**MR. SAMUEL ASONIBARE**

**V.**

**MOHAMMED MAMODU AND ANOTHER**

IN THE COURT OF APPEAL OF NIGERIA

THE 6TH DAY OF DECEMBER, 2013

CA/I/225/2009

**LEX (2013) - CA/I/225/2009**

OTHER CITATIONS

2PLR/2013/120

(2013) LPELR-22192(CA)

**BEFORE THEIR LORDSHIPS**

MONICA BOLAN'AN DONGBAN-MENSEM, JCA

CHIDI NWAOMA UWA, JCA

OBIETONBARA DANIEL-KALIO, JCA

**BETWEEN**

MR. SAMUEL ASONIBARE - Appellant(s)

AND

1. MOHAMMED MAMODU

2. DR. ABUBAKAH MOMOH

(For themselves and on behalf of other children and Beneficiaries of Late Major General Abdul R.A. Mamudu and as Administrators of the Estate of Major General Abdul R. A. Mamudu) - Respondent(s)

**ORIGINATING COURT**

OYO STATE HIGH COURT

**REPRESENTATIONS**

VICTOR OPARA, Esq. - For Appellant

AND

H. U. LANASE, Esq. - For Respondent

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

REAL ESTATE/LAND LAW - REVOCATION OF RIGHT OF OCCUPANNCY:- Power of a Governor to revoke a right of occupancy – Statutory foundation in Section 28 of the Land Use Act – Condition – Need for such revocation to be predicated on overriding public interest or on account of a breach of any term in the Certificate of Occupancy – Procedure for revocation of the right

REAL ESTATE/LAND LAW AND PROCEDURE:- Failure to cross examine a vital witness impeaching a party’s claim as to title – Evidence asserting existence and validity of an instrument – Where not challenged – Whether court is entitled to presume an admission of the existence and validity of the exhibit

ESTATE ADMINISTRATION AND MANAGEMENT:- Protection of real estate assets of an estate under administration – How treated

COMMERCIAL LAW - CONTRACT - CONVENANT:- Meaning - A covenant as an agreement which is only binding on the parties to it

CONSTITUTIONAL LAW:- Appellate jurisdiction of the Court of Appeal – Constitutional basis - Section 240 of the Constitution – Power of the President of the Court of Appeal to make Rules regulating proceedings of the Court – Constitutional Basis - Section 248 of the Constitution of Nigeria, 1999 - Whether court can exercise its discretion in waiving non-compliance with the rules so made – Whether there is s a duty on a party to show special circumstances justifying exercise of such discretion – Whether in the absence of such proof, brief filed in breach of rules of court are incompetent

ETHICS – LEGAL PRACTITIONER:- Duty to file briefs which are in accordance of extant Rules of Court - Court of Appeal Rules made by the President of the Court under Section 248 of the 1999 Constitution to regulate the practice and procedure of the court – Duty of Counsel thereto - Order 18 Rule 3 (6) of the Court of Appeal Rules, 2011 – Stipulation for every brief not to exceed thirty pages – Competence of a brief 12 pages longer

**PRACTICE AND PROCEDURE ISSUES**

ACTION - JOINDER OF NECESSARY PARTY - IRREGULARITY**:** "Order 11 rule 3 of the High Court (Civil Procedure) Rules 1988 of Oyo State – Whether failure to join a necessary party is only an irregularity which does not affect the competence of the court to adjudicate on the matter before it – When such failure is deemed an irregularity that leads to unfairness – Whether could result in the setting aside of the judgment on appeal

ACTION - NECESSARY PARTY: Who is necessary party – Necessity for joining a person as a party in an action – Whether because he should be bound by the result of the action and that the question can cannot be effectively and completely settled unless he is a party

APPEAL:- Filing of a brief of argument – Need to do so in accordance with the applicable Rules of Court When a brief is filed which is not in conformity with the provisions of the rules - Whether the consequences are that no brief has been filed

COURT - RULES OF COURT:- Purpose of- Whether court can exercise its discretion in waiving non-compliance - Special circumstances – Whether can warrant deviation from the rules – Duty to prove existence of special circumstances – On whom lies

COURT – COURT OF APPEAL:- Jurisdiction - Source appellate jurisdiction - Section 240 of the Constitution - Section 248 – Empowerment of the President of the Court of Appeal to make rules regulating the practice and procedure of the Court

EVIDENCE:- Adversarial proceedings – Purpose of cross-examination - Where party fails to cross-examine and adverse witness – Whether court can take his silence as an acceptance that the party does not dispute the facts

INTERPRETATION OF STATUTE - ORDER 11 RULE 15 OF THE HIGH COURT OF OYO STATE (CIVIL PROCEDURE) RULES, 1988: Interpretation of

INTERPRETATION OF STATUTE - Order 18 Rule 3 (6) of the Court of Appeal Rules, 2011 – Failure to observe stipulation as to maximum number of pages a brief should have

WORDS AND PHRASES:- “Leave of court” – “Shall”- “Covenant” – Meaning thereof

**MAIN JUDGMENT**

OBIETONBARA DANIEL-KALIO, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This appeal is over a land dispute. The Administrators of the Estate of Late Major-General Abdul R. A. Mamuduas Plaintiffs in the lower court (Respondents in this appeal) sued the Appellant over a piece of land in Ibadan, specifically at the Government Residential Area, Agodi, Ibadan. The land was allocated to the Late Major-General who was then a Brigadier by the Military Governor of Oyo State via a letter dated the 13th of June 1979. He paid the required fees and charges and was given a Certificate of Statutory Right of Occupancy dated 12th June, 1979. In an obvious intention of commencing construction work on the land, the land was fenced, secured with a gate, with heaps of sand and gravel dumped in it. Sometime in September 1998, the Respondents observed that the Appellant entered the land. Disconcerted by the observation, the Respondents approached the court below and filed an action against the Appellant claiming damages for trespass and praying the court for an order of perpetual injunction restraining the Appellant from further acts of trespass.

