

# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC82/1999

**Petitioner:** Matthew Okechukwu Enekwe

And

**Respondent:** Alhaji Musa Jagab, Alhaji Hamisu Umaru

Date Delivered: 2006-12-08

**Judge(s):** Umaru Atu Kalgo, Niki Tobi, Mahmud Mohammed, Ikechi Francis Ogbuagu, Francis Fedode Tabai

## Judgment Delivered

The appellant is the plaintiff. He is the registered owner of Plot No 3, Julius Bala Crescent, Legislators Quarters, Jos. The Certificate of Occupancy bears No BP 3785. The appellant is also the Chairman and Managing Director of Crystal Star Associates and Company Limited.

The plot was mortgaged to the 1st respondent as collateral for a loan advanced to Crystal Star Associates and Company Limited. Between 1987 and 1990 the 1st respondent, the mortgagee, made several attempts to realise their security. The first attempt was made between June and July 1987. The property was advertised for public auction because of the default on the part of the appellant to redeem the mortgage.

The 1st respondent decided to sell the property. Appellant quickly ran to court to stop the sale. That was in Suit No PLD/J197/87. The suit was assigned to Soluade, J. It was dismissed for want of diligent prosecution.

On 16th February, 1988 the appellant filed two motions in Suit No. PLD/J197M2/88. The first one was on notice for an injunction against 1st respondent from selling the property. The second one was ex parte for an interim injunction against 1st respondent from selling the property. The two motions came before Uloko, CJ, although the suit pending before Soluade, J, was neither reassigned nor withdrawn. On 23rd February 1988, Uloko, CJ, granted the interim injunction ex parte. He made an order restraining the 1st respondent from selling the property. The Chief Judge did not give a date for the hearing of the motion on notice. And so, it was a one way affair, the affair of the appellant as the 1st respondent was shut out of the litigation. And so was it; badly so.

There seems to be a general agreement on the above facts although there could be infinitesimal areas of disagreement. There is, however, a very loud area of disagreement. Let me state it quickly. It is the case of the appellant that while the ex parte order of Uloko, CJ, was valid and subsisting, the 1st respondent sold the property to the 3rd respondent who in turn resold it to the 2nd respondent. The 1st respondent has a different version of the matter. It is this. On 7th March 1988, the motion No PLD/J197M5/87 was struck out for want of diligent prosecution. Similarly, on 8th March 1988, the Court of Appeal dismissed the motion No. CA/J18M/88 also filed by the appellant to restrain the 1st respondent from selling the property pending on a purported appeal filed before the Court of Appeal as same was abandoned. With this development, 1st respondent sold the property to 3rd respondent who in turn sold it to the 2nd respondent on 7th September, 1989 when it appeared that "all the flurry of actions instituted by the appellant had abated." In other words, the case of the 1st respondent is that there was no subsisting or pending order when the property was sold. And so they parted ways, materially too.

Aggrieved by the sale, the appellant filed an action. He asked for two declaratory reliefs as follows:

"(1) A declaration that the 1st defendant herein has no interest whatsoever in the property for the time being.

(2) A declaration that the purported sale of the property of the 1st defendant to the 2nd and 3rd defendants is/are unlawful, null and void and of no effect whatsoever."

The 1st respondent counter-claimed for the sum of N102,109.5 being outstanding balance on the account of Crystal Star Associates and Company Limited. The 2nd respondent counter-claimed for possession of the property.

The High Court dismissed the claim of the appellant and struck out the counter-claims and held that the suit was an abuse of court process. On appeal the Court of Appeal dismissed the appeal and cross-appeal.

The appellant has come to this court. Briefs were filed and duly exchanged. The appellant formulated three issues for determination:

1. Whether the sale of the appellant's property was valid during the pendency of a restraining order.
2. Whether the Court of Appeal was right in raising new (sic) suo motu.
3. Whether the Court of Appeal was right in dismissing the appeal."

The respondents also formulated three issues for determination:

- a. Whether, going by the facts and law applicable in this case, whether the doctrine of 'lis pendens' is applicable.
- b. Whether the reliefs sought by the appellant at the lower court were not declaratory in nature and whether the Court of Appeal was wrong in applying the principles of equity when it dismissed appellant's case.
- c. Whether the title of bona fide purchaser can be nullified merely on the fact that the sale was made during the pendency of a restraining order."

I am in some difficulty to understand Issue No 2 in appellant's brief. It appears to me that there is some leakage in the sentence between the words "new" and "suo". I do not know what that word is. Could it be "issue"? That is likely to be the word. I lack the legal capacity to block the leakage with the word as I cannot speculate, as a Judge. I do not know what to do. I am helpless. Let me stop here, hoping that my speculation, though a foul to rules of procedure, is correct. Fortunately or unfortunately, there is no court beyond this to blow the whistle and award appropriate penalty.

Learned counsel for the appellant Mr. Zik Obi, submitted on Issue No 1 that the doctrine of lis pendens applies in the case as the 1st respondent sold the property during the pendency of the motion. He cited *Osaqie v. Oveyinke* (1987) 3 NWLR (Pt. 59) 144; *Bamqboye v. Olusoqa* (1996) 4 NWLR (Pt. 444) 502; *Ebieku v. Amola* (1988) 2 NWLR (Pt. 75) 128; *Odukwe v. Ogunbivi* (1988) 8 NWLR (Pt. 561) 339 at 356-357; *Aiuwon v. Akanni* (1993) 5 NWLR (Pt. 316) 182; *Barclays Bank Nigeria Ltd, v. Alhaji Ashiru* (1978) 6-7 SC 123; *Ogundaini v. Araba* (1978) 6-7 SC 55; *Ikeanvi v. ACB Ltd.* (1991) 7 NWLR (Pt. 205) 626 and *Combined Trade Ltd, v. ASTB Ltd.* (1995) 6 NWLR (Pt. 404) 709.

