

**SUPREME COURT OF NIGERIA**  
FRIDAY 22ND JANUARY, 2016. SC. 156/2005  
**CORAM:- W. S. N. ONNOGHEN, B. RHODES-VIVOUR,**  
**M. U. PETER-ODILI, O. ARIWOOLA,**  
**M. D. MUHAMMAD, JJSC**

ELIZABETH MABAMIJE ..... APPELLANT  
AND  
HANS WOLFGANG OTTO ..... RESPONDENT

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PLEADINGS - Points of law - HC Rules of Bendel State O. 24 rr. 2 & 3 - Allows both sides to raise points of law in their pleadings - And there is no restriction as which of the pleadings to be relied on (H1)

AFFIDAVITS - Averments - Validity - Where facts deposed to in affidavit have not been controverted - Such facts would be deemed unchallenged and undisputed (H2)

AFFIDAVITS - Conflicts - Resolution - Where there are conflicts in affidavit on material issue - Court is expected to invite parties and call for oral evidence - To resolve the conflict (H3)

ACTIONS - Multiplicity of suit - Abuse of process - Appellant's act of filing present suit on the same relief as in a previous suit - Amounts to an abuse of process (H4)

ACTIONS - Notice of discontinuance - Estoppel - Appellant by filing the notice has waived her rights to claim same relief on same facts in present suit - She is thus estopped from relitigating (H5)

APPEALS - Notice of - Validity - As the appeal is interlocutory - Respondent had 15 days after receipt of notice of appeal to serve respondent's notice - Otherwise it will be held incompetent (H6)

COURTS - Issue - Suo motu raising - Court would not suo motu raise issue - Without giving both sides opportunity to address it on the issue - Otherwise it will amount to denial of fair hearing (H7)

380 Mabamije v. Otto (2016) 1 KLR (pt. 377) 379; (2016) 13 APPEALS - Issue - Reply brief - Issue raised by appellant in reply brief - Which respondent did not bother to respond to in court - Is not an issue raised suo motu (H8)

### **FACTS**

At the High Court of Delta State Warri, plaintiff/appellant commenced this action against defendant/respondent, claiming the sum of N20 million being damages suffered by appellant for breach of promise to marry which was made to her by respondent and for an order compelling respondent to perfect all the marriage arrangements concerning appellant which respondent had earlier commenced with appellant's parents. After pleadings were filed and exchanged, respondent brought an application on notice seeking mainly for an order dismissing the suit in its entirety.

The grounds for the application are inter alia, that the suit is an abuse of process and that appellant is estopped from further litigating on the subject matter of the suit, having waived her purported right to the claim in a previous suit against respondent. The court heard the application and disagreed with respondent, especially on the issue of estoppel. His application for dismissal of the suit was thus dismissed. Dissatisfied, respondent appealed to the Court of Appeal Benin City. The court set aside the judgment of the trial court and held that estoppel was established. Aggrieved, appellant appealed to the Supreme Court.

**HELD** (Unanimously dismissing the appeal per

**RHODES-VIVOUR JSC)**

*PLEADINGS - Points of law*

***1. I agree with the Court of Appeal. Order 24 Rules 2 and 3 of the Bendel State (Civil Procedure) Rules 1988 allows both sides to raise points of law in their pleadings and there is no restriction as to which of the pleadings to rely on in deciding if a point of law so raised disposes of a case against the Defendant. It is thus wrong under this provision for the Court to restrict the proceedings to the points in the statement of claim as submitted by learned counsel for the Appellant.***

(p. 389 B)

*AFFIDAVITS - Averments - Validity*

**2. No counter-affidavit was filed by the Appellant. Where facts deposed to in an affidavit have not been controverted such facts must be taken as true except they are moonshine.**

**Where an affidavit is filed, deposing to certain material facts and the other party does not file a counter-affidavit to dispute the facts, the facts deposed to in the affidavit would be deemed unchallenged and undisputed. (p. 393 E)**

*AFFIDAVITS - Conflicts - Resolution*

**3. Where there is a conflict in affidavit evidence on a crucial and material issue, a trial Court is expected to invite parties to call oral evidence to resolve the conflict. (p. 393 F)**

*ACTIONS - Multiplicity of suit - Abuse of process*

**4. Unchallenged affidavit evidence which I accept reveals that if the Appellant's house was furnished by the Respondent to her satisfaction she would withdraw suit No.W/61/2000. The filing of Notice of discontinuance in suit No:W/61/2000 is indicative of the material fact that the Appellant was satisfied after the Respondent complied by furnishing her house. Estoppel is clearly established upon the un-contradicted affidavit evidence before the Court.**

**It becomes clear that filing this suit on the same facts, in which the Appellant asks for the same reliefs as in Suit No.W/61/2000 amounts to an abuse of process. It amounts to an abuse of process when a party improperly uses the judicial process to the annoyance of the other party. Proceedings that are not bona fide, that are frivolous vexatious, or oppressive.**

**My lords, instituting multiplicity of actions on the same subject matter against the same opponent on the same issue would amount to an abuse of process. Suit No.: W/61/2000 and this suit are on the same subject matter against the same Respondent on the same issue. Filing this suit amounts to an abuse of process as the Appellant discontinued suit No:W/61/2000 because she was satisfied with the furnishing of her house by the Respondent. (p. 393 G)**

*ACTIONS - Notice of discontinuance - Estoppel*

**5. A notice of discontinuance is a voluntary termination of a suit by the Plaintiff or complainant, when issues that gave rise to a suit are no longer in dispute, that is to say parties have settled. Terms of settlement are filed in Court to bring the suit to an end. A Notice of discontinuance may in certain circumstances have the same effect as terms of settlement.**

**Filing a Notice of discountenance in suit No.W/61/2000 is a clear indication that the Appellant was no longer interested in pursuing her claims and this is so because the Respondent complied with her request by duly furnishing her house with amenities to her satisfaction. The Notice of discountenance filed in suit No.W/61/2000 has the same effect as if a term of settlement was filed. Either of the processes shows that the Appellant has waived her rights to claim the same reliefs on the same facts in this suit. She is estopped from relitigating. (p.394 D)**

*E APPEALS - Notice of - Validity*

**6. This is an interlocutory appeal. The Respondent had 15 days after receipt of the Notice of Appeal to serve his Respondent's Notice on the Appellant. The Notice of Appeal was served on the Respondent on 11/10/01. The Respondent ought to have filed and served his Respondent's Notice on the Appellant within 15 days thereafter. This he failed to do. The Respondents Notice was filed on 6/2/2003. The Respondent's Notice was filed out of time. The Court of Appeal was right to rule that the Notice was incompetent.**

