

**SUPREME COURT OF NIGERIA**  
FRIDAY 1<sup>ST</sup> MARCH, 2013. SC. SC.40/2009  
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-  
COOMASSIE, S. GALADIMA, N. S. NGWUTA,  
S. S. ALAGOA, JJSC**

- |  |                   |
|--|-------------------|
| 1. OSUN STATE INDEPENDENT<br>NATIONAL ELECTORAL COMMISSION |                   |
| 2. A-G OSUN STATE  | ..... APPELLANTS  |
| AND  |                   |
| 1. NATIONAL CONSCIENCE PARTY                               |                   |
| 2. ALLIANCE FOR DEMOCRACY                                  |                   |
| 3. ALL PROGRESSIVE GRAND ALLIANCE                          |                   |
| 4. ALL NIGERIA PEOPLES PARTY                               | ..... RESPONDENTS |
| 5. NATIONAL DEMOCRATIC PARTY                               |                   |
| 6. JUSTICE PARTY   |                   |
| 7. UNITED NIGERIA PEOPLES PARTY                            |                   |

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APPEALS - Notice of appeal - Striking out of - Court of Appeal rightly struck out the appeal - Since appellants abandoned their appeal - After obtaining order for stay of execution (H1)

COURT PROCESSES - Abuse - Characteristics - It arises where a party improperly uses judicial processes - To the irritation and annoyance of his opponent (H2)

COURTS - Processes - Power to prevent abuse - By Constitution 1999 s. 6(6)(a) - Once satisfied that any proceeding before it - Is an abuse of process - Court is empowered to terminate same (H3)

**FACTS**

Before the High Court of Osun State Osogbo, plaintiffs/respondents instituted this action against defendants/appellants claiming inter alia, declaration that eligibility, qualifications and disqualifications of contestants at Local Government Councils Election in Osun State are governed by section 7(4), 106 and 107 of the 1999 Constitution. After hearing the parties, the court granted the reliefs sought except declaratory relief 5 and injunctive relief 8 which were refused.

Dissatisfied, appellants lodged an appeal at the Court of Appeal Ibadan Division. Immediately after filing the Notice and grounds of appeal, appellants brought an application for stay of execution of the judgment of the trial court which application was instantly heard and granted by the trial court.

On getting the order of stay of execution, appellants took no further steps to put their appeal on ground for hearing at the Court of Appeal. Attempt by respondents to set aside the order of stay was unsuccessful. Upon noticing that appellants were merely out to frustrate them, respondents brought an application before the Court of Appeal seeking to strike out appellants' appeal for want of diligent prosecution. Although appellants opposed the application, no counter affidavit was filed. The court heard and granted the application. Hence, appellants' notice of appeal was struck out for want of diligent prosecution. Aggrieved, appellants appealed to Supreme Court.

### **ISSUE FOR DETERMINATION**

*"Whether the lower court can safely assume jurisdiction over a substantive appeal that has not been entered and strike out the same for lack of diligent prosecution under the Court of Appeal Rules 2002."*

**HELD** (Unanimously dismissing the appeal per **MOHAMMED JSC**)

*Notice of appeal - Striking out of*

**1. The Court below had earlier found under S.6(6)(a) of the 1999 Constitution that it has inherent power to check the abuse of its process by filing an appeal, dumping same and insisting that the Court lacked power to do anything on such an appeal. In other words in addition to the appeal being struck out for want of diligent prosecution, the fact that the filing of the appeal and abandoning the same after obtaining an order of stay of executing of the judgment being appealed against, provided additional fuel in burning the abandoned appeal to extinction.**

**In the result, therefore there was no scintilla of evidence before the court below that the Appellants had complied with the conditions of appeal and that the failure to transmit and**

***file the record of appeal to the Court of Appeal, was entirely the fault of the Registrar of the trial court. This left the court below with no option but to rely on the evidence before it in paragraphs 5 and 7 of the affidavit in support of the motion. These paragraphs which clearly accused the Appellants of having abandoned their appeal after obtaining the trial court's order of stay of execution of the same judgment being appealed against remained uncontroverted and therefore deemed admitted to pave the way to the Court below in relying on the evidence to establish abuse of its process by the Appellants to justify its decision in striking out the Appellants' appeal.***  
(p. 1409 H/ 1410 D/ G)