Taking Issues 2 and 3 together, learned counsel submitted that a court of law can only adjudicate on issues raised or apparent in the pleadings of the parties or in their notice of appeal. He cited *Kolawole v. Valberto* (1989) 1 NWLR (Pt. 98) 382; *Okonii v. Niokanma* (1991) 7 NWLR (Pt. 202) 131. Also citing *Lewis and Peat (NRI) Ltd, v. Akhimien* (1976) 7 SC 157; *Overseas Construction Ltd, v. Creek Enterprises Ltd.* (1989) 3 NWLR (Pt. 13) 407; *George v. Dominion Floor Mills Ltd.* (1963) 1 All NLR 71 and *Eneaokwe v. Okadiabo* (1973) 4 SC 113, learned counsel submitted that the right sought was dubious and transitory was never an issue before the court and none of the respondents raised the issue.

Learned counsel pointed out that issues like malice, the origin of the right sought whether dubious or otherwise and the substantiality of the relief were never issues before the Court of Appeal. He reminded the court that the relief claimed at the trial court is for two declarations in respect of the property. Learned counsel attacked the dictum of the Court of Appeal to the effect that

"his present appeal is so infinitesimally insubstantial tenuous and limited duration that one would wonder if the appellant had not been pursuing the course maliciously."

To learned counsel, the dictum is a total misconception of the appeal and the relief sought from the Court of Appeal. He also attacked the dictum of the Court of Appeal to the effect that

"a declaratory relief is discretionary and the court must always exercise the greatest caution when called upon to make declaratory orders."

He particularly attacked the use of the expressions "dubious and transitory", on the ground that the words never arose for determination. He accused the Court of Appeal of making a case which the parties by their pleadings did not make. Citing *Aemacchi v. AIC Ltd.* (1986) 2 NWLR (Pt. 23) 443; *Lewis and Peat (NRI) Ltd, v. Akhimien (supra)* and *Overseas Construction Ltd, v. Creek Ent. Ltd.* (1985) 3 NWLR (Pt. 13) 407, learned counsel submitted that whether the right sought was dubious and transitory was never an issue before the court and none of the respondents raised it.

Learned counsel contended that as the Court of Appeal disagreed with the learned trial Judge that the appellant did not abuse the process of the court, it ought to have allowed Ground 3 and set aside the sale of the appellant's property by invoking section 16 of the Court of Appeal Act and Order 3 Rule 23 of the Court of Appeal Rules 1981. He urged the court to allow the appeal.

Learned counsel for the respondents, Mr. Bankole Falode, submitted on Issue No 1 that the ex parte order made by Uloko, CJ, was not pending at the time the property was sold to the 2nd and 3rd respondents on 9th July, 1989. Even if the suit was pending at the time the sale was made, learned counsel submitted that the suit under which the order was made did not qualify or entitle the appellant to the defence of *lis pendens*. He enumerated five conditions at page 4 of the respondents' brief when the doctrine of *lis pendens* can apply. Citing *Ikeanvi v. ACB Ltd.* (1991) 7 NWLR (Pt. 205) 639, learned counsel submitted that all the five conditions must co-exist for the doctrine to apply.

Learned counsel contended that the doctrine does not admit of spurious claim or litigation which is merely fabricated and ostensibly to prevent or suspend the legal right of an opponent, particularly in a claim which is dubious and invented to prevent the realisation of the loan granted the appellant by the 1st respondent. Citing *Barclays Bank of Nigeria Ltd, v. Ashiru* (1978) 6-7 SC 79, counsel submitted that the doctrine of *lis pendens* cannot be applied to a bogus suit. He also submitted that the relief of declaration sought by the appellant in the suit does not qualify to grant the application of the doctrine of *lis pendens* because the suit was not an action as to dispute over the property.

On Issue No 2, learned counsel submitted that as the reliefs sought by the appellant were declaratory in nature, the Court of Appeal was right in applying the principles of equity in dismissing the appeal of the appellant. He cited *Barclays Bank of Nigeria Limited v. Ashiru* (1978) 6-7 SC 99; *Bello v. Eweka* (1981) 1 SC 101 and *Fasesin v. Overinde* (1997) 11 NWLR (Pt. 530) 552. Learned counsel unnecessarily repeated his arguments on this issue, almost to an annoying point; repeating the principles of equity required in a declaratory relief. I got thoroughly fed up in his arguments on the issue.

On Issue No 3, learned counsel submitted that the title of a bona fide purchaser cannot be nullified merely on the fact that the sale was made during the pendency of a restraining order. He argued that as the 2nd and 3rd respondents paid for the property and their actions were not fraudulent but bona fide, both equity and law are in their favour. He urged the court to dismiss the appeal.

Let me take the cross-appeal. The following two issues are formulated for determination:

"1. Whether or not the dismissal of the action on 15/12/87 was a final judgment in which case there was no need for leave of Court of Appeal.

2. Whether the ex-parte interim order of injunction granted on 23rd February 1998 was subsisting as at the time the property was sold to 2nd and 3rd cross-appellants on 7th September, 1989."

The cross-respondent formulated the following issue for determination:

"Whether or not the sale of the appellant's property on the 7/9/89 was carried out during the pendency of ex parte order

made on the 23/2/88 notwithstanding the dismissal of Suit No. PLD/11/97/87."

Learned counsel for the cross-appellant, Mr. Bankole Falade, argued the two issues together. He submitted that the dismissal of the action on 15th December, 1987 was not a final order but an interlocutory order. He cited *Solomon v. Warner* (1981) 10B 734; *Blakev v. Latham* (1989) 43 Ch. D 23; *Afuwape v. Shodipe* (1957) SCNLR 265 and Rules of the High Court of Plateau State. Being an interlocutory order, before the appellant/cross-respondent could validly appeal against the order, he needed to seek leave of the High Court by virtue of section 221(1) of the 1979 Constitution of the Federal Republic of Nigeria, counsel argued.

