

**SUPREME COURT OF NIGERIA**  
FRIDAY 26TH FEBRUARY, 2016. SC. 192/2003  
**CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA,**  
**M. U. PETER-ODILI, O. ARIWOOLA,**  
**K. M. O. KEKERE-EKUN, JJSC**

CHIEF ISAAC EGBUCHU

..... APPELLANT

AND

1. CONTINENTAL MERCHANT BANK PLC

2. C.M.B. HOMES LIMITED

3. NIGERIA DEPOSIT INSURANCE

(Joined as Liquidator of Continental  
Merchant Bank Plc)

..... RESPONDENTS

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ORDERS OF COURT - Non suit - Is made where plaintiff has not failed entirely to prove his case - Where defendant is not entitled to court's judgment - Where no injustice to defendant would be caused (H1)

COURTS - Issue - Suo motu raising - Court is not entitled to raise issue suo motu and decide on it - Without affording parties opportunity to be heard (H2)

COURTS - Orders of - Jurisdiction - Where trial court lacks jurisdiction to entertain a matter - Or to make a particular order - Court of Appeal would equally lack jurisdiction to do so (H3)

FAIR HEARING - Non suit - Failure of CA to invite the parties to address it on issue of non-suit - Was a breach of appellant's right to fair hearing - As parties must be heard before the order is made (H4)

**FACTS**

Before the High Court of Lagos State, plaintiff/appellant commenced this action against defendants/respondents seeking inter alia for a declaration that appellant is still the Managing Director of 2<sup>nd</sup> respondent and can only be removed in accordance with the Article of Association of 2<sup>nd</sup> respondent company. Appellant alternatively asked for N7,051,588.80 as damages for breach of contract. Re-

spondents counter claimed amongst others for an order compelling appellant to immediately deliver his two Peugeot official vehicles to 1<sup>st</sup> respondent or alternatively pay N900,000.00 being the open market value of the vehicles. Appellant's major grouse is that 1<sup>st</sup> respondent unlawfully relieved him of his employment and as such he is entitled to be paid damages for breach of contract. Respondents contend that appellant's appointment was lawfully terminated in accordance with 1<sup>st</sup> respondent's conditions of service.

Hearing commenced in the matter. At the end of hearing and in its judgment, the Court awarded appellant the sum of N5,610,099.00 as damages for breach of contract and awarded the sum of N484,909,00 in favour of respondents as the total value of the official cars attached to appellant. Dissatisfied, respondents appealed to the Court of Appeal which affirmed the decision of the trial Court to the effect that appellant's employment was unlawfully terminated and that he was entitled to damages. It however expunged Exhibit P26 (a certified true copy of the statement of claim, containing a detailed computation of appellant's entitlements) on the ground that pleadings do not constitute evidence. Having expunged Exhibit P26 the substratum of appellant's claim for damages collapsed. The Court applied the provisions of Order 37 of the Lagos State High Court (Civil Procedure) Rules 1994 in exercise of its powers under section 16 of the Court of Appeal Act and made an order of non-suit. Aggrieved with this order, appellant appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Whether the learned justices of the Court of Appeal were right in ordering a non-suit in this case when the parties and/or their counsel were never invited to address the Court on the propriety or otherwise of such an order.

2. Whether in the circumstances of this case, the learned Justices of the Court of Appeal were right when they held that the appellant had not proved his entitlement to the damages claimed.

3. Whether the learned justices of the Court of Appeal were right in expunging Exhibit p.26 from the record when the admissibility of Exhibit p.26 was never a ground of appeal before the Court and there was no prayer by the appellant (now respondent) requesting that Exhibit p.26 be expunged.

# **HELD** (Unanimously allowing the appeal per **KEKERE-EKUN JSC**)

## *ORDERS OF COURT - Non suit*

**1. An order of non-suit will be made in the following circumstances:**

- a. Where the plaintiff has not failed in toto or entirely to prove his case;**
- b. Where the defendant is not in any event entitled to the court's judgment; and**
- c. Where no wrong or injustice to the defendant would be caused by such order. (p. 1346 G)**

## *COURTS - Issue - Suo motu raising*

**2. Now, the law is settled that a Court is not entitled to raise an issue suo motu and decide on it without affording the parties an opportunity to be heard. This is because in doing so the Court is seen to leave its exalted position as impartial arbiter and descend into the arena of conflict. An appellate Court is also not entitled to raise an issue not raised by either of the parties at the trial Court or on appeal and base its decision thereon without affording the parties an opportunity to be heard. (p. 1347 B)**

## *COURTS - Orders of - Jurisdiction*

**3. As rightly submitted by learned counsel for the appellant, in the exercise of its powers under Section 16 of the Court of Appeal Act, the Court of Appeal is only empowered to make an order, which the trial Court is authorised to make. Thus, where the trial Court lacks jurisdiction to entertain a cause or matter or to make a particular order, the Court of Appeal would equally lack jurisdiction to do so. Order 37 Rule 1 of the Civil Procedure Rules clearly enjoins the Court to hear the parties on the propriety of making an order of non-suit. (p. 1347 G)**