In response to the Respondents' action, the Appellant (the defendant at the lower court) filed a Statement of Defence in which he pleaded that even if it were true that the Late Major-General Mamudu was allocated the land in dispute and was issued with a Certificate of Statutory Right of Occupancy, same was revoked. The Appellant claimed that his vendor, one Alhaji R. Asamu was granted a Statutory Right of Occupancy in 1997 which supercedes the one issued to the Late General. It was averred that Alhaji Asamu assigned his interest in the land to the Appellant with the consent of the Military Administrator of Oyo State vide a Deed of Assignment and, that the Appellant has since developed the land by erecting a building on it.

After hearing the parties, the learned trial judge gave his judgment on the 26th of February, 2007. He found merit in the case of the Respondents and granted them all the reliefs claimed by them.

Perturbed by the judgment, the Appellant on the 8th of May, 2009 filed a Notice of Appeal against the judgment. He found fault with several aspects of the judgment and found reason to draw up 7 grounds of appeal. On 20/7/2009, the Appellant's Brief was filed. Seven issues were reeled off for us to determine in the appeal.

The issues are -

(1) Whether it was proper for the learned trial Judge, having on the 23rd of January 2006 made an order joining the Oyo State Government, to hear and determine the suit before him and pass judgment thereon despite the failure of the respondent in flagrant disregard of the order of 23rd January, 2006, to amend their Writ of Summons and Statement of Claim and serve same on the Oyo State Government in consonance with Order 11 rule 15 of the High Court of Oyo State (Civil Procedure) Rules, 1988.

(2) Whether the Certificate of Occupancy issued to Alhaji Raufu Asamu Registered as 33/33/3249 of the Register of Deeds, Ibadan Oyo State (Exhibit B1) does not supercede the Certificate of Occupancy dated 12th June, 1979 and registered as 34/34/2282 of the Register of Deeds, Ibadan, Oyo State (Exhibit B) issued the Respondent's father.

(3) Whether the non cross-examination of the PW2 who was called by the Respondents to tender Certificate of Occupancy dated 12th June 1979 and registered as 34/34/2282 of the Register of Deeds, Ibadan, Oyo State (Exhibit B) to the effect that the Certificate of Occupancy (Exhibit B) was revoked implies an admission of the existence and validity of the Certificate of Occupancy (Exhibit B).

(4) Whether the Deed of Assignment dated 9th September, 1997 and registered as 43/43/3270 of the Register of Deeds, Ibadan, Oyo State (Exhibit B2) which conferred title on the Appellant does not have a basis in law.

(5) Whether Exhibit B was valid and subsisting at the time the Certificate of Occupancy dated 24th September, 1997 and registered as 33/33/32419 of the Register of Deeds, Ibadan, Oyo State (Exhibit B1) was executed.

(6) Whether the resealing of the Letters of Administration in respect of the Estate of the Respondent's father (Exhibit A) obtained several months after the institution of the Respondent's suit was not obtained in anticipation of the suit.

(7) Whether the judgment of the trial court is not against the weight of evidence adduced before the trial court.

The Respondents' Brief dated 15/2/2010 was filed on 16/2/2010 but deemed as properly filed and served on 17/2/2010 by an order of this court. Six issues were identified by the Respondents as germane for determination in this appeal.  
They are -

(1) whether the provisions of order 11 Rule 15 of the Oyo State (Civil Procedure) Rules 1988 relied upon by the Defendant/Appellant is applicable in the context of the application of the Respondent in the court below having regard to the Ruling of the lower court dated 20th January, 2006, asking the Defendant/Appellant to join the Ministry of Lands, Housing and Survey, Oyo State as 2nd Defendant in this suit.

(2) Whether the issues raised about the competence and validity of various certificates of Occupancy tendered in the lower court as raised in Appellant's issues 2 to 5 are valid.

(3) Whether the Letters of Administration taken in Lagos on 2nd day of January, 1997 and its Certified True copy tendered in court and the resealing of the letters obtained at the Probate Registry in Ibadan on the 29th day of April, 2002, marked as Exhibit A was not obtained in anticipation of the suit.

(4) Whether or not the taking of necessary steps to enable a party sue and enforce his right of action can constitute an infringement of section 91(3) of the Evidence Act.

(5) Whether the non-cross-examination of PW2 after the Defendant's Counsel was given opportunity to cross-examine him does not imply an admission of the existence and validity of Certificate of Occupancy, Exhibit B.

(6) Whether any weight of evidence adduced by the Appellant can vary or add to the validity of the Exhibits tendered in the lower court.

Although the issues suggested by the Respondents are not sequentially in step with the issues suggested by the Appellant, a close examination of the Respondents' issues show that they dealt with the same issues raised by the Appellant but only have a slant that highlights the perspective of the Respondents in the matter.

For the purpose of determining the issues, I will adopt the issues as formulated by the Appellant.

