IN THE SUPREME COURT OF NIGERIA

Suit No: SC407/2001

Petitioner: Chief Nicholas Banna
And
Respondent: Telepower Nigeria Ltd

Date Delivered: 2006-07-07

Judge(s): Idris Legbo Kutigi , Niki Tobi , George Adesola Oguntade ,Aloma Mariam Mukhtar , Francis Fedode Tabai

Judgment Delivered

This appeal raises the issue of the extent of an appellate court to override the exercise of discretion by a trial court. It is not necessary for the purpose of the appeal to discuss or consider the nature of the claim brought before the trial court. It suffices to say that the respondent was the plaintiff at the Port-Harcourt High Court of Rivers State. It had brought the suit against the appellant as the defendant.

The suit was filed on 13/8/93. On the same day, the plaintiff filed an application for an interlocutory injunction in respect of some properties situate at Rumuodara, Obio in Obio/ Akpor Local Government. On 5-5-94, after a period of nine months since the suit was filed, the plaintiff applied for and was granted extension of time to file its Statement of Claim. It would appear that the case was subsequently adjourned for hearing. The matter was adjourned four times in succession for hearing and on each of those occasions, the plaintiff and its counsel were not in Court. The case was finally adjourned the fifth time for hearing to 9-3-95. As it has previously done, the plaintiff again was not in Court. Neither was its counsel. The trial judge, Abel Tariah .J. in reaction dismissed plaintiff\'s suit.

On 22-9-95, about six mouths after its suit was dismissed, the plaintiff brought an application to relist the suit for hearing and to set aside the order made on 9-3-95 dismissing the suit. Parties filed affidavit evidence in support, of and against the application to relist and set aside the order dismissing the suit. On 4-12-95, the trial judge, in his ruling dismissed the application on the ground inter alia that the excuse offered for the absence of plaintiff and its counsel on 9-3-95 was unsatisfactory.

The plaintiff was dissatisfied. It brought an appeal before the Court of Appeal, Port Harcourt Division (i.e. the court below). On 11/07/2001, the court below allowed the appeal. The ruling, of the trial Court was set aside and the suit remitted to the High court for fresh hearing. The defendant was dissatisfied with the judgment of the court below. He has brought this appeal against it.

In the appellants brief filed on behalf of the defendant, the issues for determination in the appeal were identified as these:

\"I. Whether the lower court was right when it held that the trial court could have merely struck out the respondent\'s suit instead of dismissing it;

2. Whether the lower court was right in allowing the respondent\'s appeal and setting aside the judgment of the trial court.\"

The plaintiff, in its respondent\'s brief, raised an issue for determination. But the said issue is amply covered by the defendant\'s two issues above. I shall, in this judgment, be guided by the defendant\'s issues.

As I observed earlier in this judgment, the trial court had taken the position that the explanation offered by the plaintiff as to its absence and that of its counsel from Court on 9-3-95 was unsatisfactory. The question is - what are the said reasons' In paragraphs 6 -16 of the affidavit in support of the application, it was deposed thus:

'6. That the Writ, of Summons in Suit No. PHC/567/93 was taken out about August 1993 and the Plaintiff/Applicant filed its Statement of Claim on 5-5-94;

7. That before the present suit, the Plaintiff had in 1992 taken out a Writ of Summons with No. PHC/554/92 against the same Respondent which suit is pending in High Court No. I before Hon. Justice V. M. Okor;

8. That both suits with Numbers PHC/567/93 and PHC/554/92 are over the estate at Rumuodara owned by the Respondent;

9. That to accelerate the hearing of both suits, the Plaintiff engaged the services of Chief A.B.C. Iketuonye, SAN in both suits;

10. That the entry of the Senior Advocate in the matter made K. I. Oleh Esq. hand over the case files to the Senior Advocate;

11. That this in turn created some lapses as the Senior Advocate missed the adjourned date for PH/567/93;

12. That the Senior Advocate informs us that he did not appreciate that he was expected to handle PHC/567/93 as he thought, it was only PHC/554/92 that was given to him;

