IN THE SUPREME COURT OF NIGERIA

Suit No: SC403/2001

Petitioner: Alhaji Baba M. Saleh
And
Respondent: Alhaji Shetima Monguno & Ors

Date Delivered: 2006-07-07

Judge(s): Idris Legbo Kutigi , Aloysius Iyorgyer Katsina-Alu , Ignatius Chukwudi Pats-Acholonu , George Adesola Oguntade ,

Judgment Delivered

The process culminating in this appeal started 24 years ago when the 1st Respondent, as Plaintiff filed Suit No M/l52/82 against the Appellant as Defendant at the Borno State High Court. The action was under the Undefended list procedure and he obtained judgment for the sum of Nl,412,926.00 plus N5,000.00 costs on the 16/12/82. The Appellant filed an appeal. While he pursued the appeal, he did not seek and obtain an order for stay of execution.

The 1st Respondent made some efforts to recover the judgment debt and as at 26/1/84, he had recovered only N280,000.00 from the movable properties of the Appellant leaving a balance of about N1,137,986.00. On the 26/1/84 therefore, he filed a motion for leave to attach three specific immovable properties of the Appellant in Maiduguri covered by Certificates of Occupancy Nos. NE 1776, NE 1777 and NE 1828. And on the 29/2/84 the trial Chief Judge granted the leave. In purported execution of the aforesaid leave/order of the 29/2/84 the 2nd Respondent, (Deputy Sheriff High Court Maiduguri), at the instance and as agent of the 1st Respondent, sold not only the 3 properties specified in the order but also 4 other properties of the Appellant not covered by the leave/order.

By the judgment on the 27/1/86, the Court of Appeal allowed the appeal and the judgment of the 16/12/82 was set aside for being a nullity. In the wake of this nullification, the 1st Respondent filed a fresh action in suit No M/36/86. On the application by the Defendant/Applicant/Appellant the trial Court set aside the order of sale of 29/2/84 on the 15/7/86.

And on the 25/8/87 this motion culminating in this appeal was filed. The motion prayed for an Order or Orders:

(A) Directing the 3rd - 8th Respondents/any of them to quit and deliver up possession of the under-listed three houses covered by Certificate of Occupancy Nos. NE 1776, NE 1777 and NE 1828 sold at an auction by the 2nd Respondent at the instance of the 1st Respondent and purchased severally by the 3rd - 8th Respondents pursuant to the Order of this Honourable Court in the suit herein on the 29th February 1984 which order has now been set aside by the order of this Honourable Court of 15th July 1986 thereby rendering the sale of the said houses null and void.

1. One two-storey building situate at Buba Gana Road Gamboru Ward, Maiduguri.

2. Two storey-buildings in one compound situate at Railway Street Gamboru Ward, Maiduguri.

3. One house situated at No.29 Yaskuma Street, Gamboru Word Maiduguri.

(B) Also directing the 3rd-8th Respondents/any of them to quit and deliver up possession of the under listed houses unlawfully sold at the same auction by the 2nd Respondent at the instance of the 1st Respondent and purchased severally by the 3rd -8th Respondents:

(1) One house situate at Lawan Usman Street, Gamboru Ward, near Alhaji Mohammed\'s house, Maiduguri.

(2) One two-storey building situated along Airport Road Bulumkutu Ward Maiduguri,

(3) One house situated at No. 1 Musa Dagash Street Gamboru Ward, Maiduguri

(4) A piece of land measuring 100 ft x 50 ft at Bulumkutu Ward Maiduguri purchased by the Respondent.

The motion was supported by an affidavit of 13 paragraphs. No counter affidavit was immediately filed by any of the Respondents. On the 16th of February l988, the trial Chief Judge decided that the motion would not be taken until the fresh suit filed by the 1st Respondent against the Appellant had been dispensed with (see page10 of the record). Nearly 10 years after, that is, on the 21st of February 1997, the 3rd Respondent filed a 9 paragraph counter-affidavit. The motion was finally heard on the 26th of February 1997.

In a considered ruling on the 7th of April 1997, the trial Court dismissed the application. Dissatisfied with that decision, the Appellant appealed to the Court of Appeal. By its judgement on the 26th of June 2001, the appeal was dismissed. Still dissatisfied, the Defendant/Applicant/Appellant has come on further appeal to this Court. Before this Court, the Appellant, 3rd, 4th and 7th Respondents filed and exchanged their Briefs of Argument. The Appellant\'s Brief of Argument was prepared by J.B. Daudu SAN, Mr. M.A. Adamu prepared two separate briefs for the 3rd and 7th Respondents. And Nankham Ayuba Dammo prepared the brief of the 4th Respondent. The 1st, 2nd, 5th, 6th and 8th Respondents did not file any brief.

In the Appellant\'s Brief of Argument Mr. J.B. Daudu, SAN formulated seven issues for determination. The issues were adopted in the briefs of the 3rd, 4th and 7th Respondents. The issues as formulated by Daudu, SAN are as follows:-

(1) Whether the Court of Appeal was right in affirming the decision of the Borno State High Court that steps taken by the latter in enforcing her judgment which was later adjudged a nullity by the former and which had led to the void sale of Appellant\'s houses could not be reversed by an application brought by way of a motion on notice as the Appellant did but by a writ of summons'

(2) Assuming but not conceding that the action to reverse the unlawful sale of his properties was initiated by wrong form and procedure i.e. by motion on notice, did this step divest the Borno State High Court, as affirmed by the Court of Appeal, of jurisdiction to resolve and reverse the injustice perpetrated by the High Court or was it an irregularity that was cured by the participation of the Respondents in the proceedings and by the saving provisions of the Borno State High Court Rules'

(3) Whether the Court below was correct in law when it held that 3rd parties had acquired interest from void sale of Appellant\'s property by the Borno State High Court and whether that fact had any bearing on how a consequential action for the reversal of the void steps hitherto taken could be initiated'

(4) Whether the Court below was correct in law in affirming the decision of Borno State High Court that the complaint of the Appellant to the effect that some of his houses not listed among those for which an order had been given for leave to sell them by way of auction, subsequently sold by the 2nd Respondent amounted only to an irregularity which could have been cured had the application been brought within 21 days as prescribed by sections 47 and 48 of the Sheriffs and Civil Process Act'

(5) Whether the sale of the Appellant\'s properly pursuant to a judgment that was eventually declared null and void by the Court of Appeal could be described as an irregularity and incapable of being reversed except by recourse to the specific provisions of sections 47 and 48 of the Sheriffs and Civil Process Act'

(6) Whether contrary to the decision of the Court below affirming that of the trial Court, the fundamental rights of the Appellant were not grievously breached by the fact that the trial Court suo motu stayed the application leading to this appeal for 10 years while he dealt with Suit No. M/36/86 filed by the 1st Respondent as a substitute to the proceeding that was adjudged a nullity'

(7) Whether the Court of Appeal was correct in the way and manner it affirmed the decision of the Borno State High Court in the way and manner the Appellant\'s application was dealt with, particularly with the excuse provided by the

Court below that the Appellant did not obtain an order to set aside the void sale of his properties'

I shall now commence deliberation on this appeal by first considering the last four issues. In substance, they collectively raise the fundamental legal and constitutional issues of the legality of the sales, whether the 3rd - 8th Respondents/third parties acquired absolute and indefeasible title in the properties and whether in the course of the proceedings at the trial Court, the Appellant\'s fundamental rights were violated.