*FAIR HEARING - Non suit*

**4. Contrary to the submission of learned counsel for the respondents, it has been firmly settled by decisions of this Court that hearing parties before an order of non-suit is made is mandatory.**

- B In light of all that I have said above, there is no doubt that the failure of the Court below to invite the parties to address it on the issue of non-suit was a breach of the appellant's right to fair hearing as guaranteed by Section 36 (1) of the 1999 Constitution (as amended). The judgment of Court below is therefore a nullity and cannot be allowed to stand. Accordingly I resolve this issue in the appellant's favour.**
- C** (pp. 1348 A/1349 B)

**D REPRESENTATION**

E. A. OYEBANJI, ESQ. WITH HIM, M.O.A. OLAWEPO, ESQ. and  
M. A. OLAREWAJU, ESQ., for the Appellant  
A.O. WAHAB, ESQ., for the Respondents

**E CASES REFERRED TO**

- Adigun v. A.G. Oyo State ((1987) 1 NWLR (pt. 53) 674  
Adeleke v. Raji (2002) 13 NWLR (pt. 783) 142  
Olusanya v. Olusanya (1983) 1 SCNLR 134  
Odi v. Iyala (2004) 8 NWLR (pt. 875) 283
- F** Yesufu v. A.C.B. Ltd. (1980) 1 - 2 SC 31  
Dairo v. U.B.N. Plc. (2007) 7 SC (pt. II) 97  
Nsiegebe v. Mgbemena (2007) 4 - 5 SC 1  
A.G. Leventis Plc. v. Akpu (2007) 6 SC (pt. I) 139
- G** Inakoju v. Adeleke (2007) 4 NWLR (pt. 1025) 425  
Olagbemiro v. Ajagungbade III (1990) 3 NWLR (pt. 130) 37  
Akinsuroju v. Joshua (1994) 4 NWLR (pt. 187) 542  
Okpala v. Ibeme (1989) NWLR (pt. 102) 208

**H STATUTES & RULES REFERRED TO**

Court of Appeal Act, s. 16  
Constitution of the Federal Republic of Nigeria 1999 (as amended),  
s. 36(1)  
High Court of Lagos State (Civil Procedure) Rules 1994, O. 37

**LEAD JUDGMENT BY KEKERE-EKUN JSC**

This is an appeal against the judgment of the Lagos Division of the Court of Appeal delivered on 18/7/2002 which set aside the judgment of High Court of Lagos State delivered on 15/12/1995 and made an order of non-suit. B

The facts leading to the appeal are as follows: The appellant's case is that he was appointed in 1981 by the 1<sup>st</sup> respondent as Manager Personnel and Administration. He rose to the post of General Manager in the 1st Respondent and occupied the position until 24/11/1992. He further claimed that he was subsequently appointed as the Managing Director of the 2nd respondent, a subsidiary of the 1st respondent. The necessary statutory documents were filed at the Corporate Affairs Commission in Abuja. He was earning his previous salary and emoluments as in the 1st respondent pending the approval of enhanced conditions of service by the 2nd respondent. It was his contention that before the Board of Directors of the 2nd respondent sat, the 1st respondent by a letter dated 14th January 1993, informed him that his services were no longer required. It was his further contention that having failed to comply with the Memorandum and Articles of Association of the 2nd respondent and the Companies and Allied Matters Act, the respondents were liable to pay him damages for breach of contract. C D E

It was the respondents' position on the other hand that the appellant was merely an employee of the 1st respondent seconded to manage the 2nd respondent and that he was never appointed as Managing Director of the 2nd respondent. It was the respondents' further contention that the 1st respondent was the appellant's employer and that his appointment was lawfully terminated in accordance with the 1st respondent's conditions of service. F G

Clearly aggrieved, he instituted an action against the respondents for damages for breach of contract of employment. By paragraph 23 of his Amended Statement of Claim dated 20th March, 1995, he sought the following reliefs: H

*"1. A DECLARATION that the plaintiff is still the Managing Director of the 2nd defendant.*

*2. A DECLARATION that the plaintiff as the Managing Director of the 2nd defendant company can only be removed as pro-*

*vided under Article 91 of the Articles of Association of the 2nd defendant company duly registered at the Corporate Affairs Commission and in compliance with Section 262 of the Companies and Allied Matters Decree 1990.*

B 3. *A DECLARATION that the 1st defendant's letter of 14th January 1993 written to the plaintiff by the 1st defendant is insufficient to remove the plaintiff as the Managing Director of the 2nd defendant company.*

C 4. *AN INJUNCTION restraining the defendants from validly appointing any person as the Managing Director of the 2nd defendant or from appointing anybody to act in any capacity which to all intents and purposes is that of the Managing Director of the 2nd defendant.*

*ALTERNATIVELY*

D N7,051,588.80 (seven Million, Fifty One Thousand, Five Hundred and Eighty-Eight Naira, Eighty Kobo) as damages for breach of contract.”

