

COURT OF APPEAL LAGOS DIVISION
FRIDAY 24TH FEBRUARY, 2012. CA/L/552/2009
CORAM:- K. B. AKA'AH, J. I. OKORO, M. A. DANJUMA, JJCA

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| 1. BELOXXI & CO. LTD. | |
| 2. OBI EZEUDE | APPELLANTS |
| AND | |
| 1. SOUTH TRUST BANK | |
| 2. EXPORT-IMPORT BANK | |
| OF UNITED STATES | RESPONDENTS |
| 3. PRIVATE EXPORT | |
| FUNDING CORPORATION | |

APPEALS - Right of appeal - Final judgment - Once final decision is given by HC sitting at first instance - Anybody aggrieved can appeal to CA - Notwithstanding whether grounds are of fact or mixed law and fact (H1)

APPEALS - Right of appeal - Ground of law - Right against matter that was originally heard by a lower court but went on appeal to HC - Is circumscribed by 1999 Constitution s. 242(1) - Unless ground is of law alone (H2)

APPEALS - Competence of - Objection - The clarification made by trial Judge is not an appealable decision - Hence the appeal of 17th June 2009 is incompetent and liable to be struck out (H3)

ACTIONS - Counter claim - Meaning of - It is claim by defendant against plaintiff - Which is typically concerning and resolved within the same action (H4)

ACTIONS - Counter claim - Status of - Even though a claim and counter claim may exist in the same action - They are two separate and distinct causes of actions (H5)

COURTS - Actions - Functus officio - A learned trial Judge becomes functus officio - Only after he has disposed of the main claim - As well as the counter claim (H6)

FACTS

Before the Federal High Court sitting in Lagos, plaintiffs/appellants commenced this action against defendants/respondents, seeking inter alia for a declaration that upon a proper construction of the true spirit and letters of the loan agreement comprised in (a) proposal letter from 1st respondent dated 29th October 2003 (b) letter from 2nd respondent dated 10th February, 2004 (c) letter of agreement (d) promissory note and (e) letter of guarantee all dated 2nd March 2004, the principal sum of USD 2,207,600 with accrued interests thereon is neither due nor payable now. In reaction, 2nd respondent filed statement of defence and a counter-claim. At the trial and while in the course of giving evidence by 2nd appellant, the court suo motu sought to know if appellants' claim disclosed any cause of action. The court asked learned counsel in the matter to address it on the issue. Written addresses were filed to this end.

In its ruling, the court held that appellants have not disclosed any cause of action. Their suit was therefore dismissed. The court proceeded to fix a date for the hearing of the counter-claim of respondents. Appellants appealed to the Court of Appeal Lagos Division against the dismissal of their suit. Thereafter, appellants equally filed an application before the Federal High Court for stay of proceedings in the matter pending the hearing and determination of their appeal against the ruling dismissing their suit. The court refused to hear appellants' application for stay of proceedings as the same fell on the hearing date for respondents' counter-claim. The court proceeded to explain in a short ruling that it was appellants' suit that was dismissed and not respondents' counter-claim which is distinctive in nature. Appellants were not satisfied with the explanation. Hence, they filed the present appeal before the Court of Appeal.

ISSUES FOR DETERMINATION

1. Whether the learned trial judge was right to assume jurisdiction and proceed to hear the first Defendants/Respondents' counter claim having dismissed suit No. FHC/L/C/1113/2005 on the 30th day of March 2009.

2. Whether the trial judge's ruling on the 10th day of June 2009 explaining that what he dismissed on the 30th day of March 2009 was the plaintiffs claim and not the suit when the said ruling

was being challenged at the court of Appeal amounted to the lower court sitting on appeal against its decision.

