**JOSHUA OKPARA**

**V.**

**CHIEF JOHN UBA ANOZIE & ORS**

IN THE COURT OF APPEAL OF NIGERIA

ON TUESDAY, THE 21ST DAY OF JANUARY, 2020

CA/OW/245/2013

**LEX (2020) - CA/OW/245/2013**

**OTHER CITATIONS**

3PLR/2020/25 (CA)

(2020) LPELR-49296 (CA)

**BEFORE THEIR LORDSHIPS**

RAPHAEL CHIKWE AGBO, JCA

ITA GEORGE MBABA, JCA

IBRAHIM ALI ANDENYANGTSO, JCA

**BETWEEN**

JOSHUA OKPARA - Appellant(s)

AND

1. CHIEF JOHN UBA ANOZIE

2. CHIEF EMMANUEL OBINNA ANOZIE

3. DANIEL ABAMEZIRI ANOZIE

4. OKENZE ALEX ANOZIE

5. CLETUS ANOZIE

6. MICHAEL ANOZIE

7. UZODINMA ANOZIE

8. LIVINUS ANOZIE - Respondent(s)

**ORIGINATING COURT**

IMO STATE HIGH COURT [Justice Ngozi Opara, Presiding]

**REPRESENTATION**

K.E. OWUAMALAM, ESQ. - For Appellant

AND

IBENEME NJOKU, ESQ. - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE AND PROPERTY LAW - LAND – PROOF OF TITLE:- Production of document of title – Sufficiency of, in a claim for declaration of title to land – Duty of Court to scrutinize and evaluate the said document of title – Relevant considerations

REAL ESTATE AND PROPERTY LAW – LAND:- Third party acquisition of property after judgment by trial court but before the period allowed the loser of the case to file an appeal has elapsed – Right to be put on due notice of appeal arising from said judgment – Basis of – Acquisition of interest in every encumbrance associated with the property – Whether would be free to join or be joined as an interested party to the Appeal, if he so elected

CONSTITUTIONAL LAW - JUDICIARY:-Constitutional basis of the right of Appeal - Section 241 of the 1999 Constitution – Transfer of subject matter of a suit to a 3rd party upon getting judgment from a trial court – Whether robs the Court of jurisdiction to hear an appeal arising from the trial court decision – Rights open to the third party to whom the res was transferred to – Justification of

**PRACTICE AND PROCEDURE ISSUES**

ACTION – PLEADINGS - WRIT OF SUMMONS:- Grant of an application for the renewal of a writ- Whether such application can be made ex parte - When a renewed originating process take effect

ACTION - SERVICE OF PROCESS:- Principle in Kolawole Vs Alberto – “Service of a Writ of Summons made after the period of twelve months in respect of which a Defendant enters unconditional appearance is valid service” – Basis of, on a valid writ – Ex parte application to reactivate an expired writ – Guidelines thereto

APPEAL - APPEAL AGAINST INTERLOCUTORY RULING/FINAL DECISION:- Appeal against an interlocutory decision - Time within which to apply - Whether leave of Court is required to make the applications

APPEAL - HEARING OF APPEAL:-Constitutional basis of the right of Appeal - Section 241 of the 1999 Constitution – Transfer of subject matter of a Suit to a 3rd party upon getting judgment from a trial court – Whether discounts or diminishes the constitutional rights of appeal against the said judgment

APPEAL - HEARING OF APPEAL:- Transfer of interest(s) in the subject matter of a Suit upon judgment by the trial Court but before appeal is prosecuted – Whether robs an appellate Court jurisdiction to hear an appeal from the trial court’s judgment – Principle that every judgment of a Court is expected to come to effect upon the delivery of the judgment – Legal allowance of a window of 90 days, generally (except in election related matters), for a dissatisfied party to appeal (a period that can even be extended, upon application by the person seeking to appeal) - Attitude of Court to a winning party who dissipates the res during that period of 90 days – Whether the successful party therein is expected to exercise caution in victory

APPEAL - RECORD OF APPEAL:- Principle that parties and appellate Court are bound by the records of appeal on any issue in controversy – Duty of Court to examine the state of the record on the conflicting claims of the parties – Whether extends to allegation made by a party which is not

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

This Appeal is against the judgment of Imo State High Court in Suit No. HOW/98/2007, delivered on 11th March, 2013, by Hon. Justice Ngozi Opara, wherein the trial Court gave judgment to the Claimants (now Respondents). The trial Court had earlier on 23/5/2011 granted an order of Interlocutory Injunction in favour of the Claimants, affirming the order of renewal of the originating process, which the Appellant had challenged as having expired 3 years before the Respondents sought an order for its renewal. Appellant filed this Notice of Appeal on 20/3/13 against both the said interlocutory decision and the final judgment.

At the Lower Court, the Respondents (as Claimants) had sought:

(1) Declaration that the Claimants are entitled to the Statutory Right of Occupancy over the land known as UZO AMAKOHIA EGBELU UMUIMEKA, or Plot 199 Works Layout, Owerri, Imo State.

(2) The sum of N10,000,000 (Ten Million Naira) damages for trespass.

(3) Perpetual Injunction restraining the defendant, his privies, agents, workers and servants from further trespass on the land of the Claimants.

DECISION(S) APPEALED AGAINST

1. Trial Court’s interlocutory decision of 23/5/2011, dismissing the Appellant’s application of 14/1/2011, challenging the trial Court’s jurisdiction to entertain this matter upon an alleged incompetent originating process which the trial court renewed via an ex parte application of the Respondents.

