

**SUPREME COURT OF NIGERIA**  
FRIDAY 22ND JANUARY, 2016. SC. 190/2005  
**CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA,**  
**M. U. PETER-ODILI, O. ARIWOOLA,**  
**M. D. MUHAMMAD, JJSC**

1. SIMON EZECHUKWU ..... APPELLANTS  
2. CHIDI ENE  
    AND  
I. O. C. ONWUKA ..... RESPONDENT

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AFFIDAVITS - Conflicts - Resolution of - Where conflicts exist in deposition of parties - Court must resolve same by calling for oral evidence - Either from the deponent or other witnesses (H1)

APPEALS - Affidavit - Evaluation - Where conflict still exists in affidavit after a resolution by calling for oral evidence - CA as well as SC is qualified to further appraise the affidavit (H2)

COURTS - Document - Examination of - It is lawful for courts to examine documents - If the resolution of controversy between parties so requires (H3)

COURTS - Reliefs - Grant of - Basis - Entitlement to reliefs from court is if on the basis of the facts adduced - The court thinks that grant of the reliefs is just (H4)

FAIR HEARING - Breach - Allegation - By choosing to stay away from court after being notified of the hearing - Appellants are not covered by 1999 Constitution s. 36(1) bordering on fair hearing (H5)

***FACTS***

Before the High Court of Benue State, plaintiffs/respondent brought this action by writ of summons, claiming damages against defendants/appellants for the demolition of their property. The court issued and served the parties with hearing notices. On the hearing

date, neither 1st - 4th defendants nor their counsel appeared in court. 5th - 7th defendants on the other hand, though not in court, were represented by their counsel and subsequently, by leave of court, filed their statement of defence out of time. They also participated in the trial. Their counsel fully cross examined respondent and his four witnesses.

2nd plaintiff neither appeared at nor participated in the trial from beginning to the end thereof. Following application by counsel, the name of 2<sup>nd</sup> plaintiff, who did not appear at the trial, was struck out. Learned respondent's counsel conceded to the prayers of counsel to 5<sup>th</sup> - 7<sup>th</sup> defendants that their names should be struck out since the evidence led in the trial court had not disclosed any case against them. Two days to the date adjourned for judgment, appellants brought application to the court seeking inter-alia, for the arrest of its judgment and leave to file their statement of defence out of time. The court refused the prayers in their entirety and eventually found them liable for respondent's claim. Not happy with the decision of the trial court, appellants appealed to the Court of Appeal. The court dismissed the appeal and upheld the decision of the trial court. Aggrieved further, appellants have appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

#### *3.1 ISSUE 1*

*Whether or not the Court below was right in upholding the trial Court's decision that appellants were given a fair hearing at the trial Court.*

#### *3.2 ISSUE 2*

*Whether or not the Court below was right in upholding the decision of the trial Court that there was service of Hearing Notice on the appellants, in the light of the conflicting affidavit evidence of the parties.*

**HELD** (Unanimously dismissing the appeal per

**MUHAMMAD JSC)**

*AFFIDAVITS - Conflicts - Resolution of*

**1. Now, counsel on both sides are one and correctly too that where there is irreconcilable conflict in the deposition of contesting parties before a Court, the Court must resolve the conflict by calling oral evidence either from the deponents or other witnesses. The Court, in the face of such a persisting conflict, is not allowed to prefer one deposition to the other. Learned respondent counsel cannot be faulted in his further submission that the need to call oral evidence arises only where the conflict in the affidavits are significant and material. The need to call oral evidence, on the authorities, is obviated where the conflict is narrow in which case the Court is in a position to overlook same. (p. 865 G)**

*Affidavit - Evaluation*

**2. In deciding whether the affidavit evidence of the two sides is still in conflict such that an enduring decision only emerges after the resolution of the conflict through oral evidence or that the evidence of the respondent has been wrongly preferred by the two Courts below, a further re-appraisal of the totality of the affidavit evidence needs to be made. The Lower Court as well as this Court are eminently qualified to further appraise the affidavit evidence which, not being oral, does not put the credibility of the deponents in issue. It is only where the evidence to be re-appraised is oral and the credibility of the witnesses is in issue that the appellate Court, not having seen and assessed the witnesses, is hindered and not as qualified as the trial Court in evaluating the evidence. (p. 866 F)**

*Document - Examination of*

**3. Also, it is within the lawful province of Courts to examine documents if the resolution of the controversy between the parties before them so requires. (p. 870 E)**

*COURTS - Reliefs - Grant of - Basis*

**4. Appellants are only entitled to the reliefs from the Courts if on the basis of the facts made bare to them the Courts think the grant of the reliefs is just. From the facts on record, both Courts found and correctly too that it is not just to allow the appellants who were duly served and otherwise aware of the proceedings against them to present their defence only as and when they chose to. Appellants apart, the justice of the grant as it affects the Court and the respondent is equally of essence of the rule of Court by virtue of which the merit or otherwise of appellants' application must be assessed. (p. 871 C)**

*FAIR HEARING - Breach - Allegation*

**5. It is certainly not open to a litigant that had been served hearing notice commanding him to proceed to Court to defend the case instituted against him and who, the hearing notice apart, is otherwise aware of the proceedings taken against him by another, to assert a breach of his right to fair hearing if eventually a decision is given against him. Section 36(1) of the 1999 Constitution (as amended) which enshrines the doctrine of fair hearing, the appellants' wave with gusto does not avail them. The section only provides that before any decision is taken by a Court of law against them, the appellants be given the opportunity to present their side of the matter. The appellants who chose to voluntarily stay away from the Court after that opportunity had been extended to them are not covered by the Section of the Constitution they now assert provides for them. (p. 871 F)**