HELD (Unanimously dismissing the appeal per **AKA'AH S JCA**)

APPEALS - Right of appeal - Final judgment

1. I have underlined the phrases “as of right” “final decisions” and “sitting at first instance” to underscore the fact that if a matter is being handled by the Federal or State High Court for the first time as opposed to hearing the matter as an appeal, once a final decision (which is a decision that terminates the case) is given, anybody that is aggrieved by that decision has a right of appeal to the Court of Appeal. It does not matter whether the ground/grounds contained in the Notice are grounds of fact or mixed law and fact. (p. 2005 H)

APPEALS - Right of appeal - Ground of law

2. But if the decision being complained of went as an appeal to the Federal or State High Court [i.e. if the matter was originally heard by a Magistrate, District or Area/Customary Court], the right is circumscribed by section 242(1) of the Constitution unless the ground of appeal involves questions of law alone. (p. 2006 A)

APPEALS - Competence of - Objection

3. In the instant case, the matter was being heard by the Federal High Court at first instance. If the objection being taken related to the Notice of Appeal filed on 24th April, 2009 which complained about the ruling delivered on 30th March 2009, I would straightaway overrule the preliminary objection. But the objection was taken on the Notice of Appeal filed on 17th June, 2009 wherein the appellants were questioning the clarification made by the learned trial judge on 10th June 2009 to the effect that it was the Plaintiffs' claim that was dismissed as disclosing no cause of action and not the Plaintiffs' claim as well as the counter claim. The clarification made on 10th June,

2009 is not an appealable decision. I therefore agree with the respondents' contention that the appeal of 17th June, 2009 is incompetent and is liable to be struck out. (p. 2006 B)

ACTIONS - Counter claim - Meaning of

- B **4. A counterclaim is a claim by a defendant against a plaintiff (made after the plaintiff has filed and served the defendant with the statement of claim) which is typically concerning and resolved within the same action. The defendant reverses the law suit on the plaintiff claiming damages in the same action.**
C (p. 2008 C)

ACTIONS - Counter claim - Status of

- D **5. Even though a claim and counter claim may exist in the same action, they are two separate and distinct causes of actions.**

From the legal stand point it is clear that whatever happens to the claim of the plaintiff does not affect the counterclaim. The counter-claim is an entirely different suit altogether and is not dependent on the plaintiffs claim or the main claim.
E (pp. 2008 D/2009 B)

COURTS - Actions - Functus officio

- F **6. A learned trial judge becomes functus officio only after he has disposed of the main claim as well as the counter claim. If he pronounces that the suit is dismissed as in the instant case it will be understood that it is the plaintiffs suit or claim that has been dismissed and he is not inhibited by lack of jurisdiction to go ahead to consider the counter claim. The learned trial Judge was perfectly right to proceed with the counter claim after dismissing the plaintiff's claim for not disclosing a cause of action.** (p. 2009 C)

H **REPRESENTATION**

F. R. Onoja, for the Appellants

Mr. Olumide Aju with Chukwudi Eze, for the Respondents

CASES REFERRED TO

Okonkwo v. C.C.B. (2003) 8 NWLR (pt. 822) 347

Ogbonda v. Eke (1998) 10 NWLR (pt. 568) 73

Stumore v. Campbell & Co. (1892) 1 QB 314

Ogbonna v. A-G Imo State (1992) 2 SCNJ 26

Usman v. Garke (2003) 7 SC 33

B

Jeric Nig. Ltd. v. Union Bank of Nigeria Plc. (2000) 12 SC (pt. 11) 133

Ogili Oko Memorial Farms Ltd. (2008) 34 NSCQR (pt. 11) 157

Technip v. AIC Ltd (2011) 15 NWLR (pt. 1270) 326

C

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, ss. 241(1)(a), 242

D

BOOKS REFERRED TO

Blacks Law Dictionary 7th Edition

Collins Dictionary & Thesaurus International Edition

Halsbury's Laws of England 4th Edition Vol. 36, p. 37 para. 47

Civil Procedure in Nigeria by Fidelis Nwadialo 2nd Edition 2000, p. 392 – 398

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LEAD JUDGMENT BY AKA'AHs JCA

The issue raised in this appeal is whether a trial court can proceed to determine or hear evidence concerning a counter claim after it has dismissed the suit. The argument advanced by the appellants is that the trial court having dismissed the suit becomes functus officio and therefore cannot proceed with the counter - claim.

