**IN THE HIGH COURT OF JUSTICE (APPELLATE DIVISION)**
**IN THE FEDERAL CAPITAL TERRITORY**
**IN THE ABUJA JUDICIAL DIVISION**

**BEFORE THEIR LORDSHIPS:**

**HON. JUSTICE M. E. ANENIH (PRESIDING JUDGE)**

**HON. JUSTICE JUDE O. OKEKE (JUDGE)**

**ON TUESDAY THE 14TH DAY OF JUNE, 2016**
**SUIT NO: FCT/HC/CVA/86/2015**

**BETWEEN:**

SULTRADOC CONSTRUCTION COMPANY LTD…………..…APPELLANT

**AND**

MEO-ON PETROLEUM LTD…………………………………..RESPONDENT

# JUDGMENT

**(DELIVERED BY HON. JUSTICE JUDE O. OKEKE (JUDGE)**

The Respondent herein as Plaintiff in the FCT District Court on 23rd April, 2014 took out a plaint against the Appellant herein as a Defendant seeking for:

> "*(a). An Order of the Court directing the Defendant to pay the Plaintiff the sum of N4, 666, 060.00 for the diesel supplied by the Plaintiff which has remained unpaid by the Defendant.*
>
> *(b). 10% interest from the date of Judgment until Judgment sum is liquidated."*

After trial, the Court entered judgment in favour of the Plaintiff (Respondent) herein against the Defendant (Applicant) herein and ordered the Appellant to pay the Respondent the sum of N3, 666,000 and 10% interest on the judgment sum until the whole sum is liquidated.

Being dissatisfied with the Judgment, the Appellant on 16th July, 2015 filed a Notice of Appeal against the Judgment of this Court. The Notice of Appeal was by an Order of Court made on 27th October, 2015 deemed properly filed and served out of time.

In the sole Ground of Appeal, the Appellant averred that the learned Magistrate of the lower trial Court erred in law and misconceived the position of the learned Counsel for the Appellant as it pertain to Section 26 of the District Court Law Cap 495 LFN 1990. That further ground of appeal would be raised on the receipt of record of proceeding. It seeks for the following reliefs:-

> *"(1). To allow the Appeal and set aside the judgment of the lower Court for want of fair hearing.*
>
> *(2). The lower trial Court without fair hearing to the Applicant lacked the requisite jurisdiction to deliver judgment over a matter pending for settlement out of Court."*

The parties filed and exchanged their Briefs of Argument as shown in the records of Court. The Appeal was heard on 18th May, 2016 and Judgment reserved for 25th May, 2016.

In his Briefs of Argument, Mr. Adewole Nathaniel of Counsel for the Appellant raised three issues for determination thus: -

> "*(1). Whether breach of fundamental rule of natural justice audi alteram partem is not special ground of Appeal under legal system?*
>
> *(2). Whether the trial Court in Abuja have jurisdiction to determine a matter when the Respondent solely established before the trial Court that parties based in Kaduna State and transaction took place in Kaduna?*
>
> *(3). Whether the Respondent can recovered (sic recover) a debt or liquidated money demand without leave of Court to do so?"*

Treating issue no 1, learned Counsel submitted inter alia, that on 15th December, 2014 when the case came up for mention Mr. Suleiman

Akande represented the Appellant at the trial Court. He informed the Court that the Appellant's lawyer was sick and travelled to UK for treatment. After the introduction of parties, the Court ought to have adjourned the matter for further mention in the interest of justice but no opportunity was given to the Appellant to make his plea on whether the allegation in the particulars of claim is true or false.