13. That PHC 554/92 is part heard and is further adjourned to 17-10-95 for continuation;

14. That it was when K.I. Oleh Esq. enquired from a counsel working with L. M. Alozie Esq.- the Respondent\'s counsel who informed K.I. Oleh Esq. who in turn informed me and I believe him that the present suit with No. PHC/567/93 was dismissed on 9-3-95 as neither the plaintiff nor its Counsel was in Court;

15. That the absence of both the Plaintiff and its Counsel was as a result of mix-up on dates and we shall make sure it does not happen again:

16. That hearing had not commenced in the suit before it was dismissed.\"

The defendant in opposing the application filed a counter-affidavit paragraphs 4-10 of which read:

'4. That the judgement of this Court which the Applicant seeks to set aside and relist for hearing, was dismissed by the order of this Honourable Court on the 9th day of March 1995 because the Court was satisfied that from the facts and records before it, the Plaintiff/Applicant had abandoned the case for quite a long time.

5. That since the commencement of this action, the Plaintiff was never in Court except on 30/3/94 when the ruling on the application it brought from injunction was delivered, and in all we had had 10 (ten) Court appearances namely on: 1/12/93, 8/12/93, 28/2/94, 30/3/94, 7/6/94, 29/9/94, 7/11/94, 19/12/94, 2/2/95, and 9/3/95.

6. That the Applicant has even refused to pay most, of the Costs awarded against it in course of the proceedings. On 7/6/ 94 when one Mr. Linus Nwaigbo represented the Applicant in Court for a Motion for extension of time and on 9/3/95 when this suit was dismissed, costs were awarded against the Applicant but these costs have remained unpaid till date.

7. That since 1/12/93 when the matter came for motion on the application of the Plaintiff/ Applicant the suit has always remained on the cause list and even on 8/11/94 and 10/11/94, the suit was on the cause list for Definite Hearing but Plaintiff/Applicant and his Counsel were absent from Court.

8. That thereafter, the matter was again listed for hearing on 7/11/94, 19/12/94, 2/2/95 and 9/3/95 without the

Plaintiff/Applicant or its Counsel appearing in Court.

9. That the matter was then dismissed on 9/3/95 because the Plaintiff/Applicant and its Counsel had continued to abandon the matter.

10. That the Plaintiff/Applicant has no good cause of action against me but only wants this matter to drag on just to punish me.'

The trial judge in refusing the application and dismissing the application said at pp. 80-82 of the record:

\"When on 7/6/94 this Court granted leave extending time for Plaintiff/Applicant to file his Statement of Claim, one I.A. Nwaigbo Esq. held brief to K.I.Oleh (sic) for Plaintiff/Applicant and he filed the Statement of Claim, the defendant filed the Statement of Defence on 21/9/94. The matter was adjourned to 29/9/94 for mention, thereafter for hearing on 6/11/94, 10/11/94, 19/12/94, 2/2/95, 9/3/95. In all these adjournments granted was by the Court on its own without a letter from Plaintiff's/Applicant (sic) or its Counsel against the Defendant/Respondents Counsel, objection all in the interest of justice and to ensure that the matter is determined on its merit, but justice they say is a two-edged, sword the scale of justice must not tilt towards one side only.

While, it is true that a party may be represented by Counsel, but a party who takes that option does so at his own risk. It does not dispense with the duty on a diligent litigant, who must find out from his Counsel, the progress of his case. For a party who had not heard about his case from his Counsel for almost one year and did not enquire is nothing, but an indolent litigant not to be aided more so when the same Applicant had been coming to Port Harcourt for the sister (sic) case with Counsel and had been pursuing that case diligently.

At the time K.I. Oleh Esquire filed the first application to relist in March, 1995, did he collect the file he claimed he gave to the learned SAN after in 29/9/94' How did he get the file to file the appli'cation because on 2/5/95 while the learned SAN was still insisting that he was not briefed nor was he paid for this case.

