IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)
BEFORE
HIS LORDSHIP HON. JUSTICE M. E. ANENIH
AND
HIS LORDSHIP HON. JUSTICE A. S. ADEPOJU

ON THE 29TH DAY OF JUNE, 2021

APPEAL NO: CVA/307/2019
SUIT NO: CV/FCT/544/2018

BETWEEN:
MR. EZEMA SUNDAY ----------APPELLANT
AND
MRS. ABOSEDE COKER ----------RESPONDENT
(SUING AS REPRESENTATIVE OF HER LATE HUSBAND MR. CHRIS COKER)

Appellant is represented by himself.
Respondent not in Court and not represented by Counsel.

JUDGEMENT

Delivered by HON. JUSTICE A. S. ADEPOJU

This is an appeal against the ruling of the **District Court** of the Federal Capital Territory; Abuja presided over by **His Worship Odo Celestine O**, delivered on the **19th September 2019.** The respondent as the plaintiff at the lower court took out a plaint dated and filed on the 29th of September, 2018 and served same on the defendant the appellant before us.

The claim of the plaintiff/respondent is for recovery of premises, arrears of rent and cost of the action. The matter went into trial with the plaintiff calling two witnesses. The plaintiff/respondent testified

as the PW1 on the 2/8/2019, and documentary evidence marked as Exhibits A-F were also adduced through her. She was duly cross-examined by the defendant/appellant and discharged. However, the defendant/appellant was foreclosed from cross-examining the PW2 due to his failure to appear on two adjourned dates despite being served with hearing notices. Sequel to the foreclosure he filed a motion on notice seeking to set aside the order and also to recall the PW2. The application was granted subject to the condition that he paid the sum of **₦20,000 (Twenty Thousand Naira)** to the plaintiff/respondent for transportation and other sundry expenses for the PW2. He also filed another application to set aside the order of cost made against him. Hearing in respect of the application and defence was to come up on the 19th of September, 2019 when the plaintiff/respondent's counsel applied to withdraw the entire action and prayed the court to strike out the suit. The defendant/appellant did not oppose to the withdrawal but prayed that the suit be dismissed as issues have been joined. The parties went ahead to address the court on the appropriate order to be made upon the withdrawal of the suit. And after the submission of the counsel for the parties, the court allowed the withdrawal of the suit and struck it out accordingly. The defendant/appellant aggrieved by the decision of the lower court striking out the suit filed the instant appeal challenging the decision of the lower court.

The appellant in his notice of appeal dated the 26th of September, 2019 and filed on the 27th September, 2019 set-out six (6) grounds upon which the appeal is anchored:

Ground One – "The trial court erred in law by striking out the suit instead of dismissing same at a stage when the witness for the respondent had testified and the evidence demolished during cross-examination".

On the particulars of error the appellant stated:

"1. Appellant filed a Notice of Preliminary Objection against the case of the Respondent moved same but the trial court held that the decision on same can only be made after full trial.

2. The PW1 and PW2 had testified and the respondent closes the case.
3. The authority of **ERONINI V IHEUKO (1989) 2 NWLR (PT. 101) P. 46 SC** relied upon by the appellant was wrongly discountenanced by the trial court.
4. The striking out order would unlawfully allow the Respondent have a second bite at the cherry when the case had gone irredeemably bad after cross-examination."

Ground Two – "The trial court erred in law when it failed to evaluate the evidence of the respondent as well as the stage of the case

before striking out the matter thereby rendering the decision perverse."

Particulars of error:

"1. The matter was already adjourned for defence on two occasions after the respondent voluntarily closed the case of the respondent.

2. The court did not consider the weakness of the evidence of the respondent after the cross-examination which naturally rendered the matter un-maintainable.
3. The decision of the trial court is perverse and at variance with law."

Ground Three – "The trial court erred in law when it wrongly distinguished the case of **ERONINI V IHEUKO (Supra)** as inapplicable to the instant case and that even if it applied, the said decision provides for discretion of the court and that the court exercises the discretion in favour of a striking out order in the instant case.

Particulars of error:

1. The stage of the case of the respondent has crossed a stage of irredeemable return.
2. The discretion invoked by the trial court in the case of **ERONINI V IHEUKO (Supra)** was exercised against the appellant.

3. The case of **ERONINI V IHEUKO (Supra)** applies to all cases and in every court where evidence has reached an advanced stage and the plaintiff applies to discontinue the case."