He submitted that as the appeal in interlocutory judgment was not filed within fourteen days but was filed after sixty-days, the appeal was incompetent. He cited *Alave of Efon v. Fasani* (1956) SCNLR 771; *Omonuwa v. Oshodin* (1985)2NWLR (Pt. 10) 10 and *Macfov v. UAC* (1961) 3 All ER 1169.

Although the impression is given in the brief that Issues 1 and 2 are argued together, learned counsel only argued Issue 1. He did not take Issue 2. Learned counsel for the cross-appellant raised a preliminary objection in his brief. The objection is on Grounds 1 and 2 of the Grounds of Appeal and Issue 1 of the Cross-Respondent's Brief. He relied on Order 8 Rule 2(2) and (4) of the Supreme Court Rules 1985 as amended and the following cases: *Shanu Ltd, v. Afribank Nigeria Plc* (2002) 17 NWLR (Pt. 795) 185 at 216; *Akinwale v. BON* [2001] 4 NWLR (Pt. 704) 448 at 455; *So Mai Sonka Co. (Nig.) Ltd, v. Adzeae* (2001) 9 NWLR (Pt. 718) 312 at 320; *Orakosin v. Menkiti* [2001] 9 NWLR (Pt. 719) 529 at 539; *Mbakwe v. RMS Africa* (2001) 4 NWLR (Pt. 704) 575; *Chime v. Chime* [2001] 18 NWLR (Pt. 701) 527 at 550; *Adediran v. Alao* (2001) 18 NWLR (Pt. 745) 361 at 381; *Berevin v. Gbobo* (1989) 1 NWLR (Pt. 97) 372 and *FBN v. Nioku* [1995] 3 NWLR (Pt. 384) 457 at 474-475.

Taking the only issue for determination, learned counsel argued that since the two courts below agreed that the property of the appellant was sold while the ex parte order was in force, this court should not interfere with the concurrent findings of the courts, as they are not perverse. He cited *Texaco Overseas (Nig) Limited v. Pedmar (Nig) Limited* (2002) 13 NWLR (Pt. 785) 526 at 545 and *Egesimba v. Onuzuruike* (2002) 15 NWLR (Pt. 791) 466 at 508. He urged the court to resolve the issue against the cross-appellant.

I do not think there is any argument or there should be any argument that the sale of the property was made when the ex parte order of interim injunction was subsisting. It is clear from the facts of the case that Uloko, CJ, made the ex parte order of interim injunction on 23rd February 1988 and the sale was carried out on 7th September, 1989. Accordingly the learned trial Judge, Azaki, J, was correct when he said at page 54 of the Record:

"From the materials before me it is obvious that the sale was carried out while the interim injunction was still subsisting."

The Court of Appeal held the same view when that court said at page 129 of the Record:

"The lower court was therefore correct when it held that the interim ex-parte order was still subsisting when the sale of appellant's property was carried out."

I do realise that both parties have formulated issues that will serve their purpose. While this should be so, a court of law, the mediator so to say, has a duty to examine the facts properly and take issues that will resolve the matter before it once and for all. I see that the appellant, with the greatest respect, has cunningly phrased his Issues 1 and 2 to achieve a technical purpose but this court has moved beyond the terrain of technicalities to the domain of doing substantial justice. After all, the terminal aim and result of any legal system is justice personified and wearing a human face. And so when the appellant formulated the first issue on the validity of the sale of the property during the subsistence of the restraining order, and argued it without considering the peculiar circumstances of the case in its factual milieu, I sensed some trick. I will, however, not go into the trick but rather take the issue along with Issue 1 of the respondents brief which addresses specifically and squarely the relief sought by the appellant in this matter.

The crux of the matter centres on the doctrine of *lis pendens*. I describe the doctrine as the crux of this appeal because

after the appellant has chased the shadow in Issue 1 in his brief, one will finally arrive at the substance in Issue 1 of the respondents brief. And so, why not chase or pursue the substance rather than the shadow' A shadow is more like a mirage to the eyes and a substance the material; the real thing. Chasing or pursuing a shadow looks so much like a caricature and caricatures are not for the court but they are for the streets and the market place; but realities are. Courts of law do not therefore chase or pursue shadows; they chase or pursue the material or real thing in the litigation. They look at the res and give decision on it. And that is what I will do here, the Judge that I am. I will therefore take the first issues formulated by the parties together. By that I will finally end up with the substance, my ultimate goal.

And that takes me to the examination of whether the doctrine of lis pendens applies in this case. The expression is made up of two Latin words. The first is lis. The second is pendens. The word lis means a piece of litigation, a controversy. The word pendens conveys the connotation of pending. The two words put and read together generally mean a pending law suit. The expression is a useful Latinism that has given its name to a notice required in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit must be subject to the outcome of the litigation. Traditionally, this notice was called the notice of lis pendens, but 20th century American lawyers have shortened the phrase to merely lis pendens. See Bryan Garner, *A Dictionary of Modern Legal Usage*. Second Edition, page 350. This reflects and confirms the traditional racing colloquial language of the Americas and the Americans.

The doctrine which is embedded in the common law gives notice to persons by way of warning that a particular property is the res of a litigation and that a person who acquires any interest in it must know well ahead that the interest will be subject to the decision of the court on the property. This reminds me of the fuller Latin expression, *pendente lite nihil innovetur*, which means, during litigation nothing new should be introduced. A person who buys real property in the course and pendency of a litigation has bought litigation for himself and should be prepared to face the litigation. In other words, the fortunes or gains of persons in respect of the property will be dictated or determined by the result or outcome of the litigation. Such is the strong caveat placed on the property. Although the doctrine is not the same as caveat emptor in strict legal content, it has some loose or vague affinity with it, as it relates to a person buying or purchasing a property in a market overt.