*COURT PROCESSES - Abuse - Characteristics*

***2. The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognised that the abuse of process may lie in both a proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent.*** (p. 1411 A)

*COURTS - Processes - Power to prevent abuse*

***3. On the duty of court to prevent the abuse of its process, the Court below was on strong ground that Section 6(6)(a) of the 1999 Constitution of the Federal Republic of Nigeria has given all courts established by the Constitution inherent powers and jurisdiction to ensure that the machinery of justice is duly applied and properly lubricated and not abused. One most important head of such inherent powers of Court is abuse of process which simply means that the Process of the Courts must be used bona fide and properly and must not be abused. In this respect once a court is satisfied that any proceeding before it is an abuse of process, it has the power, and indeed a duty to terminate it.*** (p. 1411 D)

**REPRESENTATION**

Mr. Abayomi Aliyu with Thelma Otaigbe (Miss), for the Appellants  
 Tihamiyu Sule Adegboyega, for the Respondents

**B CASES REFERRED TO**

Jadesimi v. Okotie-Eboh (1985) 2 NWLR (pt. 10) 909

Ogunremi v. Dada (1952) 1 All NLR (pt. 2) 657

Ezomo v. A-G Bendel State (1986) 4 NWLR (pt. 35) 469

C Yusuf v. Edun (2005) 15 NWLR (pt. 950) 34

Aye Printing (Nig.) Ltd. v. Ekiti L.G.A. (2009) 7 NWLR (pt. 141) 512

C.O.M. v. Cobham (2006) 15 NWLR (pt. 1002) 283

Central Bank of Nigeria v. Ahmed (2001) 11 NWLR (pt. 724) 369

Ngige v. Achuku (2004) 8 NWLR (pt. 875) 356

D Saraki v. Kotoye (1992) 9 NWLR (pt. 264) 155

Arubo v. Aiyeleru (1993) 3 NWLR (pt. 280) 126

Okafor v. A-G Anambra State (1991) 6 NWLR (pt. 200) 659

Banjo v. Eternal Sacred Order of Cherubim & Seraphim (1975) 3 SC 37

E

**STATUTE & RULES REFERRED TO**

Constitution of Federal Republic of Nigeria 1999, s. 6(6)(a)

Court of Appeal Rules 2002, O. 1 r. 21(1)(2)

F

**LEAD JUDGMENT BY MOHAMMED JSC**

The Respondents in this appeal were the Plaintiffs at the High Court of Justice of Osun State sitting at Osogbo where they instituted an action against the Appellants in this Court who were the Defendants at the trial court by Originating Summons and sought the following declarations and reliefs:-

H “1. *A DECLARATION that eligibility, qualifications and disqualifications of persons contesting the Local Government Councils Election in Osun State are governed by the provisions of Section 7(4), 106 and 107 of the Constitution of the Federal Republic of Nigeria, 1999.*

2. *A DECLARATION that the 1st Defendant, Osun State Independent Electoral Commission (OSSIEC) is incompetent to prescribe conditions for the eligibility, qualifications and disqualifications of can-*

*didates to contest Local Government Elections in Osun State outside the conditions stipulated by the Constitution of the Federal Republic of Nigeria 1999.*

3. A DECLARATION that Sections 5(1) and (2), 6(a), (b), (c), (d), (e), (f), (j), 13(1), (2), (a), (b), (f), (i)(3) and (a) of the Osun State Electoral Law 2002 Law No. 5 of 2002 made as a supplement to Osun State of Nigeria Gazette No. 5 Vol. 12 of 27th December, 2002, are contrary to the provisions of Sections 7 (4), 105 and 107 of the Constitution of the Federal Republic of Nigeria 1999, which provide for eligibility, qualifications and disqualifications of persons at Election to Local Government Councils in Nigeria and are therefore unconstitutional, null, void and of no effect whatsoever.

4. A DECLARATION that Section a(1) and (2) 5(a), (c), (d), (f), (c), (h), (i) 12(1), (2) and (3) 14(1)(a), 2(a), (b), (f), (i), (3)(4) of the 'Guidelines for the Local Government Elections' issued by the Osun State Independent Electoral Commission dated 16th February, 2004 are contrary to Sections 7 (4), 106 and 107 of the Constitution of the Federal Republic of Nigeria, 1999.