**NOTABLE POINT OF INTEREST**

**H MUHAMMAD JSC**

***1. Conflict in affidavit - Meaning of***

It must out rightly be observed that learned appellants' counsel harbors serious misapprehension as to what conflict in affidavit

evidence truly connotes. Conflict as a noun, see Oxford Advanced learner's Dictionary, 8th Edition, denotes a persistent situation of serious disagreement in opposing ideas or wishes which makes preference of one to the other difficult. In legal parlance, therefore, conflict means the persisting violent disagreement in the averments of the contending parties which makes it unsafe, and indeed impossible, for the Court, in the face of the disagreement, to prefer from the affidavits of both, the position of one to the other. (p. 870 A)

### **REPRESENTATION**

T. O. Aorbere with J. I. Afam, for the Appellants  
Ocha P. Ulegede with B. O. Koko (Miss), for the Respondent

### **CASES REFERRED TO**

- Roda v. FRN (2015) 1-2 SC (pt. II) 31  
Ikweki v. Ebete (2005) 2 SC (pt. II) 96  
Adeyemi v. State (2014) 5-6 SC (pt. III) 148  
Bakare v. L.S.C.S.C. (1992) 8 NWLR (pt. 262) 641  
Mark v. Eke (2004) 5 NWLR (pt. 865) 54  
Admins v. Aladetoyinbo (1995) 7 NWLR (pt. 409) 526  
First Bank Plc v. May Medical Central Ltd (2000) FWLR (pt. 48) 1343  
Shell Trustees (Nig) Ltd v. Imani & Sons Ltd. (2000) 6 NWLR (pt. 662) 639  
S.B.N. v. M. P. I. Ent. Ltd (1997) 3 NWLR (pt. 492) 209  
Eboh v. Oki (1974) NSCC (Vol.9) 26  
Garba v. University of Maiduguri (1986) 1 NWLR (pt. 18) 550  
Atanda v. Olarewaju (1988) 4 NWLR (pt. 98) 394  
Soleh Boneh Overseas (Nig) Ltd v. Ayodele (1989) 1 NWLR (pt. 99) 549  
Umar v. Bayero University (1988) 4 NWLR (pt. 86) 85  
Mogaji v. Odofofin (1978) 4 SC 65

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

Constitution of the Federal Republic of Nigeria 1999, s. 36(1)

Evidence Act, s. 74

High Court (Civil procedure) Rules of Benue State 1990, O. 22 r. 3 (1) (2), O. 11 r. 1

**BOOK REFERRED TO**

B Oxford Advanced learner's Dictionary, 8th Ed.

**LEAD JUDGMENT BY MUHAMMAD JSC**

C This is an appeal against the judgment of the Court of Appeal, Jos Division, hereinafter referred to as the Court below, delivered on the 7th day of April 2005, affirming the ruling of the Benue State High Court, the trial Court, in motion No.MHC/317M/2000 arising from Suit No.MHC/59/99. The brief facts leading to the appeal are supplied anon.

D The respondent Chief I. O. C. Onwuka and one Dr. Odu, on the 12th April 1999, as plaintiffs, took out a writ claiming damages against the appellants and five others who had demolished their property.

E The Law firm of Osuman & Co entered appearance for the 1st - 4th defendants vide T. S. Shior Esquire by a memorandum filed on 14th May 1999. S. T. Tume Esquire, a senior state counsel with the Benue State Ministry of Justice, by a memorandum filed on the 17th May 1999, entered appearance for the 5th - 7th defendants.

G Hearing notices having been issued by the trial Court, parties were all served on the 6th July 1999. On the hearing date, 16th July 1999, neither the 1st - 4th defendants nor their counsel appeared in Court. The 5th - 7th defendants, on the other hand, though not in Court, were represented by counsel and subsequently, by leave of Court, filed their statement of defence out of time. They also participated in the trial. Their counsel, J. O. Idikwu Esquire, fully cross examined the 1st plaintiff and his four witnesses. The H 2nd plaintiff neither appeared at nor participated in the trial which was concluded on the 11th April 2000.

Following application by counsel, the name of the 2nd plaintiff, who did not appear to prove his claim against the defendants,

was struck out. Learned plaintiff's counsel also conceded to the prayers of counsel to the 5th - 7th defendants that their names be struck out since the evidence led in Court had not disclosed any case against them.

On the 17th, two days to the 19th May 2000 to which date the case had earlier been adjourned for judgment by the trial Court the defendants, now appellants, applied to the Court inter-alia, for the arrest of its judgment and leave to file their statement of defence out of time. The reliefs were refused in their entirety. B

Aggrieved by the ruling of the trial Court, the two defendants C who were eventually found liable for respondent's claim appealed to the Court below. The appellants have further appealed against the trial Court's ruling as affirmed by the Court below on an amended notice containing ten grounds.

At the hearing of the appeal, parties through their counsel, D adopted and relied on their respective briefs which had earlier been filed and exchanged as their arguments in the appeal.

The eight issues formulated in the appellants' brief, see pages 6 and 7 thereof, read:- E

### *"3.0 ISSUES FOR DETERMINATION*

#### *3.1 ISSUE 1*

*Whether or not the Court below was right in upholding the trial Court's decision that appellants were given a fair hearing at the trial Court. This issue is distilled from ground 1, 2 and 3 of the grounds of appeal.* F

#### *3.2 ISSUE 2*

*Whether or not the Court below was right in upholding the decision of the trial Court that there was service of Hearing Notice G on the appellants, in the light of the conflicting affidavit evidence of the parties. This issue is distilled from (grounds 4, 5, 6 and 7 of the grounds of appeal).*

*The following subsidiary issues arise under this issue 2: namely* H

*3.2.1 (a) Whether or not the Court below was right when it upheld the decision of the trial Court in resolving the irreconcilable conflicts in the affidavit evidence of the parties without recourse to*

oral evidence and,

3.2.2. (b) *Whether or not from the evidence on record, there was proof of service of Hearing Notice on the appellants before the commencement of the trial of this suit.*

