

IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT BENIN CITY

ON TUESDAY, THE 18TH DAY OF OCTOBER, 2011

BEFORE THEIR LORDSHIPS

MARY NEKPEN ASEMOTA - JUDGE (PRESIDED)
PETER AKHIMIE AKHIHIERO - JUDGE
OHIMAI OVBIAGELE - JUDGE

APPEAL NO: CCA/26A/2011

B E T W E E N:

1. AIGBOKHAE EGBE ODIGIE í . í . í .
2. OSAIGBOVO EGBE ODIGIE í . í . í . } APPELLANTS

A N D

1. MOMODU AIGBOVO ODIGIE í . í .
2. DR. WILFRED EHIOZOGIE ODIGIE í . í . } RESPONDENTS

J U D G M E N T
DELIVERED BY MARY NEKPEN ASEMOTA (JCCA)

This is an appeal against the ruling of the Oredo Area Customary Court, Benin City in Suit No. ORACC/49R/2011 delivered on the 31st day of March, 2011 in which it struck out the appellants' action for being an abuse of court process.

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The facts of the case are briefly as follows: The appellants (as plaintiffs) initially brought an action in Suit No. ORACC/40/2010 against the respondents (as defendants) at the Oredo Area Customary Court 1, Benin City. The

respondents' counsel filed a notice of preliminary objection against the said suit on the ground that the court had no jurisdiction to hear the matter. The appellants' counsel applied to the court to withdraw the suit and it was accordingly struck out.

5 Subsequently, the appellants through another counsel filed a similar suit at the Oredo Area Customary Court 5, Benin City against the respondents jointly and severally claiming the following reliefs:

- 10 ō(a) That under Bini customary law, late Egbe Odigie Iyawe was entitled to inherit as of right the house known as No. 29, (former 47) Eki Street, Benin City which was the Igiogbe of his late father, Abuokhae Odigie Iyawe who died on 17th April, 1976.
- 15 (b) An order that Egbe Odigie Iyawe having died, the 1st plaintiff as his eldest surviving son is the one entitled to inherit the house at No. 29, Eki Street, Benin City.
- 20 (c) An order directing the defendants to surrender to the plaintiffs all documents relating to the said house at No. 29, Eki Street, Benin City now illegally withheld by the defendants.
- (d) Perpetual injunction restraining the defendants by themselves, their servants, agents and privies from laying further claims of ownership to No. 29, Eki Street, Benin City or doing anything in the said house that could give the impression that the house does not belong to the

plaintiffs or in any other way interfering with the inheritance rights of the plaintiffs.

- (e) An order giving possession of the house at No. 29, Eki Street, Benin City to the plaintiffs, the house being their own by inheritance under Bini Customary Law.ö

Plea was taken and before the commencement of hearing, the respondents' counsel on their behalf filed a notice of preliminary objection on the ground that the suit relates to a declaration of title to land in an urban area for which the lower court lacked jurisdiction.

After the submissions of counsel for the parties, the trial court in a considered ruling, dismissed the preliminary objection. It however struck out the suit for being an abuse of court process.

Dissatisfied with the ruling of the trial court, the appellants filed a notice of appeal containing a lone ground of appeal. The ground of appeal and its particulars are reproduced as follows:

- ö1. The learned President and members of Oredo Customary Court 5, Benin City erred in law in their ruling of Thursday, the 31st of March, 2011 when the Court declined jurisdiction to hear this Suit No. ORACC/49R/2011 on the ground that the appellants' only remedy in law was to have appealed against a previous ruling by another Oredo Area Customary Court in Suit No. ORACC/40/2010

which struck out their case and not in filing a fresh action in this suit.

PARTICULARS

- 5 (a) The claim which the lower court relied upon to decline jurisdiction, that is Suit No. ORACC/40/2010, was merely struck out and not dismissed because the merits of the case had not been gone into.
- (b) An appeal against the ruling in Suit No. ORACC/40/2010 was not the only option available to the appellants as erroneously held by the lower court.
- 10 (c) A case struck out when the merits of the action had not been gone into decides nothing. The plaintiff is always at liberty to either appeal against the order striking out his case or commence a fresh action based on similar facts before another or the same court.
- (d) The perverseness of the ruling now appealed against led to a
15 miscarriage of justice.ö

Counsel for the parties filed and exchanged their respective briefs of argument in consonance with the rules of this Court.

Learned counsel for the appellants, Iredia Osifo Esq., formulated one issue for determination as follows:

- 20 öWhether the lower court was right in striking out this case on the ground that the only option open to the appellants was to have appealed against the

ruling in Suit No. ORACC/40/2010 and not to file a fresh action based on the same facts and between the same parties.ö

On his part, learned counsel for the respondents, H. O. Omoregie Esq., formulated a single issue for determination to wit:

5 öWhether instituting a suit in the same court when the appellants had already conceded that the court has no jurisdiction is an abuse of court process.ö

 We have carefully examined the issues as formulated by both counsel. We prefer the issue as formulated by the appellantsø counsel as it is more germane and we adopt same with some slight modifications as follows:

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Whether the lower court was right in striking out Suit No. ORACC/49R/2011 on the ground that the only option open to the appellants was to have appealed against the ruling in Suit No. ORACC/40/2010 and not to file a fresh action against the respondents.