**Furthermore since no leave was sought to extend time to regularise the said Notice, the said Notice remains incompetent, in the absence of an order of Court regularising it. (p. 395 H)**

*H COURTS - Issue - Suo motu raising*

**7. The long settled position of the law is that a Court would not suo motu raise issues which the parties do not raise. Both sides must be given the opportunity to address the Court on**

**issues raised suo motu. Where this is not done, it may be held that the party denied the opportunity to address the Court was denied fair hearing.** (p. 396 B)

*APPEALS - Issue - Reply brief*

**8. An issue raised by the Appellant in his Reply brief (the incompetence of Respondent's Notice) which the Respondent did not bother to respond to in Court is not an issue raised suo motu. The Respondent denied himself fair hearing by not responding to the Appellants submission on the issue. Consequently, the Respondent's Notice to vary was not raised suo motu.** (p. 396 G)

## NOTABLE POINT OF INTEREST

### **RHODES-VIVOUR JSC**

#### ***1. Estoppel – Rules of***

Estoppel is a rule that prevents a person to assert the contrary of a fact or state of things which he formally asserted by words or conduct. Put in another way, a person shall not be allowed to say one thing at one time and the opposite at another time. Estoppel is based on equity and good conscience, the object being to prevent fraud and ensure justice between the parties by promoting transparency and good faith. (p. 392 C)

### **REPRESENTATION**

A. Haruna with him, A.V. Oluboyo, J.S. Agada and  
P. Attah, for the Appellant  
M.N.O. Olopade with him, C. Ajaegbu, for the Respondent

### **CASES REFERRED TO**

Toriola v. Williams (1982) 7 SC 27  
Mobil v. F.B.I.R. (1977) 3 SC 53  
Omoregbe v. Lawani (1980) 3 - 4 SC 108  
Ajomale v. Yaduat (No.2) (1991) 5 SCNJ 178  
Alagbe v. Abimbola (1978) 2 SC 39  
Akinsete v. Akindutire (1966) 1 ANLR 147  
Saraki v. Kotoye (1992) 9 NWLR (pt. 264) 156

Amaefule v. State (1988) 2 NWLR (pt. 75) 156  
 Agwasim v. Ojichie (2004) 10 NWLR (pt. 882) 613  
 Adewusi v. Popoola (1998) 12 NWLR (pt. 579) 584  
 Oko v. Igwesu (1997 4 NWLR (pt. 497) 48  
 Falobi v. Falobi (1979) 9 SC 1

B Nzeribe v. Dave Engineering Co. Ltd (1994) 8 NWLR (pt. 351) 124  
 Adewusi v. Popoola (1998) 12 NWLR (pt. 579) 584  
 Oko v. Igwesu (1997) 4 NWLR (pt. 497) 48

### **STATUTES & RULES REFERRED TO**

C Evidence Act 2011, s. 169  
 High Court (Civil Procedure) Rules of Bendel State 1988, O. 24 r. 2,  
 3

### **LEAD JUDGMENT BY RHODES-VIVOUR JSC**

D This is an appeal from the judgment of the Court of Appeal,  
 Benin City Division delivered on the 10th day of June, 2004. Briefly,  
 the facts are these: According to the Plaintiff/Appellant, she claims  
 the Respondent promised to marry her, but breached his promise by  
 E refusing to marry her. As a result of the alleged breach, the Appellant  
 as plaintiff took out a writ of summons claiming:

F *“1. The sum of N20,000,000 (Twenty Million Naira) being  
 damages, suffered by the Plaintiff for breach of promise to marry  
 was made to her by the defendant in December, 1986 (and renewed  
 every year up to June, 1999 and April (2000) at various places in  
 Warri.*

G *2. An Order compelling the defendant to perfect/complete all  
 the marriage arrangements concerning the Plaintiff which the defen-  
 dant earlier commenced with plaintiff parents/relations.”*

After pleadings were filed and exchanged, the defendant filed  
 a motion on Notice on the 7th of February, 2001. The motion was  
 brought under Order 24 Rules 2 and 3 of the High Court (Civil  
 Procedure) Rules of Bendel State and under the inherent jurisdiction  
 H of the Court. The defendant asked for the following:

*“(a) An Order setting down for hearing the points of law raised  
 in paragraph 16 of the Statement of Defence.*

*(b) An Order dismissing the suit in its entirety and*

*(c) For such further order or other orders as this Honourable*

*Court may deem fit to make in the circumstances.”*

The motion was supported by a 16 paragraph affidavit, deposed to by Seliowei Willy Bandi, a Solicitor to the defendant. Annexed to the affidavit are documents marked exhibit A, B, C.

The grounds for the application were:

(a) The suit is an abuse of the process of this Honourable Court. B

(b) Plaintiff is estopped from further litigating on the subject matter of this suit having waived her purported right to the claim in a previous suit against the defendant.

(c) The suit is embarrassing, scandalous, and vexatious. The alleged and/or purported marriage and/or promise to marry are contrary to public policy and therefore void having regard to the fact that the defendant is and was at all material times validly and legally married under the English Marriage Act of 1949. C

The Plaintiff did not file a counter affidavit. On the 16th day of May, 2001, the learned trial judge heard submissions from counsel, and in a Ruling delivered on the 1st day of August 2001, dismissed the application. The reasoning of the learned trial judge is interesting. D

The learned trial judge said:

*“... In W/61/2000, the striking out order reads: The parties and their counsel are absent. They are no longer interested in this case. The plaintiff has filed a notice of discontinuance. Consequently, this case is hereby struck out. From this order, there is no indication that the order was based on any particular act of the Defendant/Applicant.... To sum the position up, I would say had the parties filed terms of settlement upon which the W/61/2000 was struck out, the rule of estoppel would have applied because ipso facto, it would have shown that the acceptance of the terms exhibited is in settlement of W/61/2000. Mere discontinuance without more therefore cannot estop the party that discontinues from relitigating.... A Court of law is enjoined to take time before it decides to shut the doors of litigation against a willing plaintiff mid-stream.”* F G

And with that the Defendant’s application was dismissed. Dissatisfied with the Ruling of the trial Court, he filed an appeal which was heard by the Court of Appeal, Benin-City Division. On the 10th day of June, 2004 the Court of Appeal upset the judgment of the trial Court and allowed the appeal. The Court said:

*“...I agree entirely with the submissions of the learned SAN*

*that estoppel was established upon the un-contradicted affidavit evidence before the Court.”*

This appeal is against that judgment. Learned counsel for the Plaintiff/Appellant, filed the Appellant’s brief and a reply brief on 12/9/2005 and 21/12/2005.