On these issues, the submissions of learned Senior Counsel for the Appellant Mr. J.B. Daudu are firstly, that the purported auction sales based on a null judgment are equally void and non-existent in the eyes of the law. Consequently, he argued, the 3rd - 8th Respondents, referred to by the two lower Courts as bona fide purchasers bought nothing as the judgment that was purportedly being enforced was non-existent. It was his submission that the concept of a bona fide purchaser for value is only applicable when there is a sale properly so called in the eyes of the law. He further argued on these issues, that sections 47 and 48 of the Sheriffs and Civil Process Act Cap 407 Laws of the Federation of Nigeria l990 apply only to situations of mere irregularities and not to the nullity situation as exists in this case. For these submissions he relied on Alhaji Labaran Nakyauta v Alhaji Ibrahim Maikima & Anor (1977) ALL NLR (Reprint) 215 at 225/226; Leedo Presidential Motel Ltd v Bank Of The North Ltd & Anor (1998) 10 NWLR (Part 570) 353 at 381-383 amongst others.

The arguments of M.A. Adamu in the briefs of the 3rd and 7th Respondents were hardly comprehensible. The substance of his arguments on these issues, from what I can understand, is that the sale of the properties to the 3rd - 8th Respondents with or without the leave of Court was valid and transferred absolute title to them. With respect to those which sale was without the leave of Court, he submitted that the sale was a mere irregularity and by virtue of the provisions of sections 47 and 48 of the Sheriffs and Civil Process Act Cap 407 Laws of the Federation of Nigeria the sale was deemed to become absolute since there was no application to set aside same within 21 days. It was his further submission that the principles in Alhaji Labaran Makyauta v Alhaji Ibrahim Maikima & Anor (supra) and Leedo Presidential Motel Ltd v Bank Of The North Ltd & Anor (supra) do not apply to the facts and circumstances of this case.

In his arguments in the 4th Respondent\'s brief, N.A. Dammo also submitted that the complaint of the Appellant about the sale of the properties including those for which there was no leave of Court are complaints of irregularities and are therefore statute barred by virtue of the provisions of section 47 and 48 of the Sheriffs and Civil Process Act. He argued that the nullification of the judgment notwithstanding, there must be a specific order setting aside the sale to the 3rd ' 8th Respondents for such sale to be reversed. Finally on the issues, learned Counsel for the 4th Respondent submitted that Leedo Presidential Motel Ltd v Bank of The North (Supra) Adewumi v Societe General Bank Ltd (1998) 6 NWLR (Part 5.52) 154 and Alhaji Labaran Nakyautu v Alhaji Ibrahim Maikima & Anor (supra) are distinguishable and do not therefore apply to this case. On the issue of fair hearing, Counsel referred to Military Governor of Imo State & Anor v Chief B.A.E Nwauwa (1997) 2 NWLR (Part 490) 675 at 708 and Okafor v A.G. Anambra State (1991) 6 NWLR (Part 200) 659 and submitted that the Appellant\'s right to fair hearing was not breached. He urged in conclusion that the appeal be dismissed.

As a prelude to the resolution of these issues, it is pertinent to highlight a fundamental and crucial distinction between the two sets of properties over which the parties have been enmeshed in legal battle for nearly 24 years. The significance of the distinction which is clearly spelt out in reliefs (A) and (B) of the motion paper is in respect of those three specific properties covered by Certificates of Occupancy No. NE 1776, NB 1777 and NE 1828 for which attachment and sale the trial Court granted leave on the 29/2/84. (See pages 11-12 at the record of appeal), and to those four properties for which attachment and sale, no leave of the Court was sought and none granted. I shall now consider the issues raised in the light of these distinctions.

On the sale of the properties in relief (A) of the motion, the submission of Counsel for the Respondents is in my view, unassailable. By the Motion on notice of the 26/1/84, the 1st Respondent/Judgment Creditor sought the leave and authority of the trial Court to attach and sell the three specific properties of the Appellant on relief \'A\' of the motion. There is no indication on the record that the Defendant/Appellant contested the application. And on the 29/2/84, the trial Court granted the leave/order for their sale in satisfaction of the balance of the judgment debt of Nl,137,986.00 and they were accordingly sold. Sections 47 and 48 of the Sheriffs and Civil Process Act Cap 407 Laws of the Federation of

Nigeria 1990 (or of the Sheriffs and Civil Process Law Cap 123 Laws of Northern Nigeria) on which the Respondents and the Courts below relied provide:

47. \"At any time within 21 days from the date of the sale of any immovable property, application may be made to the Court to set aside the sale on the ground of any material irregularity in the conduct of the sale, but no sale shall be set aside on the ground of such irregularity unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.'

48. If no such application as mentioned in Section 47 at this Act is made, the sale shall be deemed absolute. If such application be made and the objection be disallowed the Court shall make an order confirming the sale; and in like manner, if the objection be allowed the Court shall make an order setting aside the sale for irregularity.\"

With particular reference to the three properties comprised in relief (A) therefore, the sale in respect thereof comes squarely within the provisions of sections 47 and 48 of the Sheriffs and Civil Process Act Cap 407 Laws of the Federation 1990. I am in total agreement with the reasoning and conclusion of the Courts below therefore that by reason of the provisions thereof, the auction sale not having been challenged within 21 days from the date of sale, was deemed to became absolute and effectively transferred title in the three properties to whoever of the 3rd ' 8th Respondents that bought them. In the event, I hold that there is no substance in the complaint on the properties listed in relief (A) of the motion paper. I hold also that the principle in Leedo Presidential Motel Ltd v Bank Of The North Ltd & Anor (supra) cited by Appellant\'s Counsel does not apply.

I now come to the Appellant\'s complaint about the four properties mentioned in relief (B) of the motion paper. On the 26/2/97 when this motion was argued at the trial Court, Mr. Osho, learned Counsel for the Defendant/Applicant/Appellant, submitted that the purported sale of these properties was without the leave of Court and so without any legal or constitutional authority. (See page 21 lines 8-13 of the record.) And in its ruling the Court noted the submission as follows:-

\"As regards the sale of the houses not mentioned in the orders made by Justice Kalu Anyah in his ruling of 29th February 1984, Mr. Osho submitted that the sale of such houses were nullity as no leave of the Court was obtained to attach and sell the said houses.....' (See page, 28 lines 20-24 of the record)

Surprisingly the trial Court failed to make any pronouncement on this all crucial issue.

