CHIEF RAPHAEL ONWUKA
V.
LUKUMAN OWOLEWA
COURT OF APPEAL
(ILORIN DIVISION)

CA/10/99

MORONKEJI OMOTAYO ONALAJ A, J .C.A. (Presided and Read the Leading Judgment)
PATRICK IBE AMAIZU, J.C.A.
WALTER SAMUEL NKANU ONNOGHEN, J.C.A.

TUESDAY, 20TH MARCH. 2001.

COURT - Record of proceedings - Power of court to take judicial notice of.
CRIMINAL LAW AND PROCEDURE - Witnesses - Power to recall witness -When exercisable by court in criminal proceedings.
EVIDENCE - Affidavit evidence - Where unchallenged and uncontradicted - How treated.
EVIDENCE - Cross examination - Party who fails to cross examine a .witness before the party for whom that witness testifies closes his case - Whether can subsequently apply for leave to cross examine such a witness.
EVIDENCE - Cross examination - Purpose and .source of- Right to cross-examination - Where party is denied without legal reasons - Effect.
EVIDENCE - Judicial Notice - Record of proceedings - Power of court to take judicial notice of.
EVIDENCE - Witnesses - Power to recall witness - When exercisable by court in criminal proceedings.
EVIDENCE • Witnesses - Recall of a witness in civil proceedings - Whether can be done by court without the consent of the parties.
LEGAL PRACTITIONER - Default of counsel - Attitude of court thereto - Whether can be visited on the client.
NOTABLE PRONOUNCEMENT - On need for Evidence Act to be reviewed to allow for recall of witness.
PRACTICE AND PROCEDURE - Affidavit evidence - Where unchallenged and uncontradicted - How treated.
PRACTICE AND PROCEDURE - Cross examination - Party who fails to cross-examine a witness before the party for whom that witness testifies closes his case - Whether can subsequently apply for leave to cross- examine such a witness.
PRACTICE AND PROCEDURE - Hearing notice - Purpose of- Where not served on party - Effect on proceedings and decision of court.
PRACTICE AND PROCEDURE - Service of process - Importance of- Failure to serve where required - Effect.
PRACTICE AND PROCEDURE - Witnesses - Recall of a witness in civil proceedings - Whether can be done by court without the consent of the parties.
STATUTE - Evidence Act - Need for it to be reviewed to provide for recall of witness.
WAIVER - What constitutes waiver.
WORDS AND PHRASES - Waiver - Meaning of

Issue:

Whether, having regard to the facts and circumstances of this case, the trial court rightly exercised its direction in refusing the appellant's application to recall the respondent for the purpose of being cross-examined

Facts:

The respondent filed an action against the appellant at the High Court of Kwara State, Ilorin.

On the 25th of January, 1996 when the matter came up for further hearing, counsel for the appellant discovered in court that the respondent had already testified on the 21st of September, 1995. The appellant then filed an application on notice wherein he sought leave of the High Court to recall the respondent who testified as P.W.I for cross-examination. In his supporting affidavit, counsel for the appellant stated that when the matter came up on the 20th of June 1995, he was engaged before the Court of Appeal and wrote a letter to that effect to the trial court requesting for adjournment and suggesting dates to which the matter should be adjourned. Unfortunately, all the dates suggested by him did not receive the favour of the court. The matter was then adjourned to the 21st of September 1996 which was not one of the dates suggested by him. No hearing notice for this date was served on the appellant or his counsel.

The respondent's counsel did not file any counter affidavit. The trial court after hearing arguments from both parties dismissed the appellant's application Dissatisfied with the ruling, the appellant appealed to the Court of Appeal.

***Held** (Unanimously allowing the appeal)*

1. *On Treatment of unchallenged evidence -*
   A party who fails to file a counter affidavit is by operation of law deemed to have accepted the facts deposed in the affidavit and such unchallenged facts are treated as having been established before the court. In the instant case, the facts deposed to in the supportive affidavit to the appellant's application remained unchallenged as the respondent did not file a counter-affidavit. *[Ayoola v. Baruwa* ***(1999) 11 NWLR (Pt628)*** *595,Rakol Clinic & Maternity Hasp. v. S.F.I. Co. Ltd.* ***(1999) 7 NWLR (Pt.*** *612) 613; Comptroller of Nigeria Prison v. Adekanye* ***(1999) 10 NWLR*** *(Pt.623) 400* ***referred*** *to.](Pp.709-710, paras. G-E, E-F)*
2. *On Effect of non-service of hearing notice on decision of court -* ***Hearing notice being the only legal means and procedure to get a party to appear in court, it must be properly served. Improper or invalid service or no service at all renders such proceedings a nullity. In the instant case, the proceedings of 21/9195 was a nullity as no valid hearing notice was ordered to be served on the appellant.*** *[Odutola v. Kayode* ***(1994) 2 NWLR*** *(Pt.324)* ***1 referred to and applied.]fP.*** *710.paras.C-H)*
3. *On Effect of failure to serve court processes where service required -* ***The service of a process on a party is one of the fundamental conditions precedent to the exercise of the jurisdiction by a court. Therefore, if a service of a process is necessary and there is no proof that such service was effected on appropriate party any judgment emanating from such proceeding is a nullity. The result is the same where service of e process is ordered to be effected in a particular manner and there is no proof that it was effected in the prescribed manner.*** *[Odutola v. Kayode (1994) 2* ***NWLR*** *(Pt.324)* ***1 referred*** *to](Pp. 710-711 paras.H-A)*
4. ***On Effect of failure to serve court processes where service required - Where service of any notice of a proceeding is required to be given, failure to notify any party to the case is a fundamental omission which entitles the party not served and against whom any order is made in his absence to have the order set aside on the ground that a condition precedent to the exercise of jurisdiction for making the order has not been fulfilled. The failure to serve process is not merely an irregularity***

in the procedure but a fundamental defect which renders the proceedings a nullity (P. 711, paras. A-C)

5. *On Effect where a party is denied the right to cross examine a witness -*
Under the adversarial system of jurisprudence, the art of cross examination is the greatest weapon to attack an adversary. It is fundamental, it is the pivot, the central hub and gravity of the civil system. This is so because, cross examination is based on the rules of pleadings with its source on the rule of natural justice of *audi alteram partem* ***(that is, hear the other*** *side). To* ***deny a party the right to cross-examine his adversary without legal reasons amounts to denial of fair hearing as enshrined in section*** *36(1) of* ***the 1999 Constitution of*** *Nigeria (P. 713, paras. C-H)*
NOTABLE PRONOUNCEMENT

6. *On Need for the Evidence Act to provide for recall of witnesses –*
Per ONALAJA, J.C.A. at page 712, paras. B-C:

> ***" It is pertinent to state that the Evidence Act regretably has no provision to recall a witness, one would have expected the filling of this gap when the Laws of Nigeria was reviewed in 1990, so one hopes the Law Reform Commission shall pick up the gauntlet to correct the lacuna and not to continue to resort to the common law of England."***

7. *On Whether a trial court can suo motu recall a witness in civil proceedings without consent of parlies -*
A trial Judge in a civil proceeding cannot *suo motu recall a* ***witness without the consent of the parties and where application is made before him the decision to grant or refuse the recall is discretionary which must be done judicially and judiciously.*** *[Omoregbee v. Lawani (1980) 3-4 SC 108: Elendu v Ekwoaba (1998) 12 NWLR (Pt.578) 320; Elendu v. Ekwoaba (1995) 3* ***NWLR*** *(Pt.386) 704* ***referred*** *to.](P.713,paras.E-F)*