2. Grant of Declaration as to title to land sought by the Respondents/Plaintiffs

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

(1) Whether there was a competent originating process in this matter at the trial Court, upon which the Court conducted and determined the matter. (Ground 1 - 3)

(2) Whether the trial Court’s final judgment of 11th March, 2013 in this matter was not against the weight of evidence, especially considering the fact that the said Court ignored and did not consider the Chart document from Lands Registry Owerri - Exhibit 7, which charted the res, Plot 199 Works Layout, Owerri into the expanse of land DW2, acquired from Declan Amadi, native of Umuimeka, Orji, Owerri, to whom Appellant traced his Donor’s title. (Grounds 5 - 8)

(3) Whether the trial Court did not breach the Appellant’s right to fair hearing, when on the 11th March, 2013, before delivering its judgment, it ignored the Appellant’s protest that the Respondents’ final written address was not served on him, for him to exercise his right of reply on points of law. (Ground 4)

*BY RESPONDENTS*

[The Respondents filed a preliminary objection to the hearing of the Appeal on the ground that the Respondents had already executed the judgment and passed interest to a 3rd party. In the alternative, adopted the three (3) Issues distilled by Appellants for the determination of the Appeal.]

*AS ADOPTED BY COURT*

[Adopted the three (3) Issues donated by the Appellant]

DECISION OF COURT OF APPEAL

1. The preliminary objection is therefore, dismissed for lack of merit.

2. Resolved all three issues against the Appellants

**MAIN JUDGMENT**

ITA GEORGE MBABA, J.C.A. (Delivering the Leading Judgment):

This Appeal is against the judgment of Imo State High Court in Suit No. HOW/98/2007, delivered on 11th March, 2013, by Hon. Justice Ngozi Opara, wherein the trial Court gave judgment to the Claimants (now Respondents). The trial Court had earlier on 23/5/2011 granted an order of Interlocutory Injunction in favour of the Claimants, affirming the order of renewal of the originating process, which the Appellant had challenged as having expired 3 years before the Respondents sought an order for its renewal. Appellant filed this Notice of Appeal on 20/3/13 against both the said interlocutory decision and the final judgment, grounds 1 - 3, relating to the interlocutory decision and grounds 4 - 8, relating to the final judgment. See pages 251 - 268 of the Records of Appeal.

At the Lower Court, the Respondents (as Claimants) had sought:

(1) Declaration that the Claimants are entitled to the Statutory Right of Occupancy over the land known as UZO AMAKOHIA EGBELU UMUIMEKA, or Plot 199 Works Layout, Owerri, Imo State.

(2) The sum of N10,000,000 (Ten Million Naira) damages for trespass.

(3) Perpetual Injunction restraining the defendant, his privies, agents, workers and servants from further trespass on the land of the Claimants.

Appellant said the Appeal begins from the trial Court’s interlocutory decision of 23/5/2011, dismissing the Appellant’s application of 14/1/2011, challenging the trial Court’s jurisdiction to entertain this matter upon an incompetent originating process. He relied on the case of Nwoko Vs Azakwe (2012) NWLR (Pt.1313) 151 at 156, to the effect that, where a party is aggrieved by the interlocutory decision of Court and final judgment, he is entitled to cause one notice of appeal to be filed against both decisions.

Appellant filed his brief of arguments on 21/3/17 and distilled three (3) Issues for the determination of the Appeal, as follows:

(1) Whether there was a competent originating process in this matter at the trial Court, upon which the Court conducted and determined the matter. (Ground 1 - 3)

(2) Whether the trial Court’s final judgment of 11th March, 2013 in this matter was not against the weight of evidence, especially considering the fact that the said Court ignored and did not consider the Chart document from Lands Registry Owerri - Exhibit 7, which charted the res, Plot 199 Works Layout, Owerri into the expanse of land DW2, acquired from Declan Amadi, native of Umuimeka, Orji, Owerri, to whom Appellant traced his Donor’s title. (Grounds 5 - 8)

(3) Whether the trial Court did not breach the Appellant’s right to fair hearing, when on the 11th March, 2013, before delivering its judgment, it ignored the Appellant’s protest that the Respondents’ final written address was not served on him, for him to exercise his right of reply on points of law. (Ground 4)

The Respondents filed a preliminary objection to the hearing of the Appeal, saying that this Court has no jurisdiction to hear the Appeal, because the Respondents had already executed the judgment and passed interest to a 3rd party. In the alternative, the Respondents filed their brief of arguments and adopted the three (3) Issues distilled by Appellants for the determination of the Appeal.

Appellant filed a Reply Brief on 15/5/2019 to react to the preliminary objection.

When this appeal was finally heard on 4/12/19, the Respondents referred us to the preliminary objection, which they adopted and urged us to strike out the Appeal. The parties adopted their briefs and urged us, accordingly.

On the Preliminary Objection, the Respondents argued that the subject matter of the Suit for which judgment was given to the Respondents on 11/3/2013, that is, Plot 199 Works Layout, Owerri, has passed to a 3rd party (Mr. Okechukwu Opara) by power of Attorney, dated 16th March, 2013, and that the said Power of Attorney was later registered by the Donee at the Lands Registry, Owerri, on 28/3/2013 - Exhibit A; that because of that, there is nothing more in contention between Appellant and the Respondents, the Respondents having divested themselves of all interests in the property, the subject matter of the Suit.

Appellant’s reply was that the notice of preliminary objection was frivolous, misconceived, grossly incompetent and brought in utmost bad faith, with the intention to deny the Appellant his constitutional right of Appeal as enshrined in the Section 241 of the 1999 Constitution of Nigeria, as amended.

RESOLUTION OF THE PRELIMINARY OBJECTION

I agree with the Appellant, that the so-called preliminary objection by the Respondents is just a ploy to stall or deny the Appellant the right to exercise his constitutional rights of Appeal, stipulated in Section 241 of the 1999 Constitution, as amended. The fact that the Respondents hurriedly transferred the subject matter of the Suit to a 3rd party on 16/3/2013, upon getting judgment on 11/3/2013 (less than a week of getting the judgment) cannot, in my opinion, discount or diminish the constitutional rights of the Appellant to appeal against the said judgment. If anything, I think the said 3rd party, who took the risk of buying or taking interest in the subject matter of the Suit (Plot 199 Works Layout, Owerri), soon after the judgment, which recognized the Respondents right to the land, was, or should have been, on due notice of this appeal, and by so doing, also acquired interest in every encumbrance associated with the property and would be free to join or be joined as an interested party to the Appeal, if he so elected. The Respondents are, therefore, in error to think that passing their interest in the subject matter of the Suit to a 3rd party has robbed this Court of the jurisdiction to entertain the Appeal, brought by a party to the Suit, against the other party in the Suit, and all of them, parties on record in this Appeal.