This complaint about the properties in prayer (B) raises three fundamental constitutional and legal issues. Firstly, since there was no motion on notice for leave for the attachment and sale of the four properties there was no Court order for their sale. Secondly, there was no notice to the Appellant when his four properties were purportedly sold behind his back. Thirdly, the allegation which was not denied by the 1st and 2nd Respondents established some evidence of collusion and fraud. Yet the trial Court begged the question and simply proceeded on the assumption that the leave granted for the attachment and sale of the three specific properties in prayer (A) was also sufficient authority for the sale of the properties in prayer (B) and that their sale was a mere irregularity within the meaning of sections 47 and 48 of the Sheriffs and Civil Process Act Cap 407 Laws of the Federation of Nigeria 1990.

Regrettably, the Court of Appeal persevered in the same error. The Court, per Obadina JCA, reproduced the Appellant\'s complaint about the properties not covered by the order of Court of the 29/2/84 at pages 17-18 of its judgment and reasoned as follows:-

\"From the provisions of paragraphs 5, 6 and 7 of the affidavit in support of the motion, the Appellant is certainly complaining about the irregularity in the conduct of the sale of his properties. He complained that some of the properties sold were not covered by the order of Court authorising the sale of the properties by public auction. It seems to me when a judgment debtor whose properties were ordered to be sold, is complaining that some of the properties sold were not covered by the order of Court, he is certainly complaining of irregularity in the conduct of the sale of the properties.

In that regard, it seems to me the Appellant ought to have brought an application for order setting aside the sale to the

3rd to 8th Respondents within twenty-one (21) days from the date of the sale of his immovable properties in question within the provisions of section 47 of the Sheriffs and Civil Process Law, Cap 123 of the Laws of Northern Nigeria 1963. I am also of the view that since the Appellant had failed to bring any application to set aside the sale within 21 days of the sale, the sale has become absolute within the provision of section 48 of the Sheriffs and Civil Process Law.'

(See page 167 of the record)

Thus the Court of Appeal failed to appreciate the fundamental defect in the sale of the Appellant\'s properties without an application on notice to and authority of the Court when it wholly endorsed the reasoning of the trial Court and purportedly invoked the provisions of sections 47 and 48 of the Sheriffs and Civil Process Law without reference to the Judgment (Enforcement) Rules made thereunder and more importantly, oblivious of the Appellant\'s fundamental rights guaranteed in Chapter IV of the 1999 Constitution. Order IV Rule 16(l)-(3) of the Judgment (Enforcement) Rules provides:-

'16 (1) When a judgment creditor desires a writ of attachment and sale to be issued against the immovable property of the judgment debtor, he shall apply to the High Court.

(2) The application shall be supported by evidence showing:

(a) what steps, if any, have already been taken to enforce the judgment and with what effect; and

(b) what sum now remains due under the judgment; and

(c) that no movable property of the judgment debtor, or none sufficient to satisfy the judgment debt, can with reasonable diligence be found.

(3) If upon the hearing of the application it appears to the Court that the writ of attachment and sale may lawfully issue against the immovable property, the Court shall make an order accordingly.\"

It is clear from the aforementioned provisions of the Sheriffs and Civil Process Act or Law and the Judgment (Enforcement) Rules made thereunder that the attachment and sale of the immovable property of a judgment debtor must be by leave or order of Court made upon an application. And although both the Act or Law and the Judgement (Enforcement) Rules are silent on the question of whether the application can be made ex parte or on notice, it has since been settled by this Court in Leedo Presidential Motel Ltd v Bank Of The North Ltd (supra). There the Judgment Creditor made application ex parte to the trial Court for the attachment and sale of the Judgment Debtor\'s immovable properties. The application was granted and the properties accordingly sold to the 2nd Respondent. The appeal before the Court of Appeal was dismissed. On further appeal, this Court endorsed the principle in Bayero v Federal Mortgage Bank of Nigeria Ltd (1998) 2 NWLR (Part 538) 509; Osunkwo v Ugbogbo (1966) NMLR 184 and Opubor v Demiruru (1961) 2 ALL NLR 250 and held that such an application must be on notice (to the judgment debtor) because of its crucial nature involving a determination of the judgement debtor\'s constitutional rights. The Court, per Ogundare JSC, at pages 378 - 379 stated :-

\"Although section 44 of the Sheriffs and Civil Process Law is silent as to how an application is to be made to the Court by a judgment creditor for a writ of execution against the immovable properly of the judgement debtor, it is my respectful view that as there are many things the Court has to satisfy itself about, it is only but fair and just that the judgment debtor be put on notice of the application. Order IV rule 16(2) lays down the evidence to be produced. From the nature of the evidence and upon which the Court must satisfy itself before a writ of attachment and sale is ordered to issue, the civil rights and obligations of the judgment debtor must obviously come up for determination. I cannot see how such a determination can be made behind the back of the judgment debtor without breaching his constitutional right to fair hearing under section 33(1) of the Constitution.....'

And Iguh JSC at page 390 restated the principle with emphasis thus:-

\"In my view, it cannot amount to any other thing else than a gross abuse and breach of the rules of natural justice for a writ of execution or attachment to issue against the immovable properly of judgment debtor without affording him an opportunity to be heard on such an exceptionally grievous and sensitive issue.'

See the reaction of Kutigi JSC at page 384 of the report also.

In the instant case, if the proceeds from the sale of the three properties in relief (A) specified in the Court order of 29/2/84 did not fully satisfy the balance of the judgment debt, the 1st Respondent, Alhaji Shetima Monguno, was at liberty to file another application on notice for the attachment and sale of the four properties in relief (B). That would have given the Appellant the opportunity to contest the application particularly in view of the indications in the record that at the time of the attachment and sale of the properties, the 1st Respondent had recovered as much as N830,000.00 from him. (See the statement of the Appellant at page 2 of his brief filed at the Court below at page 45 of the record and its concession in the 7th Respondent\'s brief at the Court below at page 87 of the record.) The trial Court would have had the opportunity to examine the merits and demerits of the application. But he concealed his intention from both the Court and the Appellant and acting in collusion with the 2nd Respondent, surreptitiously sold the properties to some of the 3rd'8th Respondents.

What then is the effect of the sale of these properties in relief (B) of the motion paper. In Leedo Presidential Motel Ltd v Bank of The North Ltd, in circumstances far less reprehensible than those in the instant case, this Court held the attachment and sale of the Appellant\'s property to the 2nd Respondent null and void and directed the immediate restoration of the property by the 2nd Respondent to the Appellant. In the face of the facts and circumstances of this case, I have no alternative than to hold that the attachment, and sale of the Appellant\'s four properties specified in relief (B) to the 3rd ' 8th Respondents was illegal, unconstitutional null and void and consequently, that the purported attachment and sale passed no title in any of the four properties to whoever of the 3rd-8th Respondents that bought any of them. He is accordingly entitled to the immediate restoration of the properties to him. The Court of Appeal was therefore clearly in error to regard the unauthorised illegal and unconstitutional attachment and sale of these properties as mere irregularity within the meaning at sections 47 and 48 of the Sheriffs and Civil Process Law Cap 123 Laws of Northern Nigeria 1963.