5. A DECLARATION that the 'Summary of Time Table for the Local Government Election in Osun State (2004)' issued by the Osun State Independent Electoral Commission which, among other things fixed Local Government Council Election in Osun State to 27th March, 2004 are contrary to Section 10(1)(a), (b) and (2) of the Osun State Electoral Law, 2002, Law No. 5 of 2002 made supplement to Osun State of Nigeria Gazette No. 6 Vol. 12 of 27th December, 2002 and therefore null and void and of no effect whatsoever.

6. AN INJUNCTION restraining the Defendants, their agents, servants, officers, privies, assigns and howsoever called from giving effect to or implementing the provisions of Sections 5(1) & (2), 5(a), (b), (c), (d), (e), (f), (j), 13(1), (2), 14(1), (2)(a), (b), (f), (i), (3) and (a) of the Osun State Electoral Law, 2002 made as a supplement to Osun State of Nigeria Gazette No. 5 Vol. 12 of 27th December, 2002.

7. AN INJUNCTION restraining the 1st Defendants from conducting any election into the Local Government Councils in Osun State on the basis of Sections 5(1) and (2), 6(a), (b), (c), (d), (e), (f), (j), 13(1), (2)(a), (b), (f)(i), (3) and (a) of the Osun State Electoral Law, 2002 Law No. 5 of 2002 made as a supplement to Osun State of Nigeria Gazette No. 6 Vol. 12 of 27th December, 2002.

8. *AN INJUNCTION* compelling the 1st Defendant, to give statutory Notice of Election as prescribed under Section 10(1)(a); (b) and (2) of the Osun State Electoral Law, 2002 Law No. 5 of 2002 made as supplement to Osun State of Nigeria Gazette No. 5 vol. 12 of 27th December, 2002.

B 9. *AN INJUNCTION* restraining the 1st Defendant from con-  
 D duction any election into the Local Government Councils in Osun  
 State on the basis of Sections 4(1) and (2) and 51(a), (c), (d), (f),  
 (g), (h), (i), 13(i), (2) and (3) 1a(1)(a), (2)(a) (b), (f), (i) (3) and (4)  
 C of the 'Guidelines for the Local Government Elections' issued by the  
 Osun State Independent Electoral Commission dated 15th Febru-  
 ary, 2004."

After hearing the parties on the Plaintiffs action on the Origin-  
 ating Summons, the trial court granted all the declaratory and in-  
 junctive reliefs sought except declaratory relief 5 and injunctive relief  
 8 which were refused. This judgment was handed down on 16th  
 March, 2004 in favour of the Plaintiffs against the Defendants.

Dissatisfied with the judgment of the trial court, the defendants  
 instantly the following day 17th March, 2004, lodged an appeal  
 E against it to the Court of Appeal Ibadan Division. Immediately after  
 filing the Notice and grounds of appeal, the defendants brought an  
 application for stay of execution of the judgment of the trial court  
 which application was instantly heard and granted by the trial court  
 on 26th March, 2004. On getting the order of stay of execution of  
 F the judgment of trial Court, the Defendants/Appellants took no steps  
 to put their appeal on ground for hearing at the Court of Appeal.  
 The attempt by the Plaintiffs who were Respondents at the Court of  
 Appeal to set aside the order of stay by an application dated 9th  
 G October, 2007, was not successful as the application was struck-out  
 on 15th January, 2008. Meanwhile the Defendants/Appellants ap-  
 peal remained dormant and unheard in the absence of the record of  
 appeal in spite of the fact that the Notice of Appeal against the judg-  
 ment of the trial court was filed since 17th March, 2004 and the  
 H execution of which judgment was stayed by the same trial court since  
 26th March, 2004. The Plaintiffs/Respondents then brought their  
 application before the Court of Appeal by a motion dated 9th Octo-  
 ber, 2009 to strike out the Defendants/Appellants appeal for want of  
 diligent prosecution. Although the Plaintiffs/Appellants opposed that

application at the Court of Appeal, no counter affidavit was filed in opposing the application which was heard and granted by that Court resulting in striking out the Plaintiffs/Appellants Notice of Appeal for want of diligent prosecution. The present appeal by the plaintiffs/Appellants is against that Ruling of the court of Appeal Ibadan Division given on 21st May, 2008. B