By law, however, every judgment of a Court is expected to come to effect upon the delivery of the judgment, but the law also allows a window of 90 days, generally (except in election related matters), for a dissatisfied party to appeal (and that period can even be extended, upon application by the person seeking to appeal). Thus, even the winning party is expected to exercise some restraint, during that period of 90 days, and must not dissipate the res or act to frustrate the aggrieved party from exercising his right of appeal. See PETGAS RESOURCES LTD VS MBANEFO (2017) LPELR - 42760 (SC).

In the case of Ngere & Anor Vs Chief Okuruket “XIV” & Ors (2014) LPELR - 22883 SC, my Lord, Rhodes - Vivour, JSC said:

“Judgments take effect immediately they are delivered and every Court has inherent power to proceed to enforce judgments at once. The enforcements on delivery can only be interrupted by a stay of execution, provided there is an appeal.”

But, as earlier stated, where there is an appeal against the decision of a Court, the successful party therein is expected to exercise caution in victory, and no party is expected to take any step or action that will render the decision of the Appellate Court, nugatory, upon the determination of the appeal. That imposes a duty on every party and on the Court, to protect and preserve the res. See Lawal Osula & Ors Vs Lawal-Osula & Ors (1995) LPELR - 1763 (SC):

“It is the duty of the Courts to protect and ensure that orders lawfully made are not rendered useless or nugatory by the action and conduct of the parties. See Gov. of Lagos State Vs Ojukwu (1986) 3 NWLR (Pt.26) 39 and Obeya Memorial Specialist Hospital Vs A.G. of Federation (1987) 3 NWLR (Pt.60) 325.”

In the case of Lekwot & Ors Vs J.T.ON C& CD IN KADUNA STATE & ANOR (1997) LPELR - 1778 (SC), it was held:

“both the Court from which an appeal lies as well as the Court to which the appeal lies have the duty of ensuring that the appeal, if successful, is not rendered nugatory and that the Court will make an order to that end. See Kigo Nig. Ltd Vs Holman Bros. Nig Ltd (1980) 5 - 7 SC 60.”

To that end, I think, the fact that a 3rd party throws caution to the winds and opts to take interest (buy) in a res, soon after the judgment of the Lower Court and/or during the pendency of appeal over the judgment, would not diminish the powers or jurisdiction of the appellate Court to go ahead with the appeal, to determine the interest of the parties on record in the appeal, as they were at the Court below.

The preliminary objection is therefore, dismissed for lack of merit.

Arguing the Appeal, Appellant’s Counsel K.E. Owuamalam Esq., on Issue 1, said the life - span of the originating process was 6 months, and where for any reason, it proved impossible to serve it on the defendant within its life-span, it can only be renewed by the application, brought before the originating process expires, not after. He relied on Order 6 Rules 6(1) & (2) and 7 of Imo State High Court (Civil Procedure) Rules, 2008, which also allows or permits only 2 renewals (making maximum renewals of 12 months) of originating process. Counsel said in this case, the Originating process was issued on 22/2/2007 and that the same expired; that the trial Court, on 16/4/2010 made the order setting aside the illegal service of the process on the Appellant. But that the Respondents neither applied to have the Originating process renewed before its expiration nor applied for extension of time within which to renew it; they merely brought an application, ex-parte, after joining issues with Appellant on the subject of the expiration of the originating process, after 3 years from 22/2/2007, when the process expired.

He relied on the Originating process, on pages 1 - 4 of the Records and paragraph 11 of the Appellant’s Affidavit of 14/1/2011 (page 33 of the Records), challenging the jurisdiction of the trial Court to entertain the Suit. He also relied on Abubakar Vs Nasamu (2012) 17 NWLR (Pt.1330) 523 at 546.

Counsel said it was wrong for the trial Court to dismiss Appellant’s challenge to the Suit on 23/5/11, and to re-affirm its earlier order, renewing the originating process on 22/10/2010. He urged us to resolve the issue for Appellant.

Counsel further argued that the Respondents got the originating process renewed by an ex-parte order, thereby shutting out the Appellant on the issue and denying him of fair hearing; that this happened after Appellant had raised the issue of the expiration of the writ and challenged the jurisdiction of the trial Court to entertain the same (See the Motion of Appellant filed on 14/6/10 to which the Respondents joined issues, saying the originating process had not expired). He submitted that a decision reached in contravention of the right of fair hearing of a party is null and void, relying Section 36 of the Constitution of Nigeria, 1999; Tamiti Vs NSCB (2009) 7 NWLR (Pt.1141) 631. He added that the renewal of the originating process by means of an ex-parte order had overreached the motion of the Appellant filed on 14/6/2010 to challenge the said originating process. He relied on the Order 5 Rule 2 of the Imo State High Court (Civil Procedure) Rules, 2008, which state:

“An application to set aside for irregularity any step taken in the course of any proceedings, may be allowed where it is made within a reasonable time and before the party applying has taken any fresh step, after becoming aware of the irregularity.”

He said that Appellant had promptly filed the motion on 14/6/2010 challenging the process, upon being served with the expired process, without filing statement of defence. Thus, that application was over-reached, when the trial Court entertained the motion ex-parte, filed on 19/11/2010 to renew the originating process. And even when Appellant further challenged the trial Court’s order, renewing the originating process (as per the motion filed on 14/1/2011) the trial Court still affirmed it, on 23/5/11.

He relied on the case of Nwoko Vs Azakwo (2012) 12 NWLR (Pt.1313) 151 at 153 to say that:

“Service of Court process is a precondition to the jurisdiction of the Court. Failure to serve a defendant with originating summons in a suit is a fundamental vice. This is because the service of originating processes is a condition precedent for the exercise of the Court’s jurisdiction over the subject matter of the action and over the parties.”