It is an indispensable requirement of justice that an adjudicating authority shall hear both sides by giving them ample opportunity to present their case as a hearing can only be said to be fair when all the parties to the dispute are given a hearing. If one party is refused or denied a hearing, or is not given opportunity of being heard, such hearing cannot qualify as fair hearing under the audi alteram partem rule. In this case, the Respondent single handedly picked a date without any order of the trial Court to serve Hearing Notice on the Appellant and the trial Court heard one party and delivered judgment without hearing the Appellant. He relied in this regard on ***SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA V NIGER OPTICAL SERVCES COMPANY LTD (2004) 7 NWLR (PT. 272).***

Learned Counsel also submitted that the trial Court failed in its duty to encourage parties as contained under Sections 26 and 27 of the District Court Law Cap 495 LFN 1990 with regard to settlement out of Court as the parties agreed before it. That when the parties agreed on settlement out of Court because the trial Court in Abuja lacks jurisdiction to entertain the matter, the Court adjourned for report of settlement. At resumed sitting, the Respondent's Counsel made an application to the Court to foreclose the hearing of the Appellant and the Court gave final judgment without hearing notice to the Appellant. That in the circumstances, the trial Court breached the rule of audi alteram partem. Reference was made to ***ANIDIOBI V ANIDIOBI (2006) 24 WRN P110; ODOSSA V FRN (2006) 27 WRN P. 33; AMASIKE V R.G. CAC (2006) 3 WRN P70 and O.U.C. V CHEURUN NIG. LTD (2006) 2 WRN P.167*** amongst other cases.

Learned Counsel contended that where a person's legal right or obligations are called to question, he should be accorded full opportunity to be heard before any adverse decision is taken against him. He referred to Section 36(1) of the 1999 Constitution of Nigeria. He contended that the evaluation by the trial Court was patently one sided. It never bothered itself about question put to the Respondent's witness which established that it lacked jurisdiction to entertain the matter.

With regard to issue no. 2, learned Counsel contended that issue of jurisdiction may be raised at any stage of the proceedings even on appeal and where raised the Court must deal with it timeously ***NNAKWE V STATE (2013) 18 NWLR (PT. 1385) P. 35*** was called in aid. That although the Respondent's witness (the Pw1) established before the trial Court that the transaction took place in Kaduna and she is also based thereat, the letter headed papers of the Respondent before the Court also reflect same.

With respect to issue no. 3, learned Counsel referred to Order 5 Rule 1 of the District Court Rule Cap 495 LFN 1990 Abuja and urged the Court that no leave of Court was sought to recover debt or liquidated money demand from the Court out of Kaduna jurisdiction where the transaction between the parties took place. The Respondent's Pw1 told the Court under cross examination that all transpired in Kaduna but the Appellant's question to the witness in this regard were not reflected in the record. Where the Respondent failed to seek for leave of Court to recover debt or liquidated money demand in this suit, the trial Court lacks jurisdiction to entertain the suit.

In conclusion, he prayed the Court to allow the appeal, set aside the Judgment of the trial Court, direct the Respondent and the Court Bailiff in Kaduna to return all the moveable properties of the Appellant worth over N43, 000, 000.00 in its custody, and punish whoever ever sold the moveable properties of the Appellant after the Notice of Appeal and any such further Orders as the Court may deem fit to make in the circumstances.

In his Respondent's Brief of Argument, Mr. T. Ekundayo of Counsel for the Respondent raised a Preliminary Objection and then three issues for determination. The Preliminary Objection is: "whether the notice and grounds of appeal dated 15th July, 2015 is competent to initiate this Appeal."

The substantive issues are: -

> "*(i). Whether the Appellant was denied fair hearing in the trial of the suit having regard to the proceedings of 17th February, 2015 and subsequent events.*

(ii). *Whether the trial Court had jurisdiction to entertain the suit.*

(iii). *Whether the Respondent requires leave to recover a debt."*

In the Preliminary Objection which was argued first, the learned Counsel submitted inter alia, that the Appellant's Notice and Ground of Appeal dated 5th July, 2015 is incompetent for the following reasons: -

(a). The Ground of appeal is in substance one of mixed law and facts and therefore not a competent ground of appeal as no prior leave of Court was either below or on appeal was sought and obtained before filing the notice and grounds of Appeal by the Appellant.