8. *On Power of court to call a witness suo-motu in criminal proceedings -*
In criminal cases, a judge may, for the discovery of truth, himself call and examine any witness. *(P.712,para.H)*

9. *On Meaning of "waiver" -*
Waiver is the voluntary relinquishment or abandonment, express or implied, of a legal right or advantage. The party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it. *[Edozien v. Edozien (1998)* ***12 NWLR*** *(Pt.580) 133* ***referred*** *to](P. 714, para.A)*

10. *On Whether a party who waives his right to cross examine a witness can subsequently exercise such right -*
A party who does not apply to cross examine a witness before the party for whom that witness testifies closes his case cannot subsequently during his own case, apply for leave to cross examine such *witness.(P775,para.F)*

11. *On Whether default of counsel can be visited on party -*
It is wrong to visit the default of counsel on a party to the case especially where the party is not at fault *(P.711, para.C)*

12. *On Power of court to look at its record -*
A court is entitled to look at its record and proceedings on any matter and take notice of their contents even though they may not be formally brought before the court by the parties. (P. *714, para.H)*

Nigerian Cases Referred to in the Judgment:

A.G. Fed. v. Guardian Newspaper Ltd. (1999) 9 NWLR (Pt.618) 187
ACME Builders Ltd. v. KSWB (1999) (Pt.590) 288
Ajibade v. Pedro (1992) 5 NWLR (Pt.241) 257
Ajomale v. Yaduat (No.2) (1991) 5 NWLR (Pt.191) 266
Akanbi v. Alao (1989) 3 NWLR (Pt.108) 118
Akingboye v. Salisu (1999) 7 NWLR (Pt.611) 434
Ariori v. Elemo (1983) 1 SCNLR 1
Ayoola v. Baruwa (1999) 11 NWLR (Pt.628) 595
Comptroller of Nigeria Prison Service v. Adekanye (1999) 10 NWLR (Pt.623) 400
Dan Hausa Co Ltd. v. Panatrade Ltd. (1993) 6 NWLR (Pt.298) 204
Edozien v. Edozien (1998) 12 NWLR (Pt.580) 133
Elendu v. Ekwoaba (1995) 3 NWLR (Pt.386) 704
Elendu v. Ekwoaba (1998) 12 NWLR (Pt.578) 320
Enekebe v, Enekebe (1964) 1 All NLR 102 In Re: Bakare (1969) 1 All NLR 77
Kudoro v. Alaka (1956) 5 SCNLR 255
Morakinyo v. Adesoyero (1995) 7 NWLR (Pt.409) 602
Nigerian Liquified Natural Gas Ltd. v. ADIC (1995) 8 NWLR (Pt.416) 677
Nzeribe v. Dave Eng. Nig. Co.Ltd. (1994) 8 NWLR (Pt.361) 124
Obiora v. Osele (1989) 1 NWLR (Pt.97) 279
Obomhense v. Erhahon (1993) 7 NWLR (Pt.303) 22
Odogwu v. Odogwu (1992) 2 NWLR (Pt.225) 539
Odutola v. Kayode (1994) 2 NWLR (Pt.324) 1\Omoregbe v. Lawani (1980) 3/4 SC 108
Oniah v. Onyia (1989) 1 NWLR (Pt.99) 514
Rakol Clinic & Maternity Hasp v. S.F.I Co. Ltd. (1999) 7 NWLR (Pt.612) 613
Registered Trustees ofAMORC v. Awoniyi (1994) 7 NWLR (Pt.355) 154
Salu v. Egeibon (1994) 6 NWLR (Pt. 348) 23
Sodipo v. Lemminkainen (1985) 2 NWLR (Pt.8) 547
Solanke v. Ajibola (1969) 1 NMLR 252
The Resident, Ibadan v. Lagunju (1954) 14 WACA549
Umenwa v. Umenvia (1987) 4 NWLR (Pt.65) 407
Unilag v. Aigoro (1985) 1 NWLR (Pt.l) 143
Llrhobo v. Cten (1992) 2 NWLR (Pt.589) 147
Williams v. Hope rising Voluntary Society (1982) 1 All NLR (Pt.1) 1 Willoughby v. l.M.B. Ltd. (1987) 1 NWLR (Pt.48) 105

Foreign Cases Referred to in the Judgment:

Cropper v. Smith (1884) 26 Ch. D 700 Macfay v. t/./l.C. (1962) AC 152 Osenton v. Johnston (1942) AC 130

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria 1999, Section 36 Court of Appeal Act, Cap, 75 Laws of the Federation of Nigeria 1990, S.I 6 Evidence Act ,Cap, 112 Laws of the Federation of Nigeria 1990 Sections 87, 88, 89, 74,189

Nigerian Rules of Court Referred to in the Judgment:

Court of Appeal Rules 1981 (as amended) O.6 r.9(5)
High Court of Kwara State, Civil Procedure, Rules O.8(l) and 47(1)

Books Referred to in the Judgment:

Black's Law Dictionary, 7th Edition, page 1574
Halsbury's Laws of England. Vol 16, 3rd Edition, page 335 paragraph 609

Appeal:

This was an appeal against the ruling of the High Court refusing the appellant's application to recall the respondent for cross-examination. The Court of Appeal, in a unanimous decision, allowed the appeal and remitted the matter to the High Court for retrial.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought:
Court of Appeal, Ilorin.
Names of the Justices that sat on the appeal: Moronkeji Omotayo Onalaja, J.C.A. (Presided and Read the Leading Judgment); Patrick Ibe Amaizu, J.C.A.; Walter Samuel Nkanu Onnoghen, J.C.A.
Appeal No.: CMLI10/99
Date of Judgment: Tuesday, 20th March, 2001

Counsel:

Appellant not represented.
Adebayo Adelodu Esq -for the Respondent **A** ***ONALAJA, J.C.A.(Delivering the Leading Judgment):*** *The plaintiff now respondent in this judgment filed an action against the defendant henceforth referred to in this judgment as appellant in the High Court of Kwara* ***State*** *Holden at Ilorin in Ilorin Judicial Division. The nature of the action in the particulars of claim in the writ of summons or in the statement of claim were not furnished in g the record of appeal. As the issue before this court is about recall of plaintiff who testified as 1st PW for cross-examination by the learned Counsel for the appellant who were both absent on 21st September 1995 when respondent testified for himself as the 1st PW.*

On 25th January 1996 when the case was for further hearing learned Counsel for appellant discovered in court that respondent had already testified on 21st Sept 1995. What transpired on 25th January 1996 were not furnished in the record of appeal. The record of appeal was limited to the application for recall, the arguments of counsel, the ruling of the court and the notice of appeal.

