high court produced a certificate that the Appellants did not comply with the provisions of Order 8 Rule 1 of the Court of Appeal Rules before filing an appeal. On the C 13th of January, 2009, the Court of Appeal struck out the Appellants' motion and on the 3rd of March, 2009, struck out the appeal. (See supplementary record of appeal).

This interlocutory appeal is against the order striking out the D Appellants' motion on the 13th of January, 2009.

Both sets of Respondents filed preliminary objections to the hearing of the interlocutory appeal. The 1st set of Respondents raised preliminary objection on four points. They are:

E (i) Non service of the notice of appeal on the 1st set of Respondents;

(ii) On the subsisting order of the Court of Appeal dated 3/3/09 striking out the appeal in the consolidated suits.

(iii) Record of appeal in SC. 115/2009 being incompetent for F contravening of Order 7 Rules 6, 7 (1), (3) & (4) of Supreme Court Rules;

(iv) On the incompetent grounds of appeal, comprising Grounds 1, 2, & 3.

G The 2nd set of Respondents say that this interlocutory appeal is an academic exercise and therefore it is incompetent once the Court of Appeal struck out the main appeal before it.

A preliminary objection to the hearing of an appeal is only filed when its success brings the hearing of an appeal to an end.

H In this case it is clear that if any of the grounds raised in the preliminary objections succeed the hearing of the appeal abates. Preliminary objections were correctly filed.

I shall examine the 2nd set of Respondents' preliminary objection. I earlier on said that before us is an interlocutory appeal from a motion struck out by the Court of Appeal on the 13th day of Janu-

ary, 2009.

An interlocutory appeal to this court can only be filed and entertained by this court if the main appeal from which it arose is subsisting/pending in the Court of Appeal. Since the main appeal in the Court of Appeal was struck out by that court on the 3rd of March, 2009, the interlocutory appeal comes from nowhere. It accordingly fades into insignificance. B

The interlocutory appeal can be heard by this court if the Appellants are able to get an order of the Court of Appeal re-listing the appeal struck out on the 3rd of March, 2009, or there is a successful appeal against that order to this court so that the appeal can emanate from a platform. C

Non-compliance with Order 8 Rule 1 of the Court of Appeal Rules explains why the Court of Appeal struck out the appeal. It had no jurisdiction until an appeal is properly before it. D

Hearing this appeal would amount to a waste of precious judicial time since the issues are no longer live. They have been overtaken by events. Courts should determine live issues.

Obi-Odu v. Duke (No.2) (2005) 10 NWLR (Pt.932), Okulate v. Awosanya (2002) 2 NWLR (Pt.645) 530. E

Considering the preliminary objection filed by the 1st set of Respondents would no longer be necessary since the 2nd set of Respondents preliminary objection succeeds and is sustained.

Once again I agree with his lordship, Chukwuma-Eneh, JSC, that the interlocutory appeal should be struck out. F

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