The mere mention of a ground of appeal as an error in law does not made it a ground of law but it is the substance of the ground considered that will determine whether it is only an issue of law or issue of facts or mixed law and facts. He referred to ***EHINLANWO V OKE (2008) 6-7 SC PT. 11 P. 123.*** He contended that the Appellant in his sole ground of Appeal alleged that the learned Magistrate of the lower Court erred in law and misconceived the position of the learned Counsel for the Appellant. The question as to misconception of the learned Counsel for the Appellant is a question of fact while the question as to the interpretation of Section 26 of the District Court Law, Cap 495 LFN 1990 is a question of law and this makes the sole ground of appeal one of mixed law and facts which requires leave of Court to make it a competent ground of appeal but the leave was not so obtained. Reliance was placed on ***OKWUA GUBALA & 3 ORS V IKWUEMI & 2 ORS (2010) 12 SC PT. IV P. 10.***

Counsel canvassed that the Appellant having failed to obtain leave of Court in respect of his sole ground of appeal therefore has no competent ground of appeal to sustain this appeal as the sole ground is liable to be struck out.

Learned Counsel submitted that the ground of Appeal is vague and lacks particulars and the issues raised do not flow from the sole ground of Appeal. Grounds of Appeal must have particulars. A Ground of Appeal should contain precise, clear, unequivocal and direct statement of decision being attacked. A ground of Appeal must give the exact particulars of the mistake, error or misdirection alleged as parties are bound by their Grounds of Appeal. He referred to ***DAKOLO & 2 ORS V DAKOLO & 3 ORS (2011) 6 – 7 (PT. 111) P.104.***

Relying on ***EMESPO V CORONA SHIFA – RTSGESSELL SCHAPT (2006) 5 SC (PT. 1) P. 19,*** Counsel contended that where an issue is not married to a ground of Appeal, it has no leg to stand and deserves to be struck out for being incompetent.

Treating substantive issue no. 1, ie the issue of denial of fair hearing learned Counsel submitted inter alia, that the Appellant was served with the plaint along with documentary evidence and the suit fixed for 15th December, 2014 on which day it was represented by Suleiman Akande who informed the Court their lawyer was sick whereupon the matter was adjourned for hearing.

On 17th February, 2015, the Appellant was absent but represented by Counsel Mr. Adewale Nathaniel. On that day the Appellant's witness testified. The Pw1 was cross examined by the Appellant's Counsel after which the Respondent closed its case and the case was adjourned to 26th March, 2015 for defence. On 26th March, 2015 the Appellant's Counsel applied for out of Court settlement and the matter was adjourned to 4th May, 2015 for report of settlement or defence.

During the period of adjournment neither the Appellant nor its Counsel approached the Respondent or its Counsel for settlement.

On 4th May, 2015, the Appellant and its Counsel who were aware of the adjourned date failed to come to Court without any reason communicated to the Court. The Respondent's Counsel then applied that the Appellant be foreclosed and the matter was adjourned to 4th June, 2015 for judgment.

Counsel referred to O.S.I.E.C & 3 ORS V AC & 4 ORS (2010) 12 SC (PT.10) P.108 to underscore the contention that where a party fails to utilize opportunity availed him to defend himself, he cannot later complain of denial of fair hearing. That the Appellant having participated in the trial and thereafter decided to stay away after being given an opportunity to present its case, cannot be heard to complain of denial of fair hearing.

On substantive issue no. 2 ie whether the trial Court had jurisdiction to entertain the suit, learned Counsel reminded the Court that in determining the issue, the Court is to scrutinize the particulars of claim and accompanying materials filed by the Respondent. He stated that the

Respondent's case in the trial Court is that she made supplies to the Appellant who carries on business at Plot 504 Bangui Street, Opp. Pope John Paul Centre Wuse II Abuja. The latter issued a post dated cheque which was dishonoured due to insufficient funds in its Account.

The general principles guiding the determination of place of action in a claim arising out of contract are: -

(1). Where the contract ought to have been performed.

(2). Where the Defendant resides.

(3). Where the Defendant carries on business.

Jurisdiction of Court is not determined by the residence of the Plaintiff. The Respondent has in paragraph 2 of its Particulars of claim stated that the Appellant carries on business at Plot 504 Bangui Street, Opposite Pope John Paul Centre, Wuse II Abuja. The Appellant never challenged this fact or provided any document to the contrary. By virtue of the Appellant's place of business which has been shown to be within jurisdiction, the case was filed within the right jurisdiction.