The applicant filed an application on notice dated 29th January 1996 being page 2 of the record of appeal wherein he sought leave of the High Court to recall PW1 (respondent) for cross-examination by applicant's/defendant's learned Counsel. Applicant filed a supportive affidavit of 11 paragraphs at pages 3 and 4 of the record of appeal. As the plaintiff/respondent to the motion did not file a counter affidavit, the supportive affidavit is hereby reproduced below from pages 2 and 3 of the record of appeal,

AFFIDA VITIN SUPPORT

"I, IFEOLUWA AKOSHILE (MRS) Female, Christian, Nigerian, Legal Practitioner of Calvary Chambers, 98, Emir Road Ilorin do hereby make oath and declare as follows:

1. *That I am a Legal Practitioner in the above named office and by virtue of my employment, I am familiar with the facts in this case.*
2. *That I know as a fact that when the case came up for hearing on 21/9/95 our Dr. G.O.A. Ogunyemi of Counsel could not be present in the court us he was not aware at all that the case was fixed for that date.*
3. *3. That on 28/12/94 the case was adjourned to 8/2/95 for hearing but due to the strike action embarked upon by the State Civil Service, the court did not sit and no new date was immediately assigned.*

4. *That the case was later on fixed for 18/5/95 and I hereafter 20/6/95 at the instance of the plaintiff's counsel.*
5. *That on 20/6/95 the defendant/applicant's counsel was away to Kaduna for another case in the Court of Appeal and he wrote to the Court for an adjournment but none of the dates he suggested was taken and unknown 10 him the case was adjourned to 21/9/95 for hearing.*
6. *That no hearing notice was served on the defendant/applicant's counsel when the case was slated for 21/9/95 so he did not know and could not be present in court on that day when P.W.I testified.*
7. *That the hearing notice served on the defendant/applicant cant's counsel was for 25th January, 1996.*
8. *That it was on 25th January, 1996 that Dr. G.O.A. Ogunyomi discovered that P.W.I had testified on 21/9/95 without his knowledge.*
9. *That Dr. G.O.A. Ogunyomi has informed me in our office on 25/1/96 at 2.00p.m. that he is prepared to cross-examine the plaintiff for which purpose it is necessary to recall the plaintiff.*
10. *That I know that the plaintiff is readily available in Ilorin and he will not be prejudiced if he is recalled for cross-examination.*
11. *That I make this oath in good faith."*

The matter came up for argument on 12th February 1996 as recorded at pages 4 and 5 of the record of appeal. Learned Counsel for appellant relied on his application of 29th January 1996 filed on 1/2/96 for leave to recall PW1 for cross-examination which application was brought under Orders 8(1), 37(17), and 47(1) High Court Civil Procedure Rules Kwara State and the supportive affidavit supra. As there was no counter affidavit, court should accept the facts thereon as proved and established. This was without prejudice to admission of carelessness by the chambers. He urged the court to grant the application.

In reply, learned counsel for respondent admitted he did not file a counter affidavit but relied on point of law. He submitted that paragraphs 2 to 8 of the affidavit were incurably defective as they offended the mandatory provision of sections 87, 88 and 89 of EVIDENCE ACT as amended.

Paragraphs 2,3,4, and 5 did not disclose the source of the facts. Paragraph 6 was within the peculiar knowledge of Dr. Ogunyomi (learned Counsel for the applicant) the deponent should have stated she was informed. The same reason of non disclosure of source of information applied to paragraphs 7 and 8. Court should strike out the said paragraphs as they were not legally admissible in support reliance was put on Nigerian Liquefied Nature Ga/> Ltd. v. ADIC (1995) 8 NWLR (Pt.416) page 677 at 697 and 701. By striking out the said paragraphs as urged by learned counsel there would be insufficient materials before the court to exercise its discretion in favour of applicant Nzeribe v. Dave Eng Nig. Co. Lid. (1994) 8 NWLR (Pt.361) page 124 at 146.

It is not all mistakes of Counsel that enured for the benefit of clients. In the said case the attendance of the client could have rectified the matter but the client had always been absent see Akanbi v. Alao (1989) 3 NWLR (Pt.108) page 118 at 143. So court should refuse the application, as applicant failed to establish why the discretion of the court should be exercised in his favour Morakinyo v. Adesoyero (1995)7 NWLR (Pt.409) page 602 at 623.

In reply, after seeking adjournment on the adjourned date 1st March 1996, Learned Counsel for appellant submitted Sections 87 and 89 Evidence Act were inapplicable, the deponent deposed to her personal knowledge so also Section 88 Evidence Act would not apply, as deponent was a junior Counsel in the case deposed to in paragraph 1 of the affidavit she deposed to her personal knowledge and so Sections 87, 88 and 89 Evidence Act were misplaced, court should

reject the objection to strike out paragraphs 2 to 8 of supportive affidavit supra.

The facts in issue were facts which the High Court should take judicial notice under Section 74(1) Evidence Act, as the matters were connected with hearing of the case in the High Court by the learned Judge. The cases relied upon by my learned Counsel for the respondent supra were irrelevant, those that were relevant like Akanbi v. Alao supra and Morakinyo v. Adesoyero supra support applicant's case, so court should grant the prayer as the lapse of Counsel should not be visited on client.

The learned Judge gave his considered ruling on 4th April 1996 to be found at pages 6 and 7 of the record of appeal, he reviewed the facts that led to the application by applicant to recall 1st PW (respondent) for cross examination and submissions of learned counsel to the parties. He observed at pace 7 of the record of appeal as follows:-

> *"It is trite law that court should not visit the sins of counsel on their innocent clients. However, clients are warned to beware in Akanbi v. Alao 119S9) 3 NWLR (Pt. 108i 118 at 143. In the instant case, the client has been perpetually absent from court. It was as of right that the defendant should cross-examine the plaintiff when he testified on 5/12/95. Neither the defendant nor his Counsel was present to exercise that right. When the ease came up on 25/ 1/96 for continuation, the learned defence counsel Dr Ogunyomi appeared in court and he made no effort to cross-examine PW1. Next, PW2 testified on that day and was cross-examined by Counsel.*
>
> *What the application is seeking is the enforcement of a legal right which has been earlier waived or overtaken by events. This calls for the exercise of a judicial discretion which must be grounded on fairness. It is too much indulgence, and the procedure is outlandish, to put a plaintiff (PW 1) in the witness box for cross-examination by the defence long after the plaintiff has closed his case and when the case is for defence.*
>
> *In the circumstances this application is refused and consequently 1 call on the defendant to enter hit defence, if any."*

Being dissatisfied with the said ruling applicant filed his notice of appeal timeously as recorded at pages 8 and 9 of the record of appeal. Appellant in the said notice of appeal raised and formulated three grounds of appeal and in accordance with the rules of this court he furnished the particulars, he sought the relief to set aside the refusal by the High Court to recall 1st PW (Respondent) for cross-examination by learned counsel for defendant/appellant. The notice of appeal was served on respondent.

In accordance with the rules of this court appellant filed his brief of argument in this court on 16/4/97 at page 1 of appellants brief of argument from the 3 grounds of appeal in accordance with the rules of this court and brief writing that the issues for determination must be based and correlate with the grounds of appeal distilled a singular issue for determination at page 1 paragraph B as follows:-

"Issue for determination My Lords, the following issue is humbly submitted for determination in this appeal.

Whether the trial court has judiciously exercised his judicial discretion in refusing to recall PW 1 for the purpose of being cross-examined by the defendant's counsel in this case and if he has not improperly applied the doctrine of waiver of interest in the process? Urhobo v. 0 Teri (1992) 2 NWLR (Pt.589) page 147 CA; A.-G., Federal v. Guardian Newspapers Ltd. (1999) 9 NWLR (Pt.618) page 187 SC".