Counsel also relied on Tsokwa Motors Nig. Ltd Vs UBA PLC (2008) ALL FWLR (Pt.403) 1240 at 1242, to the effect that non service of a Court process renders the proceedings on such unserved process null and void. He argued that Appellants was not served with the originating statement of claim, but was served with the renewed writ with fresh statement of claim in December, 2010 (which Statement of claim, Counsel said, was the same as one endorsed on the expired writ). He said that the Respondents however applied to file amended pleading but the application was never heard. Counsel also argued that the fresh statement of claim endorsed on “the renewed writ in this Suit, being different from the one in the originating process which the trial Court never ordered a renewal, is incompetent. It is not the one with which the Originating Process was filed and issued on the February, 2007, ordered for renewal on the 22nd November, 2007.”

He said that, because it is incompetent, all witness depositions and the survey plan placed on it, plus the conduct of the trial, up to the 11th March, 2013 (which judgment was delivered) were equally incompetent, being materials placed on nothing, and cannot stand. See Macfoy Vs UAC Ltd (1962) SC 152; Aladegbemi Vs Fasanmade (1988) 3 NWLR (Pt.81) 129.

Counsel concluded by saying that, the trial Court should have set aside the Suit, at the interlocutory stage, upon being confronted by the vitiating grounds argued above, but regrettably, the trial Court failed to do so, and rather dismissed Appellant’s application of 14/1/2011. He relied on WAEC Vs Akinola O. Akinkunmi (2008) 9 NWLR (P.1091) 151 at 157, to urge us to resolve the issue for Appellant, saying that “where a Suit is not initiated by due process of law, the Suit is incompetent, and where the Suit was heard by a Court, the proceedings before the Court are a nullity.”

On Issue 2, Counsel said assuming (without conceding) that the Originating Process on which the matter was conducted and determined, was competent, that the Respondents failed, woefully, to prove their claim of ownership of the land in dispute. He referred us to the 5 different ways of proving title to land as per the case of Clement Odunukwe v. Dennis Ofomata & Oyibojiobi Ofomata (2011) ALL FWLR (Pt.568) 827 at 830. Counsel said the Respondents had relied on 4 out of the five ways of proving title to land; and said that the onus was on them to prove any of the four ways, and that, on the strength of their case, especially, proving that they were in possession of the connected or adjacent plots of land to the land in dispute, in circumstances rendering it probable that being the owners of the adjacent plots, the land in dispute in addition, belonged to them. He argued that the evidence by the Respondents failed to establish their claim. He argued that the Respondents did not clearly trace the boundaries of the land in dispute; that their star witness in paragraph 8 of his further witness deposition (pages 158 - 160 of the Records) stated that Declan Amadi to whom the Defendant (Appellant) traced his Donor’s title, owned and sold to DW2, Plots 200, 201 and 203 which are adjacent/connected plots to the land in dispute - plot 199 Works Layout Owerri; that under cross examination, the said witness said he did not know who Thaddeus Dike was, contradicting his earlier evidence that he and other claimants sold plot 205 Work Layout to Thaddeus Dike; he said that that lie put to peg that all plots, including the one in dispute charted into the site survey plan of DW2, as purchased from Declan Amadi - a Kinsman of the Claimants - shown in Exhibit 7, were all owned by DW2, as purchased from Declan Amadi to whom the Defendant traced his donors title to the land in dispute.

He relied on the case ofUkaegbu Vs Nwololo (2009) ALL FWLR (Pt. 466) 1852 at 1859, on the duty of a claimant to show exactly and precisely a defined and identifiable area to which his claim relates.

He said that Appellant had demonstrated his Donor’s ownership of the land in evidence, from page 188 to 192 of the Records of Appeal by tendering the original copy of the Power of Attorney given to him by his Donor - one Raymond Chindo Ndubuaka - Exhibit 3, and the Survey Plan (Exhibit 4) as well as the certified true copy of the irrevocable power of attorney, issued by the Land Registry, dated 18/6/2004 and registered as No. 68, Volume 68, at page 915 by which Sylvester Ojiegbe alienated the land in dispute (plot 199 Works Layout, Owerri) to the Donor (Exhibit 5); that Appellant further tendered the certificate of occupancy given to the said Sylvester Ojiegbe dated 19/2/1986 and registered as No. 86, Volume 86, Page 139 in respect of the said land - Exhibit 6; that he further tendered as 1D1, the Chart document on which the land (plot 199 Works Layout, Owerri) was Charted/located into DW2’s site Survey Plan (which was later admitted as Exhibit 7).

Counsel said, the combined effect of the above exhibits, Appellant’s pleadings and evidence in Court (including witness depositions), put to rest the question of who owned the land in dispute, as they all traced the Appellant’s Donor’s title to Sylvester Ojiegbe, to Cornelius Iro Iwe - DW2, to the Original native owner of the land - Declan Amadi of Umuimeka Orji, who the Claimants admitted owned an expanse of land in the Works Layout area Owerri. Counsel said it was therefore unbelievable and worrisome that the trial Court ignored all those pieces of evidence and express admission by the Respondents as well as the inconsistencies in the evidence of the Respondents, to resolve the issue of ownership of the land in Respondents’ favour. He said that the trial Court did so upon a faulty reasoning, that Appellant’s case was very weak; that being a misconception.

He relied on the case of Kasandubu & Anor Vs Ultimate Petroleum Ltd & Anor. (2008) FWLR (Pt.417) 155 at 167, to say that time for bringing an action begins to run in land cases, when possession is lost (when cause of action accrued), save where there is fraudulent concealment of the facts of the time when such possession was lost or when the cause of action accrued. Counsel said, in this case, the Respondents fraudulently concealed the time the cause of action accrued. He, however, urged us to hold that the Suit was statute barred.