From the 3 grounds of appeal filed by the Appellants, only one issue for determination of their appeal was distilled by their learned counsel in their Appellants' brief of argument. The single issue is -

*"Whether the lower court can safely assume jurisdiction over a substantive appeal that has not been entered and strike out the same for lack of diligent prosecution under the Court of Appeal Rules 2002."* C

In the Respondents brief of argument, their learned counsel also saw only one issue for the determination of the appeal which he framed as follows - D

*"Whether the lower court has jurisdiction to strike out a Notice of Appeal which constitute the abuse of its process."*

In his argument in support of the lone issue for determination, learned counsel to the Appellant stated that having satisfied the conditions of appeal by the payment of the required money to allow for the compilation of the record of appeal by the trial Court Registry, blamed the Registrar of the trial court for failing to transmit the record of appeal to the Court of Appeal. E

Learned counsel relied on the case of Jadesimi v. Okotie-Eboh (1985) 2 N.W.L.R. (Pt.10) 909 at 923 to say that the Appellants having complied with the conditions of appeal, the Appellants cannot be blamed for the failure of the trial court to compile and transmit the record of appeal to the Court of Appeal resulting in the situation that the appeal not having been entered, the Court below was deprived of jurisdiction to entertain the application to strike out their Notice of appeal. Order 1, Rules 21 (1) and (2) of the Court of Appeal Rules 2002 dealing with the control of proceedings during pendency of appeal, was called in aid in support of this argument. Also relying on the case of Ogunremi v. Dada (1952) 1 All N.L.R. (Pt. H 2) 657 at 553, Learned Appellants Counsel maintained that the Court below lacked jurisdiction to entertain the application to strike out the Appellants appeal since the appeal had not been entered by the filing and transmitting of the record of appeal to the Court below. How-

ever, learned Appellants Counsel admitted that having regard to the case of *Ezomo v. Attorney General of Bendel State* (1986) 4 N.W.L.R. (Pt. 35) 469, the situation in which the appeal had not been entered both the trial court and the Court of Appeal shared concurrent jurisdiction in interlocutory matters concerning the appeal. Learned Counsel therefore concluded that as no appeal had been entered in the present case there was no appeal to be struck out by the Court below under its 2002 Rules and therefore urged this Court to resolve the lone issue in favour of the Appellants and allow this appeal.

For the Plaintiffs now Respondents in this Court, their learned Counsel drew the attention of the Court to the fact that the Defendants/Appellants who were the Respondents to the Plaintiffs/Respondents application at the Court below, filed no counter affidavit in opposing the application, the averments in their affidavit in support of their application in paragraphs 5 and 7 thereof are deemed to have been admitted by the Defendants/Appellants requiring no further proof from the Plaintiffs/Respondents/Applicants. Learned Counsel contended that the grant of the Defendants/Appellants application for stay of execution by the trial court was not meant to deprive the Plaintiffs/Respondents the fruit of the judgment of the trial Court in their favour, if the cases of *Yusuf v. Edun* (2005) 15 N.W.L.R. (Pt. 950) 34 at 56 and *Aye Printing (Nig.) Ltd. v. EKITI L.G.A.* (2009) 7 N.W.L.R. (Pt. 141) 512 at 528 are taken into consideration. It was further argued by him that a situation as in the present case where a party filed an appeal and used it to obtain an order of stay of execution of the judgment and thereafter abandoned the appeal, amounts to an abuse of Court process as found in the cases of *C.O.M. v. Cobham* (2006) 15 N.W.L.R. (Pt. 1002) 283 at 304 and *Central Bank of Nigeria v. Ahmed* (2001) 11 N.W.L.R. (Pt. 724) 369 at 409.

