**IBUM OLUMBA AND OTHERS**

**V.**

**THE REGISTERED TRUSTEE OF THE BROTHERHOOD OF THE CROSS & STAR**

IN THE COURT OF APPEAL OF NIGERIA

THE 6TH DAY OF NOVEMBER, 2012

CA/C/179/2010

**LEX (2012) - CA/C/179/2010**

OTHER CITATIONS

2PLR/2012/55 (CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, JCA

UZO I. NDUKWE-ANYANWU, JCA

JOSEPH TINE TUR, JCA

**BETWEEN**

1. IBUM OLUMBA

2. ALL STATE REAL ESTATE LTD.

3. ENO ETUK ESQ. - Appellants

AND

THE REGISTERED TRUSTEE OF THE BROTHERHOOD OF THE CROSS & STAR Respondents

**ORIGINATING COURT**

HIGH COURT OF JUSTICE, CALABAR, CROSS RIVER STATE

**REPRESENTATION**

CHRIS A.C. OGBOGU with CHARLES EKPO - For Appellant

AND

U. ESSIEN - For Respondent

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

RELIGION AND LAW:- Religious nonprofit – Church -Properties of – Parties with right to control same – Family of deceased founder and registered trustees of nonprofit – How determined

NONPROFIT/CHARITY LAW - RELIGIOUS BODY: Dealings with property of a religious nonprofit - Whether trustees of the nonprofit are the only ones exclusively entitled to deal with the properties – Relevant considerations – Right of heirs of founding trustee

ESTATE PLANNING AND ADMINISTRATION:- Properties of registered nonprofit with deceased funder – Power of control over same – On whom lies – Whether registered trustees of body or family of deceased founder – Relevant considerations

CHILDREN AND WOMEN LAW: Wife and heirs of founder of a religious non-profit organisation – real estate and properties belonging to non-profit – inheritance right of heirs and spouse of founder of a religious body against registered trustees of organisation thereto – relevant considerations

**PRACTICE AND PROCEDURE ISSUES**

ACTION - DISCONTINUANCE OF AN ACTION: Meaning - Where a claimant voluntarily puts an end to his claim wholly or in part – right of a claimant at any time to discontinue his action by filing a notice of discontinuance and serving copies of it on the other parties to the proceedings – when permission of the Court is required to discontinue – whether effect of discontinuance is that a claimant has to pay a defendant's costs unless the Court orders otherwise - Order 24 rule 1(1)-(5) and 2, High Court of Cross River State (Civil Procedure) Rules 2008 – relevant considerations thereto

EVIDENCE - BURDEN OF PROOF: Judgments and orders of Courts – whether proved by oral deposition in affidavits - Section 83(1) of the Act, 2011 - Section 132 of the Evidence Act – whether burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side - Orders of Courts of law – Whether usually proved by certified true copies of the Court's judgments or enrolled orders duly certified by the Registrar of that Court

JUDGMENT AND ORDER - AWARD OF COST: Justification - Justice demands that upon withdrawal or discontinuance of an originating summons or processes the defendant should be recouped - Whether generally the award of cost is at the discretion of the learned trial Judge - Order 24 rule 1(3) of the Rules of the High Court – Upon withdrawal or discontinuance after a defence had been filed - Whether the respondent/defendant is automatically entitled to the cost proved up to the stage of the withdrawal or discontinuance

JUDGMENT AND ORDER - INTERLOCUTORY RULING: Nature of an interlocutory ruling, order, judgment, appeal, etc as one that is interim or temporary, not constituting a final resolution of the whole dispute or issues in controversy – Nature of an order the court of Appeal may make upon a hearing bordering on an interlocutory ruling – When Court of Appeal may dismiss the appeal and make an order for hearing to proceed or order a transfer of the substantive suit to another judge for hearing and determination – Successful appeal of interlocutory ruling – Need for Court of Appeal to look at the grounds and circumstances in making an appropriate order – When striking out the suit or dismissing same thereby terminating the proceedings at the lower Court would be the appropriate order

WORDS AND PHRASES - "DEFENCE": "DISCONTINUANCE": Meaning

**MAIN JUDGMENT**

JOSEPH TINE TUR, J.C.A. (DELIVERING THE LEAD RULING):