On Issue 1, which is on the propriety of hearing the matter when the Respondents did not join the party ordered to be joined as a party by the lower court, Appellant's CounselVictor Opara in the Brief filed by him on behalf of the Appellant, copiously referred to the Ruling of the lower court on the leave granted for the joinder of the Oyo State Ministry of Housing and Survey as the 2nd Defendant in the suit. He submitted that the joinder as ordered by the lower court was disregarded by the Respondents and that the lower court rather than insist that the order for joinder be obeyed, chose to acquiesce to its disobedience. He submitted that without the joinder of the Oyo State Government as ordered, the court could not have determined the case effectively. He further submitted that the non-joinder occasioned a great miscarriage of justice. While conceding that an action cannot be defeated on the ground of joinder or misjoinder, learned counsel argued that such an action can be set aside on appeal on account of the unfairness of the non-joinder or misjoinder. He cited the decision of this court in the case of Achibong Umo Udo v. C.S.N.C. (2001) 14 NWLR part 732 p.116 at 162. Learned Counsel argued that the current judicial posture is that where the resolution of a critical issue revolves around a person who is not a party in a suit, the action is fatally defective.

He referred us to two judgments of this court.Fajemirokun v. CB (CL) (Nig.) Ltd. (2002) 10 NWLR part 774 p.95 at p.110 and Lawal v. PGP Nig. Ltd. (2001) 17 NWLR part 742 p.393 at 405.

Oyo State Government and that it was wrong for the lower court to have struck out Exhibit B1 and upheld Exhibit B in the absence of the Oyo State Government which issued both documents. It was contended that by the High Court of Oyo State (Civil Procedure) Rules on the issue of joinder, since the Oyo State Government had been joined as a Party, the Respondents as the claimants compulsorily had to amend their originating, process to reflect the joinder. Counsel urged that the lower court was wrong to determine the issues in controversy between the parties before it in the absence of the Oyo state Government as a party.

In his argument in response to the submissions of Appellant's Counsel on issue 1, Respondents' Counsel Chief Oye Esan in the Respondents Brief of Argument contended that it was the Appellant as the defendant in the lower court that sought to join the Oyo State Government as the 2nd defendant in the suit and that the ruling of the lower court gave the Appellant leave to join the said Government as the 2nd defendant. He submitted that it is therefore clear that it is the Appellant who ought to join the Oyo State Government and not the Respondents. Learned Counsel contended that the Respondents have no complaint against the Oyo State Ministry of Lands, Housing and Survey and therefore cannot join her in the suit. He cited the case of Ajayi v. Jolayemi (2001) 22 WRN vol. 22 p.123.

In the Reply Brief of Argument, Appellant's Counsel submitted that it is erroneous to hold the view that because the application for joinder was made by the Appellant, it is the Appellant that must join the Ministry of Lands, Housing and Survey of Oyo State as the 2nd Defendant in the suit. He contended that the joinder of a party is the exclusive prerogative of the court and not a party.

Learned Counsel submitted that the lower court having held that the Ministry of Lands, Housing and Survey of Oyo State was a necessary party in the suit, it was wrong for that court to have heard and decided the case without the joinder. Counsel submitted that necessary amendments to reflect a joinder never shifts to a defendant except there is a counter-claim and therefore it is of no moment that the application for joinder was brought by the Appellant. He wondered who would sign an amended Writ of Summons and Statement of Claim if the amendment was to be effected by the defendant. He referred to Order 11 rule 15 of the High Court of Oyo State (Civil Procedure) Rules 1988. He contended that the only caveat to Order 11 rule 15 aforesaid is where the court or judge in chambers makes an order dispensing with the amendment of the originating process. Such an order dispensing with the amendment of the originating process, he argued, was neither applied for nor granted by the lower court.

Learned Counsel referred to the case of Adeleke v. Awoniyi & Anor. (1962) ALL NLR part 1 p.259 and submitted that the Federal Supreme Court in that case held that where a defendant moves the court and obtains leave to join a third party as a co-defendant, the court should further order that the plaintiff should serve an amended Writ of Summons and Statement of Claim upon the defendant so joined under the order. He also referred to page 175 of the book: Civil Procedure in Nigeria 2nd Edition (2000) by Fidelis Nwadialo.

On the submission that the Respondents cannot be forced to sue a party they do not wish to sue, Learned Counsel submitted that in a proper case, the court can join a third party as a co-defendant against the wish of the plaintiff. He cited the case ofBisimillahi v. Yagba East Local Government (2003) FWLR part 141 p.1939 at 1958.

As will be recalled, issue 1 is,

*"Whether it was proper for the learned trial judge, having on the 23rd of January 2006 made an order joining the Oyo state Government, to hear and determine the suit before him and pass judgment thereon despite the failure of the Respondents in flagrant disregard of the order of 23rd January, 2006****,*** *to amend their writ of summons and statement of claim and serve same on the Oyo State Government in consonance with order 11 Rule 15 of the High court of Oyo State (Civil Procedure) Rules, 1988".*

The issue calls for the facts relating to the issue to be clearly stated.

On 24/2/2005, the defendant before the lower court i.e. the Appellant in this appeal, made an application before the lower court praying that court for permission to join the Ministry of Lands, Housing and Survey, Oyo State as the 2nd Defendant. The lower court graciously granted the permission in its ruling delivered on 209/1/2006. See at page 54 - 60 of the Record of Appeal where the lower court concluded and ordered as follows:

"I feel swayed by the argument of defence counsel and hereby grant leave unto the defendant/applicant to join the Ministry of Lands, Housing and Survey, Oyo State as the 2nd Defendant in this suit."

Apparently, the processes before the lower court were not amended to reflect the Ministry of Lands, Housing and Survey, Oyo State as the 2nd Defendant. That failure to amend is the main source of the grievance that led to the formulation of issue 1. The Appellant blamed the lower court for going ahead to hear and decide the matter; blamed the Respondents for not amending the processes on the ground that it was compulsory for them to do so, but found no blame in himself.

