In The Supreme Court of Nigeria

On Friday, the 27th day of June 1986

Before Their Lordships

Ayo Gabriel Irikefe	.....	Chief Justice of Nigeria
Andrews Otutu Obaseki	.....	Justice, Supreme Court
Anthony Nnaemezie Aniagolu	.....	Justice, Supreme Court
Augustine Nnamani	.....	Justice, Supreme Court
Dahunsi Olugbemi Coker	.....	Justice, Supreme Court
Saidu Kawu	.....	Justice, Supreme Court
Chukwudifu Akunne Oputa	.....	Justice, Supreme Court

S.C. 51/1985

Between

A. T. Bakare ..... Appellant

And

T. S. Apena (Deceased)
Alhaji Olowolagba
Sheriff A Yinde Adalemo
(Suing for Themselves and on Behalf of the Maremi/Amore Family of Orile-Ikeja) ..... Respondents

Reasons for judgement of the Court
Given by
Augustine Nnamani. JSC

On 28th April, 1986, I dismissed this appeal and indicated that I would give my reasons for that judgment today. I now give my reasons.

In suit No ID/168/75 the respondents herein, who were plaintiffs therein, claimed against the appellant, defendant therein for:

(a) Declaration of title under native law and custom to all that piece and parcel of land situate, lying, and being at Ikeja, near Alade Village in the Ikeja District of Lagos State of Nigeria;

(b) ₦500.00 damages for acts of trespass committed by the Defendant, his privies, servants and or agents on the said land;

(c) Perpetual injunction restraining the Defendant, his privies, agents and or servants from further acts of trespass"

Pleadings were ordered and exchanged. The matter proceeded to trial in which both sides gave evidence and called witnesses. On 9th March 1979, the learned trial Judge, A.L.A.L. Balogun, J., dismissed the plaintiffs/respondent claims in their entirety. It was after this judgment that the events which really led to the appeal before this Court began. In the learned trial Judge's own words –

> "On Friday the 9th day of March, 1979, I read the judgment in this action in open court; but soon thereafter when I retired into the chambers I discovered, to my dismay, that although I had found "that the land in dispute originally belonged to the ancestors of the plaintiffs one Amore" (in that the Defendant had admitted the averments of facts in paragraph 5 of the Statement of Claim relevant thereto) the Defendant in fact did not do so".

As is clearly stated in the record of proceedings and not disputed in the briefs of argument filed on behalf of both parties, the learned trial judge apparently decided to recall his judgment for the necessary amendment.

On the morning of Saturday, 10th March, 1979, he went to the Chambers of Messrs. Olunwa, Tinubu and Co. The Plaintiff's/Respondents Solicitors. This visit was in the full view of the plaintiffs who were bewildered and uneasy to find the Judge who had given judgment against them the previous day in their Solicitor's Chambers. Perhaps I should pause here to state that there are no substantial disputes over the events of those fateful days, i.e. 10th and 12th March, 1979, although I do agree with Chief Sobo Sowemimo, S.A.N., learned counsel to the appellant, that fairness demanded that the long petition

addressed to the Chief Judge of Lagos State which was heavily used by the learned Justices of the Court of Appeal ought to have been sent to the learned trial Judge for his comments. As it is we have only Mr. Olunwa's version as to what happened in his Chambers. According to this version, which is contained in a letter of 12th March, 1979 to the learned Judge, the learned trial Judge, on visiting the Respondents' Solicitors Chambers invited them to attend Court on Monday 12th March, 1979 when he intended to recall his judgment of 9th March, 1979 for amendment. Mr. Olunwa states further that he and his professional colleague, Alhaji Tinubu, opposed the proposed amendment and rectification and an argument ensued between them and the learned trial Judge. In the course of this argument, the learned trial judge found it necessary to bring the Court file from his car, while they on their part showed him a copy of the Notice and Grounds of Appeal already prepared against his judgment of 9th March. Let me reiterate that there are no substantial disagreements on these matters. In a letter dated 12th March, 1979 written by Senior Registrar on the instructions of the learned trial judge, it was stated that Messrs Olunwa and co. had been

> "notified by His Lordship that the above mentioned judgment (i.e. judgment of 9th March, 1979) will be recalled on Monday 12th March, 1979 at 9 a.m. to enable His Lordship correct a fundamental error which he had discovered, and which had bothered him so much".

On 12th March, 1979, Mr. Olunwa did not appear in Court. Mr. Adejonwo learned counsel to the appellant appeared presumably having been invited too by the learned trial judge. He addressed the Court on the question of the learned Judge's competence to amend his own judgment. Thereafter the learned trial Judge, A.L.A.L. Balogun J., proceeded to deliver a judgment which, though long, undoubtedly showed industry and learning, and in which he discussed his court's inherent jurisdiction to amend his judgment of 9th March, 1979. He recalled the said judgment of 9th March, 1979 and amended it, correcting what he had referred to as fundamental errors. The result was the same as his judgment of 9th March. In other words, the plaintiff's/respondents claims were dismissed in their entirety.