On the application of these authorities learned Plaintiffs/Respondents Counsel submitted that the abandonment of the appeal was oppressive to the Respondents and therefore constitutes an abuse of the process of the lower Court. The cases of *Jadesimi v. Okotie-Eboh* (supra) and *Ogunremi v. Dada* (supra) contended the learned Counsel, do not apply to the present case where no conditions of appeal had been complied with. On the jurisdiction of the Court below to hear the application to strike out the appeal, the Learned Respondents Counsel cited and relied on the cases of *Amadi v. Com-*

missioner for Education, Imo State (2001) 9 N.W.L.R. (Pt.717) 17 at 25 and Ngige v. Achuku (2004) 8 N.W.L.R. (Pt. 875) 356 at 362, to say that the Court below correctly exercised its jurisdiction in striking out the Defendants/Appellants appeal and therefore urged this Court to dismiss the appeal.

The issue raised in the Appellants brief that whether the lower court safely assumed jurisdiction over a substantive appeal that has not been entered and strike out same for lack of diligent prosecution does not appear to have arisen from the facts of the present case particularly the Ruling of the Court below which is now on appeal. The case that was before the Court below was an application to strike out the Appellants' notice of appeal as filed and utilised in obtaining an order of stay of execution of the same judgment being appealed against at the Court of Appeal. The parties and the Court were fully aware that the appeal had not been entered at the Court of Appeal in the absence of the Appellants filing the record of appeal.

Also from the Ruling of the Court of Appeal of 21st May, 2008, which is now on appeal, the Appellants appeal was merely struck out for lack of diligent prosecution. Part of this Ruling at page 25 of the record reads -

*"By virtue of Order 3 rule 4, there are instances where both this Court and the lower Court can entertain interlocutory applications after the appeal has been filed. But once the record of appeal has been transmitted and the appeal entered, this Court to the exclusion of the lower Court takes complete control of all proceedings relating to the appeal."*

*In the instant case it is unthinkable to suggest that the lower Court can be approached and asked to strike out the appeal that has been filed and is deemed to be inexistence. Where there is a breach, there must certainly be a remedy.*

*And this informs our finding merit in this present application and granting of same. Notice of Appeal filed on 17th March, 2004, appeal No. CA/1/229/07 is hereby accordingly struck out for want of diligent prosecution."*

**The Court below had earlier found under S.6(6)(a) of the 1999 Constitution that it has inherent power to check the abuse of its process by filing an appeal, dumping same and insisting that the Court lacked power to do anything on such**

**an appeal. In other words in addition to the appeal being struck out for want of diligent prosecution, the fact that the filing of the appeal and abandoning the same after obtaining an order of stay of executing of the judgment being appealed against, provided additional fuel in burning the abandoned appeal to extinction.**

At page 6 of the Appellants brief of argument their learned Counsel opened his arguments thus -

*“Though the appellant satisfied all the conditions of appeal including payment of compilation of record of Proceedings, the Registrar of the High Court has not forwarded same to the lower Court. Thus the appeal has not been entered.”*

In spite of the very vital nature of the above statement to the case of the Appellants at the court below, their learned Counsel failed to take the required steps by filing counter-affidavit to the affidavit of the plaintiffs/Respondents in support of their application to strike out the appeal, to bring these vital facts before the Court of Appeal for consideration in the determination of the application before it.

**In the result, therefore there was no scintilla of evidence before the court below that the Appellants had complied with the conditions of appeal and that the failure to transmit and file the record of appeal to the Court of Appeal, was entirely the fault of the Registrar of the trial court. This left the court below with no option but to rely on the evidence before it in paragraphs 5 and 7 of the affidavit in support of the motion where it was clearly deposed -**

*“5. When I conducted search on 8th day of October, 2007 at both the Osun State High Courts and the Court of Appeal registries, I discovered that no further steps (sic) was taken by the Appellant xxx*  
*7. Since the order for stay of execution was got at the lower Court, the Appellant had gone to sleep to frustrate the Respondent/Applicant from enjoying the fruit of his judgment.”*

**These paragraphs which clearly accused the Appellants of having abandoned their appeal after obtaining the trial court’s order of stay of execution of the same judgment being appealed against remained uncontroverted and therefore deemed admitted to pave the way to the Court below in relying on the evidence to establish abuse of its process by the**

***Appellants to justify its decision in striking out the Appellants' appeal.***

***The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognised that the abuse of process may lie in both a proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent.*** See Saraki v. Kotoye (1992) 9 N.W.L.R. (Pt. 264) 155 and Central Bank of Nigeria v. Ahmed (2001) 11 N.W.L.R. (Pt.724) 369 at 409.