In conclusion on this issue, I hold that there is merit in the appellant\'s complaint with respect to the properties listed in relief (B) of the motion paper.

The next issue is whether by virtue of the motion which is the subject matter of this appeal, the Appellant can be granted redress for any wrong he might have suffered in the purported sale of his properties. The Court below, affirming the decision of the trial Court, held that initiating the action by motion instead of a writ of summons rendered the proceedings incompetent and denied the trial Court of any jurisdiction in view of the provisions of Order 1 Rule 2(1) and (3) of the Borno State High Court (Civil Procedure) Rules 1988. The submission of J.B. Daudu, SAN is that since the purported attachment and sale of the properties was null and void, title in the properties never passed to the 3rd ' 8th purchasers Respondents and that the relief sought was merely akin to seeking a consequential order to reverse the void acts. He submitted that the Court had jurisdiction to entertain the motion and grant the relief in view of the provision of Section 4 of the High Court (Civil Procedure) Rules Laws of Borno State and Order 46 Rule I of the Rules. Assuming that initiating the action by motion was a wrong procedure, learned Senior Counsel argued, it was not such a wrong procedure that breached the rules of fair hearing and therefore curable under Order 2 Rule l (i) of the High Court Rules.

Learned Counsel for the 3rd and 7th Respondents submitted, on the other hand, that Rules of Court are binding on the parties and that a party cannot be heard to complain about their application, save, it can be established that their strict application had led to miscarriage of justice. He relied on Dr. Oladipo Maja v Mr. Waster Saduours (2002) NSCQLR Vol. 546 at 549; City Engineering (Nig) Ltd v Nigerian Airport Authority (1999) 70 LRCN 2121 at 2127. It was his submission that since the 3rd ' 8th Respondents were not parties in the suit, an action which seeks reliefs against them cannot be commenced by way of the motion. He relied on Okomu Oil Palm Co. Ltd v Iserhenrhen (2001) NSCQLR vol.5 page 802 at 805.

Learned Counsel for the 4th Respondent in his brief argued that the reliefs being claimed were in the guise of a

declaration of title predicated upon re-possession and the action ought, therefore, to have been commenced by a writ of summons and that commencing same by a motion rendered it incompetent. He submitted that Leedo Presidential Motel Ltd case was distinguishable and therefore not applicable.

I shall deliberate on this issue by first reproducing Order 1 Rule 2(1) and (3) of the Borno State High Court (Civil Procedure) Rules on which the lower Courts and Counsel for the Respondents relied.

Rule 2(1) provides:

\"Subject to any provision of an Act or of these rules by virtue of which any proceedings are expressly required to be begun otherwise than by writ, the following proceeding shall be begun by writ, that is to say proceedings:

(a) in which a claim is made by a Plaintiff for any relief or remedy for any tort or civil wrong;

(b) in which a claim made by the Plaintiff is based on an allegation of fraud;

(c) in which a claim is made by the Plaintiff for damages for breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a law or independently of any contract or any such provision or where the damages claimed consist of or include damages in respect of death of any person or in respect of personal injuries to any person or in respect of damage to any property;

(d) in which a claim is made by the Plaintiff in respect of infringement of a patent, trade mark, copy-right, intellectual or any other proprietary interest of whatever kind;

(e) in which a claim for a declaration is made by an interested person.

Rule 2(3):

\"Proceedings may be commenced by originating motion or petition where by these rules or under any written law the proceedings in question are required authorised to be so begun but not otherwise.'

In the motion under consideration which I have reproduced above, the reliefs are claimed against the 3rd - 8th Respondents who however, are not parties in Suit No. M/153/82. The Appellant seeks an order or orders directing them to deliver up possession of the properties specified therein. It is clearly a claim for relief or remedy for tort or other civil wrong he has suffered and it comes squarely within Rule 2(I)(a) above. There is no doubt therefore that in so far as the commencement of an action is concerned, the motion did not comply with the provisions of Order 1 Rule 2(1) of the Borno State High Court (Civil Procedure) Rules 1988.

The crucial question however is whether, having regard to the facts and circumstances of this case, it was such non-compliance that justified the dismissal of the motion' Mr. Daudu, SAN argued that the reliefs can be granted by recourse to section 4 of the Borno State High Court (Civil Procedure) Rules Law and Orders 46 and 2 Rule 1(1) of the Borno State High Court (Civil Procedure) Rules.

Section 4 of Borno State High Court (Civil Procedure) Rules Law says:-

\"4. Where a matter in respect of which no provisions or adequate provisions are made in the Rules, the Court shall adopt such procedure as will in its view do substantial justice between the parties concerned.\"

Order 46 of the High Court Rules states:-

\"Subject to particular rules, the Court may in all causes and matters make any order, which it considers necessary for doing justice, whether such order has been expressly asked for by the person entitled to the benefit of the order or not.'

And Order 2 Rules 1(1) of the Rules provides;

\"Where in the beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings or any document, judgment or Order therein.\"

Section 4 of the Borno State High Court (Civil Procedure) Rules Law does not appear to me to fully answer the question under consideration, since Order 1 Rule 2(1) provides for the mode by which the Appellant can claim the relief or remedy for the civil wrong inflicted on him. Similarly Order 46 does not, in my view, adequately answer the question since its applicability is subject to particular rules such as Order 1 Rules 2(1) of the High Court Rules.

But the clear spirit of these provisions and Order 2 Rule 1(1) is that, in the application of the High Court Rules, the Courts are enjoined to ensure substantial justice between parties. After all, Law including Rules of Court is not and should not be regarded as an end in itself; it is only a means to an end, which is justice. The Courts will not therefore insist on strict compliance with any particular Rules of Court if such strict application would inflict outright injustice. That has been the focus of this Court over the years. In Oloba v. Akereja (1998) 2 NSCC 120 at 136, this Court, per Oputa JSC, emphasised the very purpose of rules of Court as follows:-

\"All Rules of Court are made in aid of justice. That being so, the interest of justice will have to be given paramountcy over any Rule compliance with which will lead to outright injustice.\'\'

Thus in its resolve to construe statutes and rules of Court only for the ends of justice, this Court has articulated in a number of cases that whenever a Plaintiff establishes a wrong that has been inflicted on him by a defendant, he should be granted a remedy inspite of defects and other inadequacies as to form and contents of the document by which he initiates and sets out his claim. This was eloquently demonstrated in the earlier case of Aliu Bello & 13 Others v. Attorney-General of Oyo State (1986) 5 NWLR (Part 45) 828. In that case, this Court, per Oputa JSC, at page 886 restated the principle thus:-

\"Law and all its technical rules ought to be but a hand maid of justice and legal inflexibility which may be becoming of law may, if strictly followed, only serve to render justice grotesque or even lead to outright injustice. The Court will not endure that mere form or fiction of law introduced for the sake of justice, should work a wrong contrary to the real truth and substance of the case before it "..

(underlining mine).