E In paragraph 22 of his statement of claim, he gave a comprehensive computation of his remuneration and entitlements up till retirement. The respondents (as defendants) counter claimed as follows:

F 1. An Order compelling the plaintiff to deliver forthwith to the 1st defendant the vehicles Peugeot 504 Registration Number: LA 281 AR and Peugeot 505 Registration Number LA 3361 AR.

2. N1,000.00 per day as special damages for alternative transportation at the rate of N500.00 per car from 14th January, 1993 until the date of return of the vehicles to the 1st defendant.

3. N100,000.00 general damages.

G 4. In the alternative, N900,000.00 being the open market value of the said vehicles.

H At the conclusion of the trial, the High Court entered judgment in favour of the appellant in the sum of N5,610,099.00 as damages for breach of contract and awarded the sum of N484,909.00 in favour of the respondents as the total value of the official cars attached to the plaintiff.

Being dissatisfied with the decision, the respondents herein appealed to the Court below, which affirmed the decision of the trial Court to the effect that the appellant's employment was unlawfully

terminated and that he was entitled to damages. It however expunged Exhibit P26, a certified true copy of the statement of claim, containing a detailed computation of the appellant's entitlements, on the ground that pleadings do not constitute evidence.

Having expunged Exhibit P26 the substratum of the appellant's claim for damages collapsed. The lower Court applied the provisions of Order 37 of the Lagos State High Court (Civil Procedure) Rules 1994 in exercise of its powers under Section 16 of the Court of Appeal Act and made an order of non-suit. It is the order of non-suit that gave rise to the instant appeal.

At the hearing of the appeal on 8th December 2015, E.A. Oyebanji Esq. leading Messrs M.O.A. Olawepo and M.A. Olarewaju adopted and relied on the appellant's brief, which was deemed filed on 20/3/2013 and his reply brief filed on 29/6/2015. He urged the Court to allow the appeal, set aside the judgment of the Court below and restore the judgment of the trial Court on the ground that the appellant's right to fair hearing was breached, as he was not heard before the order of non-suit was made. A.O. Wahab, Esq., learned counsel for the respondents adopted and relied on the respondents' brief deemed filed on 1/6/2015 and urged the Court to dismiss the appeal.

The appellant formulated the following three issues for the determination of this appeal thus:

1. Whether the learned justices of the Court of Appeal were right in ordering a non-suit in this case when the parties and/or their counsel were never invited to address the Court on the propriety or otherwise of such an order. (Formulated from Ground 1)

2. Whether in the circumstances of this case, the learned Justices of the Court of Appeal were right when they held that the appellant had not proved his entitlement to the damages claimed. (Formulated from Grounds 3 and 4)

3. Whether the learned justices of the Court of Appeal were right in expunging Exhibit p.26 from the record when the admissibility of Exhibit p.26 was never a ground of appeal before the Court and there was no prayer by the appellant (now respondent) requesting that Exhibit p.26 be expunged. (Formulated from Ground 2)

The respondents distilled a single issue viz:

Were the learned justices of the Court of Appeal right to order

a non-suit in this matter and should that order be upheld by the Supreme Court?

I shall adopt the issues distilled by the appellant in determining the appeal. It is in *pari materia* with the sole issue formulated by the respondent. The determination of this issue would determine whether  
 B or not it is necessary to consider Issues 2 and 3, as it raises the issue of fair hearing. This is because the law is trite that any proceedings conducted without fair hearing amounts to a nullity and is bound to be set aside. See: *Mfa & Anor. vs Inongha* (2014) 1- 2 SC (pt.1) 43 @ 72; *Tsokwa Motors (Nig.) Ltd. vs U.B.A. Plc.* (2008) A FWLR (pt.403) 1240 @ 1255 A - B; *Adigun vs A.G. Oyo State* ((1987) 1 NWLR (Pt.53) 674; *Okafor vs A.G. Anambra State* (1991) 3 NWLR (Pt.200) 59; *Leaders & Co. Ltd. vs Bamaïyi* (2010) 18 NWLR (Pt.1225) 329.

#### ISSUE 1

D In support of this issue, learned counsel for the appellant referred to the judgment of the lower Court at page 685 of the record of appeal wherein it relied on the provisions of Order 37 of the High Court of Lagos State (Civil Procedure) Rules 1994 and its powers under Section 16 of the Court of Appeal Act in making the order of  
 E non-suit, and submitted that the Court was enjoined by Order 37 to hear the parties before making such an order. He submitted that by placing reliance on Section 16 of the Court of Appeal Act, which empowers the Court of Appeal to make any Order, which the trial  
 F Court is authorised to make, the Court was bound to comply strictly with the provisions of Order 37. On the admonition of the Supreme Court against making an order of non-suit without hearing the parties, he cited the following authorities: *Adeleke vs Raji* (2002) 13 NWLR (Pt.783) 142; *Olusanya vs Olusanya* (1983) 1 SCNLR 134  
 G @ 139. He also relied on Section 36 (1) of the 1999 Constitution (as amended) and submitted that there was a breach of the appellant's fundamental right to fair hearing.

