

SUPREME COURT OF NIGERIA
FRIDAY 29TH JANUARY, 2016. SC. 284/2005
CORAM:- S. GALADIMA, M. U. PETER-ODILI, K. M. O.
KEKERE-EKUN, J. I. OKORO, A. SANUSI, JJSC

- | | |
|---|-------------------|
| 1. ALHAJA BARAKAT ALAFIA | APPELLANTS |
| 2. MR. RASAKI ALAFIA | |
| 3. ALHAJA ASIRAT ALAFIA | |
| 4. ALHAJA SIKIRAT ALAFIA | |
| 5. ALHAJA DEHINDE ALAFIA | |
| 6. ALHAJA AMONUTO ABDUL | |
| (Suing as principal members and on behalf of other beneficiaries of the estate of Suberu Adededeji Alafia (deceased) excluding the 3rd and 4th Defendants). | |
| 7. ALHAJI YAKUBU AGBABIAKA | |
| 8. MR. MICHAEL AWOTOYE | |
| 9. ALHAJI GIWA | |
| 10. MR. YAKUBU AJIBOYE | |
| (suing as representatives of tenants/occupiers of No.45 Docemo Street, Lagos.) | |
| AND | |
| 1. GBODE VENTURES NIGERIA LIMITED | |
| 2. ALHAJI TAJUDEEN OLUGBODE | RESPONDENTS |
| 3. ALHAJA AMUDAT ALAFIA | |
| 4. ALHAJA ALIRAT ALAFIA | |

ACTIONS - Court - Jurisdiction - Once a matter is not properly constituted - The court lacks the jurisdiction to entertain it (H1)

JUDGMENTS - Issue - Conclusiveness - Evidence Act s. 60 - Every judgment is conclusive proof of facts directly in issue - And decided by the court against the parties and privies (H2)

JUDGMENTS - Consequential order - Where it is found that an action is improperly constituted - Striking out the action will be appro-

priate - Despite existence of other issues against the judgment (H3)

APPEALS - Court of Appeal - Issues - Determination of - CA whose decision on issue of jurisdiction may be faulted by SC - Should not be debarred from pronouncing on other issues raised in appeal (H4)

APPEALS - Right - Death of 3rd respondent did not extinguish rights of 1st and 2nd respondents - To maintain and prosecute their appeals (H5)

APPEALS - Grounds - Issues - Appellants' argument that failure to expressly tie issues to grounds makes the issue incompetent cannot hold - As it is enough if the issues can be linked (H6)

ACTIONS - Commencement - Validity - No matter how malicious an action may be - As long as it is lawful and constitutional - It cannot be held to be an abuse of court process (H7)

CONTEMPT OF COURT - Committal order - Until committal order made by trial court is challenged and set aside by Court of Appeal - 2nd respondent will remain a convict (H8)

PROPERTY LAW - Registrable instrument - Admissibility - A registrable instrument that has not been registered - Is admissible in proof of such equitable interest - And proof of payment of money (H9)

APPEALS - Issues - Resolution of the question of the Head of family against 3rd respondent - Has no adverse effect on respondents' appeal at the Court of Appeal (H10)

CONTEMPT OF COURT - Committal order - Even if it is found that 2nd respondent was served with Form 48 - The finding would still not have cured the defect in issuance of Form 48 (H11)

FACTS

This action was commenced at the High Court of Lagos State by plaintiffs/appellants suing as principal members for and on behalf of other beneficiaries of the Estate of one late Pa Suberu Adedeji

Alafia, with the exclusion of 3rd & 4th defendants/3rd & 4th respondents. It was in evidence at the trial court that upon the death of Pa Alafia, his properties including the one in dispute i.e. No. 45 Docemo Street Lagos devolved on the seven branches of his family amongst whom are 1st, 2nd and 4th appellants and 3rd and 4th respondents. It is the testimony of 2nd appellant that the property partitioned to him is different from No. 45 Docemo Street. PW6 equally testified that the first six plaintiffs at the trial court had different interests in the properties of the deceased. Appellants filed ex parte motion for several orders including that of interim injunction along with the writ of summons and statement of claim. Thereafter on a later date, the court heard appellants' motion. The court granted the orders sought including an order of injunction restraining respondents and their agents from demolishing or trespassing on No. 45 Docemo Street, pending the hearing and determination of the motion on notice already filed.

Following the grant of the ex parte orders, appellants brought a notice to show cause why the orders of attachment should not be made against respondents. Respondents reacted with a preliminary objection contending that there was non compliance with the mandatory provisions of Sheriff & Civil Process Act and Judgment Enforcement Rules. On 18/06/98, the preliminary objection was partly sustained in an interlocutory ruling of the court. The court in its final judgment on 4/10/99, gave judgment in favour of appellants. Respondents being aggrieved appealed to the Court of Appeal Lagos Division. The court set aside the trial court's ruling of 18/06/98 and the final judgment of 4/10/99. Dissatisfied, appellants have appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i). Whether or not the Lower Court was in grave error by striking out suit No. LD/1042/98 on the Ground that same was not properly constituted before the trial High Court.

“(ii). Considering the Centrality of Alhaja Amudat Alafia who was the 3rd Defendant before the trial High Court, coupled with the totality of the evidence led on her role in the transactions leading to this suit and the fact that it was established that she died long before the prosecution and hearing of the appeals, whether or not the Lower Court was not potentially wrong to have entertained the Defendants/ Respondents' appeals.

(iii). *Was the Lower Court right in refusing to allow the Appellants' preliminary objection against the hearing of the appeals.*

(iv). *Whether or not the Lower Court was right by holding that appeal No. CA/L/297/2001 was/is not a patent abuse of Court process.*

B (v). *Whether or not the Lower Court was right by holding that non-registration of exhibit 2 does not render same inadmissible in evidence.*

C (vi). *Considering the fact that the Lower Court rightly held and agreed with the trial Court to the effect that the 3rd Defendant/Respondent was not the head of the Alafia family at the time the cause of action arose, whether or not the Lower Court was not in error by allowing appeal No. CA/L/297/2001.*

D (vii). *Was the Lower Court not wrong by holding that Form 48 was not personally served on the 2nd Respondent.*

HELD (Unanimously dismissing the appeal per GALADIMA JSC)

E Court - Jurisdiction

1. There is no evidence that all the six appellants merged their respective shares after partition and as such they cannot all sue for and on behalf of themselves. Once a matter is not properly constituted, the Court lacks the jurisdiction to entertain it. (p. 259 C)

JUDGMENTS - Issue - Conclusiveness

G **2. The Appellants have contended that the contents of Exhibit 6 can be varied by the oral testimony of PW1. I do not see how evidence of PW1 contradicts Exhibit 6. To succumb to the contention of the Appellants herein is to fail to comprehend the clear provision of Section 54 of the Evidence Act (now s.60) which provides that every judgment is conclusive proof of facts directly in issue in the case and decided by the Court against the parties and privies. In the absence of any evidence to the contrary as might have been given by witness in the case, the property in dispute remains partitioned by virtue of**

Exhibit 6. (p. 259 E)

JUDGMENTS - Consequential order

3. Another angle upon which the Appellants argue issue No.1 is that the Lower Court ought not to have struck out suit No. LD/1042/98 because of its finding that the action was not properly constituted which was only one of several issues canvassed in respect of the appeal brought against the said judgment. I find this argument absolutely preposterous. A consequential order of a Court that finds that an action is improperly constituted, striking out that action would be quite appropriate in the circumstance, notwithstanding the existence of other issue(s) against the judgment of the trial Court. (p. 260 E)

APPEALS - Court of Appeal - Issues - Determination of

4. The Appellants are also dissatisfied with the decision of the Court below for proceeding to decide other issues having struck out the entire suit. While this Court being the final Court of Appeal can afford not to pronounce on other issues placed before it where it finds that the trial Court lacked jurisdiction, the Court of Appeal whose decision on jurisdiction may be faulted by this Court should not be debarred for considering and pronouncing on such other issue(s) raised in the appeal. It should pronounce on them, and the Court below has rightly done so in this case. I shall not fail to reconsider such issues notwithstanding my stance in issue No. 1. (p. 260G)

APPEALS - Right

5. This portion of the judgment of the Court below is to the effect that the death of the 3rd Respondent could not have extinguished the rights of the 1st and 2nd Respondents to maintain and prosecute their appeals. I agree with the learned counsel for the Respondents that there is no appeal challenging this portion of the judgment of the Court below, it remains unchallenged. It is noted that the question of the 3rd Respondent being or not being the head of Alafia family was raised at the trial High Court only for the purpose of validity and bindingness of Exhibit 2, which is the Lease Agreement executed

by the 3rd Respondent on behalf of ALAFIA FAMILY, including the 6th Appellants. The trial Court disbelieved the testimony of the Respondents that the 3rd Respondent was at all material time the head of Alafia family and for that reason disagreed that Exhibit 2 was binding on the other members of the Alafia family. The Court below held the contrary view. The right of the 1st and 2nd Respondents was not extinguished at the demise of the 3rd Respondent. They still reserved the right of appeal and rightly contended that at the time Exhibit 2 was executed by the 3rd Respondent, she had not died and the exercise was rightly carried out.