And at page 871, Karibi-Whyte restated the principle more pointedly when he said:-

\"I think it is erroneous to assume that the maxim ubi jus ubi remedium is only an English Common Law principle. It is a principle of universal validity couched in Latin and available to all legal systems involved in the impartial administration of justice. It enjoins the Courts to provide a remedy whenever the Plaintiff has established a right. The Court obviously cannot do otherwise. It is enjoined to eschew reliance on technicalities in the determination of disputes See State v. Gwonto & Others (1983) 1 SCNLR 142 at 160. The substance of the action rather than the form should be the predominating consideration. The Appellants have relied on the decision of this Court in Folabi v. Folabi (1976) I NMLR 169, 171 to argue that even if the writ of summons and statement of claim had not specified a particular law under which the action was brought, the Court will give a remedy where the facts as disclosed fall within a remedy recognised in law. I think this is a correct principle deducible from Folabi v Folabi (supra).'

(underlining mine)

See also Margaret Chinyere Stitch v A.G. Of The Federation (1986) 5 NWLR (Part 42) 1007; (1986) 2 NSCC 1389, where the principle was again, amply demonstrated by this Court. There the Plaintiff/Appellant claimed for the release of her car, which was taken in the custody of the Board of Customs in 1982. She lost at the High Court and her appeal to

the Court of Appeal was dismissed. Her further appeal to this Court succeeded. This Court found her entitled to the release of the car as claimed. But by the date of the judgment 12/12/86 what was left of the car was only the wreck which release to the Appellant would not meet the justice of the case. And for the purpose of providing a remedy for the Appellant for the wrong she suffered, this Court ordered the award of damages (which she never claimed) and remitted the case back to the trial Court for assessment of same.

In the light of the above, would the two Courts below be said to have done substantial justice between the parties by dismissing the motion in its entirety for non-compliance with Order I Rule 2(1) of the Borno State High Court Civil Procedure Rules, in view of the established factual situation' The factual situation is contained in prayer (B) of the motion and paragraphs 5, 6 and 7 of the supporting affidavit, which I have reproduced earlier in this judgment. It is to the effect that the 1st Respondent, in collusion with the 2nd Respondent and feigning a Court order that never existed, sold the four properties in relief (B) to some of the 3rd ' 8th Respondents. It is an allegation of fraudulent manipulation of the Court\'s process for an unlawful deal. The allegation is not denied by the 1st and 2nd Respondents. The 3rd Respondent who filed a counter affidavit some 10 years after on the 21/2/97 said nothing in denial. And of course they (Respondents) cannot deny in the face of the overwhelming evidence on record.

The Appellant has proved beyond any doubt that he has been unduly deprived of his properties for over 22 years. He has firmly established a right for which he is entitled to a remedy in law. In the face of this very strong factual situation entitling the Appellant to a remedy at law, should he be denied redress by this Court because of the admittedly wrong procedure by which he has come to Court' I shall answer this question in the negative.

There is yet another factor worth considering on this vexed issue of the wrong procedure. The decision whether to come by way of a motion or a writ of summons was entirely that of the Appellant\'s Counsel G. Brown-Peterside, SAN who formulated the process. (See page 2 of the record.) This Court has insisted in a long line of cases that parties should not he punished for the ignorance or mistake of their Counsel. See Ibodo v Enarofia (1980) 5 SC 42; Nneji v Chukwu (1988) 3 NWLR (Part 81) 186; Obidiaru v Unique & Anor (1986) 3 SC 39; Afolabi v Adekunle (1983) 8 SC 98. In Bello v A.G. of Oyo State (supra) at 870 ' 871, this Court, per Karibi-Whyte. JSC again articulated this principle of justice in the following terms:-

\"The Respondent has contended that Counsel did not in fact advert his mind to the Torts Law because of his reliance on the maxim ubi jus ubi remedium (meaning where there is a right, there is a remedy), suggested that he knew there was a right but that there was no remedy; and is asking this Court to provide one. That may well be the case. Even in such a situation the Court cannot in the discharge of its sacred duty to do justice be inhibited by the ignorance or carelessness of Counsel. The injustice resulting to the cause of the litigant from such demonstration of ignorance and carelessness does not adversely affect Counsel whose fees remain undiminished. I think 1 am speaking the mind of all those engaged in the administration of justice, not only in this Court but in all Courts in this country that the day the Courts allow the inarticulacy and ignorance of Counsel to determine the result of an action before it, that day will herald the unobtrusive genesis of the unwitting enthronement of injustice aided by the Court itself by default.\"

This principle should apply with equal force in this case. Rather than decide the case on the mistake of learned Counsel to the Appellant, the case should be decided on the merit based on the undisputed facts before the Court.

Before going to the conclusion, it is necessary to examine the role played by the 1st Respondent, Alhaji Lawan Monguno. He conceived and executed the unwholesome deal of selling the four properties and has deprived the Appellant of his properties for over 22 years. He has since abandoned the case for the 3rd, 4th and 7th Respondents, ostensibly in the belief that he no longer has anything to lose in its outcome. The effect of a dismissal of the motion is that he takes full benefit of his fraudulent deal and forever denies the Appellant of his title to the properties. That would be outright perpetration of injustice. A Court of justice cannot allow this. It has been settled that a party who has committed an illegality cannot be allowed to benefit from same. See Oilfield Supply Centre Ltd. v Johnson (1987) 2 NWLR (Part 58) 625; African Petroleum Ltd v Owodunni (1991) 8 NWLR (Part 210) 391; Ayimka v Lawal (1994) 7 NWLR (Part 356) 263.

There is also the Appellant\'s complaint about the trial Court\'s adjournment of the motion for nearly 10 years. On the

16/2/88, the trial Court adjourned the motion on the ground that a determination of same would render nugatory, the decision in Suit No M/36/86 and render the whole exercise merely academic and it remained so stayed for nearly 10 years. The Court, of Appeal saw the adjournment as a proper exercise of the Court\'s judicial discretion. Here again, there was some misconception about the relevance of Suit No M/36/86 and the motion. It is my view that the outcome of the fresh Suit had nothing to do with the execution carried out in the previous Suit No M/l 53/82. Its decision could not have restored to the Appellant, the properties comprised in relief (A) which attachment and sale were carried out under the valid order of the 29/2/84. Nor could the decision in the fresh suit have validated the fraudulent and unlawful sale of the properties comprised in relief (B). The fresh suit was, therefore, irrelevant in the determination of the merits or demerits of the motion. But for this misconception and the resultant adjournment, the motion would have been disposed of about 10 years earlier. The delay, no doubt, aggravated the injuries suffered by the Appellant. His complaint about the unwarranted adjournment therefore has merit.

In the light of the foregoing considerations and particularly having regard to the facts and circumstances overwhelmingly in favour of the Appellant and the legal effect of the dubious and unauthorised sale of the properties listed in relief (B) of the motion, a Court of equity, which this Court is, has a duty to look at the substance of the relief sought in the said prayer (B) and grant such a remedy as meets the justice of the case. The substance of what he claims, from the text of the prayer, is for an order of Court for the immediate restoration of his properties to him and I would not hesitate to hold that he is so entitled. A dismissal of the motion on ground of defective procedure as contained in the concurrent decisions of the two lower Courts would only enthrone injustice.