It has continued to bother me why Plaintiff/Applicant and K.I. Oleh Esq. should continue to input this very serious allegation of negligence and improper conduct of a Counsel to a respected SAN as Chief A.B.C. Iketuonye. In the further affidavit in support of the Plaintiff/Applicant application he deposed to the effects in paragraphs 6, 7 that he handed over this case file for this case to the learned SAN as in paragraph 8 he deposed that he assumed that the SAN had been attending Court. This would be not short of irresponsibility on the part of any Counsel to accept a case file on a matter in September 1994; refused to attend Court and insist 9 months after i.e. 2/5/95 that he was not briefed nor paid for that case. And he did not return the file, this is not like the learned SAN and cannot be. I hope Applicant realises the implication of without (sic) is being, inputted to the learned SAN.

In my view the Plaintiff/Applicant had tried to give a reason for his failure to be in Court and why I should relist even if it meant destroying the reputation built up by a respected lawyer over the years. The reason given in the affidavit is self contradictory, defeats itself and has been properly refuted by the Defendant/Respondent counter-affidavits. I see no good reason and I hold that sufficient material has not been placed before me to enable me exercise my discretion in favour of the Plaintiff/Applicant.\"

Following the appeal to the Court below, the ruling of the trial court was set aside. In doing so, the court below observed:

\"I am well aware that the decision being appealed against was delivered in 1995 while the suit itself was filed in I993. It cannot be doubted that the Appellant\'s counsel and I dare say also the Court itself have, contributed to the quagmire they found themselves. The Court below might have reasoned that the Appellant was asking the trial to be very reason'able in that matter. It is all well and good to trumpet to high heavens that where a suit is dismissed because of seeming lack of will to prosecute a case diligently, then on proper consideration, the Court ought ordinarily to give the party a second chance. That generally should be so I must confess that I am not in the least enamoured by the attitude of the Appellant in the handling of the case in the Court below.

However, I still believe that where a party has shown considerable remorse in his handling of a matter in Court and prays fervently to be admitted to have the case argued on its merit, the Court ought not to continue to be too rigid in acceding to the prayers. In such a case a punitive cost imposed by Court below would do the trick. I have never supported a resort to short circuiting a trial summarily. Indeed it never ends a trial but prolongs it. The Court below could have merely struck out the suit instead of dismissing it. In the present case, I am prepared to fall backwards to accommodate the Appellant. In the circumstances, I will allow the appeal and set aside the judgment of the Court below. The matter should be remitted to another Court below to handle. I make no order as to costs.\"

(Underlining mine)

It is apparent from the ruling of the trial court, an extract of which was reproduced above, that the plaintiff\'s application failed for two clearly stated reasons namely-

1. Indolence of plaintiff in not finding out from his Counsel for about one year the progress in the suit.

2. Inability of the trial court to accept as exculpatory, the failure of Counsel retained by plaintiff to appear in Court on five consecutive occasions.

The court below did not reach the conclusion that the reasons given by the trial court as stated above were unfounded or unjustified. It nonetheless proceeded to express the view that the trial court should have merely struck out the suit. Was the court below right in overruling the trial court on a matter of the exercise of discretion falling squarely within the powers or jurisdiction of the trial Court' I do not think the court below was right. Order 37 Rules 6(2), 7, 8 and 9 of the Rivers State High Court Civil Procedure Rules, 1987 provide:

'6(2) If when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however to the restoration thereof, on the direction of the judge.

7. If when a trial is called on, the plaintiff appears and the defendant appears, then plaintiff may prove his claim as far as the burden of proof lies upon him.

8. If when a trial is called on, the defendant appears and the plaintiff does not appear, the Defendant if he has no counter-claim shall be entitled to judgment dismissing the action but if he has a counter-claim, then he may prove the counter-claim so far as the burden lies upon him.

Provided that if the defendant admits the cause of action to the full amount claimed, the court may, if it thinks fit, give judgment as if the plaintiff had appeared.