B Learned counsel for the Respondent filed the Respondent’s brief on 10/11/2005.

Learned counsel for the appellant formulated four issues from his four grounds of appeal. They are:

“ISSUE 1

C *Is it right for the Lower Court to decide the issue of the incompetence or otherwise of the Appellants NOTICE TO VARY on findings that are obviously in-correct and/or points that were never raised by the Respondent in the Lower Court and to take up the same Suo*  
D *Motu and make findings thereon without hearing from the Appellant, the said finding being also a fresh issue in respect of which leave was not obtained by the Respondent in the Lower Court?*

ISSUE 2

*Is it right for the Lower Court to:-*

E (a) *decide the issue of estoppel by relying on the statement of Defence and Affidavit (s) and exhibits attached thereto when these processes clearly showed that the Defendant at the trial Court i.e. Respondent herein neither authorised nor consented to the purported settlement between the management of OAN oversees Agency Nigeria Ltd and the Plaintiff/Appellant herein which company was not even a party to the suit at the trial Court under circumstances in*  
F *which the Defendant clearly dissociated/distanced himself from any such move to settle the matter in the trial Court between himself and the plaintiff i.e. Appellant herein?*  
G

(b) *When the Lower Court decided the points of law said to be raised by the defendant in proceedings in lieu of demurrer by relying in the statement of Defence and Affidavits.*

ISSUE 3

H *Is it right for the Lower Court to decide a matter between parties by itself raising a point Suo Motu making findings thereon and using these findings to give a decision that is decidedly against one of the parties to a case and this at the time when reducing the judgment into writing and without hearing from him?*



*ISSUE 4*

*Is it right for the Lower Court to try and give judgment on a matter which is hinged on procedure in lieu of demurrer by relying on evidence, in this case affidavit together with exhibits?"*

Learned counsel for the Respondent formulated three issues for determination of this appeal. They are: B

*"ISSUE 1*

*To affirm whether the decisions of the learned Judges of the Court of Appeal were right when they held that estoppel was established upon the uncontradicted affidavit evidence before the trial Court.* C

*ISSUE 2*

*To affirm whether the decision of the learned judges were right when they held that the Respondent's Notice to vary dated the 6th February 2002 was incompetent.* D

*ISSUE 3*

*To affirm that the decisions of the learned Judges were right when they held that the trial judge misapplied the law when she said:*  
*"For the principle of estoppel to apply, it must be clear and certain from the transaction that the parties have entered into definite and distinct terms which has the purpose of leading one of the parties to suppose that the strict right arising under the relationship will not be enforced, and that if there is no definite term that a right will be waived by virtue of certain consideration the fact that such certain consideration arise to give rise to estoppel will be a matter to be decided upon by evidence."* E  
F

I have examined the issues formulated by counsel for consideration in this appeal, and I am satisfied that the live issue is

*"Whether estoppel was established upon the un-contradicted affidavit evidence before the Court."* G

At the hearing of this appeal on the 27th day of October, 2015 learned counsel for the Appellant, A. Haruna Esq., adopted the Appellant's brief and reply brief filed on the 12th day of September, 2015 and 21st day of December 2005 and urged this Court to allow the appeal. M. N. O. Olopade Esq., learned counsel for the Respondent, adopted the Respondent's brief filed on the 10th of November 2005 and urged this court to dismiss the appeal. Nothing was said in amplification of the briefs by counsel. I shall now address the issues. H

ISSUE 1

Issue 2(b) of the Appellant's issue reads: Is it right:

(b) When the Lower Court decided the points of law said to be raised by the Defendant in proceedings in lieu of demurer by relying on the statement of Defence and Affidavits."

B I shall take the above issue 1, together with issue 1 and 2 formulated by the Respondent. Three issues would in the circumstances be considered.

C Learned counsel for the Appellant observed that the Court of Appeal was wrong to have decided the matter before it in that since the same hinges on proceedings in lieu of demurer the statement of defence of the Respondent who was the Appellant at the Lower Court should not have been looked into or considered.

D Learned counsel for the Respondent did not bother to respond to this submission. This submission addresses the proper procedure for a trial Court to follow when considering an application under Order 24 Rules 2 and 3 of the Bendel State High Court (Civil Procedure) Rules 1988, applicable in Edo State.

E To consider the above submissions, the provisions of Order 24 Rules 2 and 3 of the Bendel State High Court (Civil Procedure) Rules 1988 applicable to Edo State under which the Appellant brought his application in the Lower Court must be examined. It reads:

F *"24 (2) Any person shall be entitled to raise by his pleading any point of law, and any points so raised shall be disposed of by the Judge who tries the cause at or after the trial.*

*Provided that by consent of the parties, or by order of the Court or a Judge on the application of either party it may be set down for hearing and disposed of at any time before the trial.*

G *(3) If in the opinion of the Court or a Judge the decision of the point of law substantially disposes of the whole action, or of any distinct case of action ground or defence set off, counter-claim, or reply therein, the Court or Judge may there upon dismiss the action or make such other order therein as may be just. "*

H Explaining the provision, the Court of Appeal said:

*"My understanding of the provision is that either party in a suit is entitled to raise any point of law in his pleadings. When this is done, the Court or Judge may dispose of it, at or after the trial. Provided that if the parties agree or the Court or the judge orders on the appli-*

*cation of either party, it may be set down for hearing and disposed of at any time before trial."*

Is the above correct?