***On the duty of court to prevent the abuse of its process, the Court below was on strong ground that Section 6(6)(a) of the 1999 Constitution of the Federal Republic of Nigeria has given all courts established by the Constitution inherent powers and jurisdiction to ensure that the machinery of justice is duly applied and properly lubricated and not abused. One most important head of such inherent powers of Court is abuse of process which simply means that the Process of the Courts must be used bona fide and properly and must not be abused. In this respect once a court is satisfied that any proceeding before it is an abuse of process, it has the power, and indeed a duty to terminate it.*** See Arubo v. Aiyeleru (1993) 3 N.W.L.R. (Pt. 280) 126 and Okafor v. Attorney General Anambra State (1991) 6 N.W.L.R. (Pt. 200) 659.

In the present case where the Appellants as Defendants having lost in the judgment of the trial court delivered against them on 16th March, 2004 promptly appealed against it the following day 17th March, 2004 by filing their Notice of Appeal and proceeding immediately to file a motion for stay of execution of that judgment using the Notice of Appeal filed, which application was promptly heard and granted by that trial court barely the following week on 26th March, 2004, only for the Appellants to go sleep to without taking the necessary steps to put the appeal on the ground for hearing at the Court of Appeal up to the 9th October, 2009 when the Respon-

dents filed their application at the Court below to strike out the Notice of Appeal for want of diligent prosecution of the appeal, the Court, below was in my view right in invoking its Powers under the law to Protect the abuse of its process by striking out the Notice of Appeal.

B The fact that the appeal filed since 17th March, 2004 had been abandoned is quite obvious that it was being kept on the list of pending appeals to irritate and annoy the Respondents and to continue to keep them away from enjoying the fruits of their success at the trial Court.

C In the result, I find no merit at all in this appeal which is hereby dismissed with N100, 000.00 costs against the Appellants.

D **MUNTAKA-COOMASSIE JSC**

This is an appeal against the decision of the Court of Appeal Ibadan Division which the Court of Appeal now lower court in which judgment was entered in favour of the plaintiffs herein the respondents.

E The action was instituted by the respondents by filing an originating summons containing five (5) DECLARATIONS and four (4) INJUNCTIVE RELIEFS.

F The trial court after hearing the parties in a reserved judgment delivered on 16/3/04 entered judgment in favour of the plaintiffs now the respondents. Four out of the five Declaratory Reliefs were granted by the trial court, only the 5th Declaratory relief was turned down, it is stated as follows:-

**5TH DECLARATORY RELIEF**

G *"A DECLARATION that the 'summary of time table for the Local Government Election in Osun State (2004) issued by the Osun State Independent Electoral Commission which, among other things fixed Local Government Council Election in Osun State to 27th March 2004 are contrary to Section 10 (1) (a), (b) and (2) of the Osun State Electoral Law, 2002, Law No. 5 of 2002 made supplement to Osun State of Nigeria Gazette No. 6 vol. 12 of 27th December, 2002 and therefore null and void and of no effect whatsoever".*

H The trial court also in its judgment refused to grant the plaintiff the 8th injunctive relief thus:-

### 8TH INJUNCTIVE RELIEF

Aggrieved by the judgment of the trial court the Defendants therein lodged an appeal to the lower court and followed it with application for stay of execution which application was heard and granted on 26/3/2004. The Appellants herein on securing the stay refused to take any further action on the appeal as required by the law to enable the appeal reach a stage of hearing of the appeal proper. B

The Respondents on 9/10/2007 unsuccessfully filed motion to set aside the Order of stay granted by the trial court as the application was struck out on 15/1/2008, leaving the appeal unheard due to absence of the record of appeal. The appeal was lying before the lower court since 26th March 2004. C

The respondents herein then, in annoyance, filed an application before the lower court on 9/10/2009 urging that court to strike out the defendants/appellants appeal for want of diligent prosecution. The objection by the appellants was not properly before the lower court as no proper counter/affidavit was filed by the plaintiffs/appellants. The lower court has no option and struck out the dormant appeal for want of diligent prosecution. This necessitates the filing of the appeal to this Hon. Court by the plaintiffs/appellants. D E