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It is necessary at this stage to state the background facts leading to this appeal. On 21/10/2005, the present appellants as plaintiffs commenced legal proceedings in the Federal High Court Lagos against the respondents as defendants in Suit No.FHC/L/CS/1113/05 claiming the following declaratory reliefs endorsed on the Writ of Summons:-

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“The plaintiffs’ claim against the defendants jointly and severally is for:

1. A declaration that upon a proper construction of the true spirit and letters of the loan agreement comprised in (a) proposal

letter from the 1st defendant dated 29th October 2003 (b) letter from the 2nd defendant dated 10th February, 2004 (c) LETTER OF AGREEMENT (d) PROMISSORY NOTE and (e) Letter of Guarantee all dated 2nd March 2004, the principal sum of 2,207,600 dollars with accrued interests thereon is neither due nor payable now.

B *2. A declaration that consequent upon the said fundamental breach by the defendants, which affected “payment schedules” and “amount of payment” the plaintiff’s are entitled to withhold payment of installments of the principal sum and interest until the issue of the said breach is resolved or rectified.”*

C The 2nd defendant on being served with the Writ of Summons and Statement of Claim filed its Statement of Defence and counterclaimed. The relevant paragraphs of the Statement of Defence are 5, 6, 7, 8, 9 while the Counterclaim is contained in paragraphs 17, 18, 19 and 21, wherein the Defendant/Counter - Claimant averred as follows:-

E *“5. In response to paragraphs 7 and 8 of the Statement of Claim, the 2nd Defendant avers that the 1st Defendant granted the 1st Plaintiff a loan facility for the purchase of biscuit manufacturing equipment to the tune of 2,207,600.00 dollars which said loan was guaranteed by the 2nd Plaintiff.*

F *6. In further answer to paragraphs 7 and 8 of the Statement of claim, the 2nd Defendant avers that with regard to the loan facility, it was the agreement of the parties that the principal sum shall be repayable semi-annually in not more than 10 approximately equal consecutive installments on July 25 and January 25 respectively, commencing on July 25, 2005 and terminating on January 25, 2010. The 2nd Defendant shall rely on the Promissory Note and Letter*

G *Agreement both dated 2nd March, 2004, and the Guarantee Letter from the 2nd Plaintiff in proof of this averment and the same are hereby pleaded.*

H *7. Further to paragraphs 7 and 8 of the Statement of Claim above, the 2nd Defendant avers that by an Assignment, the 1st Defendant assigned all its rights, title and interest in the promissory Note of Beloxxi & Company Limited dated 2nd March 2004 to the 2nd Defendant. The 2nd Defendant shall rely on the Form of Assignment of credit in proof of this averment and the same is hereby pleaded.*

8. The 2nd Defendant avers that subsequent to the assign-

ment in paragraph 7 above and the plaintiffs' default in making payment on 25th July 2005, it made a formal demand for the payment of the outstanding sum of 2,283,251.92 dollars on the 1st plaintiff and 2nd plaintiff who guaranteed the loan. The 2nd Defendant shall rely on the said demand letters both dated 5th October 2005 and the Plaintiffs are hereby given notice to produce them at the trial. B

9. With respect to the facts averred to in paragraph 13 of the Statement of Claim, the 2nd Defendant avers that the plaintiffs have failed, refused or neglected to pay their indebtedness to the 2nd Defendant under the loan agreement as at when due. C

COUNTER CLAIM

17. The 2nd Defendant avers that with respect to the loan of 2,207,600.00 (dollars) two installments were due for payment namely July 25, 2005 and January 25, 2006 and the Plaintiffs have not paid any of the installments. D

18. The 2nd Defendant avers that the Plaintiffs failed to settle these sums as at when due and in consequence, the 2nd Defendant is entitled under the Promissory Note dated 2nd March, 2004 to claim the entire outstanding amount and interest on the loan granted the Plaintiffs. E

19. The 2nd Defendant avers that it is entitled under the Promissory Note to collection expenses which comprises of the Global Recovery Group fees, Attorney's fees and court costs.