He submitted that the appellant satisfactorily proved his case for damages on the balance of probabilities on the printed evidence  
 H before the Court and that this is therefore not a case in which an order of non-suit ought to have been made.

In reaction to the above submissions, learned counsel for the respondents relied on the case of: *Chief Maxwel Dokpiri Odi vs Chief Harrison Iyala* (2004) 8 NWLR (Pt.875) 283 @ 312 D - F, wherein

this Court held that an order of non-suit is made where a plaintiff is unable to prove his whole case. That where there was failure of the trial judge to make proper and specific findings and an appellate Court can neither do the same on the printed evidence, a re-hearing or non-suit, depending on the circumstances of the particular case may be ordered. He cited the case of *Yesufu vs A.C.B. Ltd.* (1980) 1 - 2 SC 31 for the factors to be considered in determining whether or not to make an order of non-suit. He contended that the options open to this Court where an order of non-suit is made, is either to uphold the order or dismiss the appeal so that litigation may finally come to an end after nearly two decades. B C

He proceeded from paragraphs 3.4 to 3.25 at pages 7 - 16 of his brief to make submissions in respect of Exhibit P26 relied upon by the appellant in proof of the claim for damages, its probative value and the applicable law on the standard of proof in a claim for damages. Thereafter he returned to the issue at hand in paragraph 3.26 of his brief wherein he contended that it is only desirable and not mandatory for a Court to hear counsel before ordering a non-suit. He relied on the case of *Yesufu vs A.C.B. Ltd.* (supra) and submitted that in the event that the Court does not uphold the order of non-suit, the only option is to dismiss the appellant's case. D E

In reply on points of law, learned counsel for the appellant submitted that the contention of learned counsel for the respondents that the requirement to hear counsel before an order of non-suit is made is not mandatory, is misconceived and does not represent the current position of the law. He relied on the decisions of this Court in several cases, including: *Dairo vs U.B.N. Plc & Anor.* (2007) 7 SC (Pt.II) 97 @ 122 and *Nsiegebe vs Mgbemena* (2007) 4 - 5 SC 1; *A.G. Leventis Plc. vs Akpu* (2007) 6 SC (pt. I) 139 to the effect that where the Court raises an issue suo motu the parties must be given an opportunity to be heard before arriving at a decision based on the issue. He submitted that in the absence of a cross-appeal, it does not lie in the respondents' mouth to urge the Court to vary the judgment of the Court below by ordering a dismissal of the appellant's case. F G H

Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

36(1) In the determination of his civil rights and obligations, including any question or determination by or against any govern-

ment or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

On the meaning of fair hearing, this Court in *Inakoju vs Adeleke* B (2007) 4 NWLR (Pt.1025) 425 @ 618 E - F, held thus:

*“The constitutional provision mainly stems or germinates from two common law principles of natural justice. They are audi alteram partem and nemo judex in causa sua... The meaning of the Latinism [audi alteram partem] is “hear the other side; hear both sides. No man should be condemned unheard.”... What the rule or doctrine means is that the parties must be given equal opportunity to present their cases to the Court and no party should be given more opportunity or advantage in the presentation of his case.”* C

It is not in dispute that the issue of the appropriateness of an order of non-suit in the circumstances of this case never arose at the hearing of the appeal. However, in the course of its judgment, the Court below held at page 685 of the record: D

*“The implication of expunging Exhibit P26 from the record holds awesome prospect of not proving the computation of damages awardable to the respondent in the sum of N7, 051, 588.80. However, I think the peculiar circumstances of the matter warrant resorting to Order 37 of the Lagos State High Court (Civil Procedure) Rules 1994 on non-suit in exercise of the powers vested in this Court under Section 16 of the Court of Appeal Act. For ease of reference the said order is reproduced as follows:* E

*“The Court may in any suit, with or without the consent of parties, non-suit plaintiff, where satisfactory evidence shall not be given entitling either plaintiff or defendant to the judgment of the Court.* F

*“I am of the firm view the order of non-suit as contemplated in the foregoing provision of Order 37 takes care of this matter. And I accordingly so order.”* G

**An order of non-suit will be made in the following circumstances:** H

**a. Where the plaintiff has not failed in toto or entirely to prove his case;**

**b. Where the defendant is not in any event entitled to the court’s judgment; and**

**c. Where no wrong or injustice to the defendant would be caused by such order.** See *Olagbemiro vs Ajagungbade III* (1990) 3 NWLR (Pt.130) 37 @ 42, *Akinsuroju vs Joshua* (1994) 4 NWLR (Pt.187) 542 @ 590 - 551 H - A; *Okpala & Anor vs Ibeme & Ors* (1989) NWLR (pt.102) 208.