Appellant's brief of argument was served on respondent who filed respondent's brief where in paragraph 3 at page 3 he raised the under mentioned as the issue for determination. In

accordance with the rules of this court and of brief writing that like appellant the respondent's issues must also be based and correlate with the grounds of appeal raised. Respondents issue for determination followed this rule thus:-

> *"3 Issues for determination.*
>
> *Upon the totality of the appellant's three grounds of appeal, the following in the humble opinion of the respondent is sole issue calling for determination in the present appeal:-3.1 Whether the trial court was bound to exercise discretion in favour of the appellant by ordering the recall of the respondent for cross-examination notwithstanding paucity of materials presented before it for the exercise of that discretion and when the appellant had earlier waived his right to cross-examine the respondent". Akmgbove v. Salisu (1999) 7 NWLR (Pt.611) page 434 CA.*

Upon the matter coming up for arguments, the appellant was present whilst his learned counsel was absent. As appellant filed his brief of argument in this p court on 16th April 1997 the Court invoked its power under Order 6 rule 9(5) Court of Appeal Rules and deemed the appeal to have been argued on appellant's brief of argument filed in this court on 16th April 1997 alone as no reply brief was filed to respondent's brief, and to allow the appeal.

The respondent adopted and relied on his brief of argument filed in this Court on 6th April 1998 and urged the Court to dismiss the appeal.

Appellant submitted that the claim against him was for tortious damages for the sum of N25,000.00 with the case, after exchange of pleadings, set for trial with adjournments to many dates but in particular to 8th February 1995 for hearing. On that day, the trial was frustrated due to State wide strike embarked upon by Civil Servants. On 18/5/95 the matter was further adjourned to 20th June 1995 at the instance of learned counsel for the respondent. On 20/6/95 as learned G Counsel for appellant was engaged before the Kaduna Division of the Court of Appeal which was the Court of Appeal covering Kwara State, he wrote a letter for adjournment on the ground that he was billed to appear before the Court of Appeal Kaduna, he suggested in the letter many dates to which the matter be adjourned. Unfortunately, all the days suggested by him did not find favour with the learned trial Judge, as the case was adjourned to a day not suggested by him. No hearing notice for the next date of adjournment was dispatched to him. The next hearing notice was fixture for 25th Sept 1996. On the 25th Sept 1996 learned Counsel for appellant knew for the first time that respondent testified as 1st PW 21st Sept 1995. To the consternation of appellant's Counsel he immediately and promptly applied orally to the court there and then for leave to cross-examine 1st PW who was present in Court on 25/9/96 when the oral application was made.

Learned Counsel for appellant stated at page 2 of his brief of argument as follows:

> *"but the learned trial Judge directed that a formal application be filed and he proceeded to hear the evidence of 2nd PW after which plaintiff decided to close the case."*

Pursuant to the directive and in furtherance of appellant's desire to cross-examine 1st PW a formal application was made as stated above in this judgment. The learned trial Judge dismissed the application when he totally neglected to consider the uncontroverted affidavit evidence of the appellant.

Learned Counsel for appellant stated that the issue on appeal was against the exercise of judicial discretion by the lower court with the attitude of the appellate court clearly stated that generally the Appeal Court will not interfere with the principle to guide the appellate court

highlighted in the listed cases of The Resident, Ibadan v. Lagunju (1954) 14 WACA 549; Enekebe v. Ekcnebe (1964) 1 All NLR page 102 11; H.Tai Ajomale v. John E. Yaduat & Anor. (No.2) (1991) 5 NWLR (Pt.191) 266; (1991) 5 SCNJ 178 at 189.

However the appellate court will interfere with the exercise of discretion by the lower court (1) where the lower court of trial acted under a mistake of law or in disregard of principle or under a misapprehension of the facts (2) when he has taken into account irrelevant matters or failed to take account of relevant ones or (3) on the ground that injustice could arise. He supplied man)' cases to support the principle the cases included Akintunde Banjoko Solanke v. Augustine Ajibola (1969) 1 NMLR 253 SC; Kudoro v. Alaka (1956) SCNLR 255; (1956) 1 FSC 82 and some English authorities.

In addition to third principle above, appellate court would liberally, set aside any exercise of discretion by the trial court which jeopardizes the applicant's right to fair hearing Alhaji Y Dan Hausa & Co. Lid. v. Panatrade Ltd. (1993) 6 NWLR (Pt. 298) page 204; Rasaki Saiu v. Madam Towunro Egcibon (1994) 6 SCNJ 223 at 233 and 237. (1994) 6 NWLR (Pt.348) 23

Applying above to the instant appeal, the learned Judge was in breach of rules 1, 2, and 3 having based his decision on the perpetual absence from court by appellant when once a party is represented by Counsel he is not obliged to be present in court. No reference whatsoever was made to the court record to justify such comment and decision. Therefore, this court should exercise its judicial discretion in favour of the appellant by allowing the appeal. The second reason for refusal to grant the application by learned Judge was that appellant sought the enforcement of legal right which had been waived or overtaken by events. He was in serious error when sito motu in total disregard of the uncontroverted affidavit evidence before him, contrary to the LOCUS CLASS1CUS case ofAriori v. Elemo (19&3) 1 SCNLR 1;(1983) 1 SC 13 and that the doctrine of waiver to be applicable must be a voluntary act, with the person who has full knowledge of the rights, interests, profits or benefits conferred upon or accruing to him by and under the law. When in such circumstances he intentionally decided to give up all or some of the legal rights, he shall be deemed to have waived those rights see Oniah v. Onyia (1989) 1 NWLR (Pt.99) page 514 wherein Karibi Whyte JSC stated inter alia that:

> *"The concept of waiver presupposed that a person who is to enjoy a benefit or who has the choice of two benefits fully aware of the* benefits and has either neglected to exercise his right to the benefit or exercise must be voluntary."

Learned Counsel for appellant summed up that the test of waiver, is unequivocal action or inaction when the actor has full knowledge of his right. As neither the defendant/appellant nor his Counsel was aware of the testimony of 1st PW/respondent on 21/9/95 without hearing notice not served on either have not waived the right to cross-examine the respondent. The issue of waiver was raised by the court personally and gave no opportunity for appellant's counsel to have addressed him on the issue more especially when the waiver must be pleaded. It was legally improper for the learned Judge to have entered into the arena and built up a defence of waiver and laches in favour of respondent who did not raise the issue. The learned Judge therefore based his discretion on mistake of law or on wrong principle of law which allows an appellate court to interfere in the exercise of judicial discretion by the lower court. So this court should interfere and allow appellant's appeal.

The third reason for refusal to recall the 1st PW/Respondent for cross-examination amounted to a breach of fair hearing under section 36(1) 1999 Constitution as the right to cross examination is important under our civil process by virtue of Section 189 Evidence Act Cap 112 Laws of the Federation of Nigeria 1990 a denial of such right of cross examination is denial of fair hearing to appellant was wrongful exercise of judicial discretion *Mike[1] Omhenkc Obomhvnse v Richard Erhahon*

(1993) 7 SCNJ 479 at 499;(1993) 7 NWLR (Pt.303) 22 SC; *Rasaki Salu v. Madam Towuro Egeibon* (1994) 6 SCNJ 223 at 237, (1994) 6 NWLR (Pt.348) 23.

The mistake of the chambers should not he used as punishment for appellant as observed in *Cropper v. Smith* (1884) 26 CUD 700 at 710 thus:-

> "It is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for the mistakes they make in the conduct of their cases he deciding otherwise than in accordance with their rights . I know no kind of error or mistake which, if not fraudulent or intended to overreach the court ought not be correct.... the Court do not exist for the sake of discipline but for the sake of deciding matters in controversy"

See also *Tudesley (sic) Tildsley v. Harper* 1978 7 CHD 403 per Thesiger LJ.