I agree that the appeal as fought at the Court below, survived the 3rd Respondent having regards to the grounds of appeal in that Court. In the light of the foregoing, this issue is resolved in favour of the Respondents. (p. 261 G)

APPEALS - Grounds - Issues

6. On the question of failure to expressly tie the issues to grounds of appeal as argued by the Appellants, to my mind, this is one point that should not be stretched beyond its elasticity. The legal authorities relied upon by the Appellants do not quite support the strong position taken by them. The Court below was right when it held at page 1326 of the record thus:

“From the above it is very clear that the principle of law does not apply where an appellant omits to relate the issues formulated to the grounds from which they were so formulated. It is enough, if the issues can be so linked, they cannot legally be said not to arise from the grounds of appeal particularly as the applicable principle of law demands much more than merely linking the issues formulated with the grounds of appeal from which they were formulated.”

This remarkable finding of the Court below is the correct position of the law on the issue. For this, the issue is resolved in favour of the Respondents. (p. 264 C)

ACTIONS - Commencement - Validity

7. Agreed that the concept of an abuse of Court process is not limited to only multiplicity of actions and that it can as-

sume a diverse spectrum, I agree with the respondents in relying on the principle of law that says that where there is right to bring an action, the state of mind of the person exercising the right cannot affect the validity or propriety of exercise of such right. In other words, simply put, however ill-motivated or malicious the action might be, as long as it is lawful and constitutional, that cannot be held to be an abuse of Court process. (p. 265 E)

CONTEMPT OF COURT - Committal order

8. The question here is whether or not the 2nd Respondent has a constitutional right of appeal against the contempt proceedings and eventual committal order made against him therein. He has a right of appeal if he chooses to exercise it. On the state of the law on abuse of Court process, the Appellants require more than the materials they had supplied, to sustain their complaint of abuse of Court process. I agree also with the learned counsel for the Respondents in his submission that even if the materials put forward were to be countenanced, contempt proceedings being quasi - criminal, it cannot be embarked upon by mere admission of counsel of commission of that act of contempt on behalf of the 2nd Respondent; the alleged contemnor. Again as correctly observed by the Court below, the ruling of the learned trial Court, by which the 2nd Respondent was convicted of contempt at all material time subsisted, as the committal order was never quashed, notwithstanding the plea of leniency by the learned counsel for the 2nd Respondent. In law, the said ruling of the trial Court still qualified as decision which was openly appealed against in Appeal No. CA/L/297/2001.

Interestingly, the appellants submitted in their brief of argument that the Court below ought not to have embarked upon the consideration of the Appeal No. CA/L/297/2001 as the said Appeal had become academic, simply because the 2nd Respondent had never, in execution of the committal order been arrested or detained. What a plausible argument! This overlooks the fact that the 2nd Respondent's appeal in CA/L/297/2001 was against the committal order in itself, whether

executed or not. Appellants, with due respect, do not mean that a party affected by a judgment or order of Court cannot appeal against it until same has been executed. The point is that until committal order made by the trial Court is challenged as done in Appeal No. CA/L/297/2001 and set aside as done by the Court below, the 2nd Respondent would remain a “convict” by virtue of the said committal order. In view of the foregoing, this issue is resolved in favour of the Respondents.
(p. 265 G)

PROPERTYLAW - Registrable instrument - Admissibility
9. However, my attention has been drawn to ground 4 from which this issue was formulated. I agree that the issue itself clearly shows that the complaint of the Appellants is only restricted to the holding of the lower Court to the effect that non-registration of Exhibit 2, does not render same inadmissible in evidence. Therefore, their arguments canvassed on absence of Governor’s consent and absence of illiterate jurat on Exhibit 2 would appear tangential and do not go to any real issue. The issue is really that non-registration of Exhibit 2 does not render it admissible. I do not agree with the contention and submissions of the learned silk for the Appellants on the legal effect and consequences of non-registration of this Exhibit. In a number of authorities of this Court, it has been held that a registrable instrument which has not been registered is admissible in proof of such equitable interest and proof of payment of purchaser’s money, or rent etc:

May it be further noted that Exhibit 2 was admissible to show equitable, possessory rights and payment of rent by the 1st and 2nd Respondents. To that extent, the Court below was right when it upturned the decision of the trial Court expunging the said Exhibit from evidence. Again, this issue is resolved in favour of the Respondents. (p. 267 A)

APPEALS - Issues

10. I have read over the holdings of the Court below on pp. 1333-1354 of the Record. The Court quite appreciated the point. The consequence of that finding is that it clearly

knocked-off the bottom of the Appellants' submissions on the issue. The Court rightly held that the issue of who the Head of Alafia family was had no relevance to the case of the parties and the entire appeal. The available evidence, particularly, that of PW1, PW6 and Exhibit '6', which shows the partitioning of the property, clearly renders irrelevant question of who the head of the family was. Flowing from this, the conclusion is that the resolution of the question of the Head of the family, against the 3rd Respondent, has no adverse consequence on the Respondents' appeal at the Court below. The Court rightly allowed the appeal based on the issues before it, notwithstanding its finding that the 3rd Respondent was not a family Head and even if the property in dispute was not a family property. A point has been stressed that issue of head of family was not just considered in vacuo but in relation to the question of the property in dispute being a family property which the 3rd Respondent had legally alienated in his capacity as the head of family on behalf of other members of the family. To this extent, this issue is resolved against the Appellants. (p. 267 H)

CONTEMPT OF COURT - Committal order

11. Finally, issue 7 distilled from ground 14, arose from contempt proceedings conducted at the trial Court in the conviction of the 2nd Respondent, which was set aside by the Court below. A point has been made here, by the learned counsel in his brief that as the record has shown, the ruling of the trial Court resulting in the appeal No. CA/L/257/2001 was not contested at the Court below solely on the question of service of Form 48 or lack of on the 2nd Respondents. One of the points raised was whether or not the Form issued and served on the 2nd Respondent was not defective as to nullify the contempt proceedings. The Court held that it was defective and its issuance was not in compliance with the mandatory requirements of the laid down rules and procedures. This portion of the judgment is not appealed against. This aside, the Court also held that the proceedings and final order of committal issued against the 2nd Respondent was not proper and therefore unfair. I agree with the learned silk for the Respon-

dents when he submitted that even if it is found that the 2nd Respondent was served with Form 48, this finding would still not have cured the defect in issuance of Form 48 as found by the Court below as well as the illegality of the contempt proceedings and the committal order of the trial Court as also
B ***found by the Court below.***

Flowing from the above, this issue ought to be resolved in favour of the Respondents. (p. 268 E)

C **REPRESENTATION**

Olabode Olanipekun Esq. With Olabunkola Araromi (Mrs.) Vennessa Onyemuwa (Mrs.) Oreoluwa Ogunwumiju Esq, for the Appellants Adebowale Kamoru Esq. With Jamiu Agoro Esq., Francis Agunbiade Esq., for the Respondents

D **CASES REFERRED TO**

- MacFoy v. UAC Ltd (1962) AC 152
Madukolu v. Nkemdilim (1962) All NLR 581
Adesanya v. President of FRN (1981) NCLR 38
E Saraki v. Kotoye (1992) 9 NWLR (pt. 264) 156
Savage v. Sarrough (1937) 13 NLR 141
Ogunbambi v. Abowaba (1951) 13 WACA 22
Fakoya v. St. Paul's Church, Sagamu (1966) 1 All NLR 74
Oni v. Arimoro (1973) 3 SC
F Okoye v. Dumez (Nig.) Ltd. (1983) 1 NWLR (pt. 4) 783
Ogunjumo v. Ademolu (1995) 4 NWLR (pt. 389) 265
Norodum v. Ezeani (2001) 5 NWLR (pt. 706) 203
Ajadi v. Okenihun (1985) All NLR 240
G A.G. Ekiti State v. Daramola (2003) 5 SC 70
Adegbite v. Lawal (1948) 12 WACA 398
Ijekwe v. Madu (2000) 14 NWLR (pt. 688) 459

STATUTE REFERRED TO
H Evidence Act, s. 54

LEAD JUDGMENT BY GALADIMA JSC

This appeal emanated from the judgment of the Court of Appeal Lagos Division delivered on 15th day of December, 2004. By

that Judgment, the Court below allowed the Respondents' appeal herein against both the interlocutory and final Judgment of the trial High Court of Lagos State delivered respectively on 18th June, 1998 and 4th October 1999.