***Now, the law is settled that a Court is not entitled to raise an issue suo motu and decide on it without affording the parties an opportunity to be heard. This is because in doing so the Court is seen to leave its exalted position as impartial arbiter and descend into the arena of conflict.*** See *Kuti vs Balogun* (1978) 1 SC 53; *Obawole vs Williams* (1996) 10 NWLR (pt.477) 146; *Stirling Civil Eng. (Nig.) Ltd. vs Yahaya* (2005) 11 NWLR (Pt.935) 181; *Omokuwajo vs F.R.N.* (2013) 9 NWLR (Pt.1359) 300; *Ominiya vs Alabi* (2015) LPELR - SC.41/2004. ***An appellate Court is also not entitled to raise an issue not raised by either of the parties at the trial Court or on appeal and base its decision thereon without affording the parties an opportunity to be heard.***

In the case of: *Olusanya vs Olusanya* (1983) 14 NSCC 97 @ 102, this Court stated the principle regarding raising an issue suo motu by the Court thus:

*"This Court has said on a number of occasions that although an appeal Court is entitled, in its discretion, to take points suo motu, if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only: where the points are so taken, the parties must be given the opportunity to address the appeal Court before decision on the points is made by the appeal Court."*

See also: *Ejike vs C.O.P.* (2015) 4 - 5 SC (Pt.1) 101.

Apart from this, Order 37 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 1994 contains a proviso, which the Court below did not advert its mind to. The proviso is as follows:

*"Provided that the trial Judge gives the counsel to the parties the right to make submission about the propriety of the non-suit."*

***As rightly submitted by learned counsel for the appellant, in the exercise of its powers under Section 16 of the Court of Appeal Act, the Court of Appeal is only empowered to make an order, which the trial Court is authorised to make. Thus, where the trial Court lacks jurisdiction to entertain a cause or matter or to make a particular order, the Court of***

**Appeal would equally lack jurisdiction to do so. Order 37 Rule 1 of the Civil Procedure Rules clearly enjoins the Court to hear the parties on the propriety of making an order of non-suit.**

**Contrary to the submission of learned counsel for the respondents, it has been firmly settled by decisions of this Court that hearing parties before an order of non-suit is made is mandatory.** In *Adeleke vs Raji* (2002) 13 NWLR (Pt.783) 142 @ 154 A - C, Belgore, J.S.C. (as he then was) in his concurring judgment stated thus:

*"Where a Court finds some substance in entering (an) order of non-suit or strike out or retrial, it is important to hear the parties to address the Court on the desirability of making such an order. To make any of the orders, when not asked for by any of the parties, and the parties were not asked to address the Court on such an order, injustice may result there from. It is for this reason and further reasons in the judgment of Ejiwunmi, J.S.C., that I allow the appeal and the cross-appeal. I order a re-hearing of the appeal before another panel."*

Also in *Anyaduba vs N.R.T.C. Ltd* (1992) 5 NWLR (pt.243) 535 @ 566 F-G, His Lordship, Nnaemeka-Agu JSC had this to say:

*"...There can no longer arise in Nigeria the question whether parties to a suit are entitled to be heard on the propriety or otherwise of a non-suit before the order is made. It is true that parties no longer by themselves elect or ask that they be non-suited. They normally come to Court to urge the Court to enter judgment in their favour. As it is so, ordering a non-suit is in effect making an order which none of the parties has asked for. In a country like Nigeria where right to fair hearing is a constitutional right under Section 33 of the Constitution, it would be unconstitutional as being contrary to the principles of fair hearing to make any substantive order which none of the parties in litigation has asked for, no matter how benevolent it might seem. I therefore agree that for failure to invite the parties to address the Court on the propriety of a non suit before ordering it, the appeal was rightly allowed."*

Per Omo, J.S.C. (supra) @ 559 - 560 H - A:

*"My view of the position of the law ..... is that the requirement that counsel should be heard before an order of non-suit is made is*

*no longer merely desirable, it is not only prudent but important. Failure to observe this course of action will in most cases lead to an appeal against the order of non-suit made being set aside, except it is very obvious and incontestable (sic), on the evidence before a trial Court and the law applicable therein, that an order of non-suit is the only order it can make in the case in the exercise of its discretion.”* B

See also: Omoregbe vs Lawani (1980) 3 - 4 SC 108: Akpapuna vs Nzeka (1983) 2 SCNLR 1.