Where the words used in a statute are clear, they should be given their ordinary meaning, without any embellishments. See *Toriola v. Williams* 1982 7 SC P27, *Mobil v. F.B.I.R.* 1977 3 SC P53 B

***I agree with the Court of Appeal. Order 24 Rules 2 and 3 of the Bendel State (Civil Procedure) Rules 1988 allows both sides to raise points of law in their pleadings and there is no restriction as to which of the pleadings to rely on in deciding if a point of law so raised disposes of a case against the Defendant. It is thus wrong under this provision for the Court to restrict the proceedings to the points in the statement of claim as submitted by learned counsel for the Appellant.*** C

In this case, the Motion on Notice to set down points of law raised in paragraph 16 of the statement of defence was served on the Appellant, along with the supporting affidavit stating the grounds relied on. The Respondent had the opportunity to controvert the facts averred and deposed to, but did nothing. The trial Court accepted the facts as proved, but surprisingly did not rely on them in its ruling. It thus becomes clear that the Appellant as Plaintiff did not take advantage of Rule 3 of Order 25 supra which states that: D E

*"3 A Plaintiff on whom a Defendant serves a defence shall serve a reply, if he intends to defend it, serve on that Defendant a defence to counteraction."* F

Since the facts averred to in the statement of defence are not traversed, the trial Court ought to have referred to the statement of defence to see if the Appellant was caught by estoppel. Relevant extracts from the statement of defence are as follows: G

*"8. Further to paragraph 7 above, the defendant states that on the 1st of March 2000, plaintiff took out a Writ of Summons against him in suit No.:W/61/2000 wherein she claimed as follows:*

*(i) The sum of N20,000,000 (Twenty Million Naira) being damages suffered by the Plaintiff for breach of promise to marry her made to her by the Defendant in December, 1986 (and renewed every year up to June, 1999) at various places in Warri.*

*(ii) An order compelling the Defendant to perfect/complete all the marriage arrangement concerning the Plaintiff, which the Defen-*

*defendant earlier commenced with Plaintiffs parents/relations. The said Writ of Summons dated 1/3/2000 is hereby pleaded.*

10. *Although the Defendant did not accept liability to the claim and was opposed vehemently to any moves for settlement, the Management of O.A.N. Overseas Agency Nig Ltd, as a concerned party*  
 B *intervened and called for settlement of the matter out of Court during Defendant's stay overseas on holiday because the suit was embarrassing to the company.*

11. *In consequence of the intervention of the aforesaid concerned company, the Plaintiff requested that as a condition for withdrawal of the suit against the Defendant, her personal house be furnished with specific amenities.*  
 C

12. *The company aforesaid complied by duly furnishing the Plaintiff house with the said amenities. The receipts for the purchase*  
 D *of the amenities are hereby pleaded.*

13. *Being satisfied with the role played by the company, the Plaintiff caused her solicitor Mr. Ben Mene-Ejegi to file a notice of discontinuance of the suit. A copy of discountenance expressing Plaintiffs disinterest in further pursuing the claim is hereby pleaded.*

14. *The suit was on the 16th day of May, 2000 accordingly struck out. Defendant shall found and rely on the proceedings of 16th May, 2000 at the trial of the suit.*  
 E

16. *The Defendant will contend at the trial that:*

(i) *The present suit is an abuse of the process of this Honourable*  
 F *Court.*

(ii) *The Plaintiff is stopped from further litigating on the subject matter of this suit having waived her purported right to the claim on a previous suit against the Defendant.*

(iii) *The alleged and/or purported marriage and/or promise to marry are contrary to public policy and therefore void having regard to the fact that the Defendant is and was at all material times, validly and legally married under the English Marriage Act of 1949.*  
 G

(iv) *The suit is embarrassing scandalous and vexatious.*

17. *The Defendant shall at the trial of this suit apply that the points of law raised in paragraph 16 above be set down for determination."*  
 H

The admitted facts are the depositions in paragraph 6, 7, 8 and 9 of the affidavit in support which are on all fours with the aver-

ments in paragraphs 10, 11, 12, 13 and 14 of the Respondent pleadings referred to above. Estoppel was clearly established upon the uncontradicted affidavit evidence and that is the correct finding the trial Court ought to have come to. The Court of Appeal was correct to so find.

## ISSUE 2

To affirm whether the decisions of the learned Judges of the Court of Appeal were right when they held that estoppel was established upon the un-contradicted affidavit evidence before the trial Court.

Learned counsel for the Appellant observed that OAN, Overseas Agency Nig Ltd was not a party to the suit and so there was no legal relationship between O.A.N. and the plaintiff. He further observed that the affidavit in support of the Respondents application to dismiss suit No.W/181/2000 (i.e. this suit) was not deposed to by any staff of O.A.N. Ltd, it was not authorised and it violates Section 86, 87, 88 and 89 of the Evidence Act 1990. Relying on *Abalogu v. S.P.D.C. Ltd* (2003) 13 NWLR (Pt.837) p.308, *A.G. Lagos State v. Purification Tech Nig. Ltd.* (2003) 16 NWLR (Pt.845) p.1. He urged this Court to resolve the issue in the Appellant's favour since estoppel does not arise.

Learned counsel for the Respondent observed that the Appellant made it clear to the Respondent that as a condition for her to withdraw suit No.W/61/2000 which has the same facts and reliefs with the present suit. (i.e. W/181/2000), her house must be furnished with a given number of amenities. He further observed that OAN Overseas Agency Nig. Ltd a company in which the Respondent was its Managing Director duly complied with her condition by furnishing her house with said amenities. He submitted that the Appellant instructed her solicitor, Ben Mere-Ejegi Esq., to file a Notice of discontinuance in Suit No.: W/61/2000 because she was satisfied with the furnishing of her house. Learned counsel observed that the filing of this suit which is on the same facts and same reliefs with suit No.W/61/2000 is an abuse of court process, contending that the Appellant is estopped from bringing this suit against the Respondent. Reliance was placed on Section 151 of the Evidence Act, 1990. He submitted that since the Respondents affidavit in support of his Motion to dismiss suit No.W/181/2000 was unchallenged, the Appellant was es-

topped from filing the said suit and so this appeal should be dismissed. Reliance was placed on *Omeregbe v. Lawani* (1980) 3 - 4 SC. p.108, *Ajomale v. Yaduat* (No.2) 1991 5 SCNJ P.178.

Section 151 of the Evidence Act 1990, now Section 169 of the Evidence Act 2011 on estoppel states that:

B “169. When one person has either by virtue of an existing Court judgment, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed in any proceedings between C himself and such person or such persons representative in interest, to deny the truth of that things.”

Estoppel is a rule that prevents a person to assert the contrary of a fact or state of things which he formally asserted by words or D conduct. Put in another way, a person shall not be allowed to say one thing at one time and the opposite at another time. Estoppel is based on equity and good conscience, the object being to prevent fraud and ensure justice between the parties by promoting transparency and good faith.

E As earlier alluded to, after this suit was filed and pleadings settled, learned counsel for the Respondent filed a motion to dismiss the suit. One of the grounds for the Application being that the Plaintiff/Appellant is estopped from further litigating on the subject matter of this suit having waived her purported right to the claim in a previous suit F against the Defendant.