9. Any judgment obtained where one party does not appear at the trial maybe set aside by the Court upon such terms as may seem just, upon the application made six days after the trial or within such longer period as the court may allow for good cause shown.\"

(Underlining mine)

Now the relevant record of proceedings for 9-3-95 read:

Between

Telepower (Nigeria) Ltd
.....
Plaintiff

Versus

Chief Nicholas Banna
.....
Defendant

Plaintiff is absent.

Defendant is absent.

L.M. Alozie for Defendant

Counsel submits that Plaintiff have abandoned this matter. Plaintiff attended Court last in June 1994. Since there had been four or five adjournments and neither plaintiff nor their Counsel had been in Court. The matter is for hearing today, but neither Plaintiff nor Counsel is in Court. The cost award against the Plaintiff 7/6/94 to be paid before the next adjournment had not been paid.

Counsel urges this court to dismiss the suit in accordance with Order 37 rule 8. Defendant had no counter-claim.

COURT:
It is clear to me that for the attitude of the plaintiff this matter, they must be taken to have abandoned this suit.

I hereby dismiss this suit under Order 37 Rule 8 with N500.00 costs:

It is apparent from the record of proceedings reproduced above that the plaintiff and its Counsel were absent from the Court, on the date fixed for hearing. Under Order 37 rule 8 above, the trial court is authorized to dismiss the plaintiffs suit when on the date of hearing the plaintiff is absent and the defendant is present. The trial court so exercised its power to dismiss.

Under Rule 9 of Order 37, the trial judge has the discretion to set aside the order to dismiss a suit upon such terms as he may impose. The trial court felt unable to exercise its discretion in favour of the plaintiff because the reasons offered by the plaintiff were found unsatisfactory. The court expressed that it was unable to accept the excuse that the case file was given to Chief A.B.C. Iketuonye SAN after he had been fully briefed; and that the said senior Counsel disrespectfully refused to attend court. I should have thought that in such setting, it was necessary for Chief A.B.C. Iketuonye SAN to explain by an affidavit evidence the reasons why he failed to appear in Court after he had collected the case file and been fully briefed.

It is needful that it be stressed that a plaintiff who is not ready to pursue his suit with diligence upon which the court must insist has no business bringing such case to court. Counsel and parties alike must bear in mind that the time of the Court is valuable and must be apportioned between the different cases requiring attention. It is the duty of the court to proceed with the hearing of the cases before it expeditiously. The courts in the land must exact from parties and counsel as much diligence in the prosecution of their eases as would enable the court consign the incidence of congestion in our courts to history.

In any case, this Court per Bairamian JSC in Enekebe v. Enekebe (1964) 1 All NLR 102 at 107 emphasized the desirability of the need to treat with respect the exercise of discretion by the court of first instance. It quoted therein with approval the observation of Lord Simon in Charles Osenton v. Johnson (1942) A.C 130 at 138 where he said:

' The appellate tribunal is not at liberty merely to substitute its own exercise of discretion already exercised by the Judge. In other words, appellate authorities ought not to reverse order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight or no sufficient weight has been given

to the relevant considerations, then the reversal of the order on appeal may be justified.\"

See also Solanke v. Ajibola (1968) All NLR 46.

The provision dealing with fair hearing under section 36 of the 1999 Constitution of Nigeria is for the protection of all the parties to a case the plaintiffs and the defendants alike. It will be oppressive to interpret the provision as conferring, a protection on just one of the parties to a case. In this connection, I like to call to mind the views of this Court per Oputa .JSC in Willoughby v. International Merchant Rank (Nig) Ltd. (1987) 1 NWLR (Pt 48) 105 at 131 para 11

""..the Courts\' primary function is to do justice between the parties to a dispute. One sided justice will amount to injustice..... The law is made to ensure justice. Rules of Court are hand maids of justice. It is only by the orderly administration of law and obedience to the rules that legal justice can be attained. When a particular decision is against all known rules; against all known principles, then it is certainly, not made in the interest of justice.\"

It is my firm view that the court below was in error to have unjustifiably interfered with the exercise of discretion by the trial court without antecedently holding that the reason relied upon by the trial court to refuse to the application was unsustainable.