In conclusion therefore, I hold that the appeal partly succeeds and partly fails. The appeal in respect of the three properties in prayer (A) of the motion fails and the judgment of the two Courts below in respect thereof be and is hereby affirmed.

The appeal in respect of the four properties in prayer (B) of the motion succeeds and the judgment of the trial Court in respect thereof and affirmed by the Court of Appeal be and is hereby set aside. In its place, I substitute a judgment directing that the Appellant who remains the owner, is entitled to immediate restoration and possession of the four properties therein described.

I make no orders as to costs.

Judgement delivered by
Idris Legbo Kutigi. J.S.C.

I have had the privilege of reading in advance, the judgment just rendered by my learned brother Tabai, JSC. I agree with his reasoning and conclusions. The appeal succeeds in part only. The appeal in respect of three (3) properties listed under prayer (A) of the motion paper fails and is dismissed, while the appeal in respect of four (4) properties listed under prayer (B) in the motion paper is allowed. The judgments of the lower Courts as they relate to prayer (A) is therefore affirmed, and they are set aside in respect of prayer (B) only. The Respondents are directed to quit and deliver up possession of the four (4) properties listed in prayer (B) to the Appellant forthwith.

I also make no order as to costs.

Dissenting Judgement delivered by
Aloysius Iyorgyer Katsina-Alu. J.S.C.

I have had the advantage of reading in draft, the judgments delivered by my learned brothers Tabai and Oguntade JJSC in this appeal. The facts of the case have been set out in detail in both judgments. I do not therefore think it is necessary for me to recount them here. Suffice it to state that the 1st Respondent as plaintiff sued the Appellant under the undefended list at the Borno State High Court and obtained judgment. The Appellant appealed against the judgment. He however did not seek an order for stay of execution of the judgment pending the determination of his appeal.

Meanwhile the plaintiff brought an application for leave to attach three immovable properties of the Appellant covered by certificates of occupancy Nos. NE 1776, NE 1777 and NE, 1828. The application to sell the three properties was granted on 29th February 1984 and the plaintiff sold the appellant\'s three properties. The plaintiff did not stop there. He also sold the appellant\'s four other properties over which there was no Court order.

As I have already stated, the appellant appealed against the judgment of the High Court given in favour of the plaintiff. So, on 27th January 1986 the judgment of the High Court was pronounced a nullity and set aside. A nullity is in law, a void act, an act which has no legal consequence. The act is not only bad, it is incurably bad: Sec Okafor v. A. G. Anambra State (1991) 6 NWLR (Pt.200) 659; Leedo Presidential Hotel Ltd. V. Bank of the North (1998) 10 NWLR (Pt. 570) 353. The position of the law therefore is that every proceeding, which is founded on a void act, is also bad and incurably bad. You cannot put something on nothing and expect it to stay there: Macfoy v. U.A.C Ltd. (1962) AC 152 at 160. The sale of the appellant\'s properties under a judgment declared a nullity, is null and void and of no legal consequence.

One last thing. The plaintiff sold the seven properties of the appellant when the decision of the High Court was on appeal to the Court of Appeal. That was a risky gamble. I should imagine he knew that. So did the buyers. They lost.

For the foregoing and the fuller reasons given by my learned brother Oguntade JSC, I would also and do hereby allow the appeal. The judgments of both the High Court and the Court of Appeal are hereby set aside. I make an order directing that the appellant\'s properties be restored to him forthwith, I also abide by the order for costs.

Pronouncement by
Idris Legbo Kutigi. J.S.C.
(Presiding)

Pursuant to Section 294(2) of the Constitution of the Federal Republic of Nigeria

Hon Justice I.C. Pats-Acholonu who participated with us in the appeal agreed at our Conference to allow the appeal in respect of prayer B and dismiss same in respect of prayer 'A'

Dissenting Judgement delivered by
George Adesola Oguntade. J.S.C.

The 1st respondent, as plaintiff in suit No M/152/82 had brought a suit against the present appellant, as the defendant. The suit was brought in 1982 under the undefended list procedure. The Borno State High Court on 16/12/82 awarded in plaintiffs' favour N1,412,926.00 and costs of N5,000.00. Dissatisfied, the appellant brought an appeal against the judgment. He however did not seek an order for stay of execution of the judgment pending the determination of the appeal filed. This enabled the plaintiff to proceed to execute the judgment. It would appear that the movable properties of the appellant were insufficient to satisfy the judgment debt.

The Plaintiff brought an application for leave to attach three immovable properties of the appellant covered by

certificates of occupancy Nos. NE 1776,NE. 1777 and NE 1828. On 29-2-84, the Chief Judge of Borno State granted the application to sell the three properties. The plaintiff promptly sold the appellant\'s three properties hereinafter referred to as 'Lot A'. In addition, the plaintiff sold the appellant\'s four other properties in respect of which he never sought or obtained leave of Court. Those four properties are hereinafter referred to as 'Lot B'.

The appeal against the judgment of the High Court was heard by the Court of Appeal. On 27/1/86, the judgment of the High Court was pronounced a nullity and set aside. The consequence is that the judgment in respect of which appellant\'s properties were sold ceased to exist. The reaction of the plaintiff was to file a fresh suit No M/36/86. Following an application by the appellant, the order made by the Chief Judge on 29/2/84, for the sale of plaintiff\'s immovable properties was on 15-7-86 set aside.

On 25-7-87, the appellant filed an application praying for the following orders:

(A) Directing the 3rd - 8th Respondents/any of them to quit and deliver up possession of the under-listed three houses covered by Certificate of Occupancy Nos. NE 1776, NE 1777 and NE 1828 sold at an auction by the 2nd Respondent at the instance of the 1st Respondent and purchased severally by the 3rd - 8th Respondents pursuant to the Order of this Honourable Court in the suit herein on the 29th February 1984 which order has now been set aside by the order of this Honourable Court of 15th July 1986 thereby rendering the sale of the said houses null and void.

1. One two-storey building situate at Buba Gana Road Gamboru Ward, Maiduguri.

2. Two storey-buildings in one compound situate at Railway Street Gamboru Ward, Maiduguri.

3. One house situated at No.29 Yaskuma Street, Gamboru Word Maiduguri.

(B) Also directing the 3rd-8th Respondents/any of them to quit and deliver up possession of the under listed houses unlawfully sold at the same auction by the 2nd Respondent at the instance of the 1st Respondent and purchased severally by the 3rd -8th Respondents:

(1) One house situate at Lawan Usman Street, Gamboru Ward, near Alhaji Mohammed\'s house, Maiduguri.

(2) One two-storey building situated along Airport Road Bulumkutu Ward Maiduguri,

(3) One house situated at No. 1 Musa Dagash Street Gamboru Ward, Maiduguri

(4) A piece of land measuring 100 ft x 50 ft at Bulumkutu Ward Maiduguri purchased by the Respondent.