Relevant extracts from the Respondent’s affidavit in support of his motion to dismiss the suit reads:

G “3. That the plaintiff on the 1st day of March, 2000 took out a Writ of Summons against the Defendant in suit No.W/61/2000 wherein she claimed as follows:

(a) The sum of N20,000,000.00 (Twenty Million Naira) being Damages suffered by the Plaintiff for breach of promise to marry her made to her by the Defendant in December, 1986 (and renewed H every year up to June, 1999) at various places in Warri.

(b) An Order compelling the defendant to perfect/complete all the marriage arrangement concerning the plaintiff which the defendant earlier commenced with the plaintiff parents/relations.

5. That the suit came as an embarrassment to the defendant

*and entire management of OAN Overseas Agency Nigeria Limited of which the defendant is the Managing Director.*

6. That although the defendant did not accept liability to the claim of the Plaintiff, the Management of OAN Overseas Agency Nigeria Limited decided that the matter be settled out of Court as it was embarrassing to the company. B

7. That in pursuance of the averments in paragraphs 6 above, the Plaintiff requested that as a condition for her withdrawal of the suit, her house be furnished with a given number of amenities.

8. That the company aforesaid duly complied by furnishing the plaintiff's house with the said amenities. C

9. That being satisfied with the role played by the company, the plaintiff caused her Solicitor, Ben Mene-Ejiegbo Esq. to file a notice of discontinuance of the suit.

10. That the suit was on the 16th of May 2000 accordingly struck out. D

11. That it is therefore embarrassing that the plaintiff has taken out the present suit whose relief's are in pari material with the former suit."

**No counter-affidavit was filed by the Appellant. Where facts deposed to in an affidavit have not been controverted such facts must be taken as true except they are moonshine.** See *Alagbe v. Abimbola* 1978 2 SC p.39. E

**Where an affidavit is filed, deposing to certain material facts and the other party does not file a counter-affidavit to dispute the facts, the facts deposed to in the affidavit would be deemed unchallenged and undisputed. Where there is a conflict in affidavit evidence on a crucial and material issue, a trial Court is expected to invite parties to call oral evidence to resolve the conflict.** See *Akinsete v. Akindutire* (1966) 1 ANLR p.147. F G

**Unchallenged affidavit evidence which I accept reveals that if the Appellant's house was furnished by the Respondent to her satisfaction she would withdraw suit No.W/61/2000. The filing of Notice of discontinuance in suit No:W/61/2000 is indicative of the material fact that the Appellant was satisfied after the Respondent complied by furnishing her house. Estoppel is clearly established upon the un-contradicted affida-** H

*vit evidence before the Court.*

*It becomes clear that filing this suit on the same facts, in which the Appellant asks for the same reliefs as in Suit No.W/61/2000 amounts to an abuse of process. It amounts to an abuse of process when a party improperly uses the judicial process to the annoyance of the other party. Proceedings that are not bona fide, that are frivolous vexatious, or oppressive.* See Saraki v. Kotoye (1992) 9 NWLR (Pt.264) P.156, Amaefule v. State (1988) 2 NWLR (Pt.75) p.156, Agwasim v. Ojichie (2004) 10 NWLR (Pt.882) p.613.

*My lords, instituting multiplicity of actions on the same subject matter against the same opponent on the same issue would amount to an abuse of process. Suit No.: W/61/2000 and this suit are on the same subject matter against the same Respondent on the same issue. Filing this suit amounts to an abuse of process as the Appellant discontinued suit No:W/61/2000 because she was satisfied with the furnishing of her house by the Respondent.*

*A notice of discontinuance is a voluntary termination of a suit by the Plaintiff or complainant, when issues that gave rise to a suit are no longer in dispute, that is to say parties have settled. Terms of settlement are filed in Court to bring the suit to an end. A Notice of discontinuance may in certain circumstances have the same effect as terms of settlement.*

*Filing a Notice of discountenance in suit No.W/61/2000 is a clear indication that the Appellant was no longer interested in pursuing her claims and this is so because the Respondent complied with her request by duly furnishing her house with amenities to her satisfaction. The Notice of discountenance filed in suit No.W/61/2000 has the same effect as if a term of settlement was filed. Either of the processes shows that the Appellant has waived her rights to claim the same reliefs on the same facts in this suit. She is estopped from relitigating.*

The Respondent is the Management Director of O.A.N. Overseas Agency Nig Ltd, the company that paid for the amenities the Appellant requested for. It is irrelevant where the funds to purchase the amenities came from. Once the amenities were paid for, and



were paid on behalf of the Respondent and delivered to the Appellant and she received them, the company need not be a party to the suit to pay for the Appellant's amenities.

The Court of Appeal in my view was correct to dismiss the appeal as estoppel was established upon the uncontradicted affidavit evidence before the Court. Equity would not allow the Appellant to be compensated twice. If allowed, there would no longer be justice between the parties. Fraud would be enthroned, and transparency and good faith jettisoned, and that would be bad for the justice system.

I resolve issue one in favour of the Respondent.

### ISSUE 3

To affirm whether the decision of the learned judges were right when they held the Respondents Notice to vary dated the 6th February 2002 was incompetent.

Learned counsel for the Appellant, Respondent in the Court of Appeal observed that the Court of Appeal was wrong to consider the issue of incompetence of the Respondents Notice to vary on findings that are incorrect and made suo motu, without hearing the Appellant. He submitted that the cause of action taken by the Court of Appeal is a violation of the Rule of fair hearing.

Learned counsel for the Respondent observed that the Appellant who was the Respondent in the Court of Appeal filed Respondents Notice of 6/2/2002, three months after the issuance of the Civil Form 8, Relying on Adewusi v. Popoola (1998) 12 NWLR (Pt.579) p.584, Oko v. Igwesu (1997 4 NWLR (Pt.497) p.48. He submitted that the Respondent Notice to vary was incompetent.

Order 3 Rule 14(4) of the Court of Appeal Rules, 1981 states that Respondent Notice must be served on the Appellant-

*"(a) in the case of an appeal against an interlocutory order within fifteen (15) days, and*

*(b) in any other case within thirty (30) days after the service of the Notice of Appeal on the Respondent."*

***This is an interlocutory appeal. The Respondent had 15 days after receipt of the Notice of Appeal to serve his Respondent's Notice on the Appellant. The Notice of Appeal was served on the Respondent on 11/10/01. The Respondent ought to have filed and served his Respondent's Notice on the***

***Appellant within 15 days thereafter. This he failed to do. The Respondents Notice was filed on 6/2/2003. The Respondent's Notice was filed out of time. The Court of Appeal was right to rule that the Notice was incompetent.***

***Furthermore since no leave was sought to extend time to regularise the said Notice, the said Notice remains incompetent, in the absence of an order of Court regularising it.***

On whether findings on the Respondent's Notice were made *Suo Motu* by the Court of Appeal?