15 (Ground 1)

 Arguing the lone issue, learned counsel for the appellants submitted that there is a marked difference between a case being struck out and the dismissal of a case. According to him, the result of the former is that the claim is kept alive with the plaintiff at liberty to either begin the case *de novo* in the same or subsequent suit, while in the latter, it brings an end to the matter for all intents and purposes, subject to an appeal. In support, he cited the Court of Appeal

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decision in Idoko v. Ogbeikwu (2003) 7 NWLR (Part 819) 275 at 292 para. D ó H.

Counsel also cited the case of Oronti v. Onigbanjo (2004) 17 NWLR (Part 903) 601 at 613 paras. A ó B and submitted that when a matter is struck out the right to re-litigate the matter rests with the parties because the case is yet to be properly determined on the merit. Counsel emphasized that Suit No. ORACC/40/2010 was merely struck out when counsel to the plaintiffs applied to withdraw same.

Counsel also cited the case of Babatunde v. Pan Atlantic Shipping and Transport Agencies Ltd (2007) 13 NWLR (Part 1050) 113 at 138 paras. D ó G and the dictum of Muhammad (JSC) and submitted that discontinuance of an action by a plaintiff could give rise among others, to a situation where a plaintiff retains the right to re-litigate the issues/claim at a more convenient time if the need arises.

He also referred to Order IX rules 2 ó 3 of the Customary Court Rules, 1978 in support of his submission.

Furthermore, counsel argued that the filing of the suit which gave rise to this appeal would have amounted to an abuse of court process if at the time it was filed, the earlier case i.e. No. ORACC/40/2010 was still pending. He added that the earlier suit had been withdrawn and struck out before the new suit was filed. He cited the case of Aburime v. Aburime (2002) 10 NWLR (Part 776) 441 at 452 ó 453 paras. H ó B in support.

It was also counsel's submission that the three options open to a plaintiff whose case has been struck out before the merits of the case are examined is to file a completely new suit, apply to court to relist the struck out matter or convince the court that it acted wrongly in striking out the matter in the first instance.

He contended that the counsel in the matter filed a new suit because he was not satisfied with the way Suit No. ORACC/40/2010 was framed.

Counsel submitted that the trial court erred when it struck out the case which gave rise to this appeal on the ground that a court of co-ordinate jurisdiction had earlier struck out an identical case. He added that a judgment of a court does not bind a court of co-ordinate jurisdiction. He cited the case of Ibeziakor v. Nwagbogu (1973) 1 NMLR 113 in support.

Finally, counsel cited the case of N.D.I.C. v. Okeke (2011) 6 NWLR (Part 1244) 445 and submitted that when a matter is struck out, the effect is to temporarily remove it from the cause list with an option to refile the suit timeously. He contended that the earlier suit i.e. ORACC/40/2010 was struck out on 18/01/2011 and the present suit which gave rise to this appeal was filed two days later.

He urged this Court to allow the appeal and remit the case back to the lower court for hearing on its merit.

In his response, learned counsel for the respondents submitted that it amounts to an abuse of court process for a plaintiff to relitigate an issue that has already been decided against him. He cited the following cases in support:

1. YaroAdua v. Abubukar (2009) 4 WRN 184 at 186 r. 1.
- 5 2. Oludare v. Akinwale (2009) 49 WRN 46 at 57 r. 10
3. Amachree v. Princewill (2008) 12 NWLR (Part 1098) 348 ó 349 rr. 1, 2 & 4.

He further submitted that it is only when the parties, the claims, subject matter or issues are different that it does not amount to an abuse of court process.

10 He cited in support the case of Plateau State v. Attorney General of the Federation (2006) 3 NWLR (Part 967) 368 r. 10.

Finally, counsel submitted that the appellants' action in refiling the case giving rise to the appeal in the lower court after conceding that the same court had no jurisdiction to hear the matter constitutes an abuse of court process.

15 We have carefully considered the submissions of both counsel as well as the authorities cited by them.

We have observed that the preliminary objection against the suit was on the ground that the trial court lacked jurisdiction to entertain the suit because it involves a declaration of title to land in an urban area. It was in the course of respondents' counsel's submission that the issue of the claim being an abuse of 20 court process was brought in. Counsel for the respondents made copious

submissions on the issue. The trial court after an appraisal, in its ruling stated that it had jurisdiction to entertain the matter because in its opinion, it is a claim involving inheritance under customary law. It however struck out the claim for being an abuse of court process.

5 The main contention of the appellants' counsel is that the trial court was wrong when it struck out Suit No. ORACC/49R/2011 for being an abuse of court process and that the appellants rather than filing the said suit should have appealed against the ruling in Suit No. ORACC/40/2010 which was based on the same facts and between the same parties.