Dissatisfied with the said judgment of the Court below, Appellants have appealed to this Court on fourteen grounds of appeal. B

It is noteworthy to state here that the appeals giving rise to the judgment of the Court below are consolidated appeals both filed by the Respondents herein. Appeal No CA/L/297/2001 was filed against the interlocutory Ruling of the learned trial Court delivered on 18th June, 1998 while Appeal No. CA/L/43/2000 was filed against final C judgment of the trial Court delivered on 4th October, 1999.

The following are the relevant facts set out from the records for the determination of issues relating to appeal No.CA/L/297/2001. At the institution of this suit on 6th April, 1998, an ex-parte motion D for several orders, including an order of interim injunction was filed by the Appellants along with the Writ of Summons and Statement of claim. On the 16th April, 1998, arguments of the learned counsel for the plaintiffs (Appellants herein) were taken and on the same day, the learned trial judge granted the orders sought including an order E of injunction restraining all the Defendants (Respondents herein) whether by themselves or by their servants, agents, privies collaborators, or any other persons, howsoever from demolishing constructing and/or further trespassing on the property known as No.45 F Docemo Street, Lagos, pending the hearing and determination of the Motion On Notice already filed.

However, on the 28th May, 1998, consequent upon the ex-parte orders granted as aforesaid, the Appellants filed in Form 49, a Notice to show cause why the order of attachment should not be G made against the Respondents. It should be noted that earlier on, on 11th May, 1998 the Court Registrar had issued Form 48 in respect of the orders made on 16th April, 1998. In reaction, the Respondents filed a Notice of preliminary objection against Form 49 contending H that there was noncompliance with the mandatory provisions of Sheriff and Civil Process Act and the Judgment (Enforcement) Rules. On 18th day of June, 1998, ruling on the Notice of Preliminary Objection was delivered, sustaining it in part, stating that there was compliance with the rules in the case of the 2nd Respondent only. That the

Court was vested with jurisdiction to entertain the Form 49 application in respect of the said 2nd Respondent but declined jurisdiction in respect of the 1st, 3rd and 4th Respondents' application. Having struck out the Form 49 application in respect of the 1st, 3rd and 4th Respondents, the learned trial Judge ordered the arrest of the 2nd Respondents and committed him to prison for disobeying the order of the trial Court until he purged himself of the contempt.

As stated earlier, Appeal No.CA/L/43/2000 was filed against the final judgment of the trial Court. Briefly, in the suit, the property in dispute was originally owned by one PA SUBERU ADEDEJI ALAFIA. When he died intestate on 28th day of November, 1944, his properties including No.45 Docemo Street devolved on the seven branches of his family, amongst whom are the present 3rd and 4th Respondents and 1st, 3rd and 4th Appellants herein as family properties and each had its own share. Exhibit 6 tendered at the trial, and the records show that each child or descendant of this patriarch has his or her separate title, interest, right, possession, as a result of partition of the properties. One crucial finding of the Court below was that the 1st - 6th Appellants who are from different branches of the said Late Pa Suberu Adedeji Alafia family have no common interest, title, possession or otherwise after partitioning in suit No. M/4/57.

In the course of time, the representatives of the family requested that the 3rd Respondent look for a suitable Developer to develop No.45 Docemo Street. Agreement was reached with the 1st and 2nd Respondent after several Developers were approached and considered by the 3rd Respondent herein.

Evidence led by the Respondents at the trial shows that the 3rd Respondent was the head of Suberu Adedeji Alafia family while the 4th Respondent was the principal member of the said family. However, on the 4th October, 1999, the learned trial judge gave judgment in favour of the Appellants and dismissed the counter-claim of the Respondent. This judgment was upturned upon appeal filed by the Respondents to the Court of Appeal. Both the Rulings of 18th June, 1998 and the Judgment of 4th October, 1999 delivered by the trial Court were set aside. The Committal proceedings and the eventual committal order made against the 3rd Respondent were set aside. It also found that the original suit filed by the Appellants at the trial Court was incompetent and same was Struck-out.

Dissatisfied with this judgment, Appellants have appealed to this Court vide their Notice of Appeal containing six grounds of Appeal. Appellants subsequently applied to the Lower Court vide their motion of 19th January, 2005, wherein they sought leave of the Court of Appeal to appeal against its judgment delivered on 15th December, 2004. B

In Appellants' brief of argument deemed filed on 7/3/2007, they distilled from the 14 Grounds the following seven issues:

"(i). Whether or not the Lower Court was not in grave error by striking out suit No. LD/1042/98 on the Ground that same was not properly constituted before the trial High Court. Grounds 1, 2, 6, 7 and 8 C

(ii). Considering the Centrality of Alhaja Amudat Alafia who was the 3rd Defendant before the trial High Court, coupled with the totality of the evidence led on her role in the transactions leading to this suit and the fact that it was established that she died long before the prosecution and hearing of the appeals, whether or not the Lower Court was not potently wrong to have entertained the Defendants/ Respondents' appeals. Grounds 3 and 10 D

(iii). Was the Lower Court right in refusing to allow the Appellants' preliminary objection against the hearing of the appeals. Grounds 12 and 13 E

(iv). Whether or not the Lower Court was right by holding that appeal No. CAL/297/2001 was/is not a patent abuse of Court process. Ground 11 F

(v). Whether or not the Lower Court was right by holding that non-registration of exhibit 2 does not render same inadmissible in evidence. Ground 4

(vi). Considering the fact that the Lower Court rightly held G and agreed with the trial Court to the effect that the 3rd Defendant/ Respondent was not the head of the Alafia family at the time the cause of action arose, whether or not the Lower Court was not in error by allowing appeal No. CAL/297/2001. Grounds 5 and 9

(vii). Was the Lower Court not wrong by holding that Form 48 H was not personally served on the 2nd Respondent. Ground 14"

In the brief of argument settled by Adebowale Kamoru Esq. filed on 14/10/2010 but deemed filed on 9/11/2010, the Learned Counsel for Respondent adopted the brief and relied on the argu-

ment therein. The appellant adopted and relied on their Reply brief dated 31/1/2011 and deemed filed on 28/3/2012.

On 10/11/2015 when this appeal was heard, learned counsel for the Appellants, Olabode Olanipekun Esq. and Adebowale Kamoru Esq. learned counsel for the Respondents respectively adopted their
B respective briefs of argument. While the learned counsel for the appellants urged the appeal to be allowed, learned counsel for the Respondents, on the other hand, urged the Court to dismiss the appeal.

C Now to the consideration of the issues raised by the respective parties for determination. On the FIRST ISSUE, which deals with the decision of the Court below striking out suit No. LD/1042/98 on the ground that the said suit was not properly constituted before the trial High Court, the learned counsel for the Appellants reproduced the
D relevant portion of the judgment of that Court dealing with the issue found on page 1348 of the record.

He submitted that from the evidence given by the witnesses in the case, the property in dispute had not been partitioned among the different branches of Alafia family. It is submitted that there was
E common interest amongst the 1st - 6th Appellants on the strength of Exhibit 6 and Section 54 of the Evidence Act. That Exhibit 6 does not reflect the true and correct position or state of the property about the ownership or sharing of rooms. It is contended that besides the fact that the 7th - 10th Appellants were occupying shops as tenants at
F No. 45 Docemo Street Lagos, buttresses or strengthens the position that there are shops at that address. That all parties are at ad idem on this issue, the only point of difference is in respect of whether or not the 3rd Respondent herein was alive or dead. It is submitted that the
G trial Court had the duty of evaluation of evidence and prescription of probative value to such evidences. Where the trial Court has carried out such duty; it is not the business of the appellate Court to embark on a re-evaluation of evidence with a view to arriving at a different conclusion from that of the trial Judge.