In conclusion the learned Judge exercised his judicial discretion wrongfully thereby giving the appeal court legal justification to interfere b\ allowing the appeal and grant leave to appellant to cross-examine the respondent.

Respondent on his part stated that on 20th June 1995 neither the appellant nor his counsel was present in court but his letter for adjournment was tendered and granted by further adjournment to 21st Sept 1995 which was the date convenient and suitable to the court, though appellant's counsel suggested several dates he did not find out which of the dates was taken by the court despite the fact that learned counsel lives and practices in Ilorin which is the *situs* of the lower court. On 21/9/95 without explanation for the absence of appellant and his counsel the court proceeded to take evidence of plaintiff/respondent, and adjourned to 25/1/96 for continuation of the case.

On 25th Jan. 1996, appellant's counsel appeared in court after being aware of suits that the respondent has testified, he made no effort whatsoever to cross-examine the respondent. He allowed respondent call his sole witness the 2nd PW who was cross-examined by learned counsel to the appellant after which respondent closed his case and the case was adjourned for the defence. It was after this that it was dawn on the appellant to recall respondent; 1st PW for the purpose of cross-examination and admitted it was his carelessness and was responsible for his absence in Court on 21/9/95 when the respondent testified. After due consideration of the facts in the application for leave to recall respondent for cross-examination the court in the exercise of his judicial discretion rejected the application now subject of this appeal. Respondent raised a singular issue *supra* and submitted that appellant had a primary duty of placing sufficient materials upon which the court could exercise the discretion in accordance with the decision in *N.A. Williams & Ors.* v. *Hope Rising Voluntary Society* (1982) 1 All NLR 1 at 6. As no sufficient materials were placed before the court below the learned Judge was right to have rejected the application. The application before the lower court was based that learned Counsel was not aware that the case was adjourned to 21/9/95 when he ought to have approached the lower court to find out the next date of adjournment. As appellant sought equity he must also do equity as equity aids the vigilant not the indolent as appellant's conduct showed unseriousness on his part as stated in *Onwochei Odogwu* v. *Otemeoku Odogwu* (1992) 2 NWLR (Pt.225) 539;(1992) 2 SCNJ 357 at 371 where the Supreme Court said:-

> "For an applicant to be entitled to the exercise of the discretion, he must bring his conduct within the legitimate scope of the exercise of the discretion."

The law applicable by the appellate court on exercise of judicial discretion by the lower court crystallized that in appeal touching on the exercise of discretion the appeal court would be slow, very slow to interfere even if the appeal court would have exercised its discretion differently if it were seized of the matter *Leonard Okere & Ors. Titus Nlem & Ors;* (1992) 4 NWLR (Tt.234) 132(1992) p 4 SCNJ 24 at 40 where the Supreme Court through Nnaemeka Agu .JSC cited

with approval the case of *Charles Osenton & Co Johnston (*1942) A.C. 130 138 wherein it was stated that:-

> "The appellate tribunal is not at liberty merely to substitute us own exercise of discretion for the discretion already exercised by the Judge. In other words appellate authorities ought no! to refuse the order merely because they would themselves have exercised the original discretion had it attached to them, in a different way."

Respondent referred to the principles of law stated in many authorities when the Court of Appeal can interefere with exercise of judicial discretion especially where there has been a wrongful exercise of discretion, in that no weight or no sufficient weight has been given to relevant considerations or where irrelevant materials were taken into consideration in reaching the decision complained of *Leonard Okere & Ors* v. *Titus Nlem supra* does not apply in the instant case as the lower court applied the right law and attached proper weight to relevant issues, so this is not a case in which this court can interfere with the rightful exercise of the judicial discretion of the lower court when appellant failed to give sufficient and material fact as to why himself and learned counsel were absent on 21/9/95 when Ist PW/respondent concluded his testimony though in the absence of appellant a regular absentee at the proceedings. So court should dismiss the appeal as there is no legal basis to interfere with the exercise of judicial discretion by the lower court who refused the application to recall 1st PW/respondent for cross-examination, when he allowed respondent to close his case before appellant lately applied to recall him for cross-examination as appellant was indolent whereas equity only aids the vigilant.

It is a matter of justice for the lower court to ensure timeous conclusion of a matter as per Obaseki JSC enshrined in *Obiora v. Osele* (1989) 1 NWLR (Pt.97) 279 at 296 that

> "public policy demands that the business of the courts should be concluded with expedition."

Respondent submitted that appellant clearly waived his right to cross-examine respondent after becoming aware that respondent had testified on 21/9/95 and elected to go ahead with the case by consenting to calling of PW2 who was duly cross examined by appellant's learned counsel. The refusal by the appellant to have respondent cross examined before PW2 testified and closed the case for the respondent was a voluntary act on the part of the appellant and could not be heard as breach of his right to fair hearing *Ajibade v. Pedro* (1992) 5 NWLR (Pt.241) page257at 272 so also v. *Onyia (1989)* 1 NWLR (Pt.99) page 514 at 534; *Umenwa v. Umenwa* (1987) 4 NWLR (Pt.65) page 407.

This issue of waiver was intrinsic and embedded in the argument below the lower court it was wrong to complain that the lower court took up the matter *suo motu* without giving parties the opportunity to be heard on it. Learned Counsel for respondent stated and submitted further thus:

> "It will certainly be stretching the law too far and laying a dangerous precedent that a Court cannot pronounce on an issue which though not directly argued dearly encapsulates the argument of parties before the court.

My understanding of the above is to support appellant's contention that the issue of waiver was not raised or contended before the learned Judge, that though not directly argued clearly encapsulated the argument of parties before the lower court and the learned Judge was right as contended and submitted to raise it *suo motu* even though parties were not afforded opportunity to address on it. Though the learned Judge raised it *suo motu* in his ruling that alone is not sufficient to render the ruling liable to reversal as the appellant must show that the point raised by the lower court *suo motu* and on which counsel were not given opportunity to address turned out to be the sole reason for the court's decision see *Registered Trustees of the Rosicrucian Order Amore*

Nigeria v. Awoniyi & Ors, (1994) 7/8 SCNJ 390 at 408; (1994) 7 NWLR (Pt.355) 154

> "The Supreme Court will not allow an appeal simply because an appellate court raised an issue *suo motu* and took a decision without hearing parties on the same unless the court based its decision solely on that issue or the issue so decided and relied upon was so fundamental that it resulted in miscarriage of justice." See also *Akpunonu* v. *Bekaert Overseas* (1995) 5 NWLR (Pt.393) page 42 at 64."

Respondent stated that much ado or a mountain made out of a mole hill on the issue of waiver mentioned by the lower court and for which heavy weather is being made by the appellant is hollow, very hollow and would not lead to the present appeal being allowed. So the issue of waiver be rejected and the appeal dismissed.