I would allow this appeal. The judgment of the court below is set aside. I make an order restoring the ruling of the trial Court. The defendant is entitled to costs in the Court below and this Court which I fix at N5,000.00 and N10,000.00 respectively.

Judgement delivered by
Idris Legbo Kutigi, JSC

I read before now the judgment just delivered by my learned brother Oguntade, JSC. I agree with his reasoning and conclusions. The appeal is allowed. The judgment of Court of Appeal is set aside. The order of the trial Court dismissing Plaintiff\'s suit is restored. I endorse the order for costs.

Judgement delivered by
Niki Tobi, JSC

This is yet another appeal where a party either due to indolence or overt acts of indifference or nonchalance, failed to take advantage of the judicial process in the hearing of a case before the High Court. I did a generally similar appeal some two months ago. It is the case of Newswatch Communications Limited v. Alhaji Aliyu Ibrahim Atta SC. 101/2001, delivered on 28th April, 2006, not yet reported. The two cases share so much in common as they relate or affect organized delaying tactics. In Newswatch, it was the defendant. In this appeal, it is the plaintiff who filed the action. Both applied some tricks and both tricks seem to have boomeranged. Tricks have no place in the judicial process and so why play them'

On 13th August, 1993, the respondent as plaintiff filed a suit at the High Court of Rivers State claiming three reliefs. On the same day, the respondent filed a motion on notice for an order of interlocutory injunction against the appellant. The learned trial Judge, Tariah, J. dismissed the motion.

The respondent filed its Statement of Claim on 5th May, 1994. The appellant, as defendant filed his Statement of Defence on 21st June, 1994. On 11th July, 1994, the respondent filed a reply to the Statement of Defence. And so the pleadings got into the judicial process.

The case was fixed for mention on 29th September, 1994. Thereafter the matter was adjourned to 6th November, 1994; 2nd February 1995 and 9th March 1995, for hearing. On 9th March, 1995 the matter came up again for hearing. Appellant was absent. The following proceedings are at page 57 of the Record:

\"Counsel submits that Plaintiff have (sic) abandoned this matter. Plaintiff attended Court last in June 1994. Since then, there have been four or five adjournments and neither Plaintiff nor (sic) their counsel has been in court. The matter is for hearing today, but neither Plaintiff nor counsel is in Court. The cost awarded against the Plaintiff on 7/6/94 to be paid before the next adjournment had not been paid. Counsel urges this Court to dismiss the suit in accordance with Order 37 Rule 6. Defendant has no counter claim.

COURT.
It is clear to me that for the attitude of plaintiff in this matter, they must be taken to have abandoned this suit. I hereby dismiss this suit under Older 37 Rule 8 with N500.00 cost\"

And so the matter was dismissed by the learned that Judge under Older 37 Rule 8 of the Rivers State High Court (Civil Procedure) Rules 1987.

Refusing the motion to relist the suit dismissed the learned trial Judge in his Ruling of 4th December, 1995 said at pages 81 and 82 of the Record:

\"In my view the Plaintiff/Applicant had tried to give a reason for his failure to be in Court and why I should relist even if it meant destroying the reputation built up by a respected lawyer over the years. The reason given in the affidavit is self-contradictory, defeats itself and has been properly refuted by the Defendant/Respondent counter-affidavit. I see no reason and I hold that sufficient material has not been placed before me to enable me exercise my discretion in favour of the Plaintiff/Applicant... I hereby dismiss the Plaintiff/Applicant\'s application to relist the suit and set aside the judgment.\"

Dissatisfied the applicant appealed to the Court of Appeal. That Court allowed the appeal. The Court said at page 130 of the Record:

\"However, I still believe that where a party has shown considerable remorse in his handling of a matter in Court and prays fervently to be admitted to have the case argued on its merit, the Court ought not to continue to be too rigid in acceding to the prayers. In such a case a punitive cost imposed by Court below would do the trick. I have never supported a resort to short-circuiting a trial summarily. Indeed it never ends a trial but prolongs it. The Court below could have merely struck out the suit instead of dismissing it. In the present case, I am prepared to fall backwards to accommodate the Appellant. In the circumstances, I will allow the appeal and set aside the judgment of the Court below. The matter should be remitted to another Court below to handle. I make no order as to costs.\"

The question here is whether the Court of Appeal was light in allowing the appeal and holding that the learned trial Judge ought to have struck out the matter instead of dismissing it.