***In light of all that I have said above, there is no doubt that the failure of the Court below to invite the parties to address it on the issue of non-suit was a breach of the appellant’s right to fair hearing as guaranteed by Section 36 (1) of the 1999 Constitution (as amended). The judgment of Court below is therefore a nullity and cannot be allowed to stand. Accordingly I resolve this issue in the appellant’s favour.*** C D

Having resolved Issue 1 in favour of the appellant, Issues 2 and 3 no longer arise for consideration in this appeal. The appeal has merit and is hereby allowed. The judgment of the Court of Appeal, Lagos Division delivered on 18/7/2002 is hereby set aside. The appeal is hereby remitted to the Court of Appeal to be heard by a different panel. E

The parties shall bear their respective costs in the appeal.

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### **ONNOGHEN JSC**

I have had the benefit of reading in draft, the leading judgment of my learned brother, KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN J.S.C. just delivered. F

My learned brother has dealt in detail with the facts and issues calling for determination in this appeal. I do not therefore intend to repeat the facts in this comment except as may be needed for emphases. G

There is no doubt that the lower Court in non-suiting the appellant, relied on the provisions of Order 37 of the High Court of Lagos State Civil Procedure Rules of 1994 which gives power to the trial Court to make such an order. Also not in doubt is the fact that parties/counsel were not heard by the lower Court before the said order of non-suit was entered. H

Order 37 of the said High Court of Lagos State Civil Procedure Rules, 1994, provides as follows:-

*“The Court may in any suit, without the consent of parties non-suit the plaintiff where satisfactory evidence shall not be given, entitling either the plaintiff or defendant to the judgment of the Court.*

B *PROVIDED that the trial Judge gives the counsel to the parties the right to make submission about the propriety of the non-suit”*

C The lower Court, in making the order of non-suit acted under the provisions of Section 16 of the Court of Appeal Act and should have complied completely with the provisions of Order 37. Supra by hearing counsel for the parties on the issue of non-suit before proceeding to make the order. I agree that failure to so hear counsel for the parties on the matter constitutes a serious error which directly constitutes a breach of the right of fair hearing of the parties which  
D right is constitutionally guaranteed by Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999, as amended.

Section 36 (1) of the said 1999, Constitution, as amended, provides as follows:-

E *“36(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality”*

F It is trite law that the Constitution of a country is the supreme law of the land and commands absolute obedience.

G Also settled, is the principle of law that where the right of fair hearing is breached in any proceeding the said proceeding is liable to be declared a nullity by an appellate Court.

I should not be understood as saying that a Court is not empowered to raise an issue suo motu and base its decision thereon in any proceeding. What law is saying is that where a Court raises an issue suo motu, which issue is substantial and can determine the matter  
H one way or the other, the Court is duly bound, in the circumstance, to hear counsel for the parties on the issue so raised suo motu before basing its decision thereon.

Failure to do so will result in the decision being set aside for being a nullity as a result of breach of the right to fair hearing particu-

larly, the Rule of audi alteram partem. See Adeleke vs Raji (2002) 13 NWLR (Pt.783) 142; Olusanya vs Olusanya 9 (1983) 1 SCNLR 134; A-G. Leventis Nig. PLC v Akpu (2007) 6 S.C. (Pt.1) 139 at 265 etc.

The legal effect of resolving issue 1 in favour of appellant is that the decision of the lower Court delivered on the 18th day of July, 2002 is a nullity and liable to be set aside. B

The above being the situation, there is no need to proceed to consider issue 2 and 3 formulated by learned counsel for appellant. In the circumstance, the proper order is to remit the matter to the lower Court for proper determination. C

It is for the above and the more detailed reasons advanced in the leading Judgment of my learned brother that I, too, find merit in the appeal and consequently allow same.

I abide by the consequential orders made in the said leading judgment including the order as to costs. Appeal allowed. D

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### **NGWUTA JSC**

I read in draft before now the leading judgment just delivered by my learned brother, Kudirat Motonmori Olatokunbo Kekere-Ekun, J.S.C . I adopt the reasoning leading to the conclusion that the appeal has merit and ought to be allowed. E

I would like to chip in a few words on the order of non suit.

In a given civil case, a judgment is either given for the plaintiff or for the defendant. There is a third form of judgment - the order for non-suit. An order for non suit is a final decision in the sense that it terminates the proceedings in which it is made See Omorogbe vs Lawani (1980) 3-4 SC 108. F

The power to make the order is statutory and the Court, in the exercise of its discretion to make the order, is bound to act judiciously. G

See Mandilas & Karabenis vs Oridota (1972) 2 SC 47. Learned Counsel for the respondent contended in his brief that it is only desirable but not mandatory for a Court to give Counsel for the parties opportunity to address on the order before making it. This cannot be correct, Order 37 Rule 1 of the High Court of Lagos State (Civil Procedure Rules) 1994 which confers on the High Court of Lagos State the power to make the order has the following provision: H

*“Provided that the trial Judge gives Counsel to the parties the*

*right to make submissions about the propriety of the non suit.”*

B Besides, a Court cannot properly raise an issue suo motu and  
terminate the case before it based on the said issue without giving  
Counsel for the parties the opportunity to address it on the propriety  
of the issue so raised. The Court does not make the order without  
B giving Counsel the opportunity to be heard. See *Craig vs Craig* (1961)  
1 All NLR 173; *Anyadituba vs ACB Ltd* (1926) 2 SC 41. It is also a  
violation of a party’s right to fair hearing under Section 36 (1) of the  
1999 Constitution of the Federal Republic of Nigeria (as amended)  
C for a Court to terminate or determine a party’s case on an issue it  
raised suo motu without hearing that party on the issue.