The Registered Trustees of the Brotherhood of the cross and star (Respondent/Plaintiff) claim they are the only legal body authorized to administer, manage, dispose off or deal with all property of the Brotherhood of the Cross and Star every where in the world but that (1) Mr. Ibum Olumba Obu (2) All states Estates Limited and (3) Eno Etuk Esq. (Defendants/appellants) claim otherwise. That the defendants/appellants have continually and continuously entered into and taken possession of the property belonging to the brotherhood through thuggery and illegal use of police, sheer stealing and falsification of documents whereupon, the Registered Trustees took out an originating summons supported by affidavit and documentary exhibits before the High Court of Justice, Calabar, Cross River State on 2nd April, 2009 in suit No. HC/111/2009 seeking that the following questions be determined, namely:

"1. Whether the Trustees of the plaintiff are not the ones solely entitled to manage and run the affairs of the plaintiff in anything relating to administration, to the property and otherwise of the plaintiff by virtue of the trustees' law.

2. Whether the defendants have a right to meddle/obstruct continuously the administration of the landed property of the plaintiff and continuously and continually receive rents on same and take out actions that are vexatious and hamper the smooth running of the property of Brotherhood of the Cross and Star.

3. Whether the defendants having continued in their illegal activity cannot be ordered to render accounts on all the property which they are illegally using the 2nd defendant to manage pretending to be owners of the property of the Brotherhood of the cross and Star."

They sought the following reliefs against the three defendants/Appellants:

"1. A DECLARATION that the plaintiff is the sole body imbued with the power to deal with, administer and or deal otherwise with the property of the brotherhood of the cross and star in accordance with the memorandum setting it up.

2. A DECLARATION that the continued holding over and the interference of the defendants in the process of the management and care of the properties of the plaintiff is illegal a breach of the law.

3. An order that the defendants render accounts of their illegal collections on the property since 14th December, 2001.

4. An order restraining the Defendants from any further acts of trespass either by themselves, their agents assigns and cohorts or by anyone whatsoever acting or purporting to act on their behalf."

Upon service a conditional memo of appearance was entered on behalf of the three defendants by Itim Effiom Esq. of counsel on 6th April, 2009 followed by a Notice of preliminary objection filed on 29th April, 2009 that the summons be struck out on the following grounds:

"1. Misrepresentation and illegal use of the claimant's name.

2. Lack of cause of action

3. Abuse of Court process

4. Lack of jurisdiction."

Affidavits and counter affidavits trailed the preliminary objection. Some were allowed but others struck out for one reason or the other. Counsel adopted their written addresses on 13th July, 2009. The learned trial Judge delivered ruling holding that not only could the Claimants institute the originating summons but the Court had the jurisdiction to entertain and determine the questions in controversy. Being aggrieved the defendants/appellants filed a joint Notice of Appeal containing five grounds on 27th July, 2009 seeking the following reliefs from the Court of Appeal:

"(a) Setting aside the decision of the tower Court.

(b) Upholding the preliminary objection of the defendants/appellants that the inchoate originating summons of the claimant/Respondent full of misrepresentation, is also lacking in merit; an unclad duplicity of suit and a gross abuse of the Court process.

(c) Cost in the circumstances."

The appellants/defendants' brief of argument was filed on 16th April, 2010 and served on the Respondent/plaintiff who is yet to file a brief. However, on 15th July, 2011 the respondent/plaintiff filed a motion on Notice supported by affidavit and, documentary exhibits "A"-"E" praying for the following reliefs:

"1. An order striking out this appeal.

2. Such further or other order(s) as this Honourable Court may deem fit to make in the circumstances."

The grounds for seeking relief are:

"1. The relief sought by Respondent in their preliminary objection in the Court below the Ruling thereon whereof is the subject of this appeal was an order striking out the suit in that Court. The suit in that Court has been withdrawn and/or discontinued.

2. The issue of substantial number thereof agitated in this appeal have been dealt with and resolved in Appeal No.CA/C/124/2010: Helen Johnson Udoh (a.k.a Queen Ibum Olumba Obu vs. The Registered Trustees of the Brotherhood of the cross and Star."

The application is supported by an affidavit deposed to by His Holiness, Olumba Olumba Obu, are of the trustees of the Respondent/plaintiff. The facts are challenged in a counter affidavit filed on 17th May, 2012 by Apostle Ekanem B. Ekanem the Administrative Assistant to Queen Mother Ibum Olumba and Head of Administration of the Brotherhood of the Cross and Star worldwide. Another Further and Better Affidavit was filed by volunteer Itam Esq. of Domicile Associates exhibiting the judgment of the court of Appeal (Exhibit "F) dated 13th May, 2010. This necessitated a " Further and Better Counter Affidavit to the Respondents' Further and Better Affidavit filed on 18th May, 2012" deposed to by Apostle Ekanem Bassey Ekanem on 28th May, 2012 denying that Exhibit "F" had any connection with this appeal.