On Issue 3, Counsel said the refusal by the trial Court to give Appellant opportunity to reply to Respondents’ final address, on points of law, constituted a serious breach of Appellant’s constitutional rights to fair hearing. He relied on Section 36 of the 1999 Constitution of Nigeria. He said that on 19/2/13, Appellant closed his defence with the evidence of DW2 and the case was adjourned to 11/3/13 for judgment, the Court calling on both parties to file and exchange addresses before that date; that Counsel on each side took 7 days to file and serve their address Appellant’s Counsel filed on 26/2/13, which was served on 27/2/13; the Respondents filed theirs on 4/3/13 but there was no proof of service of same on Appellant; he said that Appellant only noticed the Respondents’ address on 11/3/13, minutes before the trial Judge started to read the judgment; that Appellant protested, insisting to be allowed to read the Respondents’ address, for possible reaction on points of law, but the trial Court refused the plea/protest and would not place Appellant’s Counsel on record on the complaint. He said that the trial Court cannot shut out the Appellant’s protest/objection on 11/3/2013 by refusing to take him and accord him the opportunity to be heard. He relied on the case of Tamiti Vs NSCB (2009) 7 NWLR (Pt.1141) 631 and urged us to resolve the Issues for Appellant and allow the Appeal.

The Respondents’ Counsel, Ibeneme Njoku Esq, on Issue one, said that Appellant, from the onset, knew he had a weak case and so resorted [to] all legal chicanery and sharp practices at every stage of the trial. Counsel said the Writ of Summons and Statement of claim were served on the Appellant on 7/3/2007, but Appellant filed a motion on 7/5/2007 to set aside the service, and entered a conditional Appearance on 11/6/07 (Page 6 of the Records). Counsel said while Appellant was manipulating the Court in this way, he was at the same time accelerating his construction work on the land in dispute, so that at the end he could plead “completed act.” Counsel said that it was in pursuance of this Plan that Appellant, who was served personally with the originating process, denied being served and later filed the motion to set aside the service, saying that he was not served, despite being identified by a pointer (Counsel) who accompanied the Bailiff to the house where Appellant and his family lived.

Counsel said that the trial Judge acted rightly, when he allowed the renewal of the expired originating process, exercising his discretion, pursuant to Order 5 Rule 1(1) of the High Court Rules of Imo State, which states:

“Where 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 as to time, place, manner or form, the failure shall be treated as irregularity and may not nullify such step taken in the proceedings. The Judge may give any direction as he thinks fit to regularize such steps.”

Counsel further relied on the case of Kolawole vs Alberto (1989) 1 NWLR (Pt.98) 382:

“The factors which constitute good reasons on which the exercise of discretion to renew a Writ could be founded are many and may vary according to the circumstances of each case.”

The following may qualify as good reasons:

(a) That the defendant is evading service;

(b) That the delay was induced by the conduct of the defendant or his representative.

Counsel said the above case is on all fours with the present case; that Appellant evaded service of the originating process; denied that he was the person served with the process, and that caused the expiration of the Writ, which the Court later renewed.

On the use of ex-parte application to renew the Originating process, Counsel said that was in order, as the law permits that, where the interest of the Applicant alone is involved. He argued that when the life span of the Writ expired, there was no further contest between the parties and if the Respondents had not taken steps to make the case alive once more, the Suit would have abated and Appellant would have been happy. He said the Respondent was perfectly in order to come by way of ex-parte order to renew the Writ; that it is wrong for Appellants to say that issues were joined; he said that parties cannot join issues on a matter whose life span had expired and was no longer before the Court. He relied on7up Bottling Co. Vs Abiola & Sons Ltd (1989) 4 NWLR (Pt.114) 229 at 237, to the effect that “ex-parte application means an application brought or made in the interest of one party to a Suit. Such an application may or may not directly affect the interest of the other party”.

Counsel therefore said that the trial Court was right to dismiss the Appellant’s application challenging renewal of the originating process, doing so in the exercise of its discretion. He noted that as at the time Appellant made the application, he was yet to settle his pleading after 4 years and was manipulating the time to build on the land. He relied on the case Odogwu Vs Odogwu (1992) 2 NWLR (Pt.225) 539, to say that “the right to be heard does not in any way foreclose the exercise of discretion in favour or against the party heard.” He also relied on the case of Bakare Vs Lagos State Civil Service Commission & Anor (1992) 8 NWLR (Pt.262) 641, to the effect that “It will be impossible to satisfy the requirement of fair hearing, when a party has made it impossible to reach him.”

That, he said, is the situation in this case, where Appellant, though served denied being served and that led to serving all future processes on him by substituted means.

On Issue 2, Counsel said the Respondents had been in possession of the land, unchallenged, since when they inherited it, together with other pieces of land from their forebears, until 2006, when Appellant trespassed on the land, and when challenged, resorted to threats and intimidation, using Police to arrest some of the Respondents.

On the issue of identity of the land, Counsel said there was no issue about that as both sides had identified the land in dispute; he said that identifying the land by different names does not affect its identity.

Counsel said that a trespasser cannot claim possession by a mere act of entry into land, and relied on Aromire Vs Awoyemi (1972) 1 ALL NLR 101 at 103; Badru Vs Ozoh (1986) 4 NWLR (Pt. 38) 724. He added that, one who asserts ownership, must prove same by credible evidence, and relied on Onwugbufor & Ors Vs Okoye & Ors (1996) 34 LRCN; Piaro Vs Tenalo (1976) 12 SC 41; Mogaji Vs Cadbury (1985) 2 NWLR (Pt.1) 343. Counsel said the Respondents had established their root of title to the land, tracing same from their great grandfather, ELECHI, who deforested the land; he said that Appellant rather pleaded and asserted being given irrevocable power of Attorney to enter the land to build, but failed to call the Donor, Raymond Chindo Ndubuaku to give evidence on how he got the land to donate to Appellant. Counsel said that a party who produces an instrument of grant of land in proof of his title must go ahead to prove:

(1) That the grantor had, in fact, what he purported to grant;

(2) And the capacity and authority to make the grant; and

(3) The grant had the effect claimed by the grantee, the holder of the title. He relied on Divine Ideas Vs Umoro (2007) ALL FWLR (Pt.380)

Counsel referred us to paragraphs 14 and 20 of the Appellants pleading, where he mentioned numerous people that he claimed witnessed the sale of the land in dispute to DW2 (IroIwe), including Bernard Olua, said to have been a relation of Declan Amadi, who allegedly sold land that formed part of the land in dispute to IroIwe, but that Appellant failed to call the said witnesses to give evidence in support of the averment. He relied on the case of Bala Vs Bankole (1986) 3 NWLR (Pt.27) 14. Specifically Counsel said that Appellant failed to call anybody from the family of Declan Amadi, from whom he claimed the root of title; Bernard Olua, who purportedly witnessed the sale transaction; Sylvester Ojiegbe from whom his donor purportedly acquired interest in the land; his donor and officials of the Ministry of lands Authority (OCDA), touted in connection with the registration of the land and the charting of the same by Appellant. Counsel relied on The State Vs Azeez (2008) ALL FWLR (Pt. 424) 1423 on the need to call witness whose evidence can settle the issue in controversy.