### 3.3. ISSUE 3

B *Whether or not the Court below was right in upholding the decision of the trial High Court which failed to consider and apply the provisions of Order 37, Rules 1, 2, 3, 4 and 5 of the Benue State High Court (Civil Procedure) Rules, 1988, at the time the*  
C *proceedings were conducted before the said trial Court. This issue is distilled from ground 9 of the Grounds of appeal.*

### 3.4 ISSUE 4

*Whether or not the Court below was right in relying on Exhibit "R" which was inadmissible evidence, as proof of service.*  
D *This issue arises from ground 10 of the grounds of appeal.*

*3.4.1 The Subsidiary issue that arises under issue 4 is whether or not Exhibit "R" (i.e. the uncertified photocopy of the purported proof of service of Hearing Notice on the Appellants' Counsel) was a legally admissible document, if not, was the Court below right in affirming the decision of the trial High Court based on the reliance on the said Exhibit "R".*  
E

### 3.5 ISSUE 5

*Whether in the light of issues 1, 2, 3, and 4 above, the Court of Appeal was right in dismissing the Appellants' Appeal. This issue is distilled from ground 8 of the grounds of appeal".*  
F

Learned respondent's counsel adopted the foregoing issues formulated by the appellants as arising for the determination of the appeal.  
G

My lords, consideration of all the foregoing issues on the basis of which parties urge the determination of this appeal is unnecessary. In *Roda v. FRN* (2015) 1-2, SC (Pt.II) 31 at 51 @ 52 this Court restated the overriding principle pertaining the formulation of issues for determination of appeals thus:-  
H

*"It is certainly never the number of issues formulated and argued by the Appellant that guarantees the success of his appeal. Rather, it is the relevance of these issues and the potency of the*



*arguments thereon which put the appellant on a better stead. This explains why appellate Courts persistently frown at proliferation of issues and admonish parties to refrain from the unhelpful exercise, Appellant's arguments come through more forcefully and with disarming clarity if they are neither repetitive nor verbose... The better approach, therefore, is to formulate a single issue tersely to cover a number of grounds which are governed by the same applicable principles of Law. .... Succinctness remains the overriding indicia".* B

See also Ikweki V Ebete (2005) 2 SC (Pt.II) 96; and Adeyemi C v. State (2014) 5-6 SC (PT.III) 148 at 171-172.

Appellants' real grouse in this appeal lies in the perversity they ascribe to the concurrent decisions of the two Courts below which, they contend, had proceeded in spite of the violent conflict and the paucity of facts in the affidavits for and against appellants' application at the trial Court. Appellants' 1st and 2nd main issues, in the circumstance, adequately provide for the determination of the appeal. D

Arguing the appeal, learned appellant's counsel contends that the Lower Court's affirmation of the trial Court's refusal to find merit in their application of 17th May 2000 aimed at facilitating their defence to respondent's claim constitutes a negation of their constitutionally guaranteed right of fair hearing. E

Trial in Suit No.MHC/59/99, it is submitted, was commenced F by the respondent on 26th July 1999. The case, it is argued, suffered seven adjournments before the trial Court's judgment delivered on the 19th May 2000. The appellants, who were not served with hearing notice, on becoming aware of the case, filed their application praying the trial Court to allow them, for all the reasons contained in the affidavit in support of their application, defend the suit. The facts in the affidavits of the parties, it is further contended, remain violently in conflict that no same conclusion can draw from them. The concurrent decisions of the two Courts H below, learned counsel submits, have no legal basis.

Further, arguing the appeal, learned appellants counsel submits that the Lower Court's affirmation of the trial Court's exami-

nation of the signatures of appellants' counsel in Exhibits C and R, and the eventual conclusion that the signature in exhibit C is a forgery cannot simply be right. The exercise cannot, it argued, ground the further finding of effective service of the hearing notice on the appellants by virtue of Exhibit R.

B Conflict in the averments of both sides, learned counsel further argues, also rages as to the fact of their being seen in Court at various dates during trial. The failure of the trial Court to call for oral testimony to resolve the conflict, appellants' counsel submits, C remains fatal to the decisions of both Courts as there is nothing on record to show that appellants have had the opportunity of being heard before the trial Court found them liable to the respondent. The affirmation of such a wrong decision by the Lower Court is legally untenable. Learned appellants' counsel relies on Bakare v. D L.S.C.S.C. (1992) 8 NWLR (Pt.262) 641 AT 665 and Mark v. Eke (2004) 5 NWLR (Pt.865) 54 at 80; Admins v. Aladetoyinbo (1995) 7 NWLR (Pt.409) 526 at 536 and First Bank Plc v. May Medical Central Ltd (2000) FWLR (Pt.48) 1343 and urges that the appeal E be allowed.

Responding, learned counsel submits that the central issue in the appeal is whether or not the appellants had been served to attend Court or had by any other means become aware of the suit commenced by the respondents against them. From the materials F made available to the trial Court, particularly exhibit R, the hearing notice served on 6th July, 1999 on them through their counsel, the fact has been established that appellants had been served. Once served to attend Court at the commencement of trial the appellants, learned respondent's counsel insists, in the absence of any G evidence to the contrary, are deemed to be aware of subsequent hearing dates to which the matter was adjourned. The trial Court's failure to issue subsequent hearing notices cannot, learned respondent's counsel further argues, be the basis of allowing the H appeal. Besides, the respondent's averments that the appellant were in the habit of taunting him at the trial Court as well as at the magistrate Court where the sister case was being heard were merely denied and not controverted in the further affidavits filed

by the appellants. Courts, it is argued, must deem as true such uncontroverted averments.