The appellant brought in as parties to the application, the 3rd to 7th respondents in this appeal who were alleged to have bought the properties following the execution carried out based on the order of the Chief Judge made on 29/2/84 but which was set aside on 15/7/86. Rather than expeditiously hear the application, the Chief Judge strangely ruled, that he would not hear it, until the fresh suit filed by the plaintiff had been disposed of. The motion was not heard until 21/2/97, about 10 years after it was filed. On 7/4/97, the appellant\'s application was dismissed mainly on the ground that since the 3rd to 7th respondents had not originally been parties in the case between plaintiff and the appellant (i.e. Suit No M/l52/82), the appellant should have commenced a fresh suit against them to set aside the sale of his properties to them. Another reason is that the application should have been brought within 21 days after the properties were sold. It is worthy of note here that the 2nd , 3rd to 7th respondents were duly served with appellant\'s application and that the 3rd , 4th , 5th and 7th respondents participated in the proceedings on the application to set aside the sale of appellant\'s properties. In fact, the 3rd respondent filed a counter-affidavit.

Dissatisfied with the ruling of the High Court, dismissing his application to set aside the sale of his properties, the appellant brought an appeal before the Court of Appeal, Jos Division (i.e. the Court below). The Court below on 26/6/2001 dismissed the appeal by the appellant. In dismissing the appeal, the Court below at pp. 167-169 of the record of proceedings said:

'In Okafor v. A-G. Anambra State (1991)6 NWLR (Part 200) 659 at 678, Karibi-Whyte JSC discussing the distinction between nullity and irregularity stated as follows:-

'The distinction though very fine has always been made between procedural irregularity and nullity. A judgment may be set aside for irregularity where the irregularity consists of non-compliance with the rules. Thus where there is such non-compliance, which affects the fundamental principle of irregularity, and vitiating all acts resulting in a nullity. A nullity is in law a void act, an act which has no legal consequence. The act is not only bad, and as was stated by Denning. L.J. in U.A.C. Ltd V. Macfoy, 3 All E.R. 1169, is incurably bad.'

A nullity is in law a void act; an act which has no legal consequence. In that regard, a proceedings which has been declared a nullity is void and without any legal effect or consequence whatsoever. Just as it does not confer any legal rights or title whatsoever, it does not also impose obligation or liability on anyone or make any party liable to suffer any penalty or disadvantage. In other words, it does not of itself without more, make the respondents liable or compellable to do or eschew from doing any act.

See Dawodu v.Oologundudu (1986)4 NWLR (Part 33) 104 at 115; U.A.C. Ltd V. Macfoy (1962)A.C. 164.

Once a judgment and the entire proceedings as in this case, are declared a nullity, there was nothing left before the Court upon which the applicant could base any interlocutory application such as the one brought by the appellant in this case.

Furthermore, the judgment of the Court of Appeal dated 27/1/86 as contained at page 9 of the record of appeal, is a declaratory judgment. It merely declared the judgment and the proceedings a nullity. It did not contain any order that could be enforced by either of the parties. It has no coercive direction for its enforcement. Clearly the judgment of the Court of Appeal relied upon by the appellant for his application did not contain any consequential relief that could be enforced by the appellant. The learned Counsel for the appeal (sic) argued that the judgment of the trial Court was declared a nullity by the Court of Appeal and the order for sale has also been set aside by the trial Court on the application of the appellant and therefore the sale of the properties of appellant made pursuant to the judgment was also void.

I find it very difficult and indeed impossible to buy the argument of the learned Counsel for the appellant. There is a world of difference between an order for sale and the sale itself. At the time the order for the sale of the said properties was made, the interested parties to the suit were the appellant and the 1st respondent. After the sale of the properties and indeed at the time the judgment of the trial Court was declared a nullity by the Court of Appeal and the order for sale was, on the application of the appellant, set aside by the trial Court, 3rd party bonafide purchasers' interest had been involved. It should be noted that the 3rd to 8th respondents purchased the properties on the order of the Court under a valid judgment of the Court. It seems to me therefore setting aside of the judgment and the order for sale was not enough, the sale itself must be set aside by an order of the Court. At the time the appellant filed the motion on appeal on the 28/8/87, the sale of the properties to the 3rd to 8th respondents had not been set aside, and I think there must be a specific and clear order of the Court setting aside the sale of the properties to the 3rd to 8th respondents before any application as brought by the appellant can lie.'

The appellant was dissatisfied with the judgment of the Court below and has brought this appeal against it. In the appellant\'s brief filed, seven issues were identified for determination. The issues read thus:

'(1) Whether the Court of Appeal was right in affirming the decision of the Borno State High Court that steps taken by the latter in enforcing her judgment which was later adjudged a nullity by the former and which had led to the void sale of Appellant's houses could not be reversed by an application brought by way of a motion on notice as the Appellant did but by a writ of summons'

(2) Assuming but not conceding that the action to reverse the unlawful sale of his properties was initiated by wrong form and procedure i.e. by motion on notice, did this step divest the Borno State High Court, as affirmed by the Court of

Appeal, of jurisdiction to resolve and reverse the injustice perpetrated by the High Court or was it an irregularity that was cured by the participation of the Respondents in the proceedings and by the saving provisions of the Borno State High Court Rules'

(3) Whether the Court below was correct in law when it held that 3rd parties had acquired interest from void sale of Appellant\'s property by the Borno State High Court and whether that fact had any bearing on how a consequential action for the reversal of the void steps hitherto taken could be initiated'

(4) Whether the Court, below was correct in law in affirming the decision of Borno State High Court that the complaint of the Appellant to the effect that some of his houses not listed among those for which an order had been given for leave to sell them by way of auction, subsequently sold by the 2nd Respondent amounted only to an irregularity which could have been cured had the application been brought within 21 days as prescribed by sections 47 and 48 of the Sheriffs and Civil Process Act'

(5) Whether the sale of the Appellant\'s property pursuant to a judgment that was eventually declared null and void by the Court of Appeal could be described as an irregularity and incapable of being reversed except by recourse to the specific provisions of sections 47 and 48 of the Sheriffs and Civil Process Act'

(6) Whether contrary to the decision of the Court below affirming that of the trial Court, the fundamental rights of the Appellant was not grievously breached by the fact that the trial Court suo motu stayed the application leading to this appeal for 10 years while he dealt with Suit No. M/36/86 filed by the lst Respondent as a substitute to the proceeding that was adjudged a nullity'

(7) Whether the Court of Appeal was correct in the way and manner it affirmed the decision of the Borno State High Court in the way and manner the Appellant\'s application was dealt with, particularly with the excuse provided by the Court below that the Appellant did not obtain an order to set aside the void sale of his properties''

I intend to take all the issues together as they dovetail into each other. 1 like to preface a discussion of the issues here by stating the terms of section 44(1) of the 1999 Constitution which provide:

\"44(1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things -

(a) requires the prompt payment of compensation therefore; and

(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a Court of law or tribunal or body having jurisdiction in that part of Nigeria.\"

The implication of the above provision is that no property of a citizen shall be taken from him except in compliance with the due process of law. With reference to a litigation in Court over a property or property rights, no citizen can be subjected to the sale or expropriation of his properties except in compliance with a judgment of Court.