In view of the affidavits, Counter-affidavits and further and better affidavits, etc, this Court ordered that Counsel shall file and exchange written addresses. The respondent/plaintiff filed the written address on 25th May, 2012. The appellants/defendants did likewise on 22nd June, 2012. Counsel adopted their written addresses on 18th October, 2012.

Mr. Dafe Diegbe Esq. of Counsel to the Registered Trustees of the Brotherhood of the Cross and Star referred to the motion filed on 15th July, 2011 seeking to strike out the appeal and the affidavit and documentary exhibits which consisted principally of previous judgments and the ruling of the learned trial Judge of 13th July, 2009 now subject of this appeal. Learned Counsel argued that while this appeal is pending the Federal High court, Calabar, Cross River state in suit No.FHC/CA/CS/69/2008 viz The Registered Trustees of the Brotherhood of the Cross and Star vs. Helen Johnson Udoh (a.k.a Queen Ibum Olumba Obu) delivered judgment on 24th March, 2010 granting all the reliefs claimed by the Brotherhood against the 1st Respondent in that suit which was annexed in the motion as Exhibit "D". The Appeal Court, Calabar Division, dismissed an appeal lodged by the 1st Respondent on 6th June, 2011 as evidenced in Exhibit "C". Counsel contended that a substantial number of the issues canvassed in appellants' brief (Exhibit "B") in this appeal had been dealt with and resolved in the judgment of the Court of Appeal (Exhibit "C"). It was having regard to this state of affairs that the Brotherhood filed a notice of withdrawal/discontinuance (Exhibit "E") of the originating summons under Order 24 rule 1(1)  of the High Court (Civil Procedure) Rules on 14th July, 2011 and had same served on the appellants. The argument by learned Counsel is that Exhibit "E" once filed and served is conclusive evidence that the originating summons in the lower Court had been withdrawn and has ceased to exist in that Court. That without denial the appellants before this Court are taken to have admitted the fact of withdrawal of the originating summons. In that case there remains nothing to be heard even if the main appeal is resolved either for or against the brotherhood by the Court of Appeal. Counsel relied on Anaekwe & Ors. vs. Mashashe & Ors. (2002) FWLR (Pt.93) 1941 at 1955; Badejo vs. Federal Ministry of Education (1996) 8 NWLR (Pt .464) 15  and paragraph 21/2-5/14 of the Supreme Court practice, 1997 edition, page 583 as to the legal effect of withdrawal or discontinuance of a pending suit or an appeal. Counsel further cited Conybeare vs. Lewis (1880) 13 Ch.D. 469; Obinu & Ors, vs. Orizu & Ors. (1972) 2 ECSLR 606 at 608; Babatunde vs. Pan Atlantic Shipping and Transport Agencies Ltd. & Ors. (2007) All FWLR (Pt.372) 1721 at 1743 paragraphs "F-H" and 1744   paragraphs "A"-"F" and Ekudano & Anor. vs. Keregbe & Ors. (2008) All FWLR (Pt.405) 1641 at 1646 paragraphs "G"-"H"; Emegbara vs. Health Management Board (Imo State) & Ors. (1987) 2 NWLR (Pt.56) 330 at 339 paragraph "D"-"H" to support his argument. It was further contended that the learned trial Judge had dismissed the preliminary objection now subject of this appeal. Once the originating summons in the Court below is withdrawn that ends the matter in controversy hence there are no live issues to be dealt with or resolved in this interlocutory appeal. Same has become spent, redundant, otiose, academic, moot and at best hypothetical. Learned Counsel urged that this appeal be struck out.

ISSUE TWO:

Learned Counsel referred to paragraphs 6 and 7 of the affidavit in support of the motion which were disputed in paragraphs 12 and 13 of the Counter-affidavit of the appellants and the issues in the proceedings in Exhibit "B" which had been dealt with in Exhibit "C" as binding until set aside by a Court superior to the Court of Appeal. That there is no live issue to be canvassed on appeal since they have been determined by the Court of Appeal in Exhibit "C". Learned Counsel urged that this appeal be struck out.