Particulars

(i) Global Recovery collection fees = 583,615.97 dollars F

(ii) Attorney's fees and court fees = 127,034.52 dollars

The 2nd Defendant will at the trial rely on various vouchers, invoices and other relevant documents in proof of this averment.

21. Wherefore the 2nd Defendant counter claims against the Plaintiffs jointly and severally: - G

1) The sum of \$2,207,600.00 (Two Million, Two Hundred and Seven Thousand, Six Hundred U.S. Dollars) being the principal sum in the loan facility granted to the Plaintiffs by the 1st Defendant which sum remains outstanding. H

2) Interest on the said sum as follows: -

(i) 3.15% from 2nd March 2004 to 25 July 2005 [the date of the first default (i.e. 1.15% of Libor rate during the period plus 2%).

(ii) 15.92% from 26th July 2005 to 20th September 2005

[i.e. Libor of 3.92% plus 12%]

(iii) 7.21% from 21st September, 2005 till the date of judgment and until full and final payment is made (i.e. Libor 4.21 plus 3%)”

In the course of giving evidence by the 2nd Plaintiff, the learned trial Judge suo motu sought to know if the Plaintiffs’ claim disclosed any cause of action and asked learned counsel to address him which they did by filing and exchanging written addresses. The written addresses were adopted on 23rd February, 2009. On the 30th March, 2009 the learned trial Judge in a reserved ruling held that no cause of action was disclosed in the Plaintiffs’ suit and proceeded to dismiss the suit when he made the following order: *“This suit is dismissed”*

The plaintiffs appealed against the dismissal of the suit for the non disclosure of a cause of action in their Notice of Appeal dated 24th April, 2009 (see pages 56 - 61 of the records of appeal). On 9th June, 2009 the Plaintiffs filed a motion before the Federal High Court asking for an order staying further proceedings in the suit pending the hearing and determination of the appeal against the ruling dismissing the suit on 30th March, 2009. An affidavit in support of the motion for stay of proceedings along with a written address were filed by the plaintiffs on 10/6/2009. This was on the same date that the court was ready to take evidence on the counter claim. Learned counsel for the plaintiffs drew the court’s attention to the motion for stay of proceedings filed that morning and the learned trial Judge ruled that:-

“Court: I will not countenance such a motion on a trial date”

He then requested learned counsel for the defendants to call their witness. After the witness had been sworn, learned counsel for the Plaintiffs made spirited efforts to stop the trial from proceeding until the learned trial Judge overruled him when he said:

“Court: I have gone through my records. It is clear to me from those records the plaintiffs suit was dismissed not the counter claim which form part of the same proceedings which commenced 24th September 2008”

After this ruling the witness then testified as CCW1 and after he had concluded his evidence, the court invited Plaintiffs counsel to cross examine but instead of cross-examination, learned counsel asked for a date for his motion for stay. The court then adjourned the mo-

tion to 14th July, 2009. The plaintiffs appealed against the explanation given by the learned trial judge that the suit he dismissed on 30th March, 2009 was the Plaintiffs' claim.

This latter appeal is dated 17th June, 2009 and it contains two grounds of appeal from which two issues were formulated as follows:

1. Whether the learned trial judge was right to assume jurisdiction and proceed to hear the first Defendants/Respondents' counter claim having dismissed suit No. FHC/L/C/1113/2005 on the 30th day of March 2009. (Ground 1)

2. Whether the trial judge's ruling on the 10th day of June 2009 explaining that what he dismissed on the 30th day of March 2009 was the plaintiffs claim and not the suit when the said ruling was being challenged at the court of Appeal amounted to the lower court sitting on appeal against its decision. (Ground 2)

The respondents filed Notice of Preliminary Objection contending that the appeal is incompetent and should be dismissed on the ground that there is no appealable decision giving rise to this appeal. Alternatively, it was argued that the two grounds of appeals are grounds other than grounds of pure law, which require leave which was not obtained. Learned counsel for the respondents then formulated a lone issue for determination as follows:

"Whether the ruling of the trial Judge delivered on 30th March, 2009 makes the trial court functus officio as to prevent it from entertaining the Counterclaim?"