From the order of the lower court quoted above, it is clear that what the lower court granted in its ruling was *leave*for the defendant to join the Ministry of Lands and Housing. There was no concomitant order joining the Ministry of Lands, Housing and Survey, Oyo State, "Leave of Court" according to Black's Law Dictionary, 9th Edition means "Judicial permission to follow a non-routine procedure". According to that dictionary, it is often shortened to "Leave," Clearly, the judicial permission to join the Ministry of Lands, Housing and Survey, Oyo State, was granted by the lower court to the Appellant. Having been granted that leave, it was for the Appellant to ensure that the leave or permission given it was utilized by ensuring that the said Ministry was joined as a party. Since there was no concomitant or consequential order joining the said Ministry, it is my view that the Appellant should have made an appropriate application before the lower court under Order 11 rule 15 of the High Court of Oyo State (Civil Procedure) Rules, 1988 in order to ensure the joinder and the amendment of the writ of Summons. He was not expected to fold his arms and expect the Respondents who had no desire of joining the said Ministry to as it were, *"fight his battle"* for him. Order 11 rule 15 of the High Court of Oyo State (Civil Procedure) Rules, 1988 provides:-

"Where a defendant is added or substituted, the Writ of Summons shall be amended accordingly and the plaintiff shall, unless otherwise ordered by the court or a judge in chambers, file an amended Writ and cause the new defendant to be served in the same manner as original defendants are served and the proceedings shall be continued as if the new defendant had originally been a defendant".

The operative phrase in that rule is "where a defendant is added or substituted". It is not where "where leave has been obtained". Where words of an enactment are clear and unambiguous the courts must give them their natural and ordinary meaning, see Mpidi Barry & 2 Ors v. Obi A. Eric & 3 Ors (1998) 8 NWLR part 562 p.404 at 420.

Thus, the above rule only imposes a burden or duty on a plaintiff to amend the writ and cause the new defendant to be served where a new defendant has been added, or substituted not when only a leave to so add or substitute has been granted.

Even if the 2nd defendant had been joined and the joinder was not reflected through an amendment of process, the absence of such an amendment notwithstanding, the court would still have had the power to hear and determine the case as it did. Order 11 rule 3 of the High Court (Civil Procedure) Rules 1988 of Oyo State provides:

"All persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment".

In any case, failure to join a necessary party is only an irregularity which does not affect the competence of the court to adjudicate on the matter before it. See Okoye v. Nigerian Construction & Furniture Co. Ltd. & Ors (1991) 6 NWLR part 199 p.501. An irregularity that leads to unfairness may however result in the setting aside of the judgment on appeal. See Okoye's case (supra). In this case, I do not see how the failure to join the Ministry of Lands, Housing and Survey, Oyo State led to any unfairness in the judgment of the lower court. It would be unfair in my view, if the Ministry would have to be bound by the result of the action or where the questions that arose in the action, would have been such that could not have been effectively and completely settled unless the Ministry was made a party. I say so because it has been held that the only reason which makes it necessary to make a person a party in an action is that he should be bound by the result of the action and that the question to be settled cannot be effectively and completely settled unless he is a party. See Iyimoga v. Gov. of Plateau State (1994) 8 NWLR part 360 p.73 at 78; Green v. Green (1987) 3 NWLR part 61 p.480.In this case there was no claim against the Ministry of Lands, Housing and Survey and therefore it could not have been bound by the result of the action and the main issues that called for settlement - the respective title documents - were capable of being examined and decided without the Ministry being made a party. Thus the failure to join the Ministry of Lands, Housing and survey of Oyo State did not lead to any unfairness in the judgment.

Issue 1 is resolved against the Appellant.

I now turn to issues 2, 3, 4 and 5 which were argued together by the Appellant's Counsel. The issues relate to Exhibits B and B1.

Learned Counsel for the Appellant referred to the portion of the judgment of the lower court (paragraph 3 of page 68 of the Record of Appeal) where the lower court held,

(1) that the Certificate of Occupancy of Major-General Mamudu (Exhibit B) was never revoked and therefore that the grant of, another Certificate of Occupancy to the Appellant's Vendor (Exhibit B1) was defective and incapable of forming the basis of a valid claim by the Appellant's vendor; and

(2) that the statement in Exhibit B1 that it supercedes Exhibit B, has no legal basis.

He submitted that contrary to the position of the lower court, the Appellant cannot be presumed to have admitted the existence and validity of Exhibit B merely because PW2 who was called by the Respondents to tender it was not cross-examined to the effect that Exhibit B was revoked. He contended that Exhibit B was revoked. He contended that the non cross-examination of PW2 could only go to the weight that the court would attach to the evidence of PW2.

Learned Counsel submitted that the lower court was wrong in the way it interpreted the phrase *"this Deed supercedes the deed dated 12h June 1979..."* contained in Exhibit B1 which interpretation was to the effect that there was no revocation of the Respondents Certificate of Occupancy. He submitted that the ordinary meaning of the phrase is that Exhibit 'B', the Respondents' father's certificate of occupancy, had been supplanted by the Certificate of Occupancy issued to Alhaji Raufu Asamu, the Appellant's Vendor. He submitted that the law presumes that an official act of government which the said phrase in Exhibit B1 constitutes is regular until the contrary is established. He referred to Section 150 of the Evidence Act and the book: Revocation of Right of Occupancy: Legal Framework in Nigeria by Atinuke Fadeke Oluyemiat page 52. Learned Counsel insisted that Exhibit B was not valid and subsisting at the time the Certificate of Occupancy dated 24th September, 1997 (Exhibit B1) was executed and that the validity of Exhibit B vis-a-vis Exhibit B1 cannot be effectively decided without the Oyo State Government being a party in the suit. He urged the court to reverse the judgment of the lower court and dismiss the Respondents, suit.