Chris A.C. Ogbogu, Esq. of Counsel to the appellants/defendants relied on the written address filed on 22nd June, 2012 drawing attention to the fact that the Respondent's learned Counsel did not set down the issues for determination in the written address. But Counsel did not deny the fact that the Registered Trustees of the brotherhood of the Cross and Star World Wide filed a Notice of withdrawal of the suit in the lower court (Exhibit "E") on 14th July, 2011. That this was two years after the appellants had applied for stay of proceedings and more than one year after filing and serving Appellants' Brief of Argument on the Respondent on 16th April, 2010. Exhibit "E" should have been served on the appellants within 5 days of filing but was not. The appellants were only seeing it on appeal. Counsel contended that rules of Court must be obeyed. The said Exhibit "E" is still in the court below as the trial Judge is yet to resume hearing the substantive matter and the interlocutory appeal is still pending in this Court. Counsel contended that Exhibit "E" is inoperative; it could not be said to have discharged the suit at the lower court as the stay of proceeding obtained by the appellants was still operational.

Counsel contended that once the Respondent/Plaintiff had not strictly complied with the provisions of order 24 rule 1(1) of the High court (civil Procedure) Rules, 2009 the withdrawal and discontinuance of the suit is ineffective, for example, without payment of costs occasioned by the matter so withdrawn. That filing Exhibit "E" offended the provisions of Order 24 rule 1(5) of the Rules supra.

Counsel urged this Court to hold that the originating summons has not been withdrawn, refuse this application but hear the appeal on the merit.

ISSUE TWO:

Counsel urged this Court to avoid entertaining the substantive appeal in this interlocutory application, citing Adetono vs. Zenith Int'l Plc (2011) 12 MJSC (Pt.111) 75 at 84 and Madubuike vs. Madubuike (2001) 9 NWLR (pt.719) 698. That if some of the issues raised in the appellants' brief had been argued and answered in Appeal No.CA/C/124/2010 as Contended by learned counsel to the Respondent/plaintiff, that presupposes that not all issues raised by the appellants in the brief of argument had been dealt with, argued Counsel. In that wise this Court had the inherent jurisdiction to entertain the appeal. Besides, Exhibit "C" was still pending on appeal in the Supreme Court as deposed in counter affidavit. Learned Counsel cited the case of Okonkwo vs. Uba (2011) MJSC 1 at 6 where the Supreme Court explained the purpose of an appeal. Counsel urged that this application be struck out and the pending appeal heard on the merit.

I shall preface this ruling not forgetting that the learned trial Judge merely dismissed the preliminary objection brought by the appellants/defendants on 13th  July, 2009 against the hearing and determination of the originating summons of the Registered Trustees of the brotherhood of the Cross and Star world Wide. The originating summons is still pending before that Court. The appeal filed by the appellants is against that interlocutory ruling.

An interlocutory ruling, order, judgment, appeal, etc is one that is interim or temporary, not constituting a final resolution of the whole dispute or issues in controversy. Upon a hearing, the court of Appeal may dismiss the appeal and make an order for hearing to proceed or order a transfer of the substantive suit to another judge for hearing and determination. If the appeal however succeeds the court of Appeal will, depending on the grounds and circumstances, example where the lower Court lacked the necessary jurisdiction to adjudicate, strike out the suit or, as the case may be, dismiss same thereby terminating the proceedings at the lower Court. Other orders the Court of Appeal may make upon hearing an appeal are set out in Section 15 and 16 of the Court of Appeal Act, Cap C36 Laws of the Federation of Nigeria, 2004.

The question is: lf before the determination of an interlocutory appeal the party that instituted the substantive suit in the lower Court is no longer interested in proceeding to a hearing notwithstanding the outcome of the appeal by the appellant/defendant, what is the option? In my humble view the option is to file a notice of withdrawal or discontinuance of the substantive suit or originating summons at the Court of trial. The word "discontinuance" means the termination of a law suit by the plaintiff; a voluntary dismissal or non-suit. The notice of discontinuance has the effect of the plaintiff voluntarily removing the suit or questions in the originating summons from determination from the Court of trial or refraining from prosecuting or proceeding with the action. The order to be made by the learned trial Judge will depend on the stage of the proceedings when the notice of discontinuance or withdrawal was filed.

In Osborn's Concise Law Dictionary, 9th edition, edited by Sheila Bone, p.137 the learned author states what "discontinuance" means: It is, "Where a claimant voluntarily puts an end to his claim wholly or in part.