Further arguing the appeal, learned respondent's counsel concedes that though the authorities cited by appellants' counsel correctly state the principle on the issue of fair hearing, having been served and given the opportunity of being heard, the cases no longer avail the appellants. Relying on *Shell Trustees (Nig) Ltd v. Imani & Sons Ltd* (2000) 6 NWLR (Pt.662) 639 AT 660 ? 661 and *S.B.N. v. M. P. I. Ent. Ltd* (1997) 3 NWLR (Pt.492) 209 at 218, learned counsel urges that the appeal be dismissed on that ground alone.

Appellants' insistence that the Lower Court's affirmation of the trial Court's ruling proceeded in spite of the conflict in the affidavits of contending parties, it is further argued, having not been borne by the record, is unavailing. Both Courts, it is submitted, have correctly shown that there was no conflict in the affidavits of both sides to warrant resort to oral testimony.

Lastly, learned counsel submits, by Section 74 of the Evidence Act, the trial Court is entitled to take judicial notice of documents which form part of its records. The Lower Court's affirmation of the trial Court's resort to exhibits R and C the hearing notice served the appellants and the renunciation of same by their counsel respectively, is in order. The findings of both Courts, after comparing the signatures on the two documents, that whereas Exhibit R is an effective proof of service of the hearing notice on appellants' counsel, Exhibit C the purported renunciation of Exhibit R by the counsel is a forgery, cannot also be faulted. These findings take the bottom off appellants' case completely. On the whole, learned counsel submits, the appeal being lacking in merit be dismissed.

***Now, counsel on both sides are one and correctly too that where there is irreconcilable conflict in the deposition of contesting parties before a Court, the Court must resolve the conflict by calling oral evidence either from the deponents or other witnesses. The Court, in the face of such a persisting conflict, is not allowed to prefer***

**one deposition to the other. Learned respondent counsel cannot be faulted in his further submission that the need to call oral evidence arises only where the conflict in the affidavits are significant and material. The need to call oral evidence, on the authorities, is obviated where the conflict is narrow in which case the Court is in a position to overlook same.** In *Eboh & Anor v. Oki & Ors* (1974) NSCC (Vol.9) 26, this Court restated the principle thus:-

*“while a Court, in a given case, may act on affidavit evidence, it would be unsafe to do so where the evidence is strongly contested and where issues of credibility can only be resolved upon the Court’s view of witnesses.”*

See also *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt.18) 550 and *Atanda v. Olarewaju* (1988) 4 NWLR (Pt.98) 394.

Now, can it be said from the record of this appeal that the decision of the Lower Court is an affirmation of the trial Court’s ruling refusing the appellants leave to defend respondent’s claim in spite of the unresolved conflict in the affidavits of contesting parties? Or is it that in spite of the absence of material conflict in the affidavits of both sides there is such paucity of facts to warrant the trial Court’s ruling as affirmed by the Lower Court? The two issues for the determination of the appeal encapsulate these questions, answers to which shall provide the basis of the resolution of the two issues.

***In deciding whether the affidavit evidence of the two sides is still in conflict such that an enduring decision only emerges after the resolution of the conflict through oral evidence or that the evidence of the respondent has been wrongly preferred by the two Courts below, a further re-appraisal of the totality of the affidavit evidence needs to be made. The Lower Court as well as this Court are eminently qualified to further appraise the affidavit evidence which, not being oral, does not put the credibility of the deponents in issue. It is only where the evidence to be re-appraised is oral and the credibility of the witnesses is in issue that the appellate Court, not***

**having seen and assessed the witnesses, is hindered and not as qualified as the trial Court in evaluating the evidence.** See Soleh Boneh Overseas (Nig) Ltd v. Ayodele (1989) 1 NWLR (Pt.99) 549 and Umar v. Bayero University (1988) 4 NWLR (Pt.86) 85.

After appraising the affidavit evidence available to it, the critical finding the trial Court made, inter-alia, in its ruling, see pages 104 & 105 of the record of appeal, reads:-

*“From the facts before the Court was the hearing notice served on defence counsel as averred by the plaintiff or not, Exhibit R is before the Court. It contains the initials and the correct names of T. S. Shior who was then in the chambers of Osuman and company. I have looked at Exhibit R and compared the signature there with the one Mr. T. S. Shior signed on the memorandum of appearance and I have seen no difference. I have rather spotted differences in the signature that was filed as Exhibit C denying service. I agree with Mr. Ulegede that the signature in Exhibit C is not that of Mr. T. S. Shior... I refuse to be persuaded by Exhibit C and hold that Exhibit R represents a valid document indicating that service was indeed effected on the defence counsel in July 1999 in the suit.”*

Apart from the service of the hearing notice on the appellants, the Court further held that they were aware of the proceedings thereat against them thus:

*“Considering the fact that the plaintiff and 1st and 2nd defendants are involved in a criminal case at the Chief Magistrate Court based on same facts and they have retained same counsel for the two cases; I believe plaintiff that 1st and 2nd defendants were in the habit of training (sic) him over the civil case when they went for the criminal matter as disclosed in the counter affidavit. ....and did not care to take action writing to come only when plaintiff would have thought that the case is almost over.”*

The Court further inferred as follows:-

*“I am convinced from the facts in this case that the defendants deliberately kept away from coming to Court or taking any step to defend the action instituted by the plaintiff against them*

*with the aim of frustrating the course of Justice.”*

The Court in refusing the appellants the indulgence they prayed concluded at page 107 of the record thus:

“...Where there are good and justifiable reasons for granting the extension then the Court will be right to extend time for the act required where no good reasons exist the Court can not rely on forged reasons willy nilly on the basis that both parties have to be heard. Where a party is given an opportunity to be heard and he turns it down the fault will not be that of the Court or the system of Justice... The defendants were knowingly and deliberately negligent and it is not for the Court to pamper them at this stage. I share the view of the plaintiffs counsel that the application is aimed at causing further hardship to the plaintiff and delaying the case in an inordinate manner. Reliefs i-iv refused as lacking any sound basis.”