Nigeria, as a common law country, applies the doctrine in appropriate cases. Is this an appropriate case for the application of the doctrine' That is the question. The case law will answer the question. In *Barclays Bank of Nigeria Ltd, v. Alhaji Ashiru* (1978) 1 SC 6-7 99, this Court said at page 128:

"... We think that it should be mentioned that the doctrine of lis pendens does not apply to every suit. It applies to a suit in which the object is to recover or assert title to a specific property; the property however, must be real property for the doctrine has no application to personal property."

In order for the doctrine of lis pendens to apply, the party relying on it must prove the following:

1. The object of the suit must be to recover or assert title to specific property.
2. The property must be real property.
3. At the time of the sale of the property the suit in question was pending.

All the above conditions must exist in the case. In other words, a matter based on the doctrine of lis pendens will fail if any of the conditions is not satisfied. See generally *Barclays Bank of Nigeria Ltd, v. Alhaji Ashiru*. supra; *Ogunsola v. National Insurance Corporation of Nigeria* [1991] 4 NWLR (Pt. 188) 762; *Chief Ikeanvi v. African Continental Bank Ltd.* (1991) 7 NWLR (Pt. 205) 626; *Chief Nsirim v. Nsirim* (1995) 9 NWLR (Pt. 418) 144 and *Dr. Alakiia v. Alhaji Abdulai* (1998) 6 NWLR (Pt. 552)1.

The appellant, as plaintiff, asked for two declaratory reliefs. The first one is that the 1st defendant has no interest in the property. The second one is that the purported sale of the property to the 2nd and 3rd defendants is unlawful, null and void and of no effect whatsoever. Can it be said that the reliefs of declaration have the objective of recovering or

asserting title to Plot No 3 Julius Bala Crescent, Jos' I think not.

A declaratory relief, as the name clearly implies, is declaratory of a named matter or thing or situation. A declaratory relief, in the context of the appellant's action, ends at the declaration by the court. It does not go further to tie the property to the ownership of the plaintiff. That is not the case of the appellant and the court will not go beyond the relief to order title or order recovery of the property. That will be giving the appellant what he did not claim. The law says I cannot do that. And so I bow to the law.

On declaratory reliefs, the Court of Appeal said at page 133:

"In any case, the appellant had sought from the lower court reliefs which are declaratory in nature. A declaratory relief is discretionary and the court must always exercise the greatest caution when called upon to make declaratory orders."

In the light of the reliefs sought by the appellant, I expected the Court of Appeal to take the issue of declaratory relief in the context of *lis pendens*. That should have made more meaning to the matter rather than exploring the discretionary nature of declaratory relief. In whatever way one looks at the matter, a declaratory relief cannot justify the application or applicability of the doctrine of *lis pendens*, and I so hold. This is because property will not pass to the plaintiff.

I now go to Issue No 2. I do hope I am right in adding the word "issue" between the words "new" and "suo". And that gives me the fuller expression of "raising new issue suo motu". It is the position of the law that an appellate court is bound by the Record of Appeal. It cannot go outside the Record and raise issue suo motu. If the court raises an issue suo motu, parties must be invited to address the court on the issue. See *Ndigwe v. Nwude* (1999) 11 NWLR (Pt. 626) 314; *Usman v. Garke* (1999) 1 NWLR (Pt. 587) 466; *Oshodi v. Ayifunmi* (2000) 13 NWLR (Pt. 684) 298; *Arak'a v. Ejeagwu* (2000) 15 NWLR (Pt. 692) 684; *Alli v. Alesinlove* (2000) 6 NWLR (Pt. 660) 177.

On Issue No 2, the appellant relied on what the Court of Appeal said at pages 132 and 133 of the Record:

"The opinion I hold is that the relief to be obtained by the appellant through his present appeal is so infinitesimally insubstantial tenuous and of limited duration that one would wonder if the appellant had not been pursuing the course maliciously ... In the instant case, the original of the right which the appellant sought a declaratory order upon is dubious and transitory in nature."

Learned counsel heavily descended on the expressions: "infinitesimally insubstantial tenuous, maliciously dubious and transitory in nature". To learned counsel, the expressions are tantamount to raising new issues suo motu by the Court of appeal. While I agree that counsel is free and at liberty to attack dictum or dicta in a judgment, he has a duty to read the entire judgment very carefully before he embarks on a tirade on words used by the Judge.

A Judge has the right in our adjectival law to use particular words or phrases, which, in his opinion, are germane to his evaluation of the facts of the case. In so far as he does that in line with the evidence before him, it will be unfair for counsel to castigate him or accuse him of raising issue suo motu.

A Judge can only be accused of raising issue suo motu if the issue was never raised by any of the parties in the litigation. A Judge cannot be accused of raising issue suo motu if the issue was raised by both parties or by any of the parties in the proceedings. In other words, the Court of Appeal cannot be accused of raising issue suo motu if the issue was canvassed at the trial or on appeal.

Learned counsel in his attack submitted that the word, "malice", was never raised by any of the parties, so also the substantiality of the order setting aside the sale was erroneously labelled of limited duration". He also submitted that

"the right sought was dubious and transitory was never an issue before the court and none of the respondents raised the issue".