An order for non suit made in such circumstance cannot be a  
judicious exercise of the Court’s discretion to make the order. See  
*Mandilas & Karabenis vs Oridota* (supra).

D For the above and the lucid reasoning in the lead judgment, I  
also allow the appeal. I abide by the consequential orders made in  
the lead judgment.

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E

### **PETER-ODILI JSC**

I agree with the judgment just delivered by my learned brother,  
Kudirat Motonmori Olatokunbo Kekere-Ekun, J.S.C. and to show  
my support for the reasoning, I shall make some comments.

F This is an appeal against the judgment of the Court of Appeal,  
Lagos Division delivered on the 18th day of July, 2002 wherein the  
judgment of the High Court of Lagos State was set aside and an  
order of non-suit ordered.

G The facts leading to this appeal are well captured in the lead  
judgment and it will serve no useful purpose repeating them here.

Mr. E.A. Oyebanji of counsel for the Appellant on the 8th day  
of December, 2015 adopted his Brief of Argument filed on the 19th  
day of September 2011 and deemed filed on the 20th day of March  
2013. He raised three issues for determination which are thus:-

H 1. Whether the learned Justices of the Court of Appeal were  
right ordering a non-suit in this case when the parties and/or their  
counsel were never invited to address the Court on the propriety or  
otherwise of such an order. (Formulated from Ground 1).

2. Whether in the circumstances of this case, the learned Jus-

tices of the Court of Appeal were right when they held that the Appellant had not proved his entitlement to the damages claimed. (Formulated from Grounds 3 and 4)

3. Whether the learned Justices of the Court of Appeal were right in expunging Exhibit P.26 from the record when the admissibility of Exhibit P.26 was never a ground of appeal before the Court and there was no prayer by the Appellant (now Respondent) requesting that Exhibit P.26 be expunged. (Formulated from Ground 2)

For the Appellant was also adopted a Reply Brief filed on the 29th day of June, 2015.

Learned counsel for the Respondents, A.O. Wahab Esq. adopted their Brief of Argument filed on the 27th day of May 2015 and deemed filed on the 1st day of June 2015. In it was identified a single issue and that is as follows:-

Were the learned Justices of the Court of Appeal right to order a non-suit in this matter and should that order be upheld by the Supreme Court?

I shall restrict myself to the first issue as crafted by the Appellant which is similar in content to the sole issue framed by the Respondents and that is thus:

**ISSUE ONE:**

Whether the learned Justices of the Court of Appeal were right in ordering a non-suit in this case when the parties and/or their counsel were never invited to address the Court on the propriety or otherwise of such an order.

Canvassing the position of the Appellant, Mr. Oyebanji of counsel submitted that the Court below was wrong when it ordered a non-suit of the case without hearing the parties to the appeal or their counsel before making the order. That the order non-suit was not sought for by any of the parties to the appeal nor was part of the issues on which the appeal was fought. He cited Order 37 of the Lagos State (Civil Procedure) Rules 1994: Adeleke vs Raji (2002) 13 NWLR (Pt.783) 142; Olusanya vs Olusanya (1983) 1 SCNLR 134.

For the Respondent, learned counsel, Mr. Wahab contended that it is only desirable and not mandatory for a Court to hear counsel before ordering a non-suit. That there has to be an end to litigation and so, the Court has the option to either dismiss a matter or

non suit. He referred to Yusuf vs ACB Ltd (1980) 1-2 SC 31.

The crux of the matter here is the non-suit ordered by the Court below which the Appellant contends was out of order since the Court did so suo motu without being asked to do so and without the benefit of an address by counsel to the parties on the propriety or otherwise of a non-suit order. That stance of the Appellant the Respondents disagree with stating that the Court below was right to make the order of non-suit as the circumstances called for it taking into consideration the scale of justice which tilted on the side of a non-suit.

I shall quote that relevant portion of the judgment of the Court of Appeal per Chukwuma-Eneh JCA (as he then was) and thus:-

*“However, I think the peculiar circumstances of the matter warrant resorting to Order 37 of the Lagos State High Court, Civil Procedure Rules 1994 on non-suit in exercise of the powers vested in this Court under Section 16 of the Court of Appeal Act for ease of reference, the said order is reproduced as follows:-*

*“The Court may in any suit without the consent of parties non-suit the plaintiff, where satisfactory evidence shall not be given entitling either the plaintiff or defendant to the judgment of the Court”.*

I am of the firm view that the order of non-suit as contemplated in the foregoing provision of Order 37 takes care of this matter. And I accordingly so order Per CHUKWUMA-ENEH JCA, page 685 of the Record of Appeal.