A claimant may at any time discontinue his action by filing a notice of discontinuance and serving copies of it on the other parties to the proceedings. In certain instances the permission of the Court is required to discontinue. The effect of discontinuance is that a claimant has to pay a defendant's costs unless the Court orders otherwise." Similar provision exists in the High Court of Cross River State (Civil Procedure) Rules 2008. Order 24 rule 1(1)-(5) and 2 which reads as follows:

1(1) The claimant may at any time before receipt of the defence or after the receipt thereof, before taking any other proceeding in the action, by notice in writing duly Filed and served, wholly discontinue his claim against all or any of the defendants, or withdraw any part or parts of his claim. He shall thereupon pay such defendant's costs of the action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn.

(2) A discontinuance or withdrawal as the Case may be, shall not be a defence to any subsequent claim.

(3) Where a defence has been filed, the claimant may, with the leave of a Judge, discontinue the proceeding or any part thereof on such terms and conditions as the judge may order.

(4) Where proceedings have been stayed or struck oat upon a claimant's withdrawal or discontinuance under this Order, no subsequent claim shall be filed by him on same or substantially the same facts until the terms imposed on him by the Judge have been fully complied with-

(5) The Judge may in like manner and like discretion as to terms, upon the application of a defendant order the whole or any part of his alleged grounds of defence or counter claim to be withdrawn or struck out.

2. When a cause is ready for trial, it may be withdrawn by either claimant or defendant upon producing to the Registrar a consent in writing signed by the parties and thereupon a Judge shall strike out the matter without the necessity of attendance of the parties or their Legal Practitioner."

The "Claimant" before the lower Court was the Registered Trustees of the Brotherhood of the Cross and Star World Wide. The "defendant" were the present appellants in this appeal. The brotherhood had the liberty before or after receipt of the defence, before taking any other proceedings in the originating summons, by notice in writing duly filed and served, to wholly discontinue their claims or summons against all or any of the defendants, or withdraw any part or parts of the claim.

But the Brotherhood had to pay to the defendants/appellants costs of the summons, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn.

The originating summons was filed on 2nd April, 2009 and served on the defendants/appellants who entered a conditional appearance on 6th April, 2009 followed by a defence in the form of a preliminary objection to the hearing of the summons on 29th April, 2009. In that case, the Registered Trustees of the brotherhood of the Cross and Star world wide may only discontinue the summons, with leave of a Judge on such terms and conditions as the Judge may order under Order 24 rule 1(1) and (3) of the Rules supra by payment of the cost so far incurred by the defendants/appellants in entering a defence.   
To satisfy the court of Appeal that the originating Summons had been voluntarily discontinued the Registered Trustees of the Brotherhood of the Cross and Star should have exhibited the enrolled order of the learned trial Judge granting leave to the Brotherhood to discontinue or withdraw the originating summons and the evidence of the terms and conditions upon which leave was granted by the learned Judge for the discontinuance to be effectual. Evidence of payment of costs of the defence must be proved. Judgments and orders of Courts are not proved by oral deposition in affidavits. Section 83(1) of the Act, 2011 provides that "in any proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document which seems to establish that fact shall, on the production of the original document, be admissible as evidence of that fact..." Section 132 of the Evidence Act supra further provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Orders of Courts of law are usually proved by certified true copies of the Court's judgments or enrolled orders duly certified by the Registrar of that Court. See Nzekwe vs. Nzekwe (1989) 5 SCNJ 167; Fawehinmi vs. IGP (2000) FWLR (Pt.12) 2015 at 2044; Section 106(h)(i)(j) and 128(1) of the Evidence Act, 2011.

Exhibit "E" is the purported notice of withdrawal/discontinuance of suit No.HC/111/2009) filed in the lower court on 14th July, 2011.

There is nothing accompanying the exhibit to show that The Registered Trustees of the Brotherhood obtained leave of the learned trial Judge to withdraw or discontinue the originating summons upon the payment of the cost so far incurred by the appellants/defendant in presenting their defence before the lower Court.