The appellants filed a notice of appeal to this court which contains three grounds of appeal thus:-

1. The learned judges of the Court of Appeal erred in law in assuming jurisdiction over an appeal for which their court is not seized of and/or which has not been listed on its cause list. F

2. The learned Judges of the lower court erred in law in dismissing an appeal that has not been entered in their court.

3. The learned judges of the Court of Appeal erred in law in applying their inherent power under Section 6 (6) (a) of the 1999 Constitution and the principle of Ubi Jus Ubi Remedium to assume jurisdiction in an appeal they are not seized of. G

Out of these grounds the appellants in their briefs of argument filed and adopted same on 11th December, 2012. In it the appellants distilled one single issue as follows:- H

*“Whether the lower court can safely assume jurisdiction over a substantive appeal that has not been entered and strike out the same for lack of diligent prosecution under the Court of Appeal Rules 2002.”*

Similarly, the Respondents herein formulated one issue for the

determination of this appeal as follows:-

*“Whether the lower court has jurisdiction to strike out a Notice of Appeal which constitute the abuse of its process”.*

Both learned counsel argued their respective issues and judgment in the appeal was reserved to the 1st day of March, 2013.

B My learned brother Mohammed JSC admirably and, in my view, correctly resolved the two issues filed by the parties. I was opportune to have a preview of this illuminating judgment and agree with all the reasons and conclusions therein adumbrated in the lead judgment just read by him. The appeal, fortunately or unfortunately C is devoid of any merit same is hereby dismissed. The Court of Appeal herein lower court has done a good and proper job. Their decision ought to have been affirmed. The position taken by the learned appellants’ counsel unfortunately is a devise in attempt to deny the D Respondents the ripe fruits of their success in the said judgment. I too in a nut-shell hold that the appeal deserves to be dismissed. I dismiss same I endorse the order as to costs.

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E **NGWUTA JSC**

I had the privilege of reading in advance the lead judgment just delivered by My Lord, Mohammed, JSC.

F Though I entirely agree with the reasoning and conclusion in the lead judgment I desire to chip in a few words by way of contribution.

The facts have been meticulously set out in the lead judgment and I do not need to repeat same. The judgment of the trial court G was delivered on 16/3/2004 and the notice of appeal was filed the next day 17/3/2004. The order for stay of execution of the judgment was granted on 26/3/2004, after which the appellants appeared to have gone into slumber.

H Even when the respondents prayed the Court below, based on the facts averred in their supporting affidavit to strike out the notice of appeal the appellants chose not to file a counter-affidavit and I agree with the respondents that the appellants admitted the said facts. It does not lie in the mouth of the appellant to say that they complied with the condition of appeal and shift the blame for their

tardiness on the Registrar of the Court below.

Whether or not they complied with conditions of appeal, as against the averment of the respondents that they took no step to prosecute the appeal, is an issue of fact but the appellants filed no counter-affidavit.

It is apparent from the circumstances of this case that the appeal filed on 17/3/2004 spent its force on the appellant obtaining the order for stay of execution on 26/3/2004. The appeal was brought in utmost bad faith, and ipso facto, it constitutes abuse of process of Court. See *Central Bank of Niseria v. Saidu H. Ahineo & ors* (2001) 5 SC (Pt. 11) 146; *Edierode v. Ikin* (2001) 12 SC (Pt. 11) 125.

A Court established under the provisions of the Constitution has inherent powers to stop abuse of its process. Section 6 (5) (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides:

*“S.6 (6): The judicial powers vested in accordance with the foregoing provisions of this Section -*

*(a) Shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent Powers and sanctions of a Court of law.”*

There can be no better use of “all inherent powers and sanctions of a Court of law” than to protect the processes of the Court from abuse. In exercise of their inherent powers the Court have always struck out or otherwise disposed brevi manu any matter or cause before it which is an abuse of their process. See *Banjo & ors v. Eternal Sacred order of Cherubim and Seraphim* (1975) 3 SC 37 at 42.

The Court of Appeal was right to have struck out the notice which was merely a ploy to have the execution of the judgment stayed indefinitely.

For the above and the fuller reasons in the lead judgment I also find no merit in the appeal. I dismiss same and adopt the order for costs.

H