Counsel added that pleadings do not constitute evidence; that they are mere notices, facts to found evidence - Shell B.P. Petroleum Dev. Co. Vs Abedi & Ors (1974) 1 SC 23; Ajuwon & Ors Vs Akanni & Ors (1993) 12 SCNJ 23 at 50 - 51.

Counsel said it was ridiculous to say that Appellant demonstrated that his donor not only owned the land in dispute, but that he himself and the line of persons through whom the res got to him had been in effective possession of the re since 1975, whereas, it was common knowledge that, at the time DW2 allegedly bought his land from Declan Amadi in 1975, the whole area, now known as Works Layout, Owerri, consisted of farm lands and bush paths, but after the parcellation and plotting of the whole area, in 1978, by the Government of Imo State, the plot of land in dispute became plot 199 Works Layout, Owerri.

On the allegation that the Suit was statute barred, Counsel said that cannot be, as the Appellant trespassed on the land in 2006, and they took action to ward off the trespass in 2007. He relied on Elabanjo Vs Dawodu (2006) 27 NSCQR; Ologunleko Vs Ikueomelo (1993) 2 NWLR (Pt.273) 16; Udo Vs Effiom (2008) ALL FWLR (Pt.414) 1559.

Counsel added that acquisition of certificate of occupancy is no conclusive evidence of title, as one predicated on a defective title is a nullity and void, ab initio. He relied on Kyari Vs Alkali (2001) 5 SC (Pt. 2) 192; Ogunleye Vs Oni (1990) 2 NWLR (Pt.135) 745 SC; Udo Vs Effiom (2008) ALL FWLR (Pt.414) 1559.

On Issue 3, Counsel said that Appellant’s Counsel was served with the Respondent’s address; that he never made any complaint of non-service of the process at the date of the judgment; that the allegation of non-service of the Respondents’ address was only carried in the Appellant’s brief and is fraudulent, just as Appellant earlier fraudulently denied service of the originating process. He urged us to dismiss the allegation and to dismiss the entire appeal, for lacking in merit.

RESOLUTION OF THE ISSUES

I shall consider this Appeal on the three Issues donated by the Appellant, taking them, serially.

Appellant had made a heavy weather of his Issue one, alleging a nullity of the entire trial, on the ground that the renewed originating process was a nullity as the trial Court had no competence to renew it by ex-parte Order, and after 3 years of expiration of the same (Writ). The Respondents had argued that Appellant was served with the process but he denied service and fought to set the service on him aside which was done by the Court on 16/10/10; he said that, upon the setting aside of the service of the originating process on the Appellant, the writ got expired by that time and needed to be renewed for service (again) on the Appellant. Counsel argued that while Appellant was manipulating the process (contesting the service of the Writ on him) he exploited that time of contesting service to build on the land in dispute!

The Respondents obtained an order, by ex-parte application to renew the writ on 22/11/2010; they argued that the application was properly made and granted, ex-parte, because at that time the application affected only the Respondents (Plaintiffs); that Appellant had no interest in the application; that it is wrong for Appellant to say that issues had been joined by the parties on the issue of renewal of the writ.

I tend to agree with the reasoning of the Respondents, that the application for renewal of the writ of summons could only have been done by an ex-parte application, because it was only the interest of the Respondents (as Claimants) that was to be determined by the application to renew the writ of summons. See 7up Bottling Co. Vs Abiola & Sons Ltd (1989) 4 NWLR (Pt.114) 229 at 237. An application to renew an expired writ of summons is process to give or restore life to a litigation process to originate a Suit and the Defendant (Opponent) has no interest in the process, until the same is given life and served on him (Defendant). Thus, the defendant cannot talk of joining issues with a Plaintiff, who applies to renew or restore life to an expired originating process, in my opinion.

By Order 6 Rules 6(2) and 7 of the High Court (Civil Procedure) Rules of Imo State, 2008:

“6(2) If a Judge is satisfied that it has proved impossible to serve an Originating process on any defendant within its life span and a claimant applies before its expiration for renewal of the process, the judge may renew the original or concurrent process for 3 months from the date of such renewal.

7) A judge may order renewals in each case strictly for good cause and upon prompt application, provided that no originating process shall be in force for longer than a total of 12 months. The Registrar shall state the fact, date and duration of renewal on every renewed originating process.”

See Kolawole Vs Alberto (1989) 1 NWLR (Pt.98) 382, where the Supreme Court held:

“The factors which constitute good reasons on which the exercise of discretion to renew a Writ could be founded are many and may vary according to the circumstances of each case.”

The following may qualify as good reasons:

(c) That the defendant is evading service;

(d) That the delay was induced by the conduct of the defendant or his representative.

Appellant had argued that the trial Court had no power to renew the originating process, after 3 years of its issue on 22/2/07, on the said 22/11/2010, going by Order 6 Rule 7 of the Court Rules.

That argument, in my view, is unfortunate, in the circumstances of this case, and I think, to accede to it would amount to celebrating or promoting mischief, and malicious use of the Court process. Appellant had filed a conditional appearance in this Suit, on 11/6/2007, and thereafter, used about three years to fight the service of the originating process on him, and while doing so, was building on the land, even with the knowledge of the pending law Suit. He succeeded in setting aside the service of the process on him, only on 16/10/10.