In his argument in reply, Respondents Counsel submitted that the Respondents established a better title to the land in dispute and therefore the Certificate of Occupancy granted to the Appellant's Vendor Exhibit B1, was rightly held by the lower court to be invalid. Learned Counsel submitted that Exhibit B1, the Certificate of Occupancy dated 24/9/97 issued to the Appellant's Vendor Alhaji R. Asamu has no legal basis and cannot supercede Exhibit B dated 12th June, 1979. He submitted that Exhibit B was never revoked, and consequently, Exhibit B1 cannot be valid or supercede Exhibit B, He referred us to Olatunji v. Military Governor of Oyo State (1995) 5 NWLR part 397 p.599; Adole v. Gwar (2008) 3-4 SC 78 at 99 also reported in (2008) 11 NWLR  part 1099 p.571. He insisted that the Certificate of Occupancy, Exhibit B1 and the Deed of Assignment, Exhibit B2 are invalid, null and void as same have no basis in law.

In his Reply Brief, Appellant's Counsel submitted that a Governor of a State is not limited to revoking a Certificate of Occupancy for overriding public interest only as he can revoke one under Section 28(5) of the Land Use Act for breach of a condition stipulated in the Certificate of Occupancy. He contended that the Respondents' father's Certificate of Occupancy was revoked administratively by the Ministry of Lands, Housing and Survey, Oyo State. He contended that the Respondents' father failed to meet the conditions stipulated in the Certificate of Occupancy, Exhibit B, and that the failure led to the revocation of the said Certificate of Occupancy.

The finding of the lower court that gave the Appellant cause to be aggrieved regarding issue 2 reads:

*"In the instant case, unless there is revocation of the grant made to the plaintiffs' father, the subsequent issuance of another one vide Exhibit B1 to the defendant's vendor is not proper.*

The question to now ask is whether there is revocation of the plaintiffs' father's grant as pleaded by the defendant. *No evidence was called to testify to any act of revocation.*

*There was no pretense to it at all. The PW2 was called by the plaintiff to tender Exhibit B. He was not cross-examined to the effect that Exhibit B was revoked since he tendered same then the defendant will be presumed to have admitted the existence and validity of Exhibit B. I therefore hold that since Exhibit B was never revoked, the grant of another title to the defendant's vendor as in Exhibit B1 is improper and defective and cannot therefore be a basis for a valid claim of title by the defendant's vendor. The statement in Exhibit B1 to the effect that it supercedes Exhibit B has no legal basis. It is not a recognized way of extinguishing a right acquired by a valid grant which in a statutory right such right could only be extinguished by a proper revocation pursuant to Section 28 of the Land Use Act (supra). The effect of this finding therefore is that the assignment which the defendant claimed he acquired has no basis in law. As at the time Mr. Diekola Asamu**assigning, he had nothing to assign in Exhibit B2 which is the Deed of Assignment"*

See at page 68 - 69 of the Record of Appeal.

The question that arises now is, is there any cause for this court to interfere with the above finding of the lower court? The question calls for an examination of Exhibit B and B1 which form the crux of the finding quoted extensively above.

Exhibit B is a Certificate of Statutory Right of Occupancy granted to Brigadier Abdul R. A. Mamudu on the 12th of June, 1979. Exhibit B1 is a Certificate of Statutory Right of Occupancy issued to Alhaji Raufu Asamu on the 24th of September, 1997. There is no dispute that both certificates relate to the same piece of land. From the dates on both certificates, Exhibit B is first in time by over 18 years. It is therefore safe to say that the learned trial judge was right when he said thus:

"In the instant case' unless there is revocation of the grant made to the plaintiffs' father, the subsequent issuance of another one vide Exhibit B1 to the defendant is not proper".

Next question: Was there a valid revocation of Exhibit B to make Exhibit B1 proper? The learned trial judge concluded that there was none.

He arrived at his conclusion on the premise that PW2 who tendered Exhibit B, B1 and 82 was not cross-examined on the issue of the revocation of Exhibit B and also on the premise that the statement in Exhibit B1 that, Exhibit B1 supercedes Exhibit B has no basis in law.

On the need for the cross-examination of PW2 on the revocation of Exhibit B, I cannot fault the trial judge. This is because the PW2 who was in court on a subpoena was in a position to throw some light on the material fact of revocation. PW2 Oyekunle Samuel was a Higher Estate Officer in the Ministry of Lands and Housing, Oyo State. The Supreme Court per Nnaemeka Agu, JSC stated thus on the need for cross-examination in the case of Amadi v. Nwosu (1992) NWLR part 241 p.273 at p.284.

"It is a settled principle of law that where an adversary or a witness called by him testifies on a material fact in controversy in a case, the other party should, if he does not accept the witness's testimony as true, cross-examine him on that fact, or at least show that he does not accept the evidence as true. Where as in this case, he fails to do either, a court can take his silence as an acceptance that the party does not dispute the facts."

The court made the point graphically in the case of Willoughby v. IMB (1987) 1 NWLR part 48 p.125 thus:

"was it not surprising, to say the least, that after the examination-in-chief of John Olagoke Ige, Mrs. Akinosho for the plaintiff rose up to cross-examine and all she said was - No questions. This in effect meant that the plaintiff accepted in it's entirely the evidence of John Olagoke Ige".In the circumstances, I cannot find any fault in the holding of the learned trial judge that:

"The PW2 was called by the plaintiff to tender Exhibit B, He was not cross-examined to the effect that Exhibit B was revoked since he tendered same then the defendant will be presumed to have admitted the existence and validity of Exhibit 'B'".