With the greatest respect to counsel, I do not see anything wrong with the expressions used by the Court of Appeal, as

they reflect the position the court took in its assessment of the evidence before the trial-court. The court could be wrong. The court could be right. Both are different matters. For our purpose, appellate courts have very wide powers in the evaluation of trial evidence and let no counsel reduce the power in the guise of introducing matters suo motu when that is not true. There was nothing of the sort in the judgment of the Court. The issue of \"malice, infinitesimally insubstantial, dubious and transitory\" are the Judge's opinion based on his evaluation of the evidence before the court. And Judges are entitled in our law to hold opinions. Why deny them? Accordingly, the Judge should be spared the sledge-hammer of the appellant. He has not done anything wrong.

Judges have no forum to defend themselves in the judicial process for positions they take in their judgments. They cannot speak one more word outside their judgments in defence of the positions they have taken. Let parties be slow in pouring venom on them. It is a serious attack on a Judge to say that he introduced in the case new matters which were not before the court. So much is involved as so much could be read into or out of the allegation. I will stop here, hoping that counsel will have some sympathy for Judges, their partners in the smooth and successful administration of justice. It is only when Judges and counsel are in some form of \"romance\" that their joint partnership in the crusade for building the best justice system will be achieved in our legal system. Issue No 2 has not the slightest merit. I do not want to say that it is bogus but I can say that it fails.

And that takes me to Issue No 3, which is dismissing the appeal. I am in some difficulty to appreciate the need for this issue, particularly when Issue No 2 in the Court of Appeal is not before this court. The two issues before the Court of Appeal are as follows:

(1) Whether the sale or the purported sale of the appellant's property by the 1st respondent was valid and effective in view of the interim injunction granted on the 23/2/88.

(2) Whether the applicant's claim is an abuse of court process.

I think I have taken Issue 1 above in this judgment. It is Issue 2 that I am yet to take.

Learned counsel for the appellant argued that the Court of Appeal disagreed with the trial court on the issue of abuse of the process of the court. He called in aid the judgment of the court at pages 131 and 132 of the Record:

\"Looked out from the angle, it is arguable that the appellant had not set out to abuse the process of court.\"

Is it correct for learned counsel to come to a dogmatic conclusion that the above dictum is to the effect that the Court of Appeal held the view that there was no abuse of the process of court? With respect, I do not agree with learned counsel. What the Court of Appeal said is that the point is arguable and an arguable point does not necessarily mean, in the context, that there was no abuse of the process of court. And this can be gathered from the arguments that the court gave thereafter from page 132 of the Record. I must concede that the court, with respect, did not come up stably or dogmatically on the issue, as it was in and out on the matter. The final order dismissing the appeal says it all. In view of the fact that the dismissal of the appeal by the Court of Appeal included Issue 2 on abuse of process of the court, the argument advanced by learned counsel for the appellant that the Court of Appeal ought to have allowed Ground 3 of the Grounds of Appeal before it, based on its earlier conclusion on the issue, is not valid. And what is more, what difference could it have made to allow a Ground 3? In the Court of Appeal and in this court, an appeal could be allowed on an issue; certainly not on a ground since arguments are based on issues not ground. See *Madumere v. Okafor* (1996) 4 NWLR (Pt. 445) 637.

Learned counsel for the appellant called for the application of section 16 of the Court of Appeal Act and Order 3 Rule 23 of the Court of appeal Rules in respect of Ground 3 of the Grounds of Appeal to set aside the sale of the property. The provisions, which allow the Court of Appeal to act as if it is the trial court in certain situations, are not invoked merely for the asking. The conditions for the invocation of the provisions are by now settled in law. See generally *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264; *Chief Eiowhomu v. Edok-Eter Mandilas Limited* (1986) 5 NWLR (Pt. 39)1; *Nneji v. Chief Chukwu* (1988) 3 NWLR (1988) 3 NWLR (Pt. 81) 184; *Chief Igiehon v. Omoregie* (1993) 2 NWLR (Pt. 276) 398; *Adeagbo v. Alhaji Yusuf* (1993) 6 NWLR (Pt. 301) 623.

The provisions can only be invoked for a purpose. The provisions cannot be invoked to show appellate power. Before the Court of Appeal can invoke the power, the party must show that there is a real question in controversy for the court to determine and that it is a good case for a rehearing. After all, the Court of Appeal is not an avant-garde with powers of review of cases decided at the High Court, like an ombudsman going about raking up suo motu, decisions of that court, and looking for mistakes, supposedly made by that court with or without applications made to it by a complainant. See Chief Ejowhomu v. Edok-Eter Mandilas Limited, supra. Section 16 of the Court of Appeal Act is not in the statute to instigate competition in jurisdiction between the Court of Appeal and the High Court. The section lacks the legal capacity to wipe out the original jurisdiction of the High Court. The section, in my humble view, is there to assist in the speedy hearing of appeals. It is not a substitute for trial procedure in the High Court. I ask therefore: why section 16 or the sister, Order 3 Rule 23'

In sum, I am of the view that no useful purpose should have been served by invoking the provisions in this matter, as the Court of Appeal had no jurisdiction to allow a ground of appeal. As I said earlier, the Court of Appeal deals with issues in the briefs and not grounds of appeal in Notice of Appeal. The argument of counsel therefore fails.

I have carefully examined the cross-appeal and I do not think it will serve any useful purpose to go into it, in the light of the conclusion I have reached in the main appeal. I will therefore not go into the cross-appeal, including the preliminary objection.

In sum, the appeal fails and it is dismissed. The cross-appeal is of no moment, as it is overtaken by the event of dismissing the appeal. It is struck out. I award N10,000.00 costs against the appellant in favour of the respondents.

Judgement delivered by Umaru Atu Kalgo. J.S.C.

I have had the opportunity of reading in draft the judgment of my learned brother Tobi JSC just delivered in this appeal. I entirely agree with the reasoning and conclusions reached therein which I fully adopt as mine. In the circumstances, I also agree that there is no merit in the appeal. I therefore dismiss the appeal and affirm the decision of the Court of Appeal. I abide by the order of costs made in the leading judgment.