I think the said writ remained alive and subsisting throughout the period of the contestation of the service of the process by the Appellant (and that was why Appellant contested its service). To think or hold otherwise would mock or negate the whole essence of the struggle to set aside the service of the writ of summons on the Appellant! Thus, technically, in my view, the originating process only expired, when the trial Court pronounced that Appellant was not properly served with the process, and set aside the service on 16/10/2010.

In that case of Kolawole Vs Alberto (1989) LPELR - 1700 SC, it was held:

“service of a Writ of Summons made after the period of twelve months in respect of which a Defendant enters unconditional appearance is valid service - see Khawam Vs Elias (1960) 5 F.S.C 244; The Gniezno (1967) 2 ALL ER 738 at 745. If the Writ were void because of the expiration of its effectiveness, the service would not have been regarded as valid - See Sheldon Vs Brown Bayle ys Steel Work Ltd (1953) 2 ALL ER 382. Order 5 Rule 6 did not intend that an expired writ be regarded as void.” Per Karibi-Whyte JSC.

It was further held:

Where an act originally valid is rendered invalid by subsequent act, the invalibility arising thereby is temporary and is curable, in my view as a mere irregularity. This appears to be the position of this case. A writ of summons which has not been served for twelve months remains a valid writ of summons but lies dormant and ineffective for service, waiting to be reactivated and rendered efficacious in the manner prescribed by rules of Court - Per Karibi Whyte JSC.

I think, the Respondent had promptly applied to renew the writ of summons, upon the order of 16/10/10, setting said the service of same on the Appellant. And when the trial Court ordered the renewal of the said Originating process (Writ of Summons) on 22/11/2010, the order breathed life into the said Writ of Summons and the subsequent service of the same on the Appellant by substituted means was proper, in the circumstances.

Of course, a renewed originating process, like an amended process, takes effect and dates back to when the original process was filed and so Appellant cannot talk about the Suit being statute barred. The Respondents had filed the Suit on 7/2/07, upon alleging trespass on the land by Appellant in 2006. In that case of Kolawole Vs Alberto (supra), the Supreme Court said:

“The exercise of discretion is predicated on the consideration that, if the writ is not renewed and Plaintiff is compelled thereby to apply to issue another writ, his claim may be barred by the proof (of) the limitation law. See E. Ltd Vs C & Anor (1959) 2 ALL ER 46; Small page Vs Tonge 17 Q.B.D. 644.”

See Jatau Vs Ahmed & Ors (2003) LPELR - 1597 SC; Enigbokan Vs AIICO Nig. Ltd (1994) 6 NWLR (Pt.348) 1 at 15 - 16; Ogwudire Vs Obigwe & Anor (2014) LPELR - 23635 CA.

Considering the conduct of the Appellant in contesting the service of the writ for about 3 years, before it was resolved, I would therefore resolve this issue against Appellant.

But I cannot also see how Appellant can successfully and validly raise and argue this Issue, founded on the interlocutory decision of the trial Court, reached on 23/5/2011 (which re-affirmed its decision renewing the originating process on 22/11/2010), as he, (Appellant) failed to appeal against the said decision, when it was delivered; and he took part in the entire trial, until the final judgment on 23/3/2013, and without formally filing notice of Appeal against the said interlocutory decision of 22/11/10, and/or seeking and obtaining the leave of this Court to raise appeal against the said ruling.

By law, Appellant, who failed to appeal against the said interlocutory decision, within 14 days of the decision, ought to have sought/obtained the leave of this Court to appeal against that decision, along with the Appeal against the final judgment. See Alaribe & Anor Vs Lawal & Ors (2019) LPELR - 47065 (CA); and Ekemezie Vs Ifeanacho & Ors (2019) LPELR - 46518 SC, where it was held:

“The said decision is accordingly interlocutory - this failure to obtain leave renders this appeal incompetent as this Court has no jurisdiction to entertain it - the net effect is that absence of the requisite leave of Court robs this Court of jurisdiction to hear this interlocutory appeal. I shall therefore enter an order striking out this appeal.” Nweze JSC.

See Destra Investments Ltd Vs FRN & Anor (2018) LPELR - 43883 SC:

“The Lower Court was right when it found that the decision of the trial Court is a discretionary one and an appeal querying an interlocutory decision on exercise of discretion must be by leave which was not sought before it was filed, notwithstanding the fact that it took the point suo motu without inviting counsel to address it on the point, the appeal is incompetent and liable to be struck out.”

The above, in my opinion, should be the fate of this Issue, founded on grounds 1 - 3 of the Appeal, which Appellant said are against the interlocutory decision of 23/5/2011. There is no indication that he (Appellant) sought and/or obtained the leave of this Court to argue the said issue, based on the interlocutory decision. The said Issue and grounds 1 - 3 of the Appeal are therefore incompetent and are hereby struck out.

On Issue 2, whether the final judgment of 11/3/2013 was not against the weight of evidence and that the trial Court did not consider or ignored documentary evidence like the chart obtained from the lands Registry - Exhibit 7 etc, I hasten to answer this in the negative, as I think, the trial Court had duly considered the evidence placed before it.

Appellant had argued in paragraph 4.17 and 4.18 of the brief that: “the combined effect of the exhibits, Appellant’s pleadings witness deposition and testimony in Court, put to rest the question as to who owned the land in dispute - plot 199 Works Layout, Owerri; that those pieces of materials clearly traced the Appellant’s Donors title to Sylvester Ojiegbe, to Cornelius IroIwe, DW2, to the original native owner of the land, Declan Amadi of Umuimeka Orji who, the claimants admitted owned the expanse of land in the Works Layout area, Owerri, where the land in dispute situate, and sold to DW2.

But that the trial Court, surprisingly, ignored all those pieces of material evidence and express admissions of Respondents and gave judgment to Respondents, on the ground that Appellant failed to produce some vital witnesses to testify for him and that Respondents, being indigenous to the area of the land in dispute, were in a position to know who owned the land in the area, and their land.