With regard to the finding of the learned trial judge that the statement in Exhibit B1 to the effect that Exhibit B1 supercedes Exhibit B has no legal basis, I think it will be in order to scrutinize the statement in Exhibit B1 and analyses it. The statement reads:

"4. *Other covenants (if any).*

*This Certificate supercedes deed dated 12th June 1979 and registered as No.34/34/2282 in the Lands registry, Ibadan."*

As the opening words suggests, the statement above is a covenant in Exhibit B1. A covenant is an agreement, and it is elementary law that an agreement is only binding on the parties to it. From this purview, it is difficult to see how the "covenant" between the parties in Exhibit B1 will bind the holder of Exhibit B who is a stranger to Exhibit B1.

More importantly, the power of a Governor to revoke a right of occupancy is clearly spelled out in Section 28 of the Land Use Act. Such a right of occupancy can be revoked for overriding public interest, and as pointed out by the Appellant's Counsel, on account of a breach of any term in the Certificate of Occupancy. The Act however clearly stated how such revocation can be made. It stated thus in Section 28(6) and (7):

(6) The revocation of a right of occupancy shall be signified under the hand of a public, officer duly authorized in that behalf by the Governor and notice thereof shall be given to the holder;

(7) The title of the holder of a right of occupancy shall be extinguished on receipt by him of a notice given under subsection (6) of this section or on such later date as may be stated in the notice".Clearly, the statement in Exhibit B1 that"this statement supercedes deed dated 12th June, 1979 and registered as No.34/34/2282 in the Lands Registry, Ibadan" does not even remotely, meet the clear provisions of Section 28(6) and (7) of the land Use Act. I cannot therefore fault the finding of the trial judge that:

"The statement on Exhibit B1 to the effect that it supercedes Exhibit B has no legal basis. It is not a recognized way of extinguishing a right acquired by a valid grant which in a statutory right such right could only be extinguished by a proper revocation pursuant to Section 28 of the land Use Act (supra)".

There is no cause to disturb the above finding of the trial judge. It is not pervert and does not evince any misapprehension of the facts. The finding is solidly rooted in statute law and has the rich support of case law. See for example, the Administrators/Executors of the Estate of Gen. Sani Abacha (deceased) v. Samuel David Eke-Spiff (2009) 7 NWLR 97. Issues 2, 3, 4 and 5 are resolved against the Appellant.

Issue 6 is about Exhibit A, the Letters of Administration obtained after the institution of the action at the lower court. On this issue, Appellant's counsel submitted that by virtue of section 91(3) of the Evidence Act a document made by a person interested when proceedings are pending or anticipated are not admissible in evidence. We were referred toSusano Pharmaceutical Co. v. SOL. P. Pharmaceutical Co. Ltd. (2000) 4 NWLR part 651 p.68; Onuh v. Idu (2002) FWLR part 94 p.66 at 83.

Learned Counsel submitted that Exhibit A was obtained during the pendency of the suit before the lower court and that the lower court ought to have expunged it, having admitted it wrongly. He cited the case ofKuti v. Alashe (2005) ALL FWLR part 284 p.372 at 395. Having not expunged it, learned counsel urged us to expunge Exhibit A by virtue of the powers of this court in Section 15 of the Court of Appeal Act. He cited the case of Lawson v. Afani Continental Co. Nig. Ltd. (2002) FWLR part 109 p. 1736 at 1759. He urged that the failure of the lower court to expunge Exhibit "A" occasioned a miscarriage of justice.

In his submission, Respondents Counsel argued that there is no time limit for the procurement of Letters of Administration and that the trial judge was right to have admitted Exhibit 'A'. He submitted that the resealing of Exhibit 'A' was merely to confirm that the Letters of Administration was taken in Lagos and that the resealing was because the cause of action arose in Ibadan which is outside the jurisdiction of the High Court of Lagos State.

Exhibit 'A', the re-sealed Letters of Administration was made on the 7th of May 2002 byGloria Uzo Akinrimade (Mrs.)Probate Registrar. It is clear that the Appellant's Counsel relied on Section 91(3) of the Evidence Act without adverting his mind to the provision of Section 91(4) of the Act which states:

"For the purpose of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible".

The Respondents are not the maker of Exhibit 'A'. Exhibit A was made by Mrs. Gloria Uzo Akinrimade, granted, during the pendency of the case in the lower court. She made it purely in her official capacity as Probate Registrar. She cannot be said to be a person interested. Like a poker faced post man, she did her job perfunctorily. Her interest was official and no more. As held by the Supreme Court per Karibi-Whyte, JSC in (1991) 1 NWLR part 167 p.290:

"Where however the interest of the maker is purely official or as a servant without a direct interest of a personal nature, there are decided cases that the document is not thereby excluded".

The position of the Appellant's Counsel with regard to Exhibit 'A' is misconceived. Issue 6 is resolved against the Appellant.

Issue 7 is whether the judgment of the trial court is not against the weight of evidence. The argument of Counsel on this issue strikes me as a hodge-podge of ideas that cannot be tucked under any defined issue. Arguments under the issue were given sub-title suggestive of an academic dissertation or treatise. At any rate, some of the arguments made under issue 7 such as the issue of joinder and the treatment of Exhibits B and B1 had been made under previous issues.  
'Tautology should be avoided in a Brief of Argument. At any rate the purpose of issue 7 is to persuade the court that the weight of evidence preponderates in favour of the Appellant. Having gone through the case presented by the parties carefully, I have no reason whatsoever to agree with the Appellant's Counsel that evidence in this case weigh in the Appellant's favour. Issue 7 is also resolved against the Appellant.