With regard to the substantive issue no. 3, ie whether the Respondent required leave to recover debt, Counsel referred to Order 11 of the District Court Rules and submitted the Respondent's case was commenced by way of plaint. He contended that nowhere in that Order 11 was a mention made of a mandatory requirement to obtain leave of Court.

Concluding, Counsel canvassed relying on ***TSOKWA MOTORS LTD & ANOR V UBN LTD (1996) 9 – 10 SCNJ P 294*** that an appellate Court will not disturb the findings of fact made by a trial Court except where such findings are shown to be perverse and occasion miscarriage of justice. That the findings of the lower Court in this matter that the Appellant should pay the Respondent the sum of N3, 666, 000.00 and 10% interest on the judgment sum until the whole sum is liquidated has not been shown to be perverse and no miscarriage of justice has been established by the Applicant. He prayed the Court not to disturb the findings of the lower Court.

He urged the Court to uphold the judgment and to dismiss the appeal.

The Appellant filed a Reply on point of law. The Respondent relying on Order 43 Rule 10(d) of Rules of Court 2004 urged the Court to discountenance paragraphs 3.0 to 3.7 of the Reply for not dwelling on new issues.

I have carefully weighed the submissions of Counsel for the parties. As shown above, the Respondent in his Brief of Argument raised a Preliminary Objection challenging the competence of the Appellant's appeal and jurisdiction of the Court to entertain it. The Appellant responded to it. For the reason that the settled position of the law in our adversarial legal system is that where there is a challenge to the jurisdiction of the Court to entertain a matter, the Court is to determine same first before proceeding further, I deem it proper to first consider the Respondent's Preliminary Objection challenging the competence of the Appellant's Appeal and jurisdiction of the Court to entertain it.

In summary, the objection is that the Appellant's sole Ground of Appeal raises issue of mixed law and fact and this being the case leave of either the lower Court or this Court ought to have been obtained to raise same. That the leave having not been obtained the Notice of Appeal is incompetent and the Court has no jurisdiction to entertain it. It was also contended that the ground of appeal is vague, lacks particulars and the issues do not flow from the sole ground of appeal. A ground of Appeal should have particulars and contain precise, clear and unequivocal statement of decision being attacked. The issue canvassed in the Notice of Appeal having not been married to the ground of Appeal, has no leg to stand and the Notice of Appeal is incompetent.

The Appellant's response to the objection could only be located in paragraph 2.0. of its Counsel's Reply on points of law. There it was contended that the Respondent's objection is a basket that cannot hold water. That all the authorities cited by the Respondent are irrelevant to their case. That where error in judgment of Court occasioned a miscarriage of justice and substantially affected the result of the judgment, the judgment will be set aside because error committed in judicial capacity cannot be protected to compromise right of individual.

I have given due consideration to the submission of Counsel for the parties. I have also examined the said sole Ground of Appeal in the Appellant's

Notice of Appeal. The position of the law is that an Appeal is of right where the ground of appeal involves question of law only or has relation to any of the matters mentioned under Section 241(1)(b) of 1999 Constitution of Nigeria. In all other cases and subject to the provision of Section 241 aforesaid, leave of Court ought to be obtained see: Section 242(1) of 1999 Constitution of Nigeria. All these however have to do with appeals from the High Court or Federal High Court to the Court of Appeal. They have nothing to do with Appeals from District Court (as is the case here) to the High Court of FCT.

Section 73(1) of the District Court Act gives a person aggrieved by a decision of District Court in respect of a sum of N20 or more or in relation to a property, money or good to the value of N20, subject to conditions as may be prescribed, right of appeal to the High Court. The section has not provided for whether or when leave of the District Court or the High Court should be obtained with respect to any ground of appeal. Indeed, with regard to the Grounds of Appeal from the lower Court to the High Court of FCT, Order 43 Rule 17(1) and Rule 19 of the Civil Procedure Rules of FCT High Court forbids objection being taken to any Ground of Appeal unless the Court is of the opinion the ground of appeal is so imperfectly or incorrectly stated as to be insufficient to enable the Respondent to enquire into the matter or to prepare for the hearing. Even where the defect is sufficient to mislead the Respondent, the Court is given powers under Rule 19 to amend the Notice of Appeal, if it is expedient to do so. For clarity, Order 43 Rule 17(1) provides thus: -