The facts leading to the dispute out of which this appeal arose are simple and straightforward. It suffices to say that it is all about the properties of a citizen sold based upon judgment which was subsequently set aside on the ground that it was a nullity. My learned brother has in the lead judgment made a distinction between the appellant\'s properties in respect of which leave to sell was obtained and those in respect of which no leave to sell was obtained. I have in this judgment described the former as \'lot A\' and the latter as \'lot B. I accept this differentiation however only for the purpose of showing the circumstances in which each lot was sold. I do not accept that the consequences attaching to the sale of the two lots are different. In my view both lots have a common feature. They were sold under the purported execution of a judgment subsequently declared null and void.

It is necessary that I emphasise here that this Court is the final Court in the land and that as a Court, we ought to be

mindful of the necessity to prevent a failure of justice. In Joseph Afolahi & 2 Ors. v. John Adekunle [1983] 8 SC. 98 at 119, this Court said:

'While recognising that the Rules of Court should be followed by parties to a suit, it is perhaps necessary to emphasise that justice is not a fencing game in which parties engage themselves in an exercise of out-smarting each other in a whirligig of technicalities, to the detriment of the substantial issues between them.'

In Okoro v. Migliore [1979] 11SC. 138 at 152, this Court per Aniagolu JSC similarly said:

\"My Lords, the laws of our land enjoin us, that while respecting procedural regularity, we must do substantial justice, with power to make amendments which we deem fit, or not to make them, as the occasions demand. I conceive that this case is one in which we must do substantial justice technicalities notwithstanding.\"

This Court has on several other occasions warned on the necessity to sweep aside technicalities where they obstruct the primary duty of the Court to do substantial justice: See Udo v. State [1981] 6-7 SC. 157 at 158; Onuoha v.C.O.P [1959] 4 F.S.C. 23
.
Now, the facts in this case and the injustice imposed on the appellant, arising from the failure of the Court to rise stoutly to the demands of justice is heart rendering and in my view, amounts to a monumental failure of justice of unequalled proportion. It is also a national shame. Let us revisit the dulling facts. The judgment against the appellant was given 16/12/82. Appellant\'s seven houses were sold in 1984, three of them under a Court order and four others without a Court order. Let me say that the sale of appellant\'s four houses without a Court order amounts to plain stealing. On 27/1/86, the judgment of the High Court, which was the basis for the sale of appellant\'s house, was declared a nullity by the Court below. The plaintiff did not appeal against the judgment. Rather than promptly move to restore the appellant\'s seven properties to him, the trial Chief Judge ruled that he could not do so until a fresh suit filed by the plaintiff was disposed of. In the process, appellant\'s properties were in the possession of those who had bought it for the 10 years that the new case was pending before the Chief Judge. Up till now he has not got his properties back 24 years after.

I opened this judgment by referring to section 44(1) of the 1999 Constitution. No citizen may be deprived of his property without the due process of law. It was under the due process of law that judgment was given against the appellant and his properties sold. It was by the force of the same due process of law that the judgment of the High Court was set aside as a nullity by the Court below. Why did the same due process not restore the appellant\'s properties to him' It seems to me that the system has denied the appellant his right to justice and to his properties. It was argued against the appellant that under sections 47 and 48 of the Sheriffs and Civil process Law, Cap. 123 Laws of Northern Nigeria, 1963, he ought to have brought an application to set aside the sale of his house within 21 days after the sale. These sections in my view would obviously not apply where the appellate Court set aside the judgment upon which the execution was based. It defies law and logic to say that a judgment/debtor whose property was sold in satisfaction of a judgment debt ought to apply within 21 days to set aside the sale when the appeal process to the Court of Appeal had not been concluded within 21 days. He could only bring an application to set aside the sale, after he won on appeal.

The reasoning that the appellant ought to have brought a new suit against those who bought his properties in accordance with the Rules of Court will, if upheld, defeat justice. In the first place, the appellant\'s right to have his properties back was delayed up for ten years by the trial Court which insisted on disposing of the plaintiffs new case before hearing appellant\'s application. Even if the Rules of Court impose that a new writ be issued, I think the trial Court should have seen that having delayed the appellant for ten years, his suit stood a risk of being statute barred.

In the application brought by the appellant to set aside the sale of his properties, all those involved i.e. the 3rd to 7th respondents to whom appellants properties were sold had had the opportunity of presenting their case. In other words, there was no denial of justice to them. More than that, this was a simple case. The judgment which was the basis of the execution levied had been set aside. I think that the two Courts below were wrong to insist that the appellant needed to start afresh by brining a new suit against those who bought his properties.

It is distinctly unjust to set the appellant on a path, which would end, disastrously for him since the new action he might

file would be statute barred. The Rules of Court prescribed the procedure for commencing a fresh action. Undoubtedly, appellant would have needed to bring a fresh action against the 3rd to 7th respondents in accordance with the Rules. But to insist on compliance with the Rules of Court in the circumstance would lead to a miscarriage of justice.

It is invidious in the extreme to rely on the provisions of the Sheriffs and Civil Process Law to deny the appellant the opportunity to recover his property. If the Courts below had borne in mind that, in the peculiar circumstances of this case, adherence to the provisions of the Sheriffs and Civil Process Law would lead to a breach of Section 44(1) of the 1999 Constitution and the appellant denied his property rights without a judgment against him, they would not have followed the approach they did. Any provisions of the law ought not be construed in a manner that may result in the breach of a Constitutional provision.

The Court below, rightly in my view, stated that when a judgment of a Court is pronounced a nullity, no rights under the law can flow from it. The leave granted by the Chief Judge that appellant\'s properties be sold itself became a nullity the moment the judgment upon which it was hinged was pronounced a nullity. In the same manner the sale of appellant\'s properties became a nullity. The appellant became ex debito justiciae entitled to an order returning his properties to him. It is in my view erroneous to treat the properties comprised in 'lot A' in a manner different to the properties comprised in \'lot B'. Both, at the end of the day, became properties sold in defiance of the law. There can be no degree of a nullity. If it is accepted that because the sale of appellant\'s four properties was a nullity because, no leave of Court was obtained to sell them, then afortiori, the sale of appellant\'s three other properties for which leave was obtained but which leave became a nullity following the judgment of the Court of Appeal declaring the High Court judgment a nullity, also became a nullity.

The consequence of a failure to set aside the sale of appellant\'s properties is that those properties have been in the hands of other persons for 24 years without a subsisting Court judgment. It is a most unacceptable occurrence.

In the final conclusion, I would allow this appeal. The judgments of the two Courts below are set aside. It is ordered that the appellant\'s seven properties be restored to him forthwith. The appellant is entitled to costs in the two Courts below and this Court which I fix at N3,000.00, N7,000.00 and N10,000.00 respectively.