***The long settled position of the law is that a Court would not suo motu raise issues which the parties do not raise. Both sides must be given the opportunity to address the Court on issues raised suo motu. Where this is not done, it may be held that the party denied the opportunity to address the Court was denied fair hearing.***

Before the Court of Appeal decided the competence or incompetence of the Respondent's Notice to vary dated 6/2/2002, it observed thus:

***"... Before I go into the details of the contention there in I quickly observed that the Appellant in his reply brief contended that the Respondent's Notice to vary dated 6th February, 2002 is incompetent... It is unfortunate that the learned counsel for the Respondent has not commented on this submission. That notwithstanding this Court has to rule on it..."*** See page 155 of the Record of Appeal.

It is clear from the above that the Appellant raised the issue of the incompetence of the Respondent's Notice in his reply brief and counsel for the Respondent's failed to comment on the Appellant's submissions in Court.

***An issue raised by the Appellant in his Reply brief (the incompetence of Respondent's Notice) which the Respondent did not bother to respond to in Court is not an issue raised suo motu. The Respondent denied himself fair hearing by not responding to the Appellants submission on the issue. Consequently, the Respondent's Notice to vary was not raised suo motu.***

Affidavit evidence reveals that the Appellant wanted her apartment furnished by the Respondent. He complied and that was why she discontinued suit No.W/61/2000.

Filing this suit on the same facts, seeking the same reliefs all over again as in suit No.W/61/2000 amount to relitigation, an abuse of process. The Appellant cannot be allowed to relitigate, she is estopped after she was given what she wanted.

In the light of all that I have been saying, there is clearly no merit in this appeal. B

The appeal is hereby dismissed. Parties shall bear their costs.

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### **ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead Judgment of my learned brother, RHODES, VIVOUR JSC just delivered. C

I am in agreement with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

I accordingly dismiss the appeal and abide by the consequential orders made in the said lead Judgment including the order as to costs. D

Appeal dismissed.

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### **PETER-ODILI JSC**

I agree with the judgment just delivered by my learned brother, Olabode Rhodes-Vivour, JSC and to show my support of the reasonings from which the decision emanated. I shall make some comments. F

The Appellant was Plaintiff in the High Court, Warri and on the 15th day of June, 2000 took out a writ of summons against the Respondent who was therein Defendant claiming N20,000,000.00 damages for breach of promise to marry her and an order to compel Mr. Otto Defendant to complete all the marriage arrangements concerning her which he was alleged to have commenced with her parents/relations. G

On the 7th day of February 2001, the Defendant filed a motion seeking to dismiss the suit in its entirety on grounds of estoppel H among other points of law raised the Statement of Defence.

The Plaintiff filed no counter affidavit to the said motion. The trial High Court per Akperi J dismissed the motion. The Defendant appealed to the Benin Division of the Court of Appeal which Court

allowed the appeal upholding the objection of the Defendant that indeed the plaintiff was estopped from litigating on the subject matter of the suit.

The Plaintiff/Respondent now Appellant has come before the Supreme Court to ventilate her grievance.

**B      FACTS BRIEFLY STATED**

The case of Ms. Mabamije that Mr. Otto breached his promise to marry her, and for that reason she claimed N20,000,000.00 (Twenty Million Naira) as damages as well as an order to compel Mr. Otto to perfect/complete all marriage arrangements earlier made by him.

Mr. Otto his Statement of Defence denied this allegation and stated that Ms. Mabamije had in an earlier suit, namely Suit No. W/ 61/2000 also filed at the High Court, Warri claimed the same reliefs against him.

Mr. Otto further asserted that following the intervention of OAN Overseas Agency (Nig.) Ltd, a company in which he was managing director, the said suit was withdrawn by Ms. Mabamije after that Company had fulfilled certain conditions laid down by her.

The condition was that OAN Overseas Agency (Nig.) Ltd should furnish the apartment of Ms. Mabamije with some named amenities and on the basis of which she discontinued with the earlier suit instituted against Mr. Otto was never denied.

In fact, Ms. Mabamije did not file a Counter Affidavit to contravene the Affidavit Support of the Motion to dismiss her suit on the ground of estoppel.

One of the defences of Mr. Otto at High Court, Warri, was that Ms. Mabamije should have been estopped from further litigating on the subject matter having been satisfied on same in an earlier claim.

The facts of estoppel were specifically pleaded by Mr. Otto in his Statement of Defence filed at the High Court, Warri as well as the Affidavit support of the Motion dated the 7th of February 2001 in which he sought to dismiss the suit.

Honourable Justice Akperi (Mrs.) of the High Court, Warri dismissed the Motion holding among others that the principle of estoppel had not been established.

Mr. Otto being dissatisfied with the said ruling of the High Court, Warri appealed to the Court of Appeal, Benin Division, which al-

lowed the appeal on the ground that the Appellant herein was estopped from instituting the present suit. Aggrieved, she has appealed to this Court.

On the 27th day of October 2015, Mr. Abdullahi Haruna, learned counsel for the Appellant adopted her Brief of Argument settled by John Alele Esq. and filed on the 12/9/05 and in which he formulated four issues for determination which are, viz:-

1. Is it right for the Lower Court to decide the Issue of the incompetence or otherwise of the Appellant's NOTICE OF VARY on findings that are obviously incorrect and/or points that were never raised by the Respondent in the Lower Court and to take up the same *Suo Motu* and make findings thereon without hearing from the Appellant, the said finding being also a fresh issue in respect of which leave was not obtained by the Respondent in the Lower Court.

2. Is it right for the Lower Court to:

(a) Decide the issue of estoppel by relying on the Statement of Defence and Affidavit (s) and Exhibits attached thereto when these processes clearly showed that the Defendant at the Trial Court i.e. Respondent herein neither authorized nor consented to the purported settlement between the management of O.A.N. overseas Agency (Nigeria) Limited and the

28 Plaintiff (Appellant herein) which company was not even a party to the Suit at the Trial Court under circumstances in which the Defendant clearly dissociated/distanced himself from any such move to settle the matter in the Trial Court between himself and the Plaintiff i.e. Appellant herein?