On the issue raised by appellant on wrongful exercise of refusal to recall 1st PW for cross-examination being a breach of lair hearing, the cross-examination is a mere procedural step in which parties have an election. Appellant by his inaction of 25/1/96 when he consented to cross examine PW2 without requesting to cross examine PW1 cannot now claim that his right to fair hearing had been abridged as the situation is dissimilar to the one in *Saliu v. Egeibon* (1994) 6 NWLR (Pt.348) 23; (1994) 6 SCNJ 223 as appellant had not been denied his defence as the case was adjourned for the defence. The case of *H.A. Willoughb v. International Merchant Bank Ltd.(\9&l)* 1 NWLR (Pt.48) 105; (1987) 1 SCNJ 1 at 16 laid down the guide to recall a witness as follows:- Per OPUTA JSC that:

"From the above, it is obvious that a party applying to recall a witness *must supply the trial Judge with sufficient facts* relating to why he wants the witness recalled and *what he intends to put to the witness.* It is on these facts that the trial Judge will decide whether or not the justice of the case obliges him to exercise his discretion one way or the other."

(The *Italics were supplied).*

In the instant appeal, appellant failed to satisfy the three conditions see also *Sodipo v. Lemmmkamen OY & Anor* (1985) 2 NWLR (Pt.) page 547 at 57) and to submit that the learned trial Judge exercised his judicial discretion properly and should not be disturbed. From the fore going this appeal lacks substance and should be dismissed. The above is a resume of the contentions and submission of the appellant and respondent in this appeal whilst the former urged the court to allow the appeal to enable him recall PW respondent for cross examination, the respondent urged the court to dismiss the appeal as the learned trial Judge exercised his judicial discretion properly when he refused the application to recall respondent for purpose of cross examination.

The application though not slated on the motion paper was submitted by learned Counsel for appellant have been brought under Order 88; 1) and 47; High Court (Civil Procedure) Rules of Kwara State High Court as follows:-

> "Orders
>
> (8) (Rule 1) Interlocutor applications may be made at any stage of an action.
>
> 47(1) Subject to the provisions of the High Court Law, the court may at its discretion, appoint day or days and any place or places from time to time for the hearing of actions as circumstances require." Appellant supported his application with the supportive affidavit of 11 paragraphs *supra.* It is common ground that respondent did not file a counter affidavit by operation of law which is trite and elementary respondent is deemed to have accepted the facts deposed in the affidavit. It is common ground that when the matter came up on 20th June 1995 after suffering reverses due to state wide-strike embarked upon by Kwara State Civil Servants the

matter was adjourned to 20th June 1995. On that day learned Counsel to appellant wrote the court for an adjournment as he was engaged before the Court of Appeal Kaduna Division then covering appeals from Kwara State. In the said letter not presented before this court or copied in the record of proceedings it was common ground that all the dates suggested by learned counsel were not convenient to the court. The appellant was not present in court on 20/6/95. The learned Judge invoked his discretionary power under Order 47(High Court Civil Procedure Rules *siwn)* adjourn the case to 21st Sept 1995. The Court did not order a hearing nonce to be served on the defendant appellant or his Counsel who were absent.

Appellant deposed to the fact that it was on the 25/1/96 when hearing notice for the fixture for that day was served on him and to his consternation and astonishment that he discovered in court that 1st PW/respondent had already testified on 21/9/95. On his being aware he immediately made an oral application to the learned Judge but he gave directive that formal application be made, which led to the application dated 29/1/96 the subject of this appeal.

The Respondent's position was that appellant's Counsel did not apply to cross examine respondent but allowed the case to proceed and cross-examined the 2nd PW after which respondent closed his case.

In some paragraphs of the supportive affidavit it was deposed to that

"5. but none of the dates he suggested was taken and unknown to him the case was adjourned to 21/9/95 for hearing.

6. That no hearing notice was served on the defendant/appellant's Counsel when the case was slated for 21/9/95 so he did not know and could not be present in Court on that day when PW"1 testified.

7. That the hearing notice served on the defendant/applicant's Counsel was for 25th January 1996."

The above facts having not been denied by counter affidavit arc accepted as established before this court. The appellant's case was that he only knew respondent testified on 21/9/95 on 25th January 1996 consequential to hearing notice served on him for that day.

The facts deposed to in the supportive affidavit remain unchallenged as respondent did not file a counter affidavit, it is trite law that the unchallenged facts are treated to be established before the Court *Ayooh: v Bamwa (*1999) 11 NWLR (Pt.628) page 595 CA; *Rakot Clinic & Maternity Hasp. v. S.F.I. Co. Ltd.* i 1999) 7 NWLR (Pt.612; page 613 CA: *Comptroller of Nigerian Prison Service v. Adekanye* (1999 10 NWLR (Pt.o23) page 400 CA.

I therefore hold that notwithstanding the fact that non of the days suggested to the Court in the letters of adjournment of 20/6/95 was taken prudence dictates that hearing notice should have been directed to be served on appellant, as hearing notice is the only legal means and procedure, to get a party to appear in court. After issuing hearing notice to be effected it must be properly served, improper or invalid service and or no service renders such proceedings a nullity so pronounced the Supreme Court in *Alhaji J.A. Odutolav. Inspector Kayode* (1994) 2 NWLR (Pt.324) page 1 at page 15 and 22 wherein it was held as follows:-

"(5) The service of a process on a party, where it should be served is, one of the fundamental conditions precedent to the exercise of the jurisdiction by a Court. Therefore if a service of a process is necessary and there is no proof that such service was effected on appropriate part) any judgment emanating from such proceeding is a nullity. The result is the same where service of a process is ordered to be effected in a particular manner and there is no proof that it was effected in the prescribed manner *(Management Enterpriser Ltd. v. Otusanya* (1987) 2 NWLR (Pt.55) page 179; *Obimonure v Erinosho* (1966) 1 All NLR 250; *at 252 Nig.) Ltd.* v. *O*), *2* NWLR (Pt. 103) page 337

referred to).

(6) Where service of any notice of a proceeding is required to be seven failure notify any party to the case is a fundamental omission which entitles the party not served and against whom any order is made in his absence to have the order set aside on the ground that a condition precedent to the exercise of jurisdiction for making the order has not been fulfilled. The failure to serve process is not merely an irregularity in the procedure but a fundamental defect which renders the proceedings a nullity *(Obimonure* v. *Erinosho* (1966) All NLR 250 at 252; *Scon Emuakpor* v. *Ukavbe (1975)* 12 SC 41 at 47; *Odita v. Okwudinma* (1969) 1 All NLR 228 at 23 I -232 referred to) wrong to visit the default of Counsel on a party to the case especially where the party is not at fault:- Per Uwais JSC "In the present cast ii is clear that hearing notice of the plaintiff's appeal did mil u-acli the plaintiff because his Counsel rejected service. 'The refusal to accept service is a default of Counsel and not the plain till Ii will, in my opinion, therefore be wrong to visit the del a ul t mi the plaintiff." Applied and followed *KaluMark & Anor* \. *Chiil liiihii,-/ Eke* (1997) 11 NWLR (Pt.529) page 501. 520 521 C/\.

I therefore declare the proceedings of 21/9/95 a nullity as no valid hearings.' notice was ordered to be served on appellant which ought to have been ordered as the court rejected all the date;, suggested by learned counsel to appellant were not accepted by the learned Judge whereas hearing notice was ordered for the trial of 25th Jan. 1996.

Having declared the proceedings of 21/9/95 a nullity adopting the often quoted dictum of Lord Denning in the Privy Council case of Macfoy v. LAC (1962) AC 12 that you cannot build something on nothing anything so built is bound to collapse. At the time the decision was made the Privy Council was the apex appellate court for Nigeria until it ceased following the adoption of Republican constitution of 1963 it is therefore binding on all courts in Nigeria but Kayode Eso JSC warned that the court should take it with caution. So in my judgment all the other issues argued have been subsumed in the declaration of the proceedings of 21/9/95 a nullity. Be that as it may should 1 be found to be wrong I shall consider the matter further.