Ground Four – "The trial court erred in law when the court exercised the discretion in favour of striking out as against dismissing the case."

Particulars of error:

"1. The court failed to exercise its discretion judicially and judiciously taking into account the stage of the case the weakened evidence of the respondent and the damaging cross-examination questions put to PW1.

2. The court went into a wild goose chase and took into account irrelevant factors like the likelihood of the appellant assuming the landlord of the property into consideration in ordering a striking out of the case."

Ground Five – "The ruling is against the weight of evidence."

Ground Six – "Other grounds to be filed upon the receipt of the record of proceedings."

Both counsel filed and exchanged brief of argument. The appellant vide an order of the court dated 5th November 2020 filed and served his brief of argument dated 7th day of September, 2020 out of time.

In response, the respondent's brief of argument was filed on the 24th of September, 2020 while the appellant filed a reply on point of law dated 30th September, 2020 to the respondent's brief of argument.

In the appellant's brief, two issues were formulated for determination by the court; they are;

1. Whether having due regard to the case law settled in the locus classicus case of **ERONINI V IHEUKO (1989) 3 SC (PT. 1) 30-48,** and the stage the proceedings had reached in the suit before respondent applied to withdraw their suit in its entirety against the defendant/appellant, the trial court erred in law when it ordered a striking out of the suit instead of a dismissal of same. (Formulated from Grounds 1, 2 and 3, Notice of Appeal dated 26th September, 2019).
2. Whether the lower court's discretion in favour of an order striking out the suit as against dismissal of same was done judicially and judiciously. Distilled from Grounds 4 and 5 of the Notice of Appeal dated 26th September, 2019.

The argument in support of the issues are as stated in the brief and shall be referred to in due course.

The respondent on the other hand formulated one issue for determination to wit; *"Whether the trial chief District Court was right to have made an order striking out the suit rather than an order of*

dismissal." It appears to us that the issue formulated by the respondent is more succinct and encapsulate the two issues distilled by the appellant. We adopt it in resolving the questions posed by both parties.

The learned counsel for the appellant argued that the inability of the respondent to show, identify and point-out in Exhibit B – Access Bank Plc printed statement of account from the 1st December 2015 to 30th April 2018 and the PW2 printed Access Bank Statement of account from January 2015 to November 2016 admitted as Exhibit G the amount owed by the appellant as balance of their rent, renders the whole issue raised as their cause of action thereon speculative and cannot be substantiated by law without evidence. He relied on the case of **DANTATA & SAWOE V MUHAMMED (2012) 14 NWLR (PT. 1319) PG 122** where it was held that a trial court has the sacred duty to evaluate pleadings and evidence before it, in order to come to a conclusion whether to grant or refuse the reliefs sought by claimant.

Appellant further argued that Exhibit A-F and G-H speak for itself while the reliefs sought by the respondent remain questionable, incoherent, vague and entirety mischievous. That the testimonies of the respondent (PW1) and the PW2 at the court below were totally contradictory. He also referred to the testimony of the PW2 at page 2-3 of the supplementary record of appeal wherein the PW2 testified as follows:

"It was when I told the PW1 the plaintiff's wife about the tenancy that she went and got the statement of account. The true position now is that the defendant has paid only 2015/2016 and 2018/2019 (sic) he only paid ₦80,000 from 2017/2018 to date he has not paid. That is the true position the PW1 made a mistake. I want the court to recover our money from 2016 to date and remove him from the house that is all."

This testimony the appellant argued was not supported by the documents tendered and admitted by the trial court especially Exhibits B and G. In his view, the trial court would have come to a different decision if the evidence was adequately considered in the light of the stage of the case because the testimonies of the respondent are different from their pleadings and relief before the lower court. He relied on the case of **EMMANUEL ABBAMELO V UNION BANK NIGERIA LTD (2000) 4 SC (PT. 1) 233 @ 238.**

Furthermore appellant contended that the respondent made this admission on the 19th of September, 2019 when the matter was called up for the appellant's defence. And at that stage, issues were joined and counsel to the respondent realized, that there was no headway in the proceeding and appellant had damaged the copious allegation of delay in the payment of his rent to the respondent (deceased husband account) up until the time the appellant parked out their premises in 2018. On the purported admission of the

respondents the appellant relied on the provision of Section 20 of the Evidence Act and the case of **DIN V A. N. N. LIMITED (1990) 5 SCNJ 209.**

Finally, the appellant submitted that the trial court failed to exercise its discretion judicially and judiciously taking into account the stage of the case, the weakened evidence of the respondent and the damaging cross-examination questions put to the witness. He therefore urged this court to interfere in exercise of discretionary power of the lower court in arriving at the order striking out this suit as against the order of dismissal of same.