In the final analysis, I have come to the conclusion that the appeal lacks merit. I therefore dismiss it. I award N50,000 costs against the Appellant and in favour of the Respondents.

**MONICA BOLAN'AN DONGBAN-MENSEM, J.C.A.:**

The lead judgment prepared by my learned brother OBIETONBARA DANIEL-KALIO which dismissed this appeal has masterly captured all the issues raised in this appeal.

Issue two (2) of the seven (7) issues "Reeled off for us to determine" (page 3 of the lead judgment), courts my attention and is hereby reproduced:-

"(2) Whether the Certificate of Occupancy issued to Alhaji Raufu Asamu Registered as 33/33/3249 of the Registered of Deeds, Ibadan Oyo State (Exhibit B1) does not supercede the Certificate of Occupancy dated 12th June, 1979 and registered as 34/34/2282 of the Register of Deeds, Ibadan, Oyo State (Exhibit B) issued the Respondent's".

As found in the lead judgment at page 18, Exhibit B and Exhibit B1 are Certificates of Statutory Right of Occupancy in respect of the same piece of land. Whereas Exhibit B was issued to Brigadier Abdul R. A. Mamadu on the 12th of June 1979, Exhibit B1 was issued to Alhaji Raufu Asamu on the 24th September, 1997. At the contest before the High Court of Oyo State, it was the case of the Appellant that Exhibit B which was first in time had been revoked. This assertion place the burden squarely on the Appellant to establish the facts of revocation. Apparently, the Appellant failed to discharge the burden and the learned trial judge found that:-

".. In the instant case, unless there is revocation of the grant made to the Plaintiffs' father, the subsequent issuance of another one vide Exhibit B1 to the defendant is not proper..."

Indeed, it does not lie in the mouth of the defendant to state, without more, that the initial grant had been revoked. There is a procedure to be followed and non-compliance renders a purported revocation invalid. PW2, one Oyekunle Samuel, a higher Estate Officer in the Ministry of Lands and Housing Oyo State could have been a witness of inestimable value to the Appellant.

What better witness to cross-examine on the revocation of Exhibit B and the validity of Exhibit B1! The Defendant rather than establish his case from the horse's mouth, let such a vital witness go without cross-examination!! This omission or deliberate restraint gives rise to the invocation of the provisions of Section 167(d) or the Evidence Act of 2011. Here was evidence which could have clearly affirmed the position of the Appellant as defendant but which was not elicited. The presumption inevitably is that the evidence of PW2 would have been unfavourable to the case of the Defendant!

The legal instrument of cross-examination is a powerful tool in the hands of a skillful legal Practitioner; it provides a vital survival kit in a legal battle. Why would a party with a good title avoid cross-examining such a vital witness? The case of Amadi v. Nwosu (cited in the lead judgment) provides the answer:

"...that a court can take his silence as an acceptance that the party does not dispute the facts..."

In the circumstance, the learned trial Judge was right in holding that the defendant:

"... will be presumed to have admitted the existence and validity of Exhibit 'B'..."I agree entirely with the lead judgment and also hereby affirm the Judgment of the learned trial Judge by dismissing this appeal.

All consequential orders made in the lead Judgment are hereby adopted and so ordered.

**DISSENTING OPINION**

**CHIDI NWAOMA UWA, J.C.A.:**

When this appeal came up for hearing on 21/11/3, the necessary briefs of argument had been seemingly filed. Before the appeal was argued, I noted and pointed out to my brother Justices and the learned counsel to the Appellant Victor Opara Esq. the fact that the Appellant's brief exceeded the 30 page requirement as provided by the Rules of this court. I pointed out to the learned counsel the fact that the appellant's brief dated 17/7/2009 filed on 20/7/2009 which he intended to rely on contains 42 pages. The learned counsel urged that the non-compliance should be overlooked. My learned brother, the Presiding Justice and my brother justice in the panel agreed with the learned counsel to the appellant that same be overlooked, thus leaving my opinion in the minority in being of the view that the Rules of this court ought to be obeyed and/or complied with. I shall hereunder express the said opinion.

Order 18 Rule 3 (6) of the Court of Appeal Rules, 2011 provides as follows:

"(6) (a) Except where the court directs otherwise, every brief to be filed in the court shall not exceed 30 (thirty) pages.

(b) The brief must be prepared in 210mm by 297mm paper size (A4) and typed in clear typographic character.

The typeset shall be in Arial, Times New Roman or Verdana of 12 Point with at least single spaces in between,

(c) Every brief which does not comply with the page limit and page size requirements of this order shall not be accepted by the Registry for filing." (Underlined mine for emphasis)

The above Rule is clear and unambiguous. The appellant did not dispute that the brief he intended to rely on in arguing his appeal exceeded the thirty (30) page limit provided in the Rules of this Court. In compliance with sub Rule 6 (a) there is nothing on record to show that the leave of court was sought and granted or that the court directed otherwise, before the brief was filed in the registry. The appellant did not make out that he had done so.

It is apt at this point to examine the background origin and purpose of the Court of Appeal Rules. The Court of Appeal Rules were made by the President of the Court under Section 248 of the 1999 Constitution to regulate the practice and procedure of the court. The general provision which gives the court jurisdiction to hear appeals and related matters is essentially contained in Section 240 of the Constitution, while Section 248 empowers the President of the Court of Appeal to make rules regulating the practice and procedure of the Court, see, ADENIYI v. ONAGORUWA (1994) 6 N.W.L.R. (Pt. 349) 225 AT 235.