Learned Counsel to the applicants/plaintiffs has cited a plethora of authorities in support of his argument without alluding to the fact that Order 24 rule 1(1) of the Rules supra under construction or interpretation lays emphasis on the phrase "... any time before receipt of the defence or after the receipt thereof..."as determining when the application for withdrawal or discontinuance of an action or originating summons may be duly filed and served. The important thing is to determine when the defence to the originating summons was filed by the defendant. The word "defence" is to be construed in determining this application under Order 24 rule 1(1) and (3) supra. A defendant's stated reason(s) why a claimant has no valid case, his answer, denial or plea constitutes his "defence" to the action. In the Law of pleading under the Codes of Civil Procedure, 1899, 2nd edition, page 240, Edwin E. Byrant defines the word "defence" as "...that which is alleged by a party proceeded against in an action or suit, as a reason why the plaintiff should not recover or establish that which he seeks by his complaint or petition."Order 7 rule 8(2) & (3) of the High Court of cross River State (Civil Procedure) Rules, 2008 reads as follows:

"(2) An originating summons shall be accompanied by:

(a) an affidavit setting out the facts relied upon;

(b) all the exhibits to be relied upon;

(c) a written address in support of the  summons.

(g) The person filing the originating summons shall leave at the Registry sufficient number of copies thereof together with the documents in sub-rule 2 above for service on the Respondent or respondents."

The Registrar has the duty to arrange that each respondent be served the originating summons and the accompanying documents duly certified. See Order 8 rule 2(3) and 4 of the Rules supra. upon service the respondents enters a memorandum of appearance in the Registry of the court {or.13 r.1(1)-(3), 2(1)}. It is not just enough to appear upon being served an originating summons or process. Where it is intended to dispute the claims in the summons, a defence or a counter-claim have to be filed. This is provided under Order 17 rule 36 and 38 of the Rules supra which reads thus:

"36. A defendant to an originating summons shall file a counter affidavit together with all the exhibits he intends to rely upon and a written address within 14 days after service of the originating summons.

37. XXXXXXXXXXXXXXXX

38. Where a Counter-claim is pleaded, a reply thereto is called a defence to counter-claim and shall be subject to the Rules applicable to defences-"

Where there is a defence a counter-affidavit is filed upon service of an originating summons. This may be supported by documentary exhibits if any. But if there is no defence, none needs to be filed. The respondent could also file a counter-claim to an originating summons. Costs are incurred in filing defences to originating summons, affidavits, written addresses, documents, counter-claims, etc, in the lower Court. Justice demands that upon withdrawal or discontinuance of an originating summons or processes the defendant should be recouped. Generally the award of cost is at the discretion of the learned trial Judge. See Obaya-gbona vs. Obazee (1972) 5 SC 247 at 253; Nurno vs. UAC Ltd. (1956) 1 FSC 33. But under order 24 rule 1(3) of the Rules supra it seems that upon withdrawal or discontinuance where a defence had been filed the respondent/defendant is automatically entitled to the cost proved up to the stage of the stage of the withdrawal or discontinuance.

My humble view is that the filing of the motion on notice to strike out the originating summons set out the defendants/appellants' defences. The appellants were entitled to all the costs incurred at the lower court even if the learned trial Judge was to grant leave for the originating summons to be withdrawn or discontinued. It is within the province of the trial Judge to determine the costs to be awarded as provided under order 36(1)-(3) of the High court of cross River state (Civil procedure) Rules, 2008.

This court has no jurisdiction to assess the cost that should be payable to the appellant if the Respondents withdraw or discontinue the originating summons at the lower court. Furthermore, this court will not delve into considering the matters raised in issue two as to whether they have been previously determined in Exhibit "B' or "C" for the fact that that exercise will entail an incursion into the pending appeal. That will be contrary to the authorities cited by learned Counsel to the Respondent/appellant. See also Iweka vs. SCOA (2000) 5 SC 21 at 24-25; Motune vs. Gambo (1983) NCLR 237 at 242.

On the whole, I refuse to strike out this appeal. This application fails and is dismissed with N50,000.00 costs to the Respondents.

**MOHAMMED LAWAL GARBA, J.C.A.:**

I have read the affidavit evidence and the written addresses filed by the parties in support of their respective positions in this application. The lead ruling delivered by my learned brother, Joseph Tine Tur, JCA, a draft of which I had read before now, had very comprehensively considered the issues raised therein on the basis of the extant principles of law and peculiar facts and circumstances of the appeal. I agree with the views and conclusions on the issues to the effect that the application is lacking in merit and should fail. It does and I join in dismissing it. I adopt the order on costs, made in the lead ruling.

**UZO I. NDUKWE-ANYANWU, J.C.A.:**

I had read in draft the ruling just delivered by my learned brother Joseph Tine Tur, JCA. I agree with him in refusing to grant the prayers of the applicant to strike out this appeal.

I also abide by the consequential orders contained in this ruling including that as to costs.