> "*No objection on account of any defect in the form of stating any ground for appeal shall be allowed, unless the Court is of opinion that the ground for appeal is so imperfectly or incorrectly stated as to be insufficient to enable the Respondent to enquire into the subject matter or to prepare for the hearing.*"

Rule 19 on its part provides: -

> *"No objection shall be taken or allowed upon appeal to a notice of appeal which is in writing or to any recognizance entered into under this Order for the due prosecution of the appeal for any alleged error or defect but if the error or defect appears to the Court to be such that the Respondent on the appeal had been thereby deceived or misled, it shall be lawful for the Court to amend it and if it is expedient to do*

*so, also adjourn the further hearing of the appeal, the amendment and the adjournment, if any, being made on such terms as the Court may think just."*

The foregoing provisions of Order 43 Rules 17 and 19 of the Rules of this Court which deal with objections to appeals from District Courts to the High Court are as clear as whistle in their prohibition of a party taking an objection or the Court allowing one on the bases of any defect in the manner or form in which a Ground of Appeal is stated in a Notice of Appeal before this Court. To the extent therefore that the Respondent's Preliminary Objection complains of error as it relates to the Appellant's Notice of Appeal, the objection is misconceived and cannot be allowed. This is particularly so as the Respondent has not complained it was deceived or misled in its response to the Appeal. In the light of the foregoing, the Respondent's objection on the above score is dismissed.

The Respondent's Preliminary Objection having been determined, the Court now proceeds to consider the substantive Appeal. The Appellant's sole Ground of Appeal is that the lower Court erred in law and misconceived the position of the learned Counsel for the Appellant as it pertains to Section 26 of the District Court Law.

For this, it contends that the Court had no jurisdiction to deliver judgment without affording the Appellant fair hearing on a matter which was pending for settlement out of Court.

I have in this regard perused what transpired in the Court immediately prior to the delivery of the judgment of the Court to determine whether or not:

(1). Judgment was delivered on the matter at a time it was pending for out of Court settlement.

(2). Whether the Appellant was denied fair hearing.

A reading of pages 6 to 11 of the record of Appeal shows that the case was mentioned on 15th December, 2014 and adjourned to 29th January, 2015 for hearing. On that day Counsel appeared for Plaintiff but not for the Defendant. Defendant was not present.

At resumed sitting on 17th February, 2015, Counsel appeared for the Plaintiff and the Defendant. The Plaintiff (Pw1) testified in chief and was

cross examined by the Defendant's Counsel. The Plaintiff on that date closed its case. The case was then adjourned to 26th March, 2015 for defence.

On 26th March, 2015 Counsel appeared for the Plaintiff and the Defendant. The Defendant was absent. The Defendant's Counsel Mr. Adewale Nathaniel informed the Court the Defendant travelled to Lagos to bring back his children who are on vacation. He then applied under Sections 26 and 27 of the District Court Rule to settle the matter out of Court. He said he had discussed with his learned friend. He then applied for a clear date. The Plaintiff's Counsel Mr. M. G. Eugene confirmed this state of affair. The case was then adjourned to 4th May, 2015 for "a possible report of settlement."

On 4th May, 2015 the Plaintiff and his Counsel were present in Court but the Defendant and his Counsel were absent. The Plaintiff's Counsel informed the Court the Defendant never called them for settlement. He then applied that the Defendant be foreclosed pursuant to Order 24 of District Court Rules. The Court granted the application and foreclosed the Defendant from putting up their defence. It then adjourned the case to 4th June, 2015 on which date it delivered judgment in favour of the Plaintiff against the Defendant who was absent along with his Counsel.