The question is, can the court exercise its discretion in waiving the non-compliance? The non-compliance has not been shown in any way to be not willful. Twelve pages in excess are far too many. The learned counsel did not ask that he be given an opportunity to remedy the anomaly by amendment of the brief, or an opportunity to re-file the brief with the pages reduced. The learned counsel to the appellant did not urge the court to direct that the brief be accepted for filing irrespective of the pages that exceeded the page limit of thirty. For the court to exercise its discretionary power to waive the non-compliance, there must be placed before the court enough material, to enable it do so judicially and judiciously. The court cannot on its own sentiment exercise the power in favour of the appellant, that is wrong, see, OJUKWU v. ONYEADOR (1991) 7 NWLR (Pt. 203) 286 at 319. The sub paragraphs, Rule 3 (6)(a) (b) and (c) contain the major operative word "shall". The word is mandatory. It carries the element of compulsion and command. It connotes some peremptory meaning. In the case of ACHINEKU v. ISHAGBA (1988) 4 NWLR (Pt. 89) 411 AT PAGE 420, Maidama, JCA then of this court defined the expression thus:

"The word 'shall' in its ordinary meaning is a word of command and one which has always or which must be given a compulsory meaning as denoting obligation. It has a peremptory meaning, and it is generally imperative and mandatory. It has the invaluable significance of excluding the idea of discretion and the significance of operating to impose a duty which may be enforced. Thus, if a statute provides that a thing shall be done, the natural and proper meaning is that a peremptory mandate is enjoined."

See, also CHIEF IFEZUE v. MBADUGHA and ANOTHER (1984) 1 S.C.N.L.R. 427; CHUKWUKA v. EZULIKE (1986) 5 NWLR (Pt. 45) 892; OYEYIPO and ANOTHER v. CHIEF OYINLOYE (1987) 1 NWLR (Pt. 50) 356.

No doubt, there are exceptional circumstances when the word 'shall' could be construed as 'may' in a statute, it is clear to me that the word as used repeatedly in the sub paragraphs of Rule 3(6) conveys its ordinary mandatory meaning as defined in ACHINEKU v. ISHAGBA (SUPRA). In the present context, it means compliance with the Rules of this court since this court did not direct otherwise as provided in its Rules.

From a plethora of cases from the Apex Court and this court, Rules of Court are meant to be obeyed and not made for the sake of making rules. There is a purpose for it, in this case to check verbosity and ensuring that briefs are not long winded and cumbersome. Where an appellant's brief is long for instance, the respondent's brief is likely to be long. A concise brief of argument makes the work less tedious for the court and learned counsel.

On need to obey the Rules of Court, see the cases of WILLIAMS v. HOPE RISING VOLUNTARY FUNDS SOCIETY (1982) 1-2 S.C. 145; AFRICAN NIGERIA LTD. v. OWOSENI (1995) 2 NWLR (Pt. 375) PAGE 110; OPERA v. DAWELL SCHLUMBERGER NIGERIA LTD (1995) 4 NWLR (Pt. 390) PAGE 440 and MULTI-CHOICE VENTURE LTD. v. A.G. RIVERS STATE (1997) 9 NWLR (Pt. 642) AT 644, to the effect that it is trite that the rules of court are meant to be obeyed, not waived.

They are made to assist in quick dispensation of justice, so as to give every party equal opportunity within the ambits of the rules to present their cases before an impartial court.

"Concerning the Court of Appeal Rules, In OSOLU v. OSOLU (1998) 1 NWLR (Pt. 535) 532 AT 554, Ubaezonu, JCA held thus:

"It is elementary principle of law that Rules of Court are made to be obeyed in compliance and not in breach. They are made to be obeyed not to be disregarded or neglected - ATIPIEKE EKPAN & ANOR v. AGUNU UYO (1986) 3 NWLR (Pt. 26) 63. 76".

Specifically, in filing a brief of argument in accordance with the rules, in the case of OYEBADE v. AJAYI (1993) 1 NWLR (Pt. 259) 313 AT 326; Kolawole, JCA reiterated as follows:

"In BIOKU INVESTMENT and PROPERTY CO. LTD. v. LIGHT MACHINE INDUSTRY NIG LTD and ANOR (1986) 5 NWLR (Pt. 39) 42, I said at pages 45-46 as follows:-

We have said in this court repeatedly that the rules relating to the filling of briefs must be observed. When a brief is filed which is not in conformity with the provisions of the rules, the consequences are that no brief has been filed” (Underlining mine for emphasis)

I am of the humble view that, the law must take its course and the rules of court must be obeyed, unless there are special circumstances to warrant deviation from the rules. None has been made out in the present case for the court to deviate from its Rules. See, AFOLABI v. IGUNBOR (1992) 8 NWLR (Pt. 257) 115 AT 127. Rules of court are made to assist in subjecting the law to certainty and not subject it to the whims and caprices of parties, or with respect even judges. In the case of POPOOLA BABATUNDE (2012) 7 NWLR (Pt. 1299) P. 302 AT 331, His Lordship Okoro, JCA (as he then was) in this respect held thus:

"Each court has its own set of rules which regulate its affairs. Parties who appear before the courts must therefore study the rules of courts carefully and approach the courts according to laid down rules in order to avoid chaos in the judicial process. Where a court insists that its rules must be obeyed, that should not be equated with technicality."

The learned counsel to the Respondent did not oppose the appeal being heard on the defective brief of argument filed by the appellant and had nothing to urge the court. The fact that the respondent conceded the appeal being heard on the defective appellant's brief to which he filed the respondent's brief will not make a difference. Conceding the defect will not make it right.

In the prevailing circumstances, the appellant's brief of argument dated 17/7/2009, filed on 20/7/2009 is incompetent and ought not to have been accepted for filing by the Registry of this court, same is hereby struck out.

Parties to bear their respective costs.