The dismissal of a suit is a final decision and Section 241(1)(a) of the constitution gives a right of appeal to an aggrieved party in such a circumstance. The section provides as follows:-

"241- (1) An appeal shall lie from decision of the Federal High court or a High court to the court of Appeal as of right in the following cases -

(a) Final decisions in any civil or criminal proceedings before the Federal High court or a High court sitting at first instance."

I have underlined the phrases "as of right" "final decisions" and "sitting at first instance" to underscore the fact that if a matter is being handled by the Federal or State High Court for the first time as opposed to hearing the matter as an appeal, once a final decision (which is a decision that termi-

nates the case) is given, anybody that is aggrieved by that decision has a right of appeal to the Court of Appeal. It does not matter whether the ground/grounds contained in the Notice are grounds of fact or mixed law and fact. But if the decision being complained of went as an appeal to the Federal or State High Court [i.e. if the matter was originally heard by a Magistrate, District or Area/Customary Court], the right is circumscribed by section 242(1) of the Constitution unless the ground of appeal involves questions of law alone. In the instant case, the matter was being heard by the Federal High Court at first instance. If the objection being taken related to the Notice of Appeal filed on 24th April, 2009 which complained about the ruling delivered on 30th March 2009, I would straightaway overrule the preliminary objection. But the objection was taken on the Notice of Appeal filed on 17th June, 2009 wherein the appellants were questioning the clarification made by the learned trial judge on 10th June 2009 to the effect that it was the Plaintiffs' claim that was dismissed as disclosing no cause of action and not the Plaintiffs' claim as well as the counter claim. The clarification made on 10th June, 2009 is not an appealable decision. I therefore agree with the respondents' contention that the appeal of 17th June, 2009 is incompetent and is liable to be struck out.

Even though I have agreed with the respondents' position that the appeal is incompetent and should be struck out, it is important to consider the arguments proffered by learned counsel to the parties especially the arguments advanced by appellants' counsel. He referred to Blacks Law Dictionary, 7th Edition and Collins Dictionary & Thesaurus, International Edition on the definitions of a suit which is synonymous with a 'case', 'cause', 'lawsuit', 'litigation', 'proceeding' and argued that a suit includes the claim and the counterclaim and that there is only one suit which is FHC/L/CS/1113/2005 which was dismissed on 30th March, 2009. He further submitted that the lower court having dismissed the suit cannot competently assume jurisdiction to continue to entertain any further proceeding under any guise including hearing the 2nd Defendant/Respondent's counter claim. He submitted that once a court of competent jurisdiction or the Court of Appeal gives a judgment, ruling or order it becomes functus offi-

cio. Learned counsel emphasized that what the learned trial Judge dismissed in no mistaken terms was the suit and not the Plaintiffs/Appellants claim. He argued that if it was the plaintiffs' claim that was dismissed the 2nd defendant could competently pursue its counter claim before the lower court.

I wish to state that the learned counsel for the appellants has deliberately chosen to labour under a misconception of law to achieve a set aim namely frustrate the 2nd defendant from taking advantage of the promissory Note and guarantee to enforce the loan agreement. Learned counsel for the respondents pointed out that after the ruling of the lower court made on 30th March, 2009 dismissing the Appellants' claim, the Plaintiffs appealed against the ruling on 24th April, 2009. The grounds of appeal without the particulars read:-

"1. The learned trial judge erred in law when he held that the plaintiffs/Appellants' suit discloses no cause of action against the Defendants/Respondents without considering the acts in the statement of claim filed by the Appellants.