The Counsel for the respondent on the contrary submitted that a party to a litigation can at any time before judgement seek to withdraw the suit based on the following grounds:

a. Where a plaintiff realizes the weakness of his claim in the light of the defence put up by the defendant.
b. Where plaintiff's vital witness are not available at the material time and will not so at any certain future date.
c. By abandoning the prosecution of the case, the plaintiff could substantially reduce the high cost that would have otherwise followed after a full-scale but unsuccessful; litigation or
d. Where the plaintiff may possibly retain the right to re-litigate the claim at a more auspicious time if necessary.

She further submitted that the plaintiff at any stage can withdraw his/her matter before judgement only that the court will be left to determine either to strike out or dismiss as the case may be. Reliance was placed on the case of **ABAYOMI BABATUNDE V PAN ATLANTIC SHIPPING AND TRANSPORT AGENCIES LTD & 1OR SC 2007 (PT. 1050) 113.**

She posited that the issue of testimony of the plaintiff or cross-examination at the trial court is not what determine the order to be made at the court on an application for withdrawal but an exchange of pleadings between the parties and or entering into defence by testifying or calling of witness(es) for the court to determine the matter into conclusion. That in the instant case, the trial court has not determined the matter into logical conclusion before the application for withdrawal was made. The appellant she argued, has not entered his defence. The respondent relied on the authorities of **HABIB BANK NIG PLC V LODIGIANI (NIG) LTD (2010) LPELR 4228 (CA), ANIREJU EKUNDAYO V SUNDAY KEREGBE & ORS (2008) LPELR 1100 (SC).**

The Supreme Court she stated has laid to rest in **ANIREJU EKUNDAYO V SUNDAY KEREGBE (Supra)** that the Order to be made by the court on an application for withdrawal is not always automatic as the court has the discretion to consider the facts and circumstances of the case. That looking at the plaint and the reliefs

sought which are for recovery of premises, arrears of rent and mesne profit, the proper order was that of striking out and therefore urges the court to dismiss the appeal as lacking in merit and uphold the ruling of the lower court.

We have meticulously considered the arguments of Learned Counsel for the parties as contained in their brief of arguments. It is trite that a party can at any stage before judgement is delivered withdraw its suit. However the consequential order differs from case to casse. Where a suit is withdrawn after the exchange of pleadings by the parties, it is deemed that issues have been joined. And at this stage, the proper order to make would be that of dismissal and not striking out. On the meaning of joinder of issues the Court of Appeal in the case of **UDENWA & OR V UZODINMA & ANOR (2012) LPELR 7953 CA** held:

"The term joinder of issues is defined at page 854 of the 8th edition of Black Law Dictionary as follows 'Joinder of issues'

1. ***The submission of an issue jointly for decision.***
2. ***The acceptance or adoption of a disputed point as basis of argument in a controversy.***
3. ***The taking up of the opposite side of a case or of the contrary view on a question."*- Per Owoade JCA.**

See **SAGWE V OLAKURI 2013 LPELR 22888 CA, NGUMA V A. G. IMO STATE (2011) LPELR 4593 CA.**

The appellant in the instant appeal placed reliance on the case of **UGWUOKE V FRSC & ORS (2019) LPELR 46611 CA PER ITA GEORGE MBABA JCA PP 28-32 PARAS B-A** where the Court of Appeal held:

"By law where a plaintiff or appellant applies to withdraw a suit after issues have been joined in the suit namely pleading/processes had been filed and exchanged and the battle line drawn, and evidences paraded or taken, it ceases to be with the plaintiff or applicant to unilaterally determine or terminate the case and move away and have another action or renewed action upon benefiting from the pleading/evidence of the adverse party to revoke its case… … …"

He also relied on the case of **ERONINI V IHEUKO (1989) 2 NWLR (PT. 101) 46.** Which brief facts are thus;

The plaintiff/respondent in 1975 brought an action for declaration of title to four pieces of land against the defendants/appellants. After a somewhat chequered history the case was set down for hearing on 13th August 1983. On that day, when hearing began, the plaintiff started to give evidence, and contradicted his pleadings in the capacity in which he sued and also in the traditional history which he pleaded. At the stage his counsel applied to the court for

discontinuance of the action. The defendants'/applicants' counsel did not oppose the application but asked that the action be dismissed. The learned trial Judge however struck out the case, and the defendants not pleased with his order appealed to the Court of Appeal which affirmed the decision of the High Court, Hence the appeal to the Supreme Court. The Supreme Court set aside the decision of the High Court and the Court of Appeal and dismissed the Plaintiff's action.