From the foregoing records of the Court proceeding leading to the judgment, it is apparent that the case was first adjourned on 26th March, 2015 to 4th May, 2016 for report of settlement in the presence of Counsel for both parties. However, on 4th May, 2015 neither the Defendant nor its Counsel appeared in Court and following the Plaintiff's Counsel's application pursuant to Order 24 of the District Court Rules, the Court foreclosed the Defendant's right to defence and in the same proceeding adjourned the case to 4th June, 2015 for judgment. By this, it is deducible that contrary to the Appellant's contention, judgment was not delivered on a matter pending for out of Court settlement on 4th June, 2015. By the records, the case was on 26th March 2015 scheduled for report of settlement on 4th May, 2015 and on that 4th May, 2015, both the Defendant and his Counsel were absent whereupon the Court foreclosed their right to defence pursuant to Order 24 of District Court Rules and adjourned to 4th June, 2015 for judgment. There is no gainsaying that on 4th May, 2015, there was a report to the Court by the learned Plaintiff's Counsel that settlement did not take place the Defendant having not called them to

knowing which the Court foreclosed the Defendant's right to defence. Judgment was delivered on 4th June, 2015 after the Defendant's right to defence was foreclosed on 4th May, 2015. The foregoing notwithstanding, it does appear to me, that the case having been fixed for report of settlement only on 4th May, 2015 with agreement of both Counsel on that day, neither the Defendant nor his Counsel appeared in Court that rather than foreclose the Defendant's right to defence, the Court should have adjourned the case to a future date to hear the Defendant's own view regarding the settlement or at worst for its defence of the suit. This is because the date of 4th May, 2015 was for report of settlement and not defence.

Order XXIV Rule 4 of the District Court Rules pursuant to which the Plaintiff's Counsel made the application to foreclose the Defendant which the lower Court upheld provides that: -

> "*If on the day of hearing or at any continuation or adjournment of the Court or cause, the Plaintiff appears and the Defendant does not appear or sufficiently excuse his absence or neglects to answer when called in Court, the District Court Judge may, on due proof of service of the Summons and upon his being satisfied that the time between the date of service and the date of hearing was sufficient for the Defendant to have appeared had he wished so to do, proceed to the hearing and determination of the cause on the part of the Plaintiff only, and the Judgment thereon shall be as valid as if both parties had appeared.*"

The import of Order XXIV Rule 4 is that if on a scheduled date for hearing or at any continuation or adjournment of the case, the Plaintiff appears but the Defendant does not and there is no sufficient excuse for his absence, and the Court being satisfied there was proof of service and that the Defendant had sufficient time to appear in Court if he so whishes, may proceed to the hearing and determination of the cause on the part of the Plaintiff only and judgment entered thereon shall be valid as if both parties appeared.

In this matter, it is apparent that on the said 4th May, 2015 scheduled for report of settlement the Defendant and his Counsel were absent. The record does not indicate there was any written explanation for their absence before the Court. This was despite their being present in Court on

the previous date when the case was adjourned to 4th May, 2015. They were thus privy to and were full aware the case was coming up on that date for report of settlement but were not in Court to make a report on the out of Court settlement which the defence Counsel initiated. It does appear to me that in the circumstances, the learned District Judge having being informed that settlement did not take place, ought to have declared the settlement as having failed or broken down (if he was not minded to confirm same with the Defendant's Counsel on the next date) and then adjourned the case to another date for defence by the Defendant. By so doing in my view, the opportunity given to the Defendant would not appear to have been truncated which the adjournment for the out of Court settlement and the Court's Order foreclosing his defence have appeared to have done.

In as much as Order XXIV Rule 4 pursuant to which the Order to foreclose the Defendant was made gives the Court a discretion to proceed with hearing and determination of the case where satisfied at any day of hearing or continuation thereof that the Defendant had sufficient notice of the day, the discretion ought to be judicially and judiciously exercised by taking into consideration the fact that the case was fixed for that day for report of settlement and not defence and that every party to litigation is entitled to be afforded reasonable opportunity to enjoy his constitutional right to fair hearing as guaranteed under Section 36(1) of the 1999 Constitution of Nigeria. A discretion exercised taking the above two factors into consideration would have resulted, after all is said and done, to an adjournment for defence by the Defendant. This is particularly so as the Court's scheduled business for the said 4th May, 2015 was for report of settlement and not defence. It is palpably wrong to foreclose a Defendant from conducting his defence of a suit on a day the Court's scheduled business was report of settlement and not defence. Justice would be not only be seen to have been done but also manifestly done if, given the unexplained absence of the Defendant and his Counsel and the Plaintiff and his Counsel being present that the matter should have been adjourned for defence with the Defendant's conduct damnified by way of an award of cost to assuage the Plaintiff who had spent time and resources to be present in Court. By so doing a reasonable person who is present in Court (and whose impression is used to Judge whether or not there has been fair hearing) would go away with the impression that neither party has been short changed and that justice has been done. By so doing, the reasonable man would go away with the impression that both sides have been afforded