2. The learned trial judge erred in law when he held as follows:-

"It is clear from the declaratory reliefs sought in the instant case and the averments in support of the Plaintiffs/Debtors are wielding obviating facts as a sword and not a shield. The disputes (sic) the due dates of payment to a creditor mainly on the grounds that its debt obligations should not have been assigned/transferred to another creditor and thus the principal sum of the debt and accruing interest is neither due nor payable; the Plaintiffs/Debtors further seek a declaration that they are entitled to withhold payment of installments of principal sum and interests until the issues of breach i.e. non transferability are resolved or rectified. I see no reasonable basis from departing from the strictures already articulated by their esteemed lordships in the Savannah Bank case supra. The suit is dismissed"

3. The learned trial judge further erred in law when he held as follows:-

"This decision of the House of Lords in England was quoted with approval by the Supreme Court in Messrs. Lewis & Peat (N.R.I) v. Akhimien (1996) NWLR (Pt. 240) p. 228 Ogundare JSC (as he then was) put the issue very succinctly when at pages 245 - 246 he said:

...I see no reasonable basis from departing from the strictures already articulated by their esteemed Lordships in the Savannah Bank case supra”

4. *The learned trial judge erred in law when he failed to consider the totality of the appellants’ statement of claim before dismissing the appellants’ suit for non -disclosure of a reasonable cause of action.”*

It is obvious from the grounds of appeal reproduced above that reference was only made to the Plaintiffs’ claim and not the counterclaim.

A counterclaim is a claim by a defendant against a plaintiff (made after the plaintiff has filed and served the defendant with the statement of claim) which is typically concerning and resolved within the same action. The defendant reverses the law suit on the plaintiff claiming damages in the same action. Even though a claim and counter claim may exist in the same action, they are two separate and distinct causes of actions.
In *Okonkwo v C.C.B. (2003) 8 NWLR (Pt. 822) 347*, Tobi J.S.C. held thus at pages 402 - 403.

“A counter - claim though related to the principal action, is separate and independent action and our adjectival law requires that it must be filed separately. The separate and independent nature of a counterclaim is borne out from the fact that it allows the defendant to maintain an action against the plaintiff as effectually as an independent action. As a matter of law, a Counter - claim is a cross action with separate pleadings, judgments and costs.”

In *Ogbona v. Eke (1998) 10 NWLR (Pt.568) 73* the Court of Appeal held at page 79 thus:

“It is not to be doubted that a counterclaim is a separate action which for convenience a defendant may decide to sub-join to his statement of defence. It has all the features of a claim. Hence a plaintiff will need to file a defence to a counterclaim, and indeed, if need be, sub - join a counter claim to his defence: See: Ogbonna v Att-General, Imo State (1992) 1 NWLR (Pt. 220) 647 at 675. The separateness of a counter claim is such that a plaintiff may counter claim to a counter - claim: See Renton Gibbs & Co. v. Neville (1900) 2 Q.B. 181. So, if for any reason the plaintiffs’ claim is stayed, discontinued or dismissed, as for instance being considered frivolous, the

court may nevertheless proceed with the counter claim and still grant the defendant the relief prayed for by his counterclaim” See also: Halsbury’s Laws of England 4th Edition Vol. 36 page 37 paragraph 47; Civil Procedure in Nigeria by Fidelis Nwadialo 2nd Edition 2000 at pages 392 - 398 and Stumore v Campbell & Co. (1892) 1 QB 314 at 317 per Lord Esher Master of the Rolls. B

From the legal stand point it is clear that whatever happens to the claim of the plaintiff does not affect the counter-claim. The counter-claim is an entirely different suit altogether and is not dependent on the plaintiffs claim or the main claim. A learned trial judge becomes functus officio only after he has disposed of the main claim as well as the counter claim. If he pronounces that the suit is dismissed as in the instant case it will be understood that it is the plaintiffs suit or claim that has been dismissed and he is not inhibited by lack of jurisdiction to go ahead to consider the counter claim. The learned trial Judge was perfectly right to proceed with the counter claim after dismissing the plaintiff’s claim for not disclosing a cause of action. C D

The appeal is completely bereft of any merit and it is accordingly dismissed with N50,000.00 costs in favour of the respondents. E