The best Judge in trial procedure is undoubtedly the trial Judge. He sees it all because he closely watches the proceedings and all that. He feels the pinch when parties try to dilly-dally the proceedings or adopt tricks to overreach or outsmart the adverse party. If the trial Judge fails to take a position in the light of the rules of court and takes or tows the line of sympathy in the way the Court of Appeal did, then he will have a plethora or load of cases in his cause list to the extent that he cannot get out of a mounting backlog of cases. That will reflect on him adversely and in these days of continuous assessment of the performance of Judges, he will be in for it. While I concede that a trial Judge cannot throw away the constitutional provision that parties should be given a hearing in matters before the court because of repercussions of performance assessment, a Judge owes the administration of justice a duty to facilitate and ensure the speedy hearing of a case before him. The notoriety that delayed justice attracts to the Judiciary is such that Judges must work towards the speedy dispensation of justice. We do not have a choice in this troublesome matter. Let us do our best and our best is to facilitate the speedy hearing of cases.

A plaintiff has not only a right to file on action in court to redress a wrong done him by a defendant, he also has a duty to prosecute the matter to conclusion within the rules of court. Of course, the duty is not mandatory, compulsory or sacrosanct, as he can decide not to prosecute. A plaintiff who files an action in court and exhibits some indolence and nonchalance has himself to blame. After all, he brought the defendant to court and if he decides not to pursue the case diligently, the court has no option than to either strike out or dismiss the matter, depending on the enabling rules of court.

In Newswalch Communications Limited v. Alhaji Aliyu Ibrahim Atta, I said:

\"A trial Judge can indulge a party in the judicial process for sometime but not for all times. A trial Judge has the right to withdraw his indulgence at the point the fair hearing principle will be compromised, compounded or will not really be fair as it affects the opposing party who equally yearns for it in the judicial process. At that stage, the party who is not up and doing to take advantage of the fair hearing principle put at his door steps by the trial Judge, cannot complain that he was denied fair hearing, such is the situation I see in this appeal.\"

Although the parties did not canvass fair hearing in this appeal, the issue of indulgence on the part of a trial judge clearly applies in this appeal. Let me not say more on that.

In this matter, the learned trial Judge invoked Order 37 Rule 8 of the Rivers State High Court (Civil Procedure) Rules 1987. The Rule is in the following terms:

\"If when a trial is called and the Defendant appears and the Plaintiff does not appeal, the Defendant, if he has no counter claim, shall be entitled to judgment dismissing the action...\"

I am of the view that the learned trial Judge properly invoked the rule by dismissing the suit instead of striking it out. The peremptory language of command, \"shall\" is so clear and I cannot fault the order made by the learned trial Judge. With the greatest respect, the Court of Appeal was wrong in allowing the appeal. That, Court held that the trial Judge ought to have struck out the suit instead of dismissing it, I ask: under what rule of Court' And what type of discretion that should have been'

A trial court as a court of law and equity has the power to exercise some discretion in the judicial process. As long as the discretionary power is exercised judicially and judiciously, an appellate court cannot interfere by show of appellate power. It is good law that an appellate court cannot substitute its discretion in the administration of justice for that of the trial court. And because discretionary power is exercised within the confines of the facts of the case, the trial Judge, the judge of facts, is in the best position to exercise the discretion. Where it is clear on the Record that the power was not exercised judicially and judiciously, an appellate court may interfere. I do not see such a situation in this matter.