The Lower Court at page 188 of the record most commendably set out the task before it thus:-

“To resolve the controversy in this issue, the principles and the applicable Law must take into account the facts and deductions which must emerge from the affidavits of parties (supra).”

The Court proceeded to find from these affidavits, inter-alia, that the appellants, from Exhibit R, against the background of Exhibit C, were served hearing notice through their counsel Mr. Shior who, by his signature on the exhibit, acknowledged being served. It is the Court’s further finding that other than the fact of their being served, appellants were also aware of the proceedings commenced by the respondent against them. These findings led to the Court’s dismissal of the appeal before it and the affirmation of the trial Court’s ruling.

The real grouse in the instant appeal against the foregoing judgment of the Lower Court is that the evaluation of the affidavit evidence on record by both Courts below fall below legally acceptable standards and the resulting decisions from the exercise having occasioned injustice must be set-aside. How correct are the appellants in their contention?

To arrive at enduring decisions, the two Courts must cor-

rectly evaluate the affidavit evidence of the contending parties and apply the relevant laws to the ascertained facts. In *Mogaji V Odofin* (1978) 4 SC 65 at 67 this Court has outlined the proper procedure to be adopted by Courts in the particular task thus:-

*“In short, before a Judge before whom evidence is adduced by the parties before him in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weight them together. He will then see which is heavier not by the number of witnesses called by each party, but by quality or the probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the balance of probabilities. Therefore, in determining which is heavier, the judge will naturally have regard to the following:-*

- (a) Whether the evidence is admissible;*
- (b) Whether it is relevant;*
- (c) Whether it is credible;*
- (d) Whether it is conclusive; and*
- (e) Whether it is more probable than that given by the other party.*

*Finally, after invoking the law, if any, that is applicable to the case, the trial judge will then come to his final conclusion based on the evidence which he has accepted.”*

The above procedure applies to affidavit evidence as it does to oral evidence. See also *Adeyeye v. Ajiboye* (1987) 3 NWLR (Pt.61) 432 at 451.

In the case at hand, the review of the affidavit evidence against the background of the submissions of counsel on the issues agitated undertaken by the two Courts, their consequential findings therefrom and the application of the relevant Laws to the facts ascertained, has earlier been demonstrated in this judgment. The Courts’ compliance with the procedure stipulated by this Court in its foregoing decisions is beyond dispute.

It must out rightly be observed that learned appellants' counsel harbors serious misapprehension as to what conflict in affidavit evidence truly connotes. Conflict as a noun, see Oxford Advanced learner's Dictionary, 8th Edition, denotes a persistent situation of serious disagreement in opposing ideas or wishes which makes preference of one to the other difficult. In legal parlance, therefore, conflict means the persisting violent disagreement in the averments of the contending parties which makes it unsafe, and indeed impossible, for the Court, in the face of the disagreement, to prefer from the affidavits of both, the position of one to the other.

In the case at hand, the evaluation of the affidavits of the contending parties done by the trial Court and indeed the re evaluation of same by the Lower Court have clearly shown that the conflict the learned appellants' counsel ascribes to them is non-existent. What has emerged from the exercise is the undisputed fact of service of hearing notice, Exhibit R on the appellants through their counsel, and their being aware of the proceedings against them through the unchallenged and uncontroverted averments in the counter-affidavit filed by the respondent in opposition to appellants' application. It is elementary principle of law that such unchallenged averments must be acted upon by the Courts as being true.

***Also, it is within the lawful province of Courts to examine documents if the resolution of the controversy between the parties before them so requires.*** In *Ozigbo V C.O.P (1976) N.S.C.C. (Vol. 10) 124* restated the principle thus:

*"In R V Smith 3 Cr APP R 87 and R V. Rickard 13 CR APP R 140, the Court of Criminal Appeal formed its own opinion as to the handwriting alleged to be that of the appellant after confirming it with a letter written by her after conviction and without resort to expert evidence. We have ourselves compared the specimen undisputed handwritings of the appellant with the forged documents and, in particular, the forged cheque, Exhibit A, and see no reason for disturbing the finding of the learned senior magistrate that the appellant forged the cheque Exhibit A."*

In the case at hand, one remains equally unconvinced by



the submissions of learned appellants' counsel that the conclusion drawn by the trial Court and the Lower Court as well, from Exhibit R and Exhibit C, after comparing the signatures of appellants' counsel on the two, should be disturbed.

Finally, it must further be noted that appellants' application, found unmeritorious by the two Courts below, was made pursuant to Order 22 of the Benue State High Court (Civil Procedure) Rules which stipulates:-

*"The Court may on such terms as it thinks just by order extend or abridge the period within which a person is required or authorized by these provisions or by any judgment... do any act in any proceedings."*

***Appellants are only entitled to the reliefs from the Courts if on the basis of the facts made bare to them the Courts think the grant of the reliefs is just. From the facts on record, both Courts found and correctly too that it is not just to allow the appellants who were duly served and otherwise aware of the proceedings against them to present their defence only as and when they chose to. Appellants apart, the justice of the grant as it affects the Court and the respondent is equally of essence of the rule of Court by virtue of which the merit or otherwise of appellants' application must be assessed.***

***It is certainly not open to a litigant that had been served hearing notice commanding him to proceed to Court to defend the case instituted against him and who, the hearing notice apart, is otherwise aware of the proceedings taken against him by another, to assert a breach of his right to fair hearing if eventually a decision is given against him. Section 36(1) of the 1999 Constitution (as amended) which enshrines the doctrine of fair hearing, the appellants' wave with gusto does not avail them. The section only provides that before any decision is taken by a Court of law against them, the appellants be given the opportunity to present their side of the matter. The appellants who chose to voluntarily stay away from the***

***Court after that opportunity had been extended to them are not covered by the Section of the Constitution they now assert provides for them.*** So be it. See Okafor V Ag Anambra (1991) 6 NWLR 659; (1991) LPELR-2414 (sc) and Baba v N.C.A.T.C. (1991) 7 SC (Pt.1) 58, (1991) LPELR-692 (SC).