The above two cases emanated from the High Court where pleadings were filed and exchanged by the parties and evidence adduced on behalf of the plaintiff before the application for discontinuance by the appellant's counsel. In **UGWUOKE'S** case the application for withdrawal was made by the appellant's counsel when the case came up for adoption of written address. This is in contrast with the case at hand which was instituted at the District Court vide a plaint. **ERONINI'S** case was decided based on the provision of Order 47 Rules of the High Court Laws of Eastern Nigeria 1977 whereas in the District Court there are no rules guiding discontinuance of action. In the instant appeal the plaintiff led evidence by calling two (2) witnesses; the PW1 was cross-examined by the appellant while the PW2 was not cross-examined although he was later granted leave by the court to cross-examine the PW2. The defendant did not call any

evidence in his defence. Can it be said that issues have been joined during cross-examination of the PW1 by the appellant?

Looking at the meaning of the word joinder of issues as postulated in the case of **UDENWA & OR V UZODINMA & OR SUPRA per Owoade JCA**, it cannot be said that there was a submission of an issue jointly for decision, or the taking up of the opposite side of the case or of the contrary view on a question. The issues which called for determination as stated in the plaint are payment of arrears of rent, mesne profits and possession. The plaintiff/respondent have stated its own side of the case, while the defendant have not. The question that remained unanswered is; what is the defence of the appellant to the claim of the respondent at the lower court?

The proceedings at the District Court are by way of summary trial where pleadings are seldom filed unless ordered by the court. Order 23 Rule 1 and 2 of the District Court Act Cap 495 LFN 1990 provides:

"(1) If on the day of hearing both parties appear, the plaint shall be read to the defendant and the District Judge shall require him to make his answer or defence thereto and on such defence or answer being made, the District Judge shall immediately record the same and shall except where the court considers it necessary to order otherwise proceed in summary way to hear and determine the cause without further pleading or formal joinder of issues.

(2) In all suits written pleadings may be ordered by the court."

The filing of pleadings by parties at the District Court is optional. It is therefore imperative that a defendant who is present at his trial enters his defence or call a witness on his behalf. At the District Court, issues are joined at the trial.

In paragraph 4.12 at page 9 of the brief of argument, the appellant's counsel argued that the testimony of PW1 under cross-examination and his inability to show from Exhibit B and G, the statement of accounts from Access Bank Plc, the amount the appellant owed as balance of rent rendered the whole issues raised as their cause of action therein speculative and cannot be substantiated in law without evidence. A quick look at page 162 of the record of Appeal, shows that the PW1 answered the following questions under cross-examination:

QUESTION: You told the court that I have been paying in piecemeal, how piecemeal do I pay?

ANSWER: The first year you paid full payment, the second year 2016-2017 you paid in instalment and the last one i.e. **₦80,000** was part of 2012-2018 rent.

QUESTION: Will you be surprised to know that I paid some other money into company's account other than the said **₦100,000** or **₦80,000**?

ANSWER: I am only aware of the **₦100,000** you paid twice, the first was for 2016 rent and the second **₦100,000**, **₦20,000** of it was for completion of 2016 rent leaving only **₦80,000** for 2017-2018 rent.

QUESTION: Do you have evidence to show that the money **₦200,000** I paid only **₦80,000** is for 2017-2018 rent and other for 2016 rent?

ANSWER: My evidence is in that Exhibit B (Bank Statement).

QUESTION: Is there anywhere it is stated that he said **₦120,000** out of **₦200,000** as evidence by Exhibit B was for arrears of rent and **₦80,000** for 2017-2018 part payment?

ANSWER: It was not written anywhere but the account statement (Exhibit B) of my husband is there.