H Relying on paragraph 57 of the Respondents' statement of defence and counter-claim, learned counsel submitted that they conceded at the trial High Court that the Appellants have common interest, even after the partition of the property. It is contended that the Lease Agreement referred to in reliefs (4) and (5) which the Respon-

dents sought the trial High Court to declare as valid and subsisting and thereby asking for specific performance of same in Exhibit 2 made on behalf of the family of Alhaji Adedeji Alafia. It is submitted that from the pleadings and the evidence led at the trial, the judgment of the trial High Court cannot be impeached merely on the ground that suit No ID/1042/98 is improperly constituted. He relies on JOSEPH AFOLABI & ORS v. JOHN ADEKUNLE & ANOR (1983) SC. 98. Therefore striking out the said suit for not being properly constituted cannot lead to Appeal No. CA/L/297/2001 being allowed in full and thereby making any pronouncement on merit in respect of other issues formulated. That this is like putting something on nothing and expects it to stand. Refers MacFoy v. UAC Ltd (1962) AC 152. In the light of the foregoing, the learned counsel for the Appellant has urged this Court to resolve the issue in their favour.

On the first issue, the learned counsel for the Respondents has submitted that the Court below, before reaching the conclusion to strike out suit No. LD/1042/98, on the ground that it was not properly constituted before the trial Court, the Court had extensively reviewed the evidence of the parties at the trial Court, particularly evidence of PW1, PW6, and Exhibit 6, the combination of which revealed that the property in dispute had been partitioned among different members of the 1st - 6th Appellants' family who now had no common interest in the said property. Debunking the contention of the Appellants that Exhibit 6 does not reflect the true or correct position of the state of the property and that the evidence of PW1 ought to be preferred, learned counsel submitted that the content or validity of the said Exhibit was never denied by the Appellants save their wishful contention that the content of the Exhibit can be varied by the oral testimony of PW1 and this goes contrary to the provision of Section 54 of Evidence Act.

On the issue of either mis-joinder or non-joinder of parties, the learned counsel has submitted that since the Appellants did not commence their action in their individual personal capacities but in a representative capacity on behalf of the beneficiaries of the deceased Suberu Adedeji Alafia, the Court below was right in striking out the suit as being incompetent and ought not to have upheld the judgment of the trial Court in favour of the parties that have shown to have interest in the property. Learned counsel has noted that con-

B contrary to the impression given by the Appellants in their argument in
 the brief, the suit was contested by them at the trial Court on the
 basis of Exhibit 6 which affirmed the partition and this point was
 rightly considered by the Lower Court in its judgment at pages 1349
 - 1350 of the record. Another point raised by the learned counsel for
 the Appellants is that the basis upon which issue No.1 was argued is
 that the Court below ought not to have struck out Suit No. LD/1042/
 98 only because of its finding that the action was not properly consti-
 C tuted which was only one of several other issues canvassed in respect
 of the appeal brought against the said judgment. He submitted that
 resolution of the issue of constitution of the action is such that could
 determine the fate of the suit at the Court below, notwithstanding the
 existence of other issues against the judgment of the trial Court.

D In concluding his argument on the issue, learned counsel has
 emphasized the fact that arguments contained in paragraphs 4, 24 -
 26 of the Appellant's brief have no bearing whatsoever on the issue
 being considered and to that extent ought to be discountenanced.

E Issue No.1 under consideration is crucial to the determination
 of this appeal. It deals with the decision of the Court below to strike
 out Suit No. LD/1042/98 because the said suit was not properly consti-
 tuted before the trial Court. On page 1348 of the record, the Court
 below carefully reviewed the evidence of PW1 and PW6 given at the
 trial, reproduced thus:

F *"PW1 - RASAKI ALAFIA, one of the surviving children of the
 original owner of the property in issue testified under cross-examina-
 tion at pages 48 and 49 of the record respectively thus:*

G *"It is true that the 2nd, 5th, and 6th plaintiffs were not given
 any part of No 45 Docemo Street, Lagos according to Exhibit 6. My
 own share of the properties is at No.104 Odunfa Street, Lagos."*

On his part, PW6 stated at page 79 of the record as follows:

H *"It is true that the first six plaintiffs have different interest in the
 three properties i.e. Nos. 45 and 46 Docemo Street, Lagos and 104
 Odunfa Street, Lagos."*

The learned trial judge in the light of the foregoing evidence
 held, inter alia, at page 205 of the record thus:

*"Each person becomes the absolute owner of his or her own
 portion, which cannot be removed from him without his or her con-
 sent...."*

The Court below having regards to the above extracts from the evidence of PW1 and PW6 concluded and held as follows:

“It is true that the first six plaintiffs have different interests in the three properties i.e. Nos. 45 and 46 Docemo Street, Lagos and No. 104, Odunfa Street, Lagos.”

Besides evidence of PW1 and PW6, the Court below relied on Exhibit 6, the consent judgment of 1957 which partitioned the said property at No.45 Docemo Street Lagos. It was on this premise that the Court below concluded that in so far as the 1st - 6th Appellant commenced the action as principal members for and on behalf of other beneficiaries of the Estate of Suberu Adedeji Alafia (deceased), the action was not properly constituted as the 1st - 6th Appellants had no common interest in the said property.

There is no evidence that all the six appellants merged their respective shares after partition and as such they cannot all sue for and on behalf of themselves. Once a matter is not properly constituted, the Court lacks the jurisdiction to entertain it. See: MADUKOLU v. NKEMDILIM (1962) ALL NLR 581; ABRAHAM ADESANYA v. PRESIDENT OF FRN (1981) NCLR 38.

The Appellants have contended that the contents of Exhibit 6 can be varied by the oral testimony of PW1. I do not see how evidence of PW1 contradicts Exhibit 6. To succumb to the contention of the Appellants herein is to fail to comprehend the clear provision of Section 54 of the Evidence Act (now s.60) which provides that every judgment is conclusive proof of facts directly in issue in the case and decided by the Court against the parties and privies. In the absence of any evidence to the contrary as might have been given by witness in the case, the property in dispute remains partitioned by virtue of Exhibit 6. This point was carefully considered by the Court below, when it considered the vital part of the Respondents' pleading in its judgment, the extract of which is found on page 1350 of the record. The Court held thus:

“In paragraph 2 (viii) of the consequential Amendment to the Reply to statement of Defence and counter-claim dated 14th September, 1999 and deemed filed on 16th September, 1999 to be found at pages 32 - 37 of the record, the respondents pleaded as

follows:

‘(viii). having partitioned or divided the property, each beneficiary therefore is entitled as of right to exercise his or her right on his or her own portion independent of any member or head of the family.’

B The law has always been that partition of family land means a permanent division of the land for purposes not only of use but ownership- See *Etuwewe v. Etuwewe* (1967) NMLR 41.”

C Besides the foregoing observations, the Court below rightly held further on the same place as follows:-

“The partitioning of family property is therefore one of the method by which family property can be determined in favour of constituent members or branches of a family, where the division is among constituent branches of the family, a new family ownership is D thereby created in as many places as the property is decided, each branch becoming the owner of the portion or position partitioned to it. See *Balogun v. Balogun* supra; *Majekodunmi v. Tijani* 1 NLR 74; *Osinowo v. Gbamgboye* (1941) 7 WACA 69, *Anyanbunsi v. Ugwunze* (1995) 5 NWLR (Pt.401) 255; *Oloruntemi v. Asho* (2000) 2 NWLR E (pt.643) 143.”

Another angle upon which the Appellants argue issue No.1 is that the Lower Court ought not to have struck out suit No. LD/1042/98 because of its finding that the action was not properly constituted which was only one of several issues canvassed in respect of the appeal brought against the said judgment. I find this argument absolutely preposterous. A consequential order of a Court that finds that an action is improperly constituted, striking out that action would be quite appropriate in the circumstance, notwithstanding the existence of other issue(s) against the judgment of the trial Court.

The Appellants are also dissatisfied with the decision of the Court below for proceeding to decide other issues having struck out the entire suit. While this Court being the final Court of Appeal can afford not to pronounce on other issues placed before it where it finds that the trial Court lacked jurisdiction, the Court of Appeal whose decision on jurisdiction may be faulted by this Court should not be debarred for considering and pronouncing on such other issue(s) raised in the appeal.

It should pronounce on them, and the Court below has rightly done so in this case. I shall not fail to reconsider such issues notwithstanding my stance in issue No. 1. See FRANCIS ADESEGUN KATTO v. CENTRAL BANK OF NIGERIA (1991) 9 NWLR (pt. 214) 126 at 149.

The resolution of the first issue in this appeal could have effectively determined this appeal. However, the fact that the Court below having, in the alternative, resolved some embedded legal peripheral issues raised in this appeal and also in view of the copious replies of the Appellants in their Reply brief, I shall briefly consider those other issues.