B As a whole, I resolve the two issues in the appeal against the appellants who, by their arguments, failed to show that the concurrent decisions of the two Courts below are perverse. Resultantly, I dismiss the appeal and further affirm the trial Court's ruling dismissing appellants' application inter-alia for arrest of its judgment and extension of time to file their statement of defence. Respondent is entitled to costs which I hereby put at (N200,000.00k) Two hundred thousand naira against the appellants.

D

### **ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead Judgment of my learned brother, M. D. MUHAMMAD JSC just delivered.

E I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

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

F Appeal dismissed.

### **NGWUTA JSC**

G I have read the draft of the lead judgment just delivered by my learned brother, Muhammad, JSC and I agree that the appeal has no merit and ought to be dismissed.

H At the time the application was brought the matter had been concluded and fixed for judgment on 19/5/2000. The motion was filed on 17/5/2000. It was brought pursuant to Order 22 Rule 3 (1) (2) and Order 11 Rule 1 of the High Court (Civil procedure) Rules of Benue State 1990.

The main relief is the one numbered 2 on the motion paper

hereunder reproduced:

*“2. An order arresting the judgment of the Honourable Court stated on 10/5/2000”.*

This is the main relief in the application and unless it is granted none of the other seven reliefs can avail the appellant.

All the issues formulated and canvassed are a cloak to hide the fact that the main relief is not known to law and/or procedure of Benue State of Nigeria. As at 17/5/2000 when the motion was filed all the appellants could have done was to appeal against the judgment and canvass the issues argued in the motion. Appellants were being clever by half. In any case there is no ground to disturb the concurrent findings of facts of the trial Court and the Court below. See *Kale v. Coker* (1982) 12 SC 252 and 271.

I also dismiss the appeal as devoid of merit.

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### **PETER-ODILI JSC**

I am in agreement with the judgment and reasoning just delivered by my learned brother, Musa Dattijo Muhammad JSC. I shall underscore my support with some comments.

This is an appeal against the judgment of the Court of Appeal, Jos Division delivered by Ifeyinwa Cecelia Nzeako JCA on the 7th day of April, 2005.

#### **FACTS:**

About the 12th day of April, 1999, Writ of Summons was jointly issued and served on the Defendants now Appellants among others including the Appellants. The 2nd Plaintiff later abandoned his claim which was struck out on the application of his counsel.

The claim of the Respondent against the Appellants at the trial Court therefore was as follows:-

(a) The sum of Ten Million Naira (N10,000,000.00) only, special and general damages:-

(i) Special damages of N1,581,677.02 made up as follows:-

(a) N741,677.02 value of the demolished building and chattels destroyed along.

(b) N840,000.00 representing the physical cash removed or

stolen at the time of the trespass and destruction.

(b) General damages of N8,418,323 on the footing of aggravated damages.

(c) Perpetual injunction restraining the defendants by themselves, privies, agents and servants from further acts of trespass and interference with the plaintiff's peaceful possession of his properties and land.

On the 27th day of October, 2015 date of hearing, learned counsel for the Appellant, Mr. Aorabee adopted the Appellant's Brief of Argument settled by B. I. Hom Esq., filed on 21/2/06 and deemed filed on 10/1/07. He distilled five issues for determination which are as follows:-

ISSUE 1:

Whether or not the Court below was right in upholding the trial Court's decision that appellants were given a fair hearing at the trial Court. This issue is distilled from grounds 1, 2 and 3 of the grounds of appeal.

ISSUE 2:

Whether or not the Court below was right in upholding the decision of the trial Court that there was service of Hearing Notice on the Appellants, in the light of the conflicting affidavit evidence of the parties. This issue is distilled from grounds 4, 5, 6 and 7 of the grounds of appeal.

The following subsidiary issues arise under this issue 2 namely:

1(a) Whether or not the Court below was right when it upheld the decision of the trial Court resolving the irreconcilable conflicts in the affidavit evidence of the parties without recourse to oral evidence and

2(b) Whether or not from the evidence on record, there was proof of service of Hearing Notice on the Appellants before the commencement of the trial of this suit.

ISSUE 3:

Whether or not the Court below was right in upholding the decision of the trial High Court which failed to consider and apply the provisions of Order 37, Rules 1, 2, 3, 4 and 5 of the Benue

State High Court (Civil Procedure) Rules, 1988 , at the time the proceedings were conducted before the said trial Court. This issue is distilled from ground 9 of the Grounds of appeal.

#### ISSUE 4:

Whether or not the Court below was right in relying on Exhibit 'R' which was inadmissible evidence, as proof of service. This issues arises from ground 10 of the grounds of appeal. B

1. The Subsidiary issue that arises under issue 4 is whether or not Exhibit 'R' (i.e. the uncertified photocopy of the purported proof of service of Hearing Notice on the Appellants' counsel) was a legally admissible document if not, was the Court below right in affirming the decision of the trial Court based on the reliance on the said Exhibit 'R'. C

#### ISSUE 5:

Whether in the light of issues 1, 2, 3 and 4 above, the Court of Appeal was right in dismissing the Appellants' Appeal, The issue is distilled from ground 8 of the grounds of appeal. D

Mr. Ocha P. Ulegede, learned counsel for the Respondent adopted the Brief of Argument he settled and filed on the 30/3/06. He adopted the issues as formulated by the Appellants. E

The issues so crafted shall be utilised some together as there are similarities in them.