The argument of the appellant that the respondent could not identify and point out in Exhibit B, Access Bank Plc printed statement of account from 1st December 2015 to 30th April 2018 and Exhibit G, statement of account from 1st January 2015 – November 2016 the amount he owed as arrears of rent and thus rendering the evidence speculative do not hold water. The appellant did not contradict the fact that receipts were not issued to him for the arrears of rent he claimed to have paid. Obviously in the instant case it is only the statement of account and the oral evidence of the parties that will be relied on in proof of payment of arrears of rent. Therefore if the appellant wanted to rely on the statements of account of the

respondent (Exhibit B and G) as evidence of payment of his arrears of rent at the period stated by the respondent he should lead credible oral evidence, set-up his own side of the story to contradict the testimony of the PW1 as to the time he claimed he made the payment and how much he paid. Issues can then be joined on the time of the payment, the amount paid and the period it covered. It is not the duty of the District Judge to imagine or surmise from the statement of account these relevant facts on behalf of any of the parties at the recess of his chambers. Parties must speak to relevant documents admitted as exhibits by the court.

On evaluation of evidence, the Court of Appeal in the case of **UKPONG & ORS V. CROSS LINES LTD & ORS (2016) LPELR 40131 (CA)** relied on the case of **WEST-AFRICAN BREWERIES LTD V. SAVANNAH VENTURES LTD (2002) 10 NWLR (PT. 775) 401** and held:

"In the said authority, Ayoola JSC stated thus: '…There is aplethora of authorities all going to show that it is not proper for a trial Court to embark upon examination of documents tendered as Exhibits when such examination will amount to a fact finding investigation that leads to discovery of facts which could have been proved by evidence…'"

Furthermore evidence elicited during cross-examination which are not supported by pleadings goes to no issue. See the case of **ODIGBO**

& ORS V EZEMEGBU & ORS (2013) LPELR 2125 (CA) - Per Owoade JCA where the Court stated thus:

"Evidence elicited under cross-examination as in that of examination in chief is relevant and admissible provided that in cases governed by pleadings, such evidence must have been pleaded by either of the parties and/or relates to issues that have been joined by parties. See, STATE V. AJAGBEMOKEFERI (1989) 1 NWLR (PT.100) 698, OYELOWO V. GOVERNOR OF OYO STATE (2001) 17 WRN 39, BAMGBOYE V. OLAREWAJU (1991) 4 NWLR (PT. 184) 145 @ 155, GAJI V. PAYE (2003) FWLR (PT. 163) 1."

See also **ONWE V. UCHA & ORS (2010) LPELR 4790 CA, UBA V. GODM SHOES INDUSTRIES (NIG) LTD (2010) LPELR 9255 CA** and **DIAMOND BANK PLC V MANANU (2012) LPELR 19955 CA.**

It is also important to state that the appellant did not properly cross-examine the respondent or her witness on the content of Exhibits B and G. Issues cannot be said to have been joined by the parties on the live issues for determination which is for payment of arrears of rent and mesne profit. On the effect of failure to cross-examine a witness on a particular document, the Court of Appeal in **NIGERIAN CUSTOMS SERVICE & ANOR V. SUNDAY O. BAZUAYE (2006) 3 NWLR (PT. 967) 303 @ 319** stated thus:

"The effect of a failure to cross-examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness. In other words, it is not proper for a defendant not to cross-examine a plaintiff's witness on a material point and to call evidence on the matter after the plaintiff had closed his case. In this instant case, appellants' counsel failed to cross-examine the respondent on the Exhibit CCI the medical report and card tendered by him in evidence." **– Per Abba Aji JCA.**

See also **OFORLETE V. STATE (2000) 12 NWLR (PT. 681) 415; GAJI V. PAYE (2003) 8 NWLR (PT. 823) 583 AND AGBONIFO V. AIWEREOBA (1988) 1 NWLR (PT. 70) 325.**

We are of the humble view that what transpired at the District Court was not a trial on the merit. And the proper order in the circumstance is that of striking out and not a dismissal. See the case of **EDE V CHITA (2016) LPELR 4103 CA –Per Oredola JCA** as he then was; where the erudite jurist held:

"When an application or suit is struck out by the court which was not determined on the merit, the application is still alive and could be resuscitated by the applicant. It is only a dismissal upon a determination on the merit that constitutes res judicata on the issues raised and contained therein. See the decision of the court in the case of OKO V IGWELU 4 NWLR (PT. 497) 48."

On the whole, we uphold the decision of the learned District Judge striking out the plaintiff's action. We hold that the appeal lacks merit and dismissed accordingly.

HON JUSTICE M. E. ANENIH	**HON JUSTICE A. S. ADEPOJU**
Presiding Judge	**Hon. Judge**
29/6/2021	**29/6/2021**