Judgement delivered by Mahmud Mohammed. J.S.C.

The appellant in this appeal was the plaintiff before Dauda Azaki J. (as he then was of blessed memory) at the Jos High Court of Justice asking him to set aside the sale of the appellant's property mortgaged to the 1st respondent to secure a loan. The property was sold to the 2nd respondent who later, sold it to the 3rd respondent by the 1st respondent when the appellant was in default in liquidating the loan. Before the sale of the property, the appellant had earlier instituted an action in the same High Court in Suit No PLD/J197/87 against the 1st respondent in an attempt to prevent the sale but that action was dismissed on 15-12-1987. The appellant had appealed against the dismissal of this action to the Court of Appeal, Jos Division. While this appeal was pending, the appellant got the wind that his property had been advertised for sale by the 1st respondent. With no action pending before the High Court, the appellant filed a motion on notice asking that court to stop the sale of his property pending the determination of his appeal against the decision of the High Court dismissing his action. With the same motion on notice, the appellant also filed an Ex-parte motion asking for the same relief of injunction stopping the sale of his property pending the hearing and determination of the motion on notice for the same relief by the court. The Ex-parte motion was promptly heard and granted on the same day it was filed 23-2-1988, while no date was given for the hearing of the motion on notice which remained not heard up to today. The appeal by the appellant against the dismissal of his action against the 1st respondent is still pending unheard at the Court of



Appeal.

Meanwhile the 1st respondent which was quickly served with the Ex-parte order stopping the sale of the property pending the hearing and determination of the appellant's motion on notice was not served with that motion on notice as no date was fixed for its hearing. It was in this situation that the 1st respondent without taking steps to set aside the Ex-parte order of interim injunction restraining it from selling the appellant's property pending the hearing and determination of his motion on notice, went ahead and sold the property to the 2nd respondent who later sold to the 3rd respondent.

It was on these undisputed facts at the background that the appellant abandoned his motion on notice for the relief of injunction pending the hearing of his appeal at the Court of Appeal and the appeal itself which he also abandoned, instituted and pursued a fresh action No PLD/J105/90 against all the respondents as defendants asking for the setting aside of the sale of the property. The learned trial judge after hearing the parties on this action which he found as an abuse of the process of court, dismissed the action. The appellant's appeal to the Court of Appeal was equally dismissed hence the further appeal to this court by the appellant.

In the appellant's brief of argument, three issues were identified for the determination of the appeal. They are:

1. Whether the sale of the appellant's property was valid during the pendency of a restraining order.
2. Whether the Court of Appeal was right in raising new 2 issues suo motu.
3. Whether the Court of Appeal was right in dismissing the appeal."

In the respondent's brief however, the following three issues were formulated -

- a. Whether going by the facts and the law applicable in this case, whether the doctrine of 'lis pendens' is applicable.
- b. Whether the reliefs sought by the appellant at the lower court were not declaratory in nature and whether the Court of Appeal was wrong in applying the principles of equity when it dismissed appellant's case.
- c. Whether the title of bona fide purchaser can be nullified merely on the fact that the sale was made during the pendency of a restraining order."

The nature of the dispute between the parties which the trial court heard and determined can be seen from the findings of the trial court at page 54 of the record where the learned trial judge said '

"From the materials before me it is obvious that the sale was carried out while interim injunction was still subsisting. The efficacy and life span of the order was dependent upon the motion on notice for the injunction which was never fixed for hearing. In other words, the case of this action is hinged on a motion which has not been determined. It is still pending before the court."

After referring to paragraph 9 of the defendant's now respondent's statement of defence which stated that the plaintiffs appellant's action was an abuse of the process of court, the learned trial judge agreed with the statement, the evidence before him and dismissed the action at page 56 of the record in the following words '

"In my judgment this suit is a duplication or extension of motion No. PLD/J197M1/88 now pending in court. It is hereby dismissed. It is for the same reasons that I strike out the counter-claims of the defendants which are all hinged on the pending motion."

The final result of the appellant's appeal against this decision of the trial court at the Court of Appeal irrespective of other comments in the lead judgment, was the dismissal of the appeal.

Therefore from the decision of the trial court and the court below now on appeal, it is quite clear that the allegation of the abuse of process of court leveled against the appellant in filing and pursuing an action in the same court while his motion for the same reliefs in the same court remained dormant and undetermined for many years was the main issue. In other words the dismissal of the appellant's action and the dismissal of his appeal was principally based on the action being an abuse of the process of court.

However, in spite of the fact that the appellant challenged the decision of the court below in dismissing his appeal by agreeing with the trial court that the action of the appellant at the trial court was an abuse of the process of court in ground 2 of the appellant's grounds of appeal, no issue for determination of the appeal was formulated from that ground to specifically challenge the concurrent decisions of the two courts below that the action of the appellant was an abuse of the process of court which is an issue of law. For the avoidance of any doubt I quote ground 2 of the grounds of appeal which reads '

'(2) The learned Justices of the Court of Appeal erred in law in dismissing the appeal after coming to the conclusion that:

'It is arguable that the appellant had not set out to, abuse the process of court'

And thus occasioned a miscarriage of justice.

#### Particulars of Error of Law

(a) The trial court had found and held:

'That suit is an abuse of court process; it is hereby dismissed.'

(b) The appeal was to challenge the dismissal of the case by the trial court.

(c) Having found that the appellant had not set out to abuse the process of court that:

'I myself think that the remedies available to the appellant in pursuing the enforcement of the ex-parte order of injunction had become inadequate to meet the new situation arising from the sale of the appellant's property to 2nd and 3rd respondent.'