OKORO JCA

I had the privilege of reading in draft the illuminating Judgment of my learned brother, Aka’ahs, JCA, just delivered and I completely agree with him that this appeal is devoid of any scintilla of merit and ought to be dismissed. It is settled law that a counter claim is a separate and independent action which has to be instituted in accordance with the rules of court. Such a claim maintains its uniqueness and stands or falls on its own. As the Claimant is duty bound to lead evidence to prove his claim, so also is the counter-claimant bound to lead evidence to prove his counterclaim. The counter-claim cannot fail simply because the main claim has failed. It has to be determined on its own merit. In many decided cases, the main claim may fail while the counter-claim succeeds and vice verse. Thus a counter-claim is a separate action independent of the main claim. See *Ogbonna v. Attorney General of Imo State* (1992) 2 SCNJ 26; *Usman v. Garke* F G H

2010 Beloxi & Co. Ltd. v. South Trust Bank (2014) 5 KLR Okoro JCA
(2003) 7 SC 33; Jeric Nig. Ltd v. Union Bank of Nigeria Plc. (2000)
12 SC (pt.11) 133; Ogili Oko Memorial Farms Ltd. & Anor. (2008)
34 NSCQR (Pt. 11) 157.

It follows that where the main claim is struck out for whatever reason or even dismissed, it does not affect the counter-claim. The court still reserves the right or the Jurisdiction to determine one way or the other the issues raised in the counter-claim. The argument that since the main claim was dismissed, then the court does not have Jurisdiction to entertain the counter-claim is puerile. It is on this note that I join my learned brother Aka'ahs, JCA to dismiss this appeal and also agree that the Respondents are entitled to costs of N50,000.00. I so hold.

DANJUMA JCA

I have had the benefit of reading in draft the lead judgment of my Lord Kumai Bayang Aka'ahs, (OFR, PJ) and I agree that this appeal has no merit and should be dismissed.

The Appellant was the Plaintiff at the trial wherein the Respondent had counterclaimed. The main claim proceeded to trial and on the 23rd February 2009 addresses were adopted, while by a reserved ruling of 30th March 2009, the Plaintiff's suit was dismissed upon the ground that no cause of action had been disclosed by the claim.

A motion for stay of proceedings in respect of the action (counter claim) pending was sought on the basis that an appeal had been lodged against the order dismissing the claim. An affidavit with a written address sought to be moved on the date fixed for the hearing of the counter claim were discountenanced by the trial judge and the cross appeal was taken rather than cross examine the cross appellant's witness, there was an insistence on going ahead with the motion for stay of proceedings. Appellant's counsel did not have his way. He had his say, though. The Appellant appealed against the explanation that the order dismissing the claim related only to the Plaintiff's claim, not withstanding that his motion was adjourned to 14th July 2009.

A counter claim is a distinct claim from the principal or main claim and shall be heard independently and a judgment given in respect thereof. The stand taken by the trial judge was right and he

had not at all, become functus officio in the hearing of the counter claim, as it was still pending. The observation made appertaining thereto did not erode the justice in the conclusion dismissing the main suit of the Plaintiff, in the circumstances. The term “functus officio” has been defined by this court in a plethora of decisions including Technip v. AIC Ltd (2011) 15 NWLR Pt. 1270, Page 326 at Page 349 B paragraphs D-E wherein I stated thus:

“The term functus officio is defined as one “having performed his/her office” i.e. of an officer or official body without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. In the instant case, the original commission of the court in respect of the matter had not been accomplished, that is the determination of the appeal on its merit was yet to be done to make the court become functus officio.” C

The scenario before the learned trial judge was similar to the D one referred to in the afore-quoted decision of this court. The counter claim still subsisting had not been taken and the trial judge in the same proceedings was still dominus litis the litigation.

Upon this little contribution of mine, I adopt in its entirety the E succinct and articulately robust reasoning and the conclusion in the leading judgment in dismissing the appeal herein. Appeal dismissed for lack of merit. I abide by the consequential order relating to costs.

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