I hereunder cite and quote the said Order 37 of the High Court of Lagos State Civil Procedure Rules 1994 (which was applicable to this appeal at the Court of Appeal).

ORDER 37 of the said Rule provides:-

*“The Court may in any suit, without the consent of parties non-suit the plaintiff where satisfactory evidence shall not be given, entitling either the plaintiff or Defendant to the judgment of the Court PROVIDED that the trial judge gives the counsel to the parties the right to make submission about the propriety of the non-suit”.*

The said Order 37 of the Lagos State (Civil Procedure) Rules 1994 applying to the High Court of Lagos State on which the Court below stood to make the order of non-suit provided that the Court get addressed by counsel to the parties as a condition precedent before making the order. I am of this humble view as this Court has

interpreted that Order or any such Order from any other High Court Rules in that way. I shall refer to a few authorities in support of that view.

See in ADELEKE vs RAJI 2002, 13 NWLR Pt. 783, page 142, the Supreme Court stated the position of the law thus:-

*“Where a Court finds some substance in entering order of non-suit or strike out or retrial, it is important to hear the parties to address the Court on the desirability of making such an order. To make any of the orders when not asked for by any of the parties, and the parties were not asked to address the Court on such an order, injustice may result there from”.* Per BELGORE J.S.C at page 154.

In OLUSANYA vs OLUSANYA 1983 1 SCNLR part 134, page 139, the Court held Per UWAISS J.S.C., thus:-

*“The Court has said on a number of occasions that although an Appeal Court is entitled in its discretion to take points suo motu if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances. Where the points are so taken, the parties must be given the opportunity to address the Appeal Court before decision on the point is made by the Appeal Court”.*

Similarly, in the case of A.G. Leventis Nig. Plc vs Akpu (2007) 6 SC (pt.1) 139, this Honourable Court held per Ogbuagu J.S.C .at Page 265 as follows:-

*“This Court has in many decided cases, deprecated a Court raising a matter/point suo motu, without affording the parties the opportunity of addressing it on the matter/point as it amounts to a denial of fair hearing guaranteed in Section 33(1) of the 1979 Constitution of the Federal Republic of Nigeria now Section 36 (1) of the 1999 Constitution”.*

The reason for the need to hear the parties before the order of non-suit is made in order that the right to fair hearing of the party as enshrined Section 36 of the 1999 Constitution or Section 33 of the 1979 Constitution not infringed upon. That is why this Court as the Apex Court has again and again deprecated a situation where a Court raises a matter or issue without calling on the parties or counsel on their behalf to address it on the matter. The implication of the failure to so have the counsel or parties address the Court is well captured in the case of Afolabi vs Adekunle (1983) 3 SCNLR 141 at 148 per Aniagolu J.S.C. and as follows:-

- “What the learned trial judge did by calling upon the parties to address him on what order to make dismissal or non suit was merely to follow the advice of this Court in a number of cases. Craig vs Craig, 1967 NMLR 52 Bakare Elufisoye vs Samuel Alabetutu 1968 NMLR 298 at 301, Mrs. Aigbe vs Bishop John Edokpolor 1977 2 SC page 1; Omoregbe vs Lawani (1980) 3-4 SC 108 namely that where at the close of the hearing of a case, the trial judge should think of entering a non-suit it is desirable that he should ask counsel for the parties for their submissions on the intended order. This is as it should be as has been pointed out in these cases, because the entry of an order for non-suit means that the plaintiff is being given a second chance to prove his case another ordeal against the defendant who by the non-suit order will of necessity enter into a second litigation with the plaintiff”.*
- Again, the order could mean an injustice against the plaintiff who could claim to have satisfactorily proved his case yet was being required to once again commence his action a new and go into the ordeal of a new trial. It is for this reason that a trial judge should hear the parties on the important issue of non-suit before making the Order”.

In the end and based on this infraction of fair hearing that the issue is resolved in favour of the Appellant and with the fuller and better reasoning in the leading judgment, this appeal is allowed as this Court sets aside the Order of non-suit order made by the Court of Appeal.

I abide by the consequential orders made.

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### **ARIWOOLA JSC**

- My learned brother Kudirat Motonmori Olatokunbo Kekere-Ekun, J.S.C. obliged me a draft of the leading judgment just delivered and I am in agreement entirely with the reasoning and the conclusion of the said leading judgment.
- I too will allow the appeal and set aside the judgment of the Court below. The appeal is hereby allowed by me. I abide by the other consequential orders in the leading judgment including the order on costs.