Issue No. 2 deals with the legal consequence of the death of the 3rd Respondent herein, who was the 3rd Defendant before the trial Court and the 3rd Respondent at the hearing of the appeals at the Court below. The contention of the Appellants is that the appeal at the Court below was incompetent as a result of the death of the 3rd respondent. It is not correct as submitted by the Appellants that the Court below held that the death of the 3rd Respondent did not extinguish the action or appeals against the 3rd Respondent. The correct holding of the Court below on the issue, as can be found at page 1334 of the record, is as follows:

"I am of the view that judging from the facts of this case the death of 3rd appellant does not mean the death of this appeal. I agree with the submission of learned counsel for the appellants that the headship of Alafia family was not contested in the Court below in vacuo but in relation to the validity of exhibit 2 and that the demise of 3rd appellant cannot be said to have extinguished the rights of 1st and 2nd appellants to prosecute this appeal in view of the judgment of the Lower Court. It has to be remembered that the appellants did counter claim at the Lower Court."

This portion of the judgment of the Court below is to the effect that the death of the 3rd Respondent could not have extinguished the rights of the 1st and 2nd Respondents to maintain and prosecute their appeals. I agree with the learned counsel for the Respondents that there is no appeal challenging this portion of the judgment of the Court below, it remains unchallenged. It is noted that the question of the 3rd Respondent being or not being the head of Alafia family was raised at

the trial High Court only for the purpose of validity and bindingness of Exhibit 2, which is the Lease Agreement executed by the 3rd Respondent on behalf of ALAFIA FAMILY, including the 6th Appellants. The trial Court disbelieved the testimony of the Respondents that the 3rd Respondent was at all material time the head of Alafia family and for that reason disagreed that Exhibit 2 was binding on the other members of the Alafia family. The Court below held the contrary view. The right of the 1st and 2nd Respondents was not extinguished at the demise of the 3rd Respondent. They still reserved the right of appeal and rightly contended that at the time Exhibit 2 was executed by the 3rd Respondent, she had not died and the exercise was rightly carried out.

I agree that the appeal as fought at the Court below, survived the 3rd Respondent having regards to the grounds of appeal in that Court. In the light of the foregoing, this issue is resolved in favour of the Respondents.

Issue No.3 raised by the Appellants is a complaint that the Lower Court did not allow the Appellants' preliminary objection against the hearing of the Appeals. It is submitted by the Appellants that the Court below wrongly refused the preliminary objection. That the Respondents' appeals do not arise from any judgment given in their favour by the trial High Court, which dismissed their claims. It is submitted that in so far as 7th - 10th Respondents herein have not filed appeal against the dismissal of their claims by the trial High Court, any ground of appeal or argument in their brief against them can only be academic or moot exercise and speculative.

Further to the foregoing submissions, learned silk has argued in the brief as follows: That grounds 7, 8, 9 and 10 of the notice of appeal and some issues of the Respondents set out in their brief at the lower Court touched either wholly or substantially on the said set of Appellants. It is contended that issue VI of the Respondents' brief at the lower Court, argued on pp 39 -46, relates to the 7th - 10th Appellants and paragraphs 5.7, 5.8, 5.9, 5.31, 5.32, 5.33, 5.38, 5.40, and 5.44 of the said brief all relate to the same set of Appellants. Yet the trial High Court dismissed their claims. It is submitted that as long as all the foregoing grounds of appeal are incompetent, the issues formulated thereon are automatically incompetent.

The Appellants made a two-pronged approach to their complaint under this issue at the Court below: That the Respondents had no right to appeal against the 7th - 10th Appellants whose claims at the trial Court were dismissed and that grounds 7, 8, 9, and 10 of the Notice of Appeal and issues (iii) (iv) (vi) and (vii) formulated thereon were incompetent. Secondly, that issues raised by the Respondents in their brief of argument and so argued are not tied to any of the grounds of appeal. B

I have observed that the record of appeal reveals that the Appellants herein had raised a preliminary objection to the appeals on several grounds upon which this instant issue is now being argued. C The Court below considered the said preliminary objection alongside the main appeal and dismissed the preliminary objection in its entirety. As noted, it is this decision of the Court below that is now being complained of by grounds 12 and 13 of the Notice of Appeal filed in D this Court and upon which this issue is formulated.

On the issue of right of appeal by the Respondents against the 7th - 10th Appellants, it is apt to reproduce the Appellants ground of objection, which reads:

“All grounds of appeal relating to the 7th, 8th, 9th and 10th Respondents (now 7th - 10th Appellants) whose case was discounted by the lower Court and who have not cross-appealed are incompetent and all portions of and arguments in the appellants (now Respondents) brief relating to them are liable to be struck out.” E F

The argument of the Appellants on this issue in submitting that the Respondents had no right of appeal against the judgment of the trial High Court is on the premise that the claims of the 7th - 10th Appellants were dismissed and there was no judgment in favour of the said 7th - 10th Appellants which could be appealed against by G the Respondents.

On pages 1330 -1331 of the Record, one of the crucial findings made by the Court below related to the claims of the 7th - 10th appellants at the trial Court and its judgment. The Court below found, as a fact, that some of the claims awarded to the Appellants, particularly 7th - 10th in accordance to their claims 18(B) (i) and (ii); H

These claims read as follows:

“18 (B) - the 7th - 10th plaintiffs claim against the Defendants jointly and or severally as follows:

(i) *A declaration that having paid their rents in full, each of the plaintiffs was entitled to a peaceful enjoyment of the apartments which each of them held as tenant within the premises situated at No.45 Docemo Street, Lagos until his tenancy or rent expired.*

(ii) *A declaration that the purported notice to quit received by the plaintiffs on 21st March, 1999 but dated February, 1998 and emanating from or signed by the 2nd Defendant is illegal null and void and of no effect whatsoever.”*

The foregoing findings of the Court below form the basis upon which the Appellants’ ground of objection was dismissed. The Court below did rightly find that the trial Court correctly, decided in favour of the 7th-10th respondents. In the circumstance, the Appellants’ line of argument to the contrary cannot hold.

On the question of failure to expressly tie the issues to grounds of appeal as argued by the Appellants, to my mind, this is one point that should not be stretched beyond its elasticity. The legal authorities relied upon by the Appellants do not quite support the strong position taken by them. The Court below was right when it held at page 1326 of the record thus:

“From the above it is very clear that the principle of law does not apply where an appellant omits to relate the issues formulated to the grounds from which they were so formulated. It is enough, if the issues can be so linked, they cannot legally be said not to arise from the grounds of appeal particularly as the applicable principle of law demands much more than merely linking the issues formulated with the grounds of appeal from which they were formulated.”

This remarkable finding of the Court below is the correct position of the law on the issue. For this, the issue is resolved in favour of the Respondents.

Issue 4 raises question of abuse of Court process. It constitutes one of the grounds raised in the Appellants’ Notice of Preliminary objection filed at the Court below and was dismissed. The Court in its judgment; considering the relevant authorities on the subject matter, held that the Appellants failed to supply materials upon which the complaint of abuse of Court process could be sustained. The Court at page 1333 of the record held:

“Applying the above principles to the facts of this case with

particular reference to interlocutory appeal, can it be said that Appeal No. CA/L/297/2007 is an abuse of Court process. The answer, with greatest respect to senior counsel for the respondents, is definitely in the negative. It is clear that for an action to be declared to be an abuse of process of Court, it must be shown clearly that there are two or more actions between the same parties in respect of the same subject matter.... All the facts relied upon by learned counsel for the respondents such as alleged admission of the former counsel for the respondents etc are very irrelevant to the issue of abuse of Court process having regards to the decided authorities on the subject.”

The Appellants at page 24 of their brief of argument disagree with the Court's conclusion and contended that it misconceived the law by restricting the complaint of abuse of Court process to multiplicity of action. They argue that facts and circumstances put forward by them constitute good grounds for holding that Appeal No. CA/L/297/2001 constitute an abuse of Court process. Most importantly, that the 2nd Respondent was in contempt of Court order and having begged for leniency and withdrawn the earlier appeal filed by him against his committal order, to resuscitate the said appeal, is a patent abuse of Court process.