The Appeal Court ought to have allowed the appeal, set aside the order of dismissal and set aside the sale of the appellant's property.'

It can be seen therefore that the appellant decided to ignore the main and real issue for determination in this appeal and hanged on a subsidiary issue of lis-pendens upon which neither the trial court nor the court below based its judgment. Looking at the appeal from this angle, I am of the firm view that the appellant not having attacked the substance of the decision of the trial court dismissing his action and the subsequent decision of the court below dismissing his appeal, this appeal must fail.

Accordingly, for the reasons I have given in this judgment and the fuller reasons contained in the judgment of my learned brother Niki Tobi, JSC with which I entirely agree, I also dismiss this appeal with NI 0,000.00 costs to the respondents and strike out the cross-appeal.

Judgement delivered by Ikechi Francis Ogbuagu. J.S.C.

I have had the privilege of reading before now, the lead Judgment of my learned brother, Niki Tobi, JSC just delivered. I entirely agree with him that the main appeal should be dismissed, while the Cross-Appeal be struck out for being of no moment. However, I will make my own brief contribution.

In all the circumstances of the facts in respect of the case leading to this appeal, what is respectfully clear to me and which should and ought to be a signal or an eye opener to any litigant who thinks he is clever and wants to be clever, is that the Latin maxim of "Nullus commodum potest de injuria sua propria" - "No one can gain advantage by his own wrong", is a truism and it is a statement of fact. In other words, the law, is that a party should not be allowed to benefit from his own wrong. Again, the court should not allow itself, to be used as an instrument of "fraud". See also the case of Adimorah v. Ajufor & ors. (1988) 6 SCNJ. 18; Ogwuru v. Cooperative Bank of Eastern Nia. Ltd. (1994) 8 NWLR (Pt. 365) 685 and Aibade (Mrs.) & anor. v. Madam Pedro & anor. (19B2) 5 NWLR (Pt.241) 257; (1992) 6 SCNJ. 44

The Appellant, was the owner of the property known as and called No. 3 Julius Bala Crescent, Legislators' Quarters, Dogon Dutse, Jos in Plateau State. He mortgaged the property to the 1st Respondent. When the 1st Respondent advertised the said property for sale by Public Auction, the Appellant instituted an action at the Plateau State High Court, Jos in Suit No. PLD/J197/87 against the 1st Respondent and its agent. The learned trial Judge - Soluade, J. to whom the case was assigned by the then Chief Judge of the State -G.I. Uloko, dismissed the suit on 15th December, 1987. In February, 1988, the Appellant filed an appeal against the said dismissal to the Court of Appeal, Jos Division (hereinafter called "the court below"). That appeal, is still pending in that court up till now.

The Appellant filed two identical motions - one ex-parte and the other on notice. In the ex-parte application, the Appellant prayed for an order restraining the 1st Respondent from selling the property pending the hearing of the motion on notice. In the motion on notice, the Appellant prayed for an order restraining the 1st Respondent, from selling the property pending the determination of his said appeal to the court below. Either by design or otherwise, the very Chief Judge who had assigned the substantive suit to Soluade, J., for hearing and determination, chose to hear the motion ex-parte and on 23rd February, 1988, he made an order restraining the 1st Respondent,

"From selling or doing anything inconsistent with the title of the applicant to the property covered by C of O No BP 3785 situate at Julius Bala Crescent, Jos, until the substantive application is heard and determined".

[the underlining mine]

Incidentally and significantly, firstly, when the learned Chief Judge made the above order, he did not fix a date (as is usual), for the hearing of the substantive motion on notice. Secondly, at the time the said order was made, the said Suit PLD/J197/87. to the knowledge of the Appellant, had been dismissed.

Let me now confine myself to the suit leading to the instant appeal; It is noted by me that the 2nd and 3rd Respondents, were not parties to Suit No. PLD.J197/87. However, on 7th September, 1989, the 1st Respondent sold the property to the 3rd Respondent. In reaction, the Appellant instituted and filed the action in Suit No. PLD/J105/90 on 14th March, 1990 leading to this appeal. The reliefs sought in the Statement of Claim, are as follows:

- "a) A declaration that the 1st defendant herein has no interest whatsoever in the property, for the time being and
- b) A declaration that the purported sale of the property by the 1st defendant to 2nd and 3rd defendants, or the agreement by 1st defendant to sell the property to the 2nd and 3rd defendants is/are unlawful, null, void and of no effect whatsoever".

[the underlining mine]

I will pause here to state and it be stressed that grant of an ex-parte order of injunction, is not unconstitutional. It can be utilized in cases of real emergency or urgency, for instance, where, it is impossible to give notice of motion which will be beneficial. See the case of Chief John Attamah & 4 ors. V. The Anglican Bishop of the Niger & 3 ors. (1999) 9 SCNJ. 23 @ 30.

In the absence of such an emergency or urgency, it is settled that a court, must be very cautious in granting an ex-parte injunction as the procedure, may be easily abused by litigants (as in the instant case). The order must be very sparingly made and only when the circumstances are urgent and compelling such as to leave the court with no other alternative in preventing an anticipated injury of a grave nature. See the case of Qgbonna v. NURT Workers & 5 ors. (1990) 3 NWLR fPt.141)696(S>. 709 C.A. - per Oguntade, JCA (as he then was). As aptly stated by Kolawole, JCA, in the case of Nigerian Cement Co. Ltd. V. Nigerian Railway Corporation & anor. (1992) 1 NWLR fPt.220) 749 @ 760 C.A., granting of ex-parte injunctions, is the exercise of very extra ordinary jurisdiction.