Of course, the Respondents had argued that the trial Court had made proper evaluation and findings, and had reached the correct conclusion, when it held for them (Respondents). Counsel said it was ridiculous to claim that

“Appellant demonstrated that his donor, not only owned the land in dispute but that he himself and the line of persons through whom the res got to him, had been in effective possession of the res since 1975”,

when apart from DW2 (IroIwe), none of the persons, who either witnessed the land transaction or were in the line of the persons through whom Appellant got the res, was called to give evidence; that they (Respondents) were in possession of the land until 2006, when Appellant trespassed thereon; Counsel said that they inherited the land from their forebear (Elechi) who deforested the land; that the entire land in the area, as at 1975, was a farm land until the government of Imo State picked interest in it in 1998 and demarcated or parceled the expanse of land into a Layout and Plots, with the land in dispute, becoming Plot 199. They argued that Raymond Chindo Ndubuaka who allegedly donated the land to Appellant, was not called to say how he got the land, and that DW2, who allegedly bought the land in dispute, did not call any of the persons who allegedly witnessed the sale, including Bernard Olua, who was said to be alive, nor any relation of the alleged seller, Declan Amadi, nor Sylvester Ojiegbe from whom the Appellant’s donor (Raymond Chindo Ndubuaku) purportedly acquired the land!

Counsel submitted that brandishing documents of title of land, like certificate of occupancy (C. of .O) and Power of Attorney, is of no use, where the party who produces the document cannot establish his root of title, backed by the instrument, produced. He relied on Divine Ideas Vs Umoru (2007) ALL FWLR (Pt.380).

Of course, the law is trite, that mere production of document of title to land, is not conclusive proof of title, where the source of the title document or authority to issue same, is wanting in legitimacy. The Court is expected to scrutinize and evaluate the said document of title, to determine whether:

(a) The document is genuine and valid

(b) It was duly executed, stamped and registered

(c) The grantor had the authority and capacity to make the grant

(d) The grantor, in fact, had what he purported to grant and

(e) The document has the effect claimed by the holder of the document. See Apampa & Ors Vs Ogungbemi (2017) LPELR - 43264 (CA); Akinduro Vs Alaya (2007) 6 SC (Pt.2) 120; Kyari Vs Alkali (2001) 11 NWLR (Pt.724) 412; Romaine Vs Romaine (1992) 4 NWLR (Pt.2380 650; Oyeneyin Vs Akinkugbe (2010) 4 NWLR (Pt.1184) 265; and Francis Adesina Ayanwale Vs O.O. Odusami (2011) LPELR - 8143 (SC); Korie Vs Ifenkwe (2018) LPELR - 44987 (CA).

In this case, the trial Court had found that the evidence of Respondents was satisfactory, in the tracing of their title to the land in dispute; and that Appellant’s evidence was wanting, especially as the DW2’s evidence of purchase of the lands in the area (including the land in dispute) from Declan Amadi, was not substantiated particularly as Bernard Olua, who allegedly witnessed the sale, was not called to testify (even when he was said to be alive) to show that what DW2 bought, from Declan Amadi, included the land in dispute - plot 199 Works Layout, Owerri.

Appellant did not also call evidence of the officials from the land Registry and or Owerri Capital Development Authority, on the charting of the Plots of the lands in their Exhibit 7, and the ownership of same, and I think, it was his (Appellant’s) duty to call such evidence, not the Respondents’ duty. I resolve the Issue against the Appellant, as I cannot see how I can fault the decision of the trial Court, that the Respondents had established their claim.

On Issue 3, whether the trial Court breached Appellant’s right to fair hearing, by acting on Respondents’ Address, without allowing Appellant opportunity to file a Reply on points of law and ignoring Appellant’s protest on the issue, on the date of judgment. I think, Appellant himself anticipated the futility of this issue (which is not covered by the Records of Appeal), when his Counsel alleged (in what appears as blackmailing the trial Court) that he only saw Respondents’ address on the date of the judgment, and he raised protest against it, and sought to be allowed to read the Address for possible reaction on points of law, before the judgment, but the Court refused/or ignored him, and would not record his protest!

The Respondents’ Counsel had denied the above allegations and had asserted that Appellant had been served with their address and that there was no such protest at the time of reading the judgment; that Appellant was only acting his usual mischief, by alleging such blackmail against the trial Judge.

There is nothing in the Records of Appeal to support Appellant’s claims that he was not served with Respondents’ address and that he protested and sought to be allowed to react to the Respondents’ address (which he allegedly saw on the date of judgment) and was refused, thereby violating his right of fair hearing! Normally, both the appellate Court and the parties are bound by the Records of Appeal in any matter/question or issue that touches on the Appeal. This strange complaint of Appellant, on this issue, is outside the catchment of the Records of Appeal and appears to be wishful thinking of Appellant and/or some mischief, to discredit the judgment. See Abaribe vs Nkwonta & Ors (2015) LPELR - 25701 (CA):

“The parties and appellate Court are bound by the records of appeal on any issue in controversy, and cannot go outside the clear facts on the records to speculate on any issue” Orok Vs Orok (2013) LPELR - 20377; Garuba Vs Omokhodion (2011) 15 NWLR (Pt.1269) 145 at 180.” See also Audu Vs FRN (2013) LPELR - 19897 (SC); Sommer Vs FHA (1992) 1 NWLR (Pt.219) 548; Texaco Panama Inc. of Nig. Ltd Vs S.P.D.C. Nig. Ltd (2002) 5 NWLR (Pt.759) 209 to the effect that the Court is not only bound by the records of appeal, but is also bound to examine the state of the record on the conflicting claims of the parties.

The said Issue 3, in my view, was contrived to blackmail the trial Court. It is incompetent and is struck out.

On the whole, I resolve the Issues against Appellant and dismiss the Appeal for lacking in merit. I award cost of N50,000 Fifty Thousand Naira against Appellant, to the Respondents.

**RAPHAEL CHIKWE AGBO, J.C.A.:**

I agree.

**IBRAHIM ALI ANDENYANGTSO, J.C.A.:**

Having had the privilege of reading the judgment just delivered my learned Noble Lord I. G. MBABA JCA, I agree with his reasoning and conclusions that this Appeal lacks merit and deserves to be dismissed.

I according dismiss same and abide by the ancillary orders made in the lead judgment as to cost.