Agreed that the concept of an abuse of Court process is not limited to only multiplicity of actions and that it can assume a diverse spectrum, I agree with the respondents in relying on the principle of law that says that where there is right to bring an action, the state of mind of the person exercising the right cannot affect the validity or propriety of exercise of such right. In other words, simply put, however ill-motivated or malicious the action might be, as long as it is lawful and constitutional, that cannot be held to be an abuse of Court process. See SARAHI v. KOTOYE (1992) 9 NWLR (pt. 264) 156 at 190. The question here is whether or not the 2nd Respondent has a constitutional right of appeal against the contempt proceedings and eventual committal order made against him therein. He has a right of appeal if he chooses to exercise it. On the state of the law on abuse of Court process, the Appellants require more than the materials they had supplied, to sustain their complaint of abuse of Court process. I agree also with the learned counsel for the Respondents in his submis-

sion that even if the materials put forward were to be countenanced, contempt proceedings being quasi - criminal, it cannot be embarked upon by mere admission of counsel of commission of that act of contempt on behalf of the 2nd Respondent; the alleged contemnor. Again as correctly observed by
 B *the Court below, the ruling of the learned trial Court, by which the 2nd Respondent was convicted of contempt at all material time subsisted, as the committal order was never quashed, notwithstanding the plea of leniency by the learned counsel*
 C *for the 2nd Respondent. In law, the said ruling of the trial Court still qualified as decision which was openly appealed against in Appeal No. CA/L/297/2001.*

Interestingly, the appellants submitted in their brief of argument that the Court below ought not to have embarked
 D *upon the consideration of the Appeal No. CA/L/297/2001 as the said Appeal had become academic, simply because the 2nd Respondent had never, in execution of the committal order been arrested or detained. What a plausible argument! This overlooks the fact that the 2nd Respondent's appeal in CA/L/*
 E *297/2001 was against the committal order in itself, whether executed or not. Appellants, with due respect, do not mean that a party affected by a judgment or order of Court cannot appeal against it until same has been executed. The point is*
 F *that until committal order made by the trial Court is challenged as done in Appeal No. CA/L/297/2001 and set aside as done by the Court below, the 2nd Respondent would remain a "convict" by virtue of the said committal order. In view of the foregoing, this issue is resolved in favour of the Respondents.*

G On issue No. 5, learned senior counsel for the Appellants has submitted, particularly in his Reply brief, that the Respondents' argument on admissibility of Exhibit 2, the case of OKOYE v. DUMEZ (NIG.) LTD (1983) 1 NWLR (pt. 4) 783 is not relevant to the issue under consideration. It is submitted that the 1st and 2nd Respondents herein have not acquired any interest; legal or equitable in the property situate at No. 45, Docemo Street Lagos, in virtue of this,
 H Exhibit 2, is a one-sided document "orchestrated" without concurrence of all the principal members of Alafia family, particularly the 1st - 6th Appellants, who are owners of the said property. To this extent,

the learned silk argues, Exhibit 2 is void ab initio, and the 1st and 2nd Respondents did not acquire any legal or equitable interest by virtue of same.

However, my attention has been drawn to ground 4 from which this issue was formulated. I agree that the issue itself clearly shows that the complaint of the Appellants is only restricted to the holding of the lower Court to the effect that non-registration of Exhibit 2, does not render same inadmissible in evidence. Therefore, their arguments canvassed on absence of Governor's consent and absence of illiterate jurat on Exhibit 2 would appear tangential and do not go to any real issue. The issue is really that non-registration of Exhibit 2 does not render it admissible. I do not agree with the contention and submissions of the learned silk for the Appellants on the legal effect and consequences of non-registration of this Exhibit. In a number of authorities of this Court, it has been held that a registrable instrument which has not been registered is admissible in proof of such equitable interest and proof of payment of purchaser's money, or rent etc: SAVAGE v. SARROUGH (1937) 13 NLR 141: See OGUNBAMBI v. ABOWABA (1951) 13 WACA 22, FAKOYA v. ST. PAUL'S CHURCH SAGAMU (1966) 1 ALL NLR 74: ONI v. ARIMORO (1973) 3 SC. OKOYE v. DUMEZ (NIG.) LTD (1983) 1 NWLR (pt. 4) 783 . OGUNJUMO v. ADEMOLU (1995) 4 NWLR (pt. 389) at 265.

May it be further noted that Exhibit 2 was admissible to show equitable, possessory rights and payment of rent by the 1st and 2nd Respondents. To that extent, the Court below was right when it upturned the decision of the trial Court expunging the said Exhibit from evidence. Again, this issue is resolved in favour of the Respondents.

Issue No.6 does not need my lengthy discourse. Arguments put forward by the Appellants can only be sustained, if and only if the property in dispute is held to be a family property. If it were then, the finding of the trial Court which the Court below upheld to the effect that the 3rd Respondent was not the Head of the Alafia Family, and could not have executed Exhibit 2 in that capacity, would have weakened the case of the Respondents at the Court below.

I have read over the holdings of the Court below on pp.

1333-1354 of the Record. The Court quite appreciated the point. The consequence of that finding is that it clearly knocked-off the bottom of the Appellants' submissions on the issue. The Court rightly held that the issue of who the Head of Alafia family was had no relevance to the case of the parties and the entire appeal. The available evidence, particularly, that of PW1, PW6 and Exhibit '6', which shows the partitioning of the property, clearly renders irrelevant question of who the head of the family was. Flowing from this, the conclusion is that the resolution of the question of the Head of the family, against the 3rd Respondent, has no adverse consequence on the Respondents' appeal at the Court below. The Court rightly allowed the appeal based on the issues before it, notwithstanding its finding that the 3rd Respondent was not a family Head and even if the property in dispute was not a family property. A point has been stressed that issue of head of family was not just considered in vacuo but in relation to the question of the property in dispute being a family property which the 3rd Respondent had legally alienated in his capacity as the head of family on behalf of other members of the family. To this extent, this issue is resolved against the Appellants.

Finally, issue 7 distilled from ground 14, arose from contempt proceedings conducted at the trial Court in the conviction of the 2nd Respondent, which was set aside by the Court below. A point has been made here, by the learned counsel in his brief that as the record has shown, the ruling of the trial Court resulting in the appeal No. CA/L/257/2001 was not contested at the Court below solely on the question of service of Form 48 or lack of on the 2nd Respondents. One of the points raised was whether or not the Form issued and served on the 2nd Respondent was not defective as to nullify the contempt proceedings. The Court held that it was defective and its issuance was not in compliance with the mandatory requirements of the laid down rules and procedures. This portion of the judgment is not appealed against. This aside, the Court also held that the proceedings and final order of committal issued against the 2nd Respondent was not proper and therefore unfair. I agree with the learned silk for the Respon-

dents when he submitted that even if it is found that the 2nd Respondent was served with Form 48, this finding would still not have cured the defect in issuance of Form 48 as found by the Court below as well as the illegality of the contempt proceedings and the committal order of the trial Court as also found by the Court below. B

Flowing from the above, this issue ought to be resolved in favour of the Respondents.

In sum, all the issues set out for determination having been resolved in favour of the Respondents, the appeal is dismissed. The decision of the Court below allowing Appeal No. CA/L/43/2000 in part and striking suit No. LD/1042/98 is hereby affirmed. I make no order as to costs. Parties to bear their costs in the circumstance of this case. C

D

PETER-ODILI JSC

I am in agreement with the judgment just delivered by my learned brother, Suleiman Galadima JSC and I shall show my support to the reasoning with some comments of mine. E

This is an appeal from the judgment of the Court of Appeal, Lagos Division coram: Aka'ahs, Onnoghen and Dattijo Muhammad JJCA delivered on the 15th day of December, 2004 allowing the appeal filed by the Appellants against the judgment of the trial High Court delivered on 4th October, 1999 by Honourable Justice A. O. Silva. F

It is to be noted that the appeals giving rise to the judgment of the Court below are consolidated appeals both filed by the Respondents herein. Appeal NO. CA/L/297/2001 was filed against the interlocutory rulings of the learned trial Court delivered on the 18th June, 1998 while Appeal NO. CA/L/43/2000 was filed against the final judgment of the trial Court delivered on the 4th October, 1999. Both appeals were consolidated by order of the Court below resulting into the judgment delivered on the 15th day of December, 2004. G H

The facts are well captured in the lead judgment which I have adopted as mine.

Olabode Olanipekun Esq. of counsel for the Appellants on the 10th day of November, 2015 date of hearing adopted their Brief

Argument - which was settled by Chief Wole Olanipekun SAN filed on the 25/7/2006 and deemed filed on 7/3/07. Learned Senior Advocate had identified seven issues for determination in the said Brief of Argument which are thus:-

(i) WHETHER OR NOT THE LOWER COURT WAS NOT IN GRAVE ERROR BY STRIKING OUT SUIT NO.LD/1042/98 ON THE GROUND THAT SAME WAS NOT PROPERLY CONSTITUTED BEFORE THE TRIAL HIGH COURT - GROUNDS 1, 2, 6, 7 & 8.