10 It is not in dispute between the parties that Suit No. ORACC/40/2010 and ORACC/49R/2011 are similar suits involving the same parties and same claim. The earlier suit i.e Suit No. ORACC/40/2010 was struck out when it was withdrawn by the appellants' counsel after the respondents' counsel had raised a preliminary objection to the jurisdiction of the court.

15 It is pertinent to state here that in Suit No. ORACC/40/2010 the parties were yet to testify before it was struck out by the trial court. Counsel for the appellants has argued strenuously that the striking out of the matter did not foreclose the appellants from filing a fresh suit as the suit was not dismissed.

20 It has been held in a plethora of authorities that there are marked differences between a striking out order and one of dismissal. See the following cases:

1. Babatunde v. P.A.S & T.A. Ltd (2007) 13 NWLR (Part 1050) 113 at 24 r. 12
2. Idoko v. Ogbeikwu (supra)
3. Okpala v. Ibeme (1989) 2 NWLR (Part 102) 208 at 223.
- 5 4. Green v. Green (1987) 3 NWLR (Part 61) 480.

By way of emphasis, an order of dismissal concludes the case against the plaintiff, subject of course to an appeal. An order of dismissal of the suit is made when the matter has been heard on its merit and the plaintiff fails to prove his case. On the other hand, a striking out order is made when the issue in dispute between the parties has not been decided on its merit, the claim being kept at abeyance as it were, with the plaintiff at liberty to resuscitate it if he so chooses.

See the following cases:

- 1) Oronti v. Onigbanjo (supra)
- 2) Soetan v. Total Nig, Ltd (1976) 1 SC 86.

15 A striking out order in a proceeding merely terminates that particular proceeding. In any event, hearing a case on its merit which involves the production of evidence by the parties, evaluation by the court and determination had not taken place at the trial court. See Crown Flour Mills Ltd v. Owodunmi (2005) FWLR (Part 257) 1553 at 1568 and H.B. (Nig) PLC. v. Lodigiani (Nig) Ltd. (supra)

20 Suit No. ORACC/49R/2011 which gave rise to the instant appeal was filed

by the appellants after their claim in Suit No. ORACC/40/2010 had been struck
out. The appellants merely exercised the particular option that appealed to them
by filing a completely new claim. We agree with learned counsel for the
appellants that the appellants also had the option of either appealing against the
5 order striking out the earlier suit or applying to court to relist the suit. The choice
rested with the appellant. See the case of N.D.I.C. v. Okeke (supra) rr. 1 and 2.

Learned counsel for the respondents had referred to the case of YarøAdua
v. Abubakar (2009) W.R.N. 184 at 186 r. 1 also reported in (2008) 19 NWLR
(Part 1120) 236 at 237 ratio 1 and submitted that it is an abuse of process of court
10 for a plaintiff to relitigate an identical issue which has been decided against him.
We agree with him that the submission represents the position of the law.
However, we are unable to see how he arrived at that conclusion in the instant
appeal. The issue of jurisdiction that was raised in Suit No. ORACC/40/2010 by
way of preliminary objection had not even been considered by the trial court
15 when the suit was withdrawn by the plaintiffs' counsel at the time and that suit
was subsequently struck out. Arguments had not even been taken in respect of
the preliminary objection. The issue certainly was not decided. It could not
therefore be raised even as issue estoppel.

In our considered view, the filing of Suit No. ORACC/49R/2011 was not
20 an abuse of court process because the earlier suit i.e Suit No. ORACC/40/2010

which was struck out had not been decided on its merit. See the case of Anyafulu v. Agazie (2005) 3 NWLR (Part 912) 416 at 419 r. 2.

At this stage it becomes necessary to comment briefly on the issue of abuse of court process. Multiplicity of actions between the same parties and on the same subject matter can be regarded as abuse of court process. It arises where matters involving same parties and issues are raised contemporaneously in the same or different courts.

In the instant appeal, the earlier Suit No. ORACC/40/2010 had been struck out before Suit No. ORACC/49R/2011 was filed. It certainly does not fall within the category of multiplicity of suits which constitutes abuse of court process. The two suits were not pending concurrently. See the following cases:

- 1) Agwasim v. Ojichie (2004) 10 NWLR (Part 882) 613
- 2) N.D.I.C. v. Okeke (supra)

The lone issue is therefore answered in the negative.

In the result, we find merit in this appeal and hereby allow it. Consequently, the ruling of the Oredo Area Customary Court delivered in Suit No. ORACC/49R/2011 on the 31st day of March, 2011 wherein the suit was struck out is hereby set aside. We hereby order that the said suit be remitted to Ikpoba/Okha Area Customary Court, Oregbeni, Benin City for hearing and

determination *de novo*.

We make no order as to costs.

HON. JUSTICE M. N. ASEMOTA

HON. JUSTICE P. A. AKHIHIERO

HON. JUSTICE O. OVBIAGELE

Iredia Osifo Esq., í í í í í í Counsel for the Appellants

H. O. Omoregie Esq., í í í í í Counsel for the Respondents