Evidence Act Cap 112 Laws of Federation of Nigeria 1990 in its Part X deals with taking oral evidence and the examination of witnesses, especially sections 185, 186, 187 in particular sections 188 and 189 read as follows:-

'"188(1) The examination of a witness by the party who calls him shall be called his examination-in-chief.

(2) The examination of a witness by a part)' other than the party who calls him snail be called his cross-examination

(3) When a witness has been cross-examined and is then examined by the party who called him, such examination shall be called his re-examination.

189(1) Witnesses shall be first examined-in-chief, then, if any other party so desires, cross examined, then, if the party calling him so desires re examined.

(2) The examination and cross-examination must relate to relevantfacts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

"It is pertinent to state that the EVIDENCE ACT regrettably has no provision to recall a witness one would have expected the filling of this gap when the Laws of Nigeria was reviewed in 1990, so one hopes the LAW REFORM COMMISSION shall pick up the gauntlet to correct the lacuna and not to continue to resort to the Common Law of England

declared by Idigbe JSC in *Isaac Omore^bec v. Pendor Lawani* (1980) 3/4 SC 108, (1980) NSCC 164 at 171. 172

> "The question of law which arises for our decision from this second ground of appeal is one of considerable importance; and this is particularly so - it seems to me - because there appears to be considerable misunderstanding among practitioners and, sometimes, in the lower courts (as in the case in hand) on the issue of "calling" a witness (not selected by the parties) and "recalling" a witness (so selected) in civil proceedings. There is, therefore, need to re-state the principle which govern this aspect of our law of evidence. The basis of the general principle which governs this aspect of trials in courts in this country is much the same as in English Law from which legal system much of our rules of evidence derive; and it is very aptly put by Sir Rupert Cross in the 4th Edition of his book on Evidence at p. 195, wherein the learned author stated:
>
> "The elucidation of lacts bv means of questions put by parties or their representatives to witnesses summoned, for the most part, by them, called mainly in the order of their choice, before a Judge acting as umpire rather than inquisitor, is the essential feature of the English 'adversary' or 'accusatorial' system of justice *(Emphasis mine)*

Accordingly, a general rule of our law of evidence is that neither a Judge, nor an umpire in arbitration proceedings, has any right to call a witness in a civil action without the consent of parties - See *Re Enoch and Zareizky Bock and Co's Arbitration* (1910) 1 K.B. 327, also *Bell-Cam* v. *Bell-Cam* (1965) 1 All NLR 106 at 109 per Bairamian, J.S.C. Whereas, however, in criminal cases a Judge may. for the discovery of truth, himself call and examine any witness - See section 200 of the Criminal Procedure Act and similar provisions in the Criminal Procedure Laws of the several States, he can, in civil cases, do so only with the consent of the parties to the proceedings. However, with regard to recalling a witness who has already at the request of party or parties to the proceedings given evidence, different considerations arise. Suppose, it is discovered long after a witness who, at the instance of one of the parties, gave evidence earlier in the proceedings that he or she had in another proceedings testified to th&contrary in respect of a very important issue in the proceedings in hand, can it be seriously contended that he or she cannot be re-called by the Court *suo motu,* or even in the face of objection by one of the parties to the proceeding in hand, in order that his or her credit may be re-examined because to do so (as the learned trial Judge in these proceedings has stated), would tantamount to a serious irregularity? I should think not. On this subject, the learned authors of the Eleventh Edition of Taylor on his Treatise on the Law of Evidence Vol. 2 paragraph 1477 have this to say;

(A) "The Judge has always a discretionary power (A) with which the Court above is very unwilling to interefere, of re-calling witnesses at any stage of the trial, and of putting such question to them as the exigencies of justice require. He will seldom however, except in special circumstances, permit a plaintiff,

(B) after his case is closed to recall a witness to prove a material fact; though the application will in general be entertained, if made before the closing of the plaintiff's case. So if it be discovered after a witness has

(C) been cross-examined, that his testimony at the trial relative to the subject matter of the cause differs from some other statement for merely made by him, the court will allow him to be re-called if still within reach, and to be further cross-examined, in order to lay the foundation for impeaching his credit by producing witnesses to contradict him ....."

Applying the locus classicus on recall of witness in our civil process and jurisprudence by the erudite, illuminating and quintessence judgment of Idigbe JSC put it beyond peradventure that a trial Judge *suo motu* cannot recall a witness without the consent of the parties and where application is made before him to grant or refuse the recall, is discretionary which must be done judicially and judiciously *Elendu* v. *Ekwoaba* (1995) 3 NWLR (Pt.386) page 704 CA confirmed by the Supreme Court in *Elendu* v. *Ekwoaba* (1998) 12 NWLR (Pi.578) page 320 SC. The attitude of appellate court towards exercise of judicial discretion is well settled and articulated in the rule in *University of Lagos & Anor* v, *Aigoro* (1985) 1 NWLR (Pt. 1) page 143 SC; Acme *Builders Ltd. v. KSWB* (1999) NWLR (Pt.590) page288 *SC; Chigbu v. Tonimas (Nig.) Ltd.* (1999) 32 NWLR (Pt.593) *U5;Alhaji J.A. Odutola v. Inspector Kayode supra*, The principle were clearly canvassed in appellant and respondent briefs of argument and highlighted in the arguments of the parties. The submission of respondent that cross-examination is procedural is untenable, as under our adversarial system of jurisprudence the art of cross-examination is the greatest weapon to attack an adversary, it is fundamental, the pivot, the central hub and gravity of our civil system because cross examination is based on our rules of pleading with its source on the rule of natural justice of *audi aheram partem* (that is hear the other side) to deny a party from cross-examination of his adversary without justifiable legal reasons amount to denial of fair hearing as enshrined in section 36(1) 1999 Constitution of Nigeria.

It is common ground that non of the parties raised the issue of waiver in which the learned Judge held against the appellant. Waiver is defined in Blacks Law Dictionary 7th Edition page 1574 thus:-

> "Waiver: - the voluntary relinquishment or abandonment express or implied of a legal right or advantage. The party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it."

See *Chief (Engr) Onia G. Edozien (the Onu Olu ofAsaba) v. Prof Ogbuefi Joseph Chike Edozien & 4 Ors* (1998) 12 NWLR (Pt.580) page 133 at 154 CA, g the Court of Appeal held thus:-

> "The question of waiver can only arise against a person when he abandoned his personal right or benefit and is seeking subsequently to rely on such right or benefit."

Applying the above authorities to the instant appeal where the parties did not directly or indirectly raise the issue of waiver but the trial Judge based his judgment on it in refusing to grant the prayer of recall of the respondent for cross-examination and on the facts appellant did not abandon his legal rights of cross-examination more also that it was on 25/1/96 that appellant knew respondent testified and filed the motion the subject of this appeal on 29/1/96. The finding of waiver against appellant by the learned Judge was based on wrong principle of law which is an exception to the general rule that ordinarily appeal court loathes to interfere with the exercise of judicial discretion by the lower court. Having ^ exercised his judicial discretion on wrong principle of law therefore I set aside the ruling of the learned trial Judge wherein he refused the application of the appellant to recall the respondent for the purpose of his cross-examination by learned counsel for the appellant.