(ii) CONSIDERING THE CENTRALITY OF ALHAJA AMUDAT ALAFIA WHO WAS THE 3RD DEFENDANT BEFORE THE TRIAL HIGH COURT, COUPLED WITH THE TOTALITY OF THE EVIDENCE LED ON HER ROLE IN THE TRANSACTIONS LEADING TO THIS SUIT AND THE FACT THAT IT WAS ESTABLISHED THAT SHE DIED LONG BEFORE THE PROSECUTION AND HEARING OF THE APPEALS, WHETHER OR NOT THE LOWER COURT WAS NOT PATENTLY WRONG TO HAVE ENTERTAINED THE DEFENDANTS/RESPONDENTS' APPEALS - GROUNDS 3 AND 10.

(iii) WAS THE LOWER COURT RIGHT IN REFUSING TO ALLOW THE APPELLANTS' PRELIMINARY OBJECTION AGAINST THE HEARING OF THE APPEALS- GROUNDS 12 AND 13.

(iv) WHETHER OR NOT THE LOWER COURT WAS RIGHT BY HOLDING THAT APPEAL NO. CA/L/297/2001 WAS/IS NOT A PATENTLY ABUSE OF COURT PROCESS - GROUND 11.

(v) WHETHER OR NOT THE LOWER COURT WAS RIGHT BY HOLDING THAT NON-REGISTRATION OF EXHIBIT 2 DOES NOT RENDER SAME INADMISSIBLE IN EVIDENCE - GROUND 4.

(vi) CONSIDERING THE FACT THAT THE LOWER COURT RIGHTLY HELD AND AGREED WITH THE TRIAL COURT TO THE EFFECT THAT THE 3RD DEFENDANT/RESPONDENT WAS NOT THE HEAD OF THE ALAFIA FAMILY AT THE TIME THE CAUSE OF ACTION AROSE, WHETHER OR NOT THE LOWER COURT WAS NOT IN ERROR BY ALLOWING APPEAL NO. CA/L/297/2001 - GROUNDS 5 AND 9.

(vii) WAS THE LOWER COURT NOT WRONG BY HOLDING THAT FORM 48 WAS NOT PERSONALLY SERVED ON THE 2ND RESPONDENT - GROUND 14.

For the respondents, learned counsel, Adebowale Kamoru adopted the Brief of argument he settled, filed on the 14/6/2010 and

was deemed filed on the 9/11/10. He adopted the issues as formulated by the appellants. The said drafted issues shall be used by me in the determination of this appeal.

ISSUE NO.1:

Whether or not the Lower Court was in grave error by striking out Suit NO. LA/1042/98 on the ground that same was not properly constituted before the trial Court - Grounds 1, 2, 6, 7 & 8. B

Canvassing for the Appellants, Mr. Olanipekun stated that the evaluation of evidence and ascription of probative value to evidence are the primary functions of a Court of trial which saw, heard and assessed the witness. That, that being the case, the evidence of PW1 having been properly evaluated by the trial High Court and so it was not the business of the appellate Court to embark on a re-evaluation of evidence with a view to arriving at a different conclusion from that of the Court of first instance. He cited *Norodum v. Ezeani* (2001) 5 NWLR (Pt. 706) 203 at 210; *Ajadi v. Okenihun* (1985) All NLR 240 at 248; *A.G. Ekiti State v. Daramola* (2003) 5 SC 70 at 106. C D

That Plaintiffs/Appellants have a common interest in the property at No. 45 Docemo Street, Lagos the subject matter of the suit and so were entitled to bring a representative action. He cited *Ukatta v. Ndinaeze* (1997) 4 NWLR (pt. 499) 251 at 275; *Ndulue v. Ibezim* (2002) 12 NWLR (pt. 780) 139. E

Learned counsel said even if Suit NO. LD/1042/98 is not properly constituted on the ground that there is no claim in favour of one or two of the plaintiffs that fact alone cannot defeat the entire action or the judgment of the trial Court, because if a representative action is not properly constituted, it could be treated as a personal action. He relied on *Adegbite v. Lawal* (1948) 12 WACA 398; *Ijekwe v. Madu* (2000) 14 NWLR (Pt. 688) 459 at 479. F G

He further stated for the Appellants that by striking out Suit No. LD/1042/98, the Court below adopted a strict technical approach or relied on technicality at the expense of substantial justice. He cited *Maesk Line v. Addide Investment Ltd* (2002) 11 NWLR (Pt. 778) 317 at 383; *State v. Gwonto* (1983) 1 SCNLR 142 at 160 etc. H

Mr. Kamoru of counsel for the Respondents contended that the Plaintiffs/Appellants commenced the action in a representative capacity and so it is erroneous to argue for the reliefs to be granted in favour of the individuals who are some of the plaintiffs in the repre-

sentative capacity. That they plaintiffs deemed to have a common interest there cannot be a question of severance of the plaintiffs as argued by the Appellants. He cited *Nwangwuma v. Ikunade* (1992) 8 NWLR 192; *Oragbode v. Onitiju* (1962) 1 All NLR 32 etc.

B It is common ground between the parties that the property had been partitioned but the stand of the Appellants is that in spite of the partition, the Appellants had common interest for which the representative action can be pursued jointly in order to derive the benefits among themselves.

C The Respondents rejected that position on the ground that, with the partition, the interests became separated and cannot be pursued in a representative capacity, the interests no longer common among the parties. That the striking out of the suit by the Court below was not properly constituted before the trial High Court was D correct.

I shall refer to excerpts from the judgment of the Court of Appeal, thus:-

E *"It is clear from the evidence above and I agree with learned counsel for the Appellants that the Respondents, particularly 1st - 6th Respondents have no common interest in the suit with reference to the property in issue situate and lying at No.45 Docemo Street, Lagos and that the Lower Court is in error in holding that the said Respondents have a common interest despite its earlier finding that the said F property had been partitioned. By virtue of some of the declarations granted by the lower Court, some of the Respondents who are not entitled to the property in issue now have interest therein contrary to the partition, which should not be the case. The error arose in still treating the property in issue as belonging to the family of Suberu G Adedeji Alafia (deceased) despite the partition."*

That Court below stated further as follows:-

H *"Learned senior counsel for the Respondents has treated the issue as being one of either mis-joinder or non-joinder of parties. This is, with respect, not the case here. The case is simply whether the 1st to 6th Respondents have a common interest in the subject matter of litigation so as to institute an action in respective capacity. It is the law that the persons who are to be represented and the person or persons representing them should have the same interest in the cause or matter - See Nwanguma v. Ikunade (1992) 8 NWLR 192".*

The Court of Appeal stated further thus:-

“In Paragraph 2 (iii) of the Consequential Amendment to the reply Statement of Defence and counter-claim dated 14th September, 1999 and deemed filed on 16th September, 1999 to be found at pages 32 - 37 of the record, the Respondents pleaded as follows: B
‘(viii) having partitioned or divided the property, each beneficiary thereof is entitled as of right to exercise his or her right on his or her own portion independent of any member or head of the family’”

The above is very correct and the lower Court did find accordingly. The law has always been that partition of family land means a permanent division of the land for purposes not only of use but ownership C See Etunwewe v. Etuwewe (1967) NMLR 41.

Going back in time, the evidence before the trial High Court from the testimonies of PW1, PW6 and the document Exhibit 6, the judgment of Court delivered in 1957 affirming the partitioning of the property. Of note is that the contents or validity of Exhibit 6 were never denied. It was based on the evidence aforesaid that the Court below the excerpts above quoted, evaluated the evidence and found as a fact that the property with the partitioning belongs to the families D of 1st, 2nd and 4th Appellants and the 3rd and 4th Respondents. That appellate Court on that basis came to the conclusion that in so far as the 1st - 6th Appellants initiated the action “suing as principal members for and on behalf of other beneficiaries of the Estate of E Suberu Adedeji Alafia (deceased),” the action was not properly constituted as the 1st - 6th Appellants had no common interest in the F said property.

The Appellants had canvassed the point that the Court below ought to have treated the issue as one of mis-joinder of parties and not one that ought to be afflicted the action with striking out on account of incompetence in line with the path the trial High Court trod. This stance is in conflict with the fact that the Appellants had not commenced the action in their individual personal capacities but in a representative capacity on behalf of the beneficiaries of the Estate of Suberu Adedeji Alafia (deceased). It is for this reason that I am in agreement with learned counsel for the Respondents that an action H in a representative capacity as the Appellants have done herein at the trial High Court can only be by persons with an interest common to those on behalf of whom the action has been brought and is not just

a question whereby a severance of the Plaintiffs as posited by the Appellants, can be. It is not just one that can be waved off as a misjoinder or non-joinder of parties but one that goes into the constitution of the suit itself and therefore critical. I rely on *Nwanguma v. Ikunade* (1992) 8 NWLR (pt. 192). *Oragbode v. Onitiju* (1962) 1 All B NLR 32.