a reasonable opportunity to put across their respective cases. See: ***A.S.T.C. C V AWURUM (2004) 1NWLR (PT.885) P. 601.***

The Order of foreclosure would have been a discretion properly exercised if the case was, given the unexplained absence of the Defendant and his Counsel adjourned to another date (for failure of settlement) for defence and a hearing notice served on the Defendant and on that next date he or his Counsel still fails to appear in Court to conduct the defence of the case. This will be in line with the opinion of Onu, JSC in ***UNITED SPINNERS LTD VL CHARTERED BANK LTD (2011) FWLR (PT. 68) P. 640*** where the eminent jurist held that with regard to exercise of judicial discretion: -

> "*Further, in the exercise of judicial discretion, the primary objective of the Court must be to attain substantial justice. Acting judicially, it ought to be pointed out, imports consideration of the interest of both parties and weighing them in order to arrive at a just and fair decision."*

Similar view was echoed in ***KASUNMU V SHITTA-BEY (2007) ALL FWLR (PT. 356) P. 71*** where the Court of Appeal held that: -

> *"Discretion is said to be exercised judicially and judiciously when it is exercised in such a way as to achieve substantial justice, that it is when it takes into account the interests of both parties along with the peculiar facts and circumstances of the case in order to arrive a just and fair decision."*
>
> *In* ***ALSTHOM S.A. V SARAKI (2000) FWLR (PT. 22) P. 964,*** *the Supreme Court also emphasized that discretion is said to be judicial and judicious if it is exercised with a leaning towards accommodating the interests of the parties without allowing mere procedural irregularities brought about by mistake of Counsel to stipple or preclude the determination of a case on its merit."*

Being this guided, it is deducible that by foreclosing the Defendant's case on a day fixed for report of settlement though he was absent without reason and despite being aware of that day but without consideration given to his constitutionally guaranteed right to be given reasonable opportunity to defend the case, with an aim at achieving substantial justice the lower Court acted injudiciously and deprived him of his right to fair hearing. The

judgment entered against the Defendant in the circumstances is perverse, one reached without due regard to *audi alteram partem* and cannot stand being a nullity.

For the foregoing reasons alone, the Court resolves the sole issue raised above in favour of the Appellant against the Defendant. In consequence the Court upholds the Appellant's Appeal. The Judgment of the lower Court is set aside. The trial Court having arrived at the nullified judgment without affording the Appellant an opportunity to defend the suit, the case shall be and is hereby placing reliance on Order 46 Rule 1 of Rules of Court 2004 remitted to the lower Court for retrial by another Court.

The Appellant's Counsel's invitation to the Court in the Brief of Argument to direct for return of the Appellant's properties seized during the execution and punish those who sold the same cannot be granted as there is no prayer in that regard in the Appellant Notice of Appeal. In any event, the Appeal having succeeded, the execution of the lower Court's Judgment cannot stand as one cannot put something on nothing and it will stand. See: ***IBRAHIM V OJONYE (2011) LPELR – 3737 (CA).*** The Lower Court is to make appropriate Orders regarding the properties after the retrial of the suit.

The Assistant Chief Registrar of this Court is directed to furnish the parties in this case with Certified True Copies of this Judgment within 7 days from today.

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| **SIGNED** | **SIGNED** |
| **HON. PRESIDING JUDGE** | **HON.JUDGE** |
| **14/6/2016** | **14/6/2016** |

**LEGAL REPRESENTATIONS:**

(1). Mr. Adewole Nathaniel for the Appellant.

(2). Mr. T. Ekundayo for the Respondent.