(b) When the Lower Court decided the points of law said to be raised by the Defendant in proceedings in lieu of demurrer by relying on the Statement of Defence and Affidavits.

3. Is it right for the Lower Court to decide a matter between parties by itself raising a point *Suo Motu* making findings thereon and using these findings to give a decision that is decidedly against one of the parties to a case and this at the time when reducing the Judgment into writing and without hearing from him?

4. Is it right for the Lower Court to try and give Judgment on a matter which is hinged on procedure in lieu of demurrer by relying on evidence in this case Affidavit together with exhibits?

M.N.O. Olopade Esq, learned counsel for the Respondent

adopted the Brief of the Respondent settled by Okhuelegbe Omoso, filed on 19/11/05 in which he raised three issues for determination which are thus:-

1. To affirm whether the decisions of the Learned Judges of the Court of Appeal were right when they held that estoppel was established upon the uncontradicted affidavit evidence before the Trial Court.

2. To affirm whether the decision of the learned Judges were right when they held that the Respondents' Notice to vary dated the 6th February 2002, was incompetent.

3. To affirm that the decision of the Learned Judges were right when they held that the Trial Judge misapplied the law when she said:

*"For the principle of estoppel to apply it must be clear and certain from the transaction that the parties have entered into definite and distinct terms which has the purpose of leading one of the parties to suppose that the strict right arising under the relationship will not be enforced and that if there is no definite term that a right will be waived by virtue of certain consideration the fact that such certain consideration arise to give rise to estoppel will be a matter to be decided upon by evidence".*

The issues as crafted by the Respondent are better for use than the inelegant formulation of the Appellant's counsel and so I shall utilise those of the Respondent with those of the Respondent with Issues 1 and 3 taken together.

#### ISSUES 1 & 3:

In these two questions are found whether the Court of Appeal was right when it held that estoppel was established and that the trial High Court Judge misapplied the law.

Learned counsel for the Appellant contended that by virtue of Section 132 of the Evidence Act when any judgment or judicial proceedings or any contract or grant or disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings or the terms of such contract, grant or disposition of property except the document itself or secondary evidence of its contents cases in which secondary evidence admissible under the provisions therein contained nor may the contents of such document be contradicted, altered, added to or

varied by oral evidence. That the Ruling or decision is to be found in the Ruling of Makwe J which is not a final judgment as the matter was struck out and so cannot be added to or varied by affidavit evidence and therefore the proviso to Section 132 does not apply. That the Lower Court was therefore wrong to have considered and decided the matter before it in that since the same hinges on proceedings in lieu of demurrer, the Statement of Defence of the Respondent who was Appellant at the Lower Court should not have been looked into or considered at all. B

For the Appellant, it was further submitted that the Defendant and Respondent herein did not raise the issue of the Plaintiff not filing a Reply in traverse to the Statement of Defence and so the Court below was wrong to have raised it suo motu and used it for find in favour of the Defendant. Learned counsel said the Lower Court misapplied Order 25, Rule 1 of the Rules of High Court (Civil Procedure) Rules of Bendel State; Balogun & 3 Ors v. A.G, Lagos State (1980) (July - September) High Court of Lagos State Report page 40 at 59 60. C D

That the Lower Court had not interpreted properly Order 22, Rule 3 (1) as the Plaintiff is deemed to have denied the allegation of estoppel and settlement even though no reply was filed to deny the Statement of Defence. E

Learned counsel for the Respondent contended that the Court below was right when they held that estoppel was established upon the uncontradicted affidavit evidence before the trial Judge. He cited Section 151 of the Evidence Act, Capt. 112 Laws of the Federation, 1990. F

That the learned trial judge was not presented with any conflicting affidavit which should have necessitated the taking of oral testimony. He relied on Falobi v. Falobi (1979) 9 SC 1 at 14 - 15; Ajomale v Yaduat (No.2) (1991) 5 SCNJ 178 at 184 etc. G

That the conclusion reached by the Court below was correct when it held that estoppel was established in the suit having regard to the proven facts before the trial Court. H

In reply on points of law in accordance with Appellant's Reply Brief filed on 21/12/05, learned counsel stated that it is not correct that there was uncontradicted evidence before the trial Court.

The learned trial judge had held thus:-

*“For the principle of estoppel to apply it must be clear and certain from the transaction that the parties have entered into definite and distinct terms which has the purpose of leading one of the parties to suppose that the strict right arising under the relationship will not be enforced, and that if there is no definite term that a right will be waived by virtue of certain consideration the fact that such certain consideration arise to give rise to estoppel will be a matter to be decided upon by evidence”.*

She went on to state:-

*“Coming to whether the facts deposed to in the affidavit which learned counsel say amounts to estoppel, I would say that for the principle of estoppel to apply it must be clear and certain from the transaction that the parties have entered in to definite and distinct terms which has the purpose of leading one of the parties to suppose that the strict right arising under a relationship will not be enforced. If there is no definite term that a right will be waived by virtue of certain considerations, the fact that such certain consideration arises to give rise to estoppel will be a matter to be decided upon by evidence”.*

The learned trial judge went further to state as follows at page 28 of the Records:-

*“What should be uppermost in this application is whether there is something to show that the discontinuance on the face of W.61/2000 was based on the acceptance of the performance of the condition the plaintiff/appellant gave the defendant”.*

The learned trial judge in the same frame of mind continued thus:-

*“To sum the position up, I would say had the parties filed terms of settlement upon which the suit W/61/2000 was struck out, the rule of estoppel would have applied because Ipso facto, it would have shown that the acceptance of the items exhibited is in settlement of W/16/2000. Mere discontinuance without more therefore cannot estop the party to discontinue from relitigating”.*

The learned Justices of the Court of Appeal disagreed with what the trial Court did in the light of the depositions in the affidavit of the respondent which were not controverted, The relevant portions thereof are as stated hereunder, viz:-

3. That the Plaintiff on the 1st day of March, 2000 took out a Writ of Summons against the Defendant in Suit No.W/16/2000



wherein she claimed as follows:

“(a) The sum of N20,000,000,00 (Twenty Million Naira) being Damages suffered by the Plaintiff for breach of promise to marry her, made to her by the Defendant in December, 1986 (and renewed every year up to June, 1999) at various places in Warri.