For the foregoing reasons, apart from the declaration of the proceedings of 21/9/95 a nullity, I allow appellant's appeal and set aside the ruling of Ilorin High Court delivered on 4th April 1996 by Hon. Justice J.F. Gbadeyan. Applying Section 16 Court of Appeal Act. Cap.75 Laws of the Federation 1990 that the case be remitted to Ilorin High Court for retrial *de novo* before another Judge not the Honourable Justice Gbadeyan.

Having allowed the appeal the appellant is entitled to cost which I fix in favour of

appellant in the sum of N5.000.00 (Five thousand naira; against the respondent.

AMAIZU, J.C.A, : I have had the benefit of reading in draft the lead judgment just delivered by my learned brother. Onalaja. J.C.A. I agree with his reasoning and conclusion.

It is common ground that the respondent did not swear to a counter-affidavit. In that case, the averments in the affidavit in support are deemed to be accepted and established.

According to the appellant, it was when he was served with the hearing notice on 25/9/96 that he became aware that the respondent gave evidence on 21/ 9/95. He could not therefore have waived his right to cross examine the respondent as he was not present when the respondent gave evidence.

It is trite that a court is entitled to look at its own record and proceedings on any matter and take notice of their contents although they may not be formally brought before the court by the parties. (Halsbury's Laws of England Vol. 16, 3rd Edition, page 335, paragraph 609). I observe that the number of times the appellant was present during the hearing of the suit before the lower court was not made an issue by the parties. The trial Judge however took h into consideration in arriving at his decision. This is evident from the following part of his ruling -"In the instant case the client has been perpetually absent from court. It was as of right that the defendant should cross examine the plaintiff when he testified on 21/9/95. Neither the defendant nor his Counsel was present to exercise that right". It does seem to me that in order to make the decision of the lower court acceptable, the learned trial Judge should have stated in the ruling the number of times the case came up for hearing before him, and the number of times the appellant was absent in court. That in my view, would have helped this court determine if, the learned trial Judge was right in arriving at his decision that the appellant was perpetually absent from court.

For the above reasons, and others ably marshalled out in the lead judgment. 1 also allow the appeal, I abide by the consequential orders contained in the lead judgment including the order as to costs.

ONNOGHEN, J.C.A.: I have had the opportunity of reading in draft the lead judgment of my learned brother Onalaja JCA, just delivered.

I agree with him that this appeal has merits and should be granted. 1 however have something to add.

The facts of the case are straight forward and have been reproduced in the lead judgment of my learned brother. I do not intend to repeat them here unless as needed to emphasis the points being made or under consideration.

The only case which could have supported the position of the learned trial Judge in refusing the application, from my research, is:

in the Matter of Bakado Line Ltd (Private).

in the Matter of Companies Act.

In Re: Chief Bolaji Bakare (1969s 1 All NLR 1~ at 79 Or (1969) ANLR 74 at 75 to 76 (1990 Ed.)

where the Supreme Court, per Ademola CJN (as he then was) decided that a party who does not apply to cross-examine a witness before the party for whom that witness testifies closes his case cannot subsequently, during his own case, apply for leave to cross examine such witness. The facts of that case are as follows:

As demanded by the provisions of the then companies Act Cap 37, the petitioner presented a petition together with affidavit in support for the winding up of a company. The respondent accordingly filed an answer together with supporting affidavit. At the hearing of the petition learned counsel for the petitioner relied on the petition and the supporting affidavits and

closed his case.
Thereafter the learned trial Judge addressed counsel for the respondent (The Bakado Line Ltd) who also replied that he was resting his case on his answer to the petition and the affidavits in support. At that stage, learned counsel for the petitioner applied to the court for leave to cross-examine the deponent to the affidavits in support of the respondent's answer which application was opposed but the learned trial Judge overruled the objection and ordered the deponents to attend for cross-examination.

As soon as the application was granted learned counsel for the respondent applied for leave of court to cross-examine the deponent to the affidavits in support of the petition. The application was opposed but the trial court granted same. The petitioner was dissatisfied so he appealed to the Supreme Court which held *inter alia* as follows:

> "The view we have taken of the matter is that when the first party relied on his petition and affidavit supporting it, if there was any question to ask him from his petition, this would be the time to cross - examine him. If he was not cross - examined then he would be entitled to close his case. It is after this, that the 2nd party opens his case. The relied on his answer and the affidavits supporting, the 1st party if he desired to do so, will cross - examine at this stage. After the cross - examination the 2nd party closes his case. If the end party failed to ask for leave to cross-examine 1st party before he (2nd party) opens his case, he cannot in our view, be said to follow the ordinary rules of procedures, if he (2nd party) asked for leave to cross - examine the 1st party subsequently.
>
> We think that in the circumstances of the present case, the application to cross examine the deponent to the affidavits of the petition was made too late and that the Judge was wrong to have granted it."

However, In *Re: Bakare's* case *supra,* is distinguishable from the present case.

In the first place and as held by the Supreme Court in that case the matter before that court was winding up proceedings which are special proceedings with special provisions applicable thereto. In this regard, the Supreme Court stated at page 79 thus:

> "To some extent winding up proceedings are special proceedings hence special provisions as to procedure are made in winding up rules. If leave to cross-examine a deponent to an affidavit is granted and the deponent fails to appear.... his affidavit must be rejected, and where as in this case, a petitioner rested his case on his affidavits and closed his case, it would be unfair to him, if because he failed to appear for cross-examination in response to an order pursuant to an application made after the close of his case, the only evidence in which he had relied should stand in jeopardy of being rejected. In the case of *Stauss & Anor v. Goldshmidt & Ors.* (1892) 8 TLR 239, where the circumstances were not dissimilar, the court held it would be wrong to accede to an application at that stage for the cross-examination if a deponent whose affidavit had already been accepted in evidence legitimately...."

The present case is not winding up proceedings but an ordinary civil proceedings.
In *Re: Bakare,* it was, in effect the defendant who sought to recall the witness of the plaintiff for cross-examination after the plaintiff and the defendant have both closed their case. This is the main distinguishing feature of that case. That apart, there is the very disturbing fact that the trial court did not cause a hearing notice to be issued and served on either the learned Counsel for the defendant now appellant or the defendant/appellant personally following the application for adjournment which was duly granted but without adjourning the matter to any of the dates suggested by learned Counsel for the appellant in his letter for adjournment.

I am of the firm view that justice and fair play demand that a hearing notice should have been served on learned counsel under the circumstances so as to notify him of the new date.

When the new date arrived the appellant and Counsel were absent but the court went ahead to hear the matter and later adjourned same but this time thought it fit and proper to order a hearing notice to be served on learned Counsel which was duly done and counsel did appear on the next date.

I am not unmindful of the fact that it has been contended that the appellant ought to have been in court and that if he had been, he could have notified his Counsel of the new date. I agree that normally this is the case but in the present case and under the circumstances the presence of learned Counsel is more important because he was the one to have cross-examined the witness, not the appellant. That apart, I think the respondent could easily have been compensated by way of cost rather than deny the appellant the right of fair hearing by refusing to allow his counsel to cross examine the respondent. It amounts to giving the respondent undue advantage over the appellant in a contest that is supposed to be free and fair under the rules of court.

For these and other reasons assigned in the lead judgment I also allow the appeal and set aside the ruling of Hon. Justice Fola Gbadeyan in suit No. KWS/ 165/92 delivered on 4th April 1996 and further order that the matter be remitted to the court below for trial *dc novo* before another Judge.

I abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal allowed