With the above in mind, with the facts therefore are different from the facts as obtained in, *Joseph Afolabi & Ors v. John Adekunle & anor* (1283) 8 SC 98, a judgment of this Court per Obaseki JSC C which this Court said, once pleadings and evidence show conclusively a representative capacity and the case was fought throughout in that capacity even if amendment to reflect that capacity had not been applied for and obtained, the trial Court can justifiably properly enter judgment for or against the party in that capacity. The facts and D circumstances in *Afolabi v. Adekunle* (supra) are opposite to what is at play here and now as the circumstances prevailing are not such that an amendment of pleadings can cure or such as can be ignored while a Court proceeds to grant a valid judgment. It is for the same reason that the case of *Ukatta v. Ndinaeze* (1997) 4 NWLR (pt.499) E 251 at 275; *Ndulue v. Ibezim* (2002) 12 NWLR (pt. 780) 139 are cited out of context and cannot be relied upon to the benefit of the Appellant as the facts in those cases are distinct and not apposite to those in existence herein.

It is in the light of the foregoing and the better reasoning in the F lead judgment that I agree with the Court below that the Suit before the trial High Court was improperly constituted and liable to be struck out and went ahead to strike it out. In conclusion, this appeal is dismissed as I uphold the decision and order of the Court of Appeal G which struck out Suit No. LD/1042/98.

I abide by the consequential orders as to costs.

KEKERE-EKUN JSC

H I have had a preview of the judgment of my learned brother, GALADIMA, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

One of the main issues in contention in this appeal is whether the Lower Court was right in striking out Suit No LD/1042/98 on the

ground that it was not properly constituted. It was instituted in a representative capacity by the plaintiffs (Appellants herein) suing as principal members for and on behalf of other beneficiaries of the Estate of Suberu Adedeji Alafia (deceased) excluding the 3rd and 4th defendants (now 3rd and 4th Respondents).

The evidence at the trial Court was that on the death of Pa Suberu Adedeji Alafia, his properties including No 45 Docemo Street, Lagos devolved on the seven branches of his family amongst whom are the present 1st, 2nd and 4th Appellants and the 3rd and 4th Respondents. This partitioning was confirmed by Exhibit 6, a consent judgment delivered in 1957. It is also not in dispute that the 1st - 6th Appellants are from different branches of the family.

The effect of partitioning of family land was stated by this Court in the case of: *Olorunfemi v. Aso* (2000) 2 NWLR (Pt.643) 143 @ 156 F - H thus:

“The effect of partitioning family land is that the property that had hitherto belonged to the family as a whole is split up into ownership by constituent members of the family. It puts an end to the communal ownership. When the division is among constituent branches of the family, a new family ownership is created in as many places as the property is divided, each family becoming the owner of the portion partitioned to it.”

See also: *Yesufu v. Adama* (2010) 5 NWLR (pt. 1188) 522 @ 542 A; *Oyadiji v. Olaniyi* (2005) 5 NWLR (919) 561 @ 575 C - E; *Balogun v. Balogun* 9 WACA (1943) 78.

In the instant case, PW 1 (the 2nd Appellant) testified that the property partitioned to him is different from NO.45 Docemo Street, PW6 also testified that the first six plaintiffs had different interests in the properties of the deceased at Nos 45 & 46 Docemo Street and No. 104 Odunfa Street, Lagos. And yet the plaintiffs sued at the trial Court in respect of the property at No. 45 Docemo Street, Lagos for themselves and on behalf of other beneficiaries of Pa Suberu Adedeji Alafia Estate.

Although the evidence showed that the family members to whom the property in dispute had been partitioned were administering the property jointly for convenience, they could not be said to have a common interest with other members of Suberu Adedeji Alafia Family who did not have a share in that particular property.

The law is that when an action is brought in a representative capacity, those represented must have a common interest and a common grievance and the relief sought must, in its nature, be beneficial to all those whom the plaintiff is representing. See: *Bwari v. Oseni* (1992) 4 NWLR (Pt. 237) 557 @ 582; *Idise v. Williams* (1995) 1 NWLR (Pt.370) 142; *Adefulu v. Oyesile & Ors* (1989) 5 NWLR (Pt.122) 377.

That was certainly not the case in Suit No. LD/1042/98. The trial Court was therefore correct when it struck out the suit for not being properly constituted.

For these and the more elaborate reasons ably advanced in the lead judgment, I also dismiss this appeal as lacking in merit and affirm the judgment of the Court below.

I abide by the order on costs.

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OKORO JSC

The lead judgment just delivered by my learned brother Suleiman Galadima, JSC captures exactly the decision of this Court in this appeal. All the issues submitted for the determination of this appeal have been admirably and efficiently resolved. I agree with the reasons marshaled to reach the conclusion that this appeal is devoid of merit and deserves an order of dismissal. In support of the judgment, I intend to make a few comments.

The facts giving birth to this appeal have been ably set out in the lead judgment. I adopt those facts in making my comments. The main issue, in my opinion is whether the Court of Appeal was right in striking out Suit No. LD/1042/98 on the ground that same was not properly constituted before the trial Court.

At the trial Court, the plaintiffs who are appellants herein filed this suit “suing as principal members and on behalf of other beneficiaries of the estate of SUBERU ADEDEJI ALAFIA (deceased) excluding the 3rd and 4th defendants) and as representatives of tenants/occupiers of No. 45 Docemo Street, Lagos.?? But the Court below made findings which show that the appellants did not have a common interest in the property which could have entitled them to sue as presently constituted. On page 1348 of the record, the Court below found as follows:

“It is clear from the evidence above and I agree with learned counsel for the appellants that the respondents, particularly 1st - 6th respondents have no common interest in the Suit with reference to the property in issue situate and lying at No.45 Docemo Street, Lagos and that the Lower Court is in error in holding that the said respondents have a common interest despite its earlier finding that the said property had been partitioned. By virtue of some of the declarations granted by the Lower Court, some of the respondents who are not entitled to the property in issue now have interest therein contrary to the partition, which should not be the case. The error arose in still treating the property in issue as belonging to the family of Suberu Adedeji Alafia (deceased) despite partition.”

Now, taking the evidence of PW1, PW6 and Exhibit 6 into consideration, the above findings of the Court of Appeal is unassailable. Exhibit 6 is a consent judgment of 1957 wherein the property at No. 45 Decemo Street, Lagos was partitioned. The first set of appellants i.e. 1st - 6th states that they are principal members of the family and sue on behalf of other beneficiaries. Again the 7th - 10th appellants were suing as tenants/occupiers of the said property. So, whether they sued as principal members or tenants on behalf of others in a property that was clearly partitioned, they did not have any common interest in the property.

It is trite that in a representative action, the legal burden cast upon the plaintiff is that of establishing the existence of a common interest and a common grievance. In other words, where there are numerous persons having the same interest in one cause or matter, one or more of the persons can sue on behalf of the others. Where however, they do not have a common interest, a plaintiff cannot sue on their behalf. See *Busari Ayinde & Ors v. Adedokun Akanji & Ors* (1988) 1 NWLR (pt. 68) 70, *J.W. Amu v. J.B. Atane & Anor* (1974) 10 SC 163, *Melifonwu & Ors v. Egbuyi & Ors* (1982) 9 SC (Reprint) 73, 1982) LPELR - 1857 (SC).

The Court below found that the property in question now belongs to the families of the 1st, 2nd and 4th appellants excluding the 3rd and 4th respondents. This has not been challenged and/or controverted. I agree with the Court below that in so far as the 1st - 6th appellants commenced this action in the manner already stated above, the action was not properly constituted as the 1st - 6th appellants

had no common interest in the property.

In view of the foregoing and the fuller reasons adumbrated in the lead judgment, I agree that the Lower Court was on a strong wicket when it struck out Suit No. LD/1042/98. In the circumstance, there is no merit in this appeal and is hereby dismissed by me. I make

B no order as to costs.

SANUSI JSC

C The lead judgment prepared and delivered by my learned brother Suleiman Galadima, JSC was made available to me before now. Having perused same, I agree with the reasons and conclusion arrived at by my lord. I adopt them as mine and have nothing useful to add. I also dismiss the appeal and uphold the decision of the lower
D Court which struck out the appeal. I endorse the consequential order made including one on costs.

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