(b) An order compelling the defendant to Perfect/complete all the marriage arrangement concerning the plaintiff which the defendant earlier commenced with the plaintiffs parents/relations. B

5. That the suit came as an embarrassment to the defendant and entire management of OAN Overseas Agency Nigeria Limited of which the defendant is the Managing Director. C

6. That although the defendant did not accept liability to the claim of the plaintiff, the management of OAN Overseas Agency Nigeria Limited decided that the matter be settled out of Court as it was embarrassing to the company. D

7. That in pursuance of the averments in paragraphs 6 above, the Plaintiff requested that AS A CONDITION FOR HER WITHDRAWAL OF THE SUIT, her house be furnished with a given number of amenities.

8. That the company aforesaid DULY COMPLIED BY FURNISHING THE PLAINTIFF’S HOUSE WITH THE SAID AMENITIES. E

9. That being satisfied WITH THE ROLE PLAYED BY THE COMPANY, the plaintiff caused her Solicitor, Ben Mene-Ejiegbo Esq. to file a notice of discontinuance of the suit.

10. That the suit was on the 16th of May 2000 ACCORDINGLY struck out. F

11. That it is therefore embarrassing that the plaintiff has taken out the present suit whose relief’s are in pari material with the former suit. G

The Court below found it strange that the Court of trial made the findings and set about having the conclusion that was produced in the light of what is now trite that the respondent made strong assertions of facts in the affidavit which remained unchallenged as that was the only affidavit before the trial Court as the appellant made no counter affidavit. Therefore since those facts remained not controverted or attacked by the only way allowed which is a counter affidavit then those facts are taken as admitted which is what the learned trial judge should have done. I refer to Ajomale v Yaduat H

(NO.2) (1991) 5 SCNJ 178 at 184. That flowing from Section 151 of the Evidence Act Cap 112 Laws of the Federation 1990 applicable at the material time which provides as follows:-

By Section 151 of the Evidence Act, Cap 112, Laws of the Federation, 1990:

B *“when one person has, by his declaration, act or omission intentionally cause or permitted another person to believe a thing to be true and to act upon such belief, neither he or his representative in interest shall be allowed, in any proceeding between himself and*  
 C *such as person or such person’s representative in interest to deny the truth of that thing”.*

What the learned justices of the Court below did is difficult to fault as with the unchallenged evidence before the trial Court which remained unchallenged and the import of the facts deposed showed  
 D that the Appellant was estopped from bringing another suit against the Respondent. I refer to the cases of Omoregbe v Lawani (1980) 3 - 4 SC 108 at 117; Nzeribe v Dave Engineering Co. Ltd (1994) 8 NWLR (Pt.351) 124 at 137 wherein Iguh JSC stated clearly which I accept as guide as follows:-

E *“Where evidence given by a party to any proceedings or by his witness is not challenged by the opposite party who has the opportunity to do so, it is always open to the Court seised of the proceedings to act on the unchallenged evidence before it... This is because in such circumstance the evidence before the trial Court obviously goes one way with the other set of facts or evidence weighing*  
 F *against it. There is nothing in such a situation to put on the other side of that proverbial or imaginary scale or balance, as against the evidence given by or on behalf of the plaintiff. The onus of proof in*  
 G *such a case is naturally discharged on a minimal of proof”.*

In this case, the Appellant is seeking to have her cake after a full consumption of the same which situation produced the estoppel stopping her in her tracks. I see no reason to depart from the Court of Appeal’s decision which is in accordance with the law and there-  
 H fore these two issues are resolved in favour of the Respondent.

## ISSUE 2

These questions the rightness of the learned justices of the Court of Appeal in holding that the Respondent’s Notice of Vary dated the 6th February, 2002 was incompetent.

It was submitted for the Appellants that it was wrong for the Court below to have raised the issue suo motu of the matter of the Appellants Notice to vary being improperly brought without the parties being put on notice thereof. That the Lower Court erred in not only embarking on the matter on its own but relying on the Briefs of Argument without considering its own Rulings of 28/1/2004 and 25/3/2004 on this issue. That a Notice of Intention is relied upon when the party raising the same does not appeal against a decision. He cited Order 3, Rule 4 (1) of the Rules of the Court of Appeal.

In response, learned counsel for Respondent stated that by Order 3, Rule 14 (4) of the Court of Appeal Rules 1981 (as amended), a Respondent is required to file and serve the Respondent's Notice within 15 days after the service on her of the Notice of Appeal which did not happen in this case as the appellant as Respondent in the Court below served the said Notice of Intention three months after the service of the Notice of Appeal and had sought no leave to file out of time. He cited *Adewusi v Popoola* (1998) 12 NWLR (Pt.579) p.584; *Oko v. Igwesi* (1997) 4 NWLR (Pt.497) 48 at 58.

The relevant Rule of Court Order 3, Rule 14 (4) of the Court of Appeal Rules, 1981 as amended which stipulates thus:-

*“(a) in the case of an appeal against an interlocutory order within fifteen (15) days, and*

*(b) in any other case within thirty (30) days after the service of the Notice of Appeal on the Respondent.”*

In this case, the Certificate of service of Notice and Grounds of Appeal was issued at the trial Court on the 11th October 2001, but the Appellant herein as respondent in the Court of Appeal filed respondents Notice on the 6th February, 2002, a clear three months after the issuance of that Civil Form 8 thereby necessitating a leave of Court to ensure validity thereof for the respondent's Notice to be filed out of time. Definitely the respondent's Notice was out of time and thereby incompetent and that is the end of it and so the position of the Appellant that she ought to have had that Notice to vary cannot be defended. See *Adewusi v. Popoola* (1998) 12 NWLR (Pt.579) H 584; *Oko v Igwesi* (1997) 4 NWLR (Pt.497) 48 at 58.

This issue is also resolved in favour of the Respondent. The issues having gone favourably for the Respondent in light of the foregoing and the better reasoning in the lead judgment, I too dismiss

this appeal as unmeritorious. I abide by the consequential orders made.

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**ARIWOOLA JSC**

B I had the opportunity of reading in draft the lead judgment of my learned brother, Rhodes-Vivour, JSC just delivered. The issues that arose were beautifully dealt with.

C I agree entirely with the reasoning and the conclusion that the appeal lacks merit and should be dismissed. I have nothing new to add. I will also dismiss the appeal for lacking merit and substance.

Appeal dismissed. I abide by the consequential orders in the lead judgment including that on costs.

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D

**MUHAMMAD JSC**

I was obliged the draft of the lead judgment of my brother Rhodes-Vivour JSC, I entirely agree with his lordship that the appeal lacks merit. I dismiss same and abide by the consequential orders made in the lead judgment.

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