Now, the learned Chief Judge and the learned counsel for the Appellant, knew or ought to have known, the consequences of not fixing a hearing date for the substantive motion on notice. Firstly, they knew that an ex-parte order of injunction, should not be in force for more than a few days. Sometimes, both the ex-parte application and the motion on notice, are served together. Where this was/is not done, a short date is normally or usually given to enable the service of the motion on notice on the respondent.

In the case of Kotove. v. Central Bank of Nigeria (1989) 1 NWLR fPt.98) 419 (5) 440: (1989) 1 SCNJ 31 also referred to by the court below, Nnaemeka-Agu, JSC, stated inter alia, as follows:

" ..... By their nature, injunctions granted ex-parte can only be properly interim in nature. They are made without notice to the other side; to keep matters in status quo to a named date, usually not more than a few days or until the respondent can be put on notice. The rationale of an order made on such application is that delay to be caused by proceeding in the ordinary way by putting the other side on notice would or might cause such irretrievable or serious mischief. Such injunctions are for cases of real urgency. The emphasis is on "real ....."

So, it could be seen that the Appellant and his learned counsel, having got the said order, were no longer in a hurry to have the motion heard since the learned Chief Judge to their knowledge, deliberately or inadvertently, refused or did not bother to fix a date for the hearing of the motion on notice. Surely, if a date was not fixed, the said motion cannot or could not be served on the Respondents. Any wonder, the learned counsel for the Cross-Appellant in the court below, submitted to that court that it was a violation of the right to fair hearing for the ex-parte order to have been kept in existence for so long. However, I blame the learned counsel for the Cross-Appellant, for not availing themselves with the provisions in Order 8 Rule 7 of the Rules of the High Court of Plateau State which provides for a party aggrieved by an order exparte, to bring an application within seven (7) days thereafter, to set it aside.

Back to the suit leading to this instant appeal. The learned trial Judge - Azaki, J., after finding as a fact that the said motion on notice was still pending and after dealing with what is an abuse of the process of court which was raised/pleaded in the 1st Respondent's pleadings, stated inter alia, at page 56 of the Records, as follows:

" ..... The reliefs claimed in this action are what may be granted in determining the pending motion. I do not see how I can decide this suit without pre-empting the decision in the pending motion. This suit is a duplicity or extension of the pending motion.

Unconsciously, perhaps, the plaintiff, by this action intends to prolong the processing and hearing of his appeal against the decision in No PLO/J197/87 ..... The effect of this is that the file will no longer be available at the registry for the preparation of the records of proceedings and submission to the Court of Appeal for hearing and determination.

In my judgment this suit is a duplication or extension of motion No PLD/J197MI/88 now pending in court. The suit is an abuse of process. It is hereby dismissed. It is for the same reasons that I strike out the counter-claims of the defendants which are all hinged on the pending motion".

The court below - per Oguntade, JCA (as he then was), at page 132 of the Records, stated inter alia, as follows:

"..... The appellant commenced the suit from which this appeal arose on 14/3/90. As at that date, appellant's motion on notice, the hearing of which the order ex parte was made contingent upon has not been heard. There was no evidence

that the Appellant moved for the hearing of the motion. Rather the appellant obtained an ex-parte order and did nothing for two whole years before he commenced his Suit on 11/3/90 (sic) and up till now in 1997, to ensure that the motion on notice is heard".

The court below at page 133 thereof, found as a fact, that the Appellant had sought from the trial court, reliefs which are declaratory in nature. It stated that a declaratory relief is discretionary and that the court must always exercise the greatest caution when called upon to make declaratory orders. It held that in the instant case, the origin of the right which the Appellant sought a declaratory order upon, "is dubious and transitory in nature". His Lordship then stated thus -

"I agree entirely that the lower court was right to refuse to grant the declaratory reliefs sought by the appellant".

I agree with the above statements of the law and as they are also settled. See *Ibeneweka v. Egbuna* (1964) 1 WLR 219. Both the main appeal and the cross-appeal, were dismissed.

I have deliberately gone this far, in order to show that in the determination of this instant appeal, it must be borne in mind that this suit, relates to Suit No. PLD/J105/90 which was dismissed by Azaki, J. on 28th July; 1992 as an abuse of the process of the court - i.e. that the suit, was a duplication or an extension of a pending motion and that the interim order of injunction, was subsisting. It is not the same Suit No. PLD/J197/87. which was dismissed by Soluade, J. on 15th December, 1987 and which is still on appeal at the court below. In other words, the court below is still to determine whether the dismissal of the suit, was proper or not. That suit is not before this court. What is before this Court, is the decision by the court below in respect of Suit No. PLD/.J105/90.

As it stands, there is the concurrent findings of fact by the two lower courts. The attitude of this Court in respect thereof, has been settled, stated and re-stated in a plethora of decided authorities. This Court, cannot therefore, interfere. I can only add that it is for the Appellant, to see whether the interim order granted in his favour, is beneficial to him or not. The trial court in PLD/J105/90 at page 47 of the Records, found as a fact, that the loan and interest, had not been fully paid by February, 1987 and I suppose, up till now. The interest on the loan, is still mounting until the motion on notice, is heard and determined. The trial court stated at the same page that the Appellant, admitted receipt of several letters of demand to repay the loan for which he replied asking for time to do so but that he failed to effect the payment. The trial court also stated that an application for a similar order for injunction, was made to the Court of Appeal, but that the Appellant said that he did not know if it was dismissed. But that he was informed by his counsel that the application was abandoned.

This is why I stated in this Judgment, that a person cannot be allowed to take advantage of his own wrong. So was it also held by

Judgement delivered by Francis Fedode Tabai. J.S.C.

I was privileged to read, in advance the leading judgment prepared by my learned brother Tobi. J.S.C. and I agree that the appeal be dismissed and the Cross-Appeal struck out. I also abide by the order on costs contained in the leading judgment.