It is for the above reasons and the more detailed ones given by my learned brother, Oguntade, JSC, in his judgment that I too allow the appeal. I also make an order restoring the ruling of the learned trial Judge. I adopt the order as to costs in the judgment of my learned brother.

Judgement delivered by
Aloma Mariam Mukhtar, JSC

In a writ of summons which the plaintiff who is now the respondent caused to be taken it claimed the following reliefs:

\"I. A declaration that the Deed of Revocation of Power of Attorney dated the 22nd day of July 1993 by Chief Nicholas Banna to TELEPOWER (NIGERIA) LIMITED purporting to revoke that Power of Attorney dated 21st day of

September 1990 is null and void and of no effect whatsoever.

2. A declaration that the defendant 'remains bound\' by the terms and conditions of that Power of Attorney dated 21st day of September 1990 made by Chief Nicholas Banna to TELEPOWER (NIGERIA) LIMITED.

3. An Injunction restraining the defendant, his agents, workers or privies from doing any act that negates or is capable of negating the effect of the said Power of Attorney within the period prescribed in the said Power of Attorney\".

Simultaneously it filed an application for the following orders :-

1. An order of injunction restraining the defendant/respondent, his agents, workers and/or privies from interfering with the occupational rights of National Drug Law Enforcement Agency who are tenants of the applicant at \"Telepower Estates\" situate at Rumuodara Obio in Obio/Akpor Local Government Area of Rivers State pending the determination of the main suit.

2. An order of injunction restraining the defendant/respondent, his agents, workers and/or privies from entering into the \"Telepower Estates\" situate at Rumuodara Obia in Obio/Akpor Local Government Area of Rivers State except only for purposes stated in that Power of Attorney dated 21st day of September, 1990 donated by Chief Nicholas Banna to Telepower (Nig) Limited pending the determination of the main suit.

After the above processes were in the High Court, it took the plaintiff almost nine months to file an application for extension of time within which to file the plaintiff\'s Statement of Claim, and that was after the application for injunction had been dismissed on 30/3/94. The orders for extension of time to file the statement of claim and to deem as properly filed the statement of claim were granted on 7/6/94. Thereafter, the suit was dismissed on 9/3/95 and on 7/12/95, (eighteen months after the order of deeming of the statement of claim, was made). A motion to relist the suit was moved and refused by the learned trial judge. It can be seen from the record of proceedings that a period of nine months had lapsed without the plaintiff/respondent taking any step before the court dismissed the suit. See page (57) of the printed record of proceedings.

Dissatisfied with the refusal to relist the suit the plaintiff appealed to the Court of Appeal, and the appeal was allowed, and the judgment of the trial court was set aside. It is against this decision that the defendant/appellant appealed to this court on three grounds of appeal. Briefs of argument were exchanged by learned counsel for the parties, and they were adopted at the hearing of the appeal. Two issues for determination were formulated in the appellant\'s brief of argument, which read thus:-

1. Whether the lower court was right when it held that the trial court could have merely struck out the respondent\'s suit instead of dismissing it.

2. Whether the lower court was right in allowing the respondent\'s appeal and setting aside the judgment of the trial court.

In its brief of argument the respondent formulated the following single issue:-

\"Whether within the peculiar facts of this case, the Court of Appeal was justified in ordering that the suit be relisted and heard and determined at the High Court on its merit\".

Order 37 Rules 6 (2) 7, 8 and 9 of the Rivers State High Court (Civil Procedure Rules) 1987, which governs proceedings in the High Court of Rivers State makes the following provisions:-

\"6(2) If when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, how ever to the restoration thereof, on the direction of the judge,

7. If when a dial is called on, the plaintiff appears and the defendant does not appear, then the plaintiff may prove

his claim, as far as the burden of prove lies upon him.

8. If when a trial is called on the defendant appears and the plaintiff does not appear, the defendant; if he has no counter claim, shall be entitled to judgment dismissing the action, but if he has a counter'claim then he may prove the counter claim, so far as the burden of prove lies upon him. Provided that if the defendant admits the cause of action to the full amount claimed, the court may, if it thinks fit, give judgment as if the plaintiff had appeared.