#### Issues 1, 2, & 3:

These issues question in the main whether appellants were given fair hearing at the trial Court and if the Court below was right in upholding the decision at the trial Court that there was indeed service of the hearing notice on the appellants. F

Arguing the position of the Appellants, learned counsel, Mr. Aorabee stated that for a total of seven adjournments all recorded, the appellants were in Court only on 19/5/2000 when they became aware of the proceedings and filed a motion on 17/5/2000 and exhibited a 46 paragraph statement of defence praying the Court of trial to arrest the judgment and grant them leave to defend the action on the merit. This prayer the trial Court refused and on appeal the Court below affirmed on the ground that the Appellants were duly served with the hearing notice through their counsel to H

the knowledge of the Appellants.

It was submitted for the Appellants that the foreclosure of the Appellants' right to be heard by the Court of Appeal amounted to an infringement of the provisions of Section 36 (1) (2) (a) of the Constitution of the Federal Republic of Nigeria 1999. He cited  
B Bakare v. L.S.C.S.C. (1992) 8 NWLR (Pt.262) 641 at 665.

That there were conflicts the affidavits of the parties on the issue of where there was service of hearing notice on the Appellant on their counsel and the attention of the trial Court were called to  
C the total of six affidavits, three from the Appellants and three from the Respondents rebuttal of the claims of the Appellants as Applicants support of their application to arrest the judgment of the trial Court. That these irreconcilable conflicts should have been resolved by oral evidence which was not done. He referred to Falola v UBN  
D PLC (2005) All FWLR (Pt.257) 1435 at 1445; Mark v Eke (2004) 5 NWLR (Pt.865) 54 at 80.

For the Appellants, it was contended that the trial Court wrongly compared the signatures on Exhibits B, C, and R and  
E coming to the conclusion that the signature on Exhibit C, affidavit of renunciation was not that of Mr. T. S. Shior. He cited Alake v. The State (1992) 11/12 SCNJ 117.

That there was non-compliance with the mandatory provisions of Order 37, Rules 1, 2, 3, 4 and 5 of the Benue State High  
F Court (Civil Procedure) Rules, 1988 which is a fundamental defect rendering the proceedings before the trial Court a nullity.

Responding, learned counsel for the Respondent, Mr. Ulegede contended that the principle of fair hearing contemplates that the  
G opportunity be afforded parties to be heard and where this is done as this case and the party chose not to utilise same the party cannot be heard to complain. He relied on Shell Trustees (Nig.) Ltd v Imani & Sons Ltd (2000) 5 NWLR (Pt. 662) 639 at 660 - 665; S.B.N. v. M.P.I. Ent. Ltd (1997) 3 NWLR (Pt.492) 902 at 218.

H That the trial Court acted properly in law under Section 108 of the Evidence Act and in the circumstances of this case when he compared the acceptable documentary evidence of the signature of Mr. Shior in the Court's record with the exhibits C and R and

resolving the supposed conflict in favour of the Respondent and there was no necessity for oral evidence. He cited *Eimskip Ltd v. Exquisite Inds. (Nig.) Ltd* (2003) FWLR (Pt.151) 1842.

The appellants through counsel had argued very strongly that no service of the hearing notice was made on them. This the respondents contest equally vehemently on the ground that service was made properly on learned counsel for the Appellants, Mr. T. S. Shior which is tantamount to good service on the party. That the learned trial Judge resolving this conflict on service was right to compare the accepted signature of Mr. T. S. Shior the record of the Court on the Memorandum of Appearance with exhibits R and C endorsements on the Hearing Notice and the renunciation respectively thereby coming to the conclusion that Mr. Shior being effectively served, the Appellants had thereby been served albeit through their counsel. This position of the trial Court, the appellate was comfortable with in its affirmation that Appellants were served and so afforded the opportunity to be present and canvass their side of the case. Therefore if they kept away, they lost the right to cry that they were not accorded fair hearing.

In what the trial Court did its resolution of whether or not service was effected and its confirmation by the Lower Court, I see no reason to fault as where there is documentary evidence from which the Court can settle conflicts in affidavits then, there is no point calling for oral evidence. This is so as in this case the signature of Mr. T. S. Shior in the endorsement of the hearing notice Exhibit R compared with the signature of the same counsel, Mr. T. S. Shior in his Memorandum of Appearance his document of renunciation Exhibit C tilted the balance favour of the same person making the said document and confirming the proof of service of the Hearing Notice. This is to underscore the fact that there is no hard and fast rule that in every conflict in one affidavit evidence against the other, as if there are some documents from which the conflict could be resolved then resort is had thereby without the necessity of calling for oral testimony in resolution of such conflict. In other words, calling for oral evidence to resolve conflict in affidavit evidence is not the first and only option out of the stalemate.

I rely on *Peters v Jackson* (2002) FWLR (R. 113) 376 at 392; *Bismillahi v. Yagba - East Local Government* (2003) FWLR (Pt.141) 1939 at 1964; *Eimskip Ltd. v. Exquisite Inds. (Nig.) Ltd* (2003) FWLR (Pt.151) 1842 at 1866; *Shell Trustees (Nig.) Ltd v. Iman & Sons Ltd* (2000) 6 NWLR (Pt.662) 639; *S.B.N. v. M.P.I. ENT. LTD* (1997) 3 NWLR (Pt.492) 209 at 218.

For emphasis, it needs be said that since the trial Court had ascertained that the hearing notice was properly served on the Appellants, there was no extra requirement that fresh hearing notice should be served on the appellants on every adjourned date as the Court was satisfied that the opportunity to be heard was afforded the appellants and their keeping away was their choice and the repercussions they must live with and it does not lie in their mouth that the Court below ought to have allowed their appeal as they were not served on each adjourned date thereafter.