9. Any judgment obtained where one party does not appear at the trial may be set aside by the court, upon such term as may seem just, upon the application made six days after the trial or within such longer period as the court may allow for good cause shown.\"

According to learned counsel for the appellant the respondent initiated this action and went home without appearing in court at all, and the counsel after appearing a few times in court and stopped even when the case was called up for hearing on 6/11/94, 10/11/94, 19/12/94, 2/2/95 and 9/3/95.

Learned counsel for the respondent has argued that the learned trial judge should have merely struck out the suit and not dismiss it, as Order 37 Rule (8) supra should he used as handmaid and not as a mistress, as enjoined by Collins M. R. in Coles and Revensheer, In Re (1990) I KBI at 4. He also placed reliance on the case of Nishizawa Ltd. V. Jethwane 1984 All NLR 470. I agree that it is a fact that rules of court are made to assist the court and not to encumber it, and authorities abound on this, but then it does not mean that this principle must be followed blindly without recourse to the right and convenience of the opponent. Similarly authorities abound that rules of court are made to be obeyed, and not ignored or jettisoned at the instance of a party just to suit such party. See Kachia v. Yazid 2001 17 NWLR part 742 page 431. As is demonstrated in the suit that culminated in this appeal, the plaintiff who should in fact exhibit more zeal and anxiety in prosecuting this case which it had filed seeking for some reliefs decided to forget or neglect the suit by not appearing in court or finding out the position of his suit in the registry, just because it had engaged the services of a Solicitor. It certainly did not expect the trial judge to merely fold his arms and allow the case to be adjourned until the plaintiff deemed it convenient for the case to be heard or disposed of before he can act, most especially as the defendant was diligent and always in court each time the case came up.

Just, as much as there is a saying that there must be an end to litigation, I will add here that there must also be an end to playing pranks, wasting the court's time. For several different dates the case came up for hearing but the plaintiff was not bothered, even after it had eventually filed its statement of claim after an order of extension to do so by the court, and after the defendant had filed his statement, of defence. This unwarranted behaviour was well demonstrated by the learned trial judge in his ruling when he said infer alia thus:-

\"Thereafter for hearing on 6/11/94, 10/11/94, 19/12/94, 2/2/95, 9/3/95. In all these adjournment granted (sic) was by the court on its own without a letter from plaintiffs/applicant or its counsel against the defendant/respondent\'s counsel objection all in the interest of justice and to ensure that the matter is determined on its merit, but justice they say is a two edged sword the scale of justice must not tilt towards one side only. While it is true that a party may be represented by counsel, a party who takes that option does so at his own risk. It does not dispense with the duty on a diligent litigant who must find out from his counsel the progress of his case\".

Underlining above is mine.

Besides no litigant should be allowed to take a Court to ransom. It is the vogue for the public to attack Courts on delays of cases in Courts, when unknown to the generality of the public the fault does not lie in the Courts alone. The litigants and lawyers also share in this snail pace of litigations. The instant case is a locus classicus, and it behoves courts to discourage these unwholesome behaviour and frown on them.

Indeed, justice is supposed to be for both sides, and not only the convenience of one side. I am in full agreement with the above reasoning of the learned trial judge. The learned trial judge dismissed the action under the correct and proper rule, and was right in refusing to relist it. In this wise I refuse to endorse the finding of the lower court that, the trial court could have merely struck out the suit instead of dismissing it.

In the light of the above reasoning in addition to those in the lead judgment of my learned brother Oguntade JSC, I agree that the appeal has merit and should be allowed. I allow the appeal, and abide by the orders made in the lead judgment.

Judgement delivered by
Francis Fedode Tabai, JSC

I have had the privilege of rending in advance, the leading judgment of my learned brother Oguntade JSC and I agree that the appeal be allowed. I also agree with the orders on costs contained in the leading judgment.