Again, when the trial Court set the case down for hearing ordering hearing notices to issue on the parties including the appellants which exhibits S1, S2 and R evince, the cry by the Appellants that the form in which that was done was not in strict compliance with Order 37 of the Rules of the Benue State High Court, goes to no issue. The reason is supplied by Order 2, Rule 1 (1) (2) of the Benue State High Court Rules which Provides thus:-

*“1(1) Where in beginning or purporting to begin proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings, or any document, judgment or order therein”.*

*“2.(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or Order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken fresh step after becoming aware of the irregularity”.*

What I am trying to convey is that the appellants instead of



calling attention to the supposed infraction took several steps including a motion to arrest the judgment and for extension of time to enter their defence before the judgment, filed an appeal to the Court below which appeal has since been dismissed. Clearly the reactions of the Appellants came too late and the Rules of Court they sought refuge in could not avail them. B

The issues raised herein that is 1, 2, & 3 are resolved against the Appellants.

#### ISSUES 4 & 5:

These raise the questions whether or not the Court below C was right relying on Exhibit R, the uncertified photocopy of the proof of service of the hearing notice on the Appellant's counsel and taking it as an admissible document and if not whether the Court below was right to affirm the decision of the trial Court which relied on the said Exhibit R. Also, if from the totality of what transpired the Court of Appeal was right to have dismissed the Appellants' appeal. D

Learned counsel for the Appellants submitted that Exhibit R attached to the counter affidavit of the respondent dated 19/6/2000 E purporting to be proof of service of hearing notice on the then counsel to the Appellants - Mr. T. S. Shior is a public document by virtue of Section 109 (a) (ii) and (iii) of the said Evidence Act as it came from the record of the Court which act was carried out by a public officer - Mr. Boniface Mtsor, a bailiff. That by the combined F effect of Section 97 (2) (c), Sections 111 (1) and 112 of the Evidence Act only certified true copies of public documents are admissible evidence to the exclusion of even original copies thereof and so Exhibit "R" being uncertified does not pass the test of admissibility. He referred to Obadina Family and Executors of Chief G J. A. Ajao v. Ambrose Family & Ors (1969) 1 NMLR 25 at 30.

That this Court can even at this stage expunge and/or disregard Exhibit 'R' and hold that it was wrongly admitted and based on which this appeal should be allowed. Learned counsel cited H National Investment and Properties Company Ltd v. The Thompson Organisation Ltd; Shanu v. Afribank (Nig.) Plc (2002) 17 NWLR (Pt.795) 185 at 222.

For the respondent was contended that while it is trite that only certified copies of public documents are admissible in evidence legal proceedings and any objection to the admissibility of copies of public documents not properly certified can be raised during a trial. However, it is also trite that all documents attached to an affidavit form part of the affidavit in question and it is not possible to raise objection to its admissibility in the affidavit of the respondent without running foul of Section 87 of the Evidence Act 1990. He cited *C.R.P.D.I.C. Ltd v. Obongh* (2001) FWLR (Pt.54) 353.

That the proof of service of the Hearing Notices exhibits R, S1 and S2, returned by Mr. M. T. Shior were in the Court records and without the exhibition of the same, the Court has the power and right to look at its own records for the purpose of establishing for itself the truth of the issue of service. He cited Section 74 of the Evidence Act. That the trial Court is allowed to take judicial notice of its own records which the Court did in this case, Also that where any judicial or official act is slow to have been done in a manner substantially regular it is presumed that formal requisites for its validity were complied with. He cited Section 150(1) of the Evidence Act, 1990; *Fannami v. Bukar & Ors* (2004) FWLR (1998) 1210 AT 1241.

The stance of the Appellants is that Exhibit R being a public document and a photocopy not certified should be expunged by the Court which would result in the collapse of the case of the Respondent from the trial Court up. That position of the Appellants not for our purpose herein as it is not disputed that only certified copies of public documents are admissible in evidence in legal proceedings and any objection to the admissibility of copies of public documents not properly certified can be raised during a trial.

However, it is also trite that all documents attached to an affidavit such as Exhibit R form part of the affidavit in question and it is not possible to raise objection to its admissibility in the affidavit of the respondent without running counter to Section 87 of the Evidence Act 1990, I rely on *C.R.P.D.I.C. Ltd v. Obongh*

(2001) FWLR (Pt.54) 353.

There were proofs of service of the Hearing Notices Exhibits R, S1 and S2 returned by Mr. M. T. Shior who effected service which documents were in the Court records and since the Court has the power to look at its record to convince itself of the truth of the service alleged, the fact of non certification of the said documents are therefore a non issue since the Court is allowed to take judicial notice of same being in its custody. See Section 74 of the Evidence Act. Also, the presumption of validity is prescribed covering any judicial or official act which has been shown to have been done substantially in a regular way. See *Fannami v Bukar & Ors* (2004) FWLR (Pt.198) 1210 at 1241. B C

The concurrent findings of the two Courts below being difficult to challenge and no perversity seen, I shall in keeping with the better reasoning the lead judgment also resolve these issues 4 & 5 in favour of the Respondents. D

In conclusion, all issues resolved in favour of the Respondent, I too dismiss this appeal which I find unmeritorious. I abide by the consequential orders made. E

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### **ARIWOOLA JSC**

I have had the opportunity of reading the draft of the leading judgment of my learned brother, Musa Dattijo Muhammad, JSC, just delivered and I am in total agreement with the reasoning therein and conclusion arrived thereat. F

I have nothing new to add as the lead judgment beautifully dealt with the issues involved to arrive at the conclusion that the appeal deserves to be dismissed. I also dismiss the appeal and will abide by the consequential orders including that on costs. G