The plaintiffs/respondents then appealed against the judgment of 12th March to the Court of Appeal. In order to emphasise the issue which the court of Appeal dealt with, I find it necessary to set down the grounds of appeal. They were in these terms:-

> "(a) That having delivered the judgment of the Court in this suit on Friday, the 9th day of March, 1979; the learned trial Judge had no jurisdiction in the case to deliver an amended judgment on Monday, the 12th day of March, 1979.
>
> (b) That the learned trial Judge had exceeded his jurisdiction in the case in delivering and or reading a second judgment in open court on Monday, the 12th day of March, 1979, after the 1st judgment was read out by His Lordship on Friday the 9th day of March, 1979.
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> (c) That the learned Trial Judge was personally interested in the said judgment of Monday the 12th day of March, 1979, in that the learned trial Judge did not cause Hearing Notice to issue to parties and counsel but rather on Saturday, the 10th March, 1979, personally went round *suo motu* and or called in the Chambers of Counsel to discuss the said second judgment delivered on Monday the 12th of March, 1979.
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> (d) The judgment of the learned Trial Judge dated the 12th day of March, 1979, is erroneous in point of law.
>
> (e) And other specific illegalities substantially affecting the merits of the case has (sic) been committed in the proceedings to wit the delivery of the said judgment of the 12th day of March, 1979, "*functus officio*"
>
> (f) That the decision is unreasonable, or cannot be supported having regard to the evidence".

It is clear from these grounds of appeal that no attack was being made at this stage on the judgment of 9th March, 1979. I shall in the course of this judgment refer to the separate Notice and Grounds of Appeal relating to that judgment.

Before the Court of Appeal, both Chief Sobo Sowemimo and Mr. Olunwa not only agreed that the conduct of the learned trial Judge in visiting the chambers of the respondents' solicitors was bizarre to say the least, but also that at the time he delivered the judgment of 12th March, 1979 the learned trial Judge was *functus officio* and accordingly that judgment of 12th March, 1979 was a nullity. The effect of that agreement was of course that the question of the power of the Court to amend its own judgment, on which the learned trial judge had devoted so much research effort was not canvassed in any detail. What was really before the Court of Appeal was whether, in all the circumstances of the case, particularly the events of 10th and 12th March, 1979 both judgments of 9th and 12th March, 1979 ought not to be annulled.

On 26th March, 1984, the Court of Appeal (Uthman Mohammed, Ademola and Nnaemeka-Agu, JJCA.) unanimously allowed the respondents' appeal. The Court held that the learned trial Judge was *functus officio* when he purportedly delivered the judgment of 12th March, 1979 and so that judgment was declared null and void. In view of the conduct of the learned trial Judge in visiting the chambers of the respondent's Solicitors, it was the view of that Court that even the judgment of 9th March, 1979 could not escape public scrutiny. Since, the learned trial Judge had admitted making fundamental errors in his judgment of 9th March, 1979 the justice of the cause dictated that that judgment be also annulled and retrial ordered. The appellant then appealed to this Court.

It is pertinent to add that in this Court the question of the competence of the learned trial Judge in amending his judgment was neither made a ground of appeal nor was it argued before us.

In the only ground of appeal the appellant complained that:

> "The Court of Appeal misdirected itself in law in holding that the conduct of the trial Judge in going personally to the Appellant/Respondent's Counsel's chambers on the 10th March 1979 to invite counsel to be present in Court on the 12th March, 1979 to address him on the point that he intended to recall the judgment (not yet enrolled) he delivered on the 9th March, 1979 is seriously objectionable as to vitiate the proceedings and judgment delivered on the 12th March, 1979, and also the proceedings and judgment delivered on the 9th March, 1979 thereby setting aside the two proceedings and judgments and ordering retrial before another Judge"

In his brief of argument and oral submission before this Court, Chief Sobo Sowemimo, S.A.N. strenuously argued that though the learned trial Judge's visit to respondent's Counsel's Chambers was irregular, it was not so irregular or objectionable as to vitiate the proceedings and judgment of 9th March, 1979. Relying on such cases as *Whitford Residents and Rate Payers Association v. Manukau City Corporation (1974) 2N.Z.L.R. 340* and *Commonwealth Conciliation and Ors. Ex-parte the ANGLISS Group 122 G.L.R. 546*, he argued that no bias could be justly placed at the door of the learned trial Judge as to justify the vitiation of the proceedings and judgment of 9th March, 1979. Although Mr. Olunwa was not called, I have had recourse to the comprehensive brief of argument which he filed on behalf of the respondents. The first matter to which I would wish to advert my mind is the question of amendment of the judgment of 9th March 1979 by the learned trial Judge. Uthman Mohammed, J .C.A. in his lead judgment agreed –

> "with the appellant's counsel that the learned trial Judge is definitely in error to amend his judgment in the way he did"

The learned Justice of Appeal referred to the decision of this Court in *Minister of Lagos Affairs Mines and Power and Anor. v. Akin Olugbade and Ors. (1974) 1 All N .L.R. part 2,226 at 233* where approval was given to the statement of Morris L.J. in *Thynne v. Thynne (1955) 3 All E.R. 129,145* that

> "where a Court has decided an issue and the decision of the court is truly embodied in some judgment or order that has been effective then the court cannot reopen the matter and cannot substitute a different decision in place of the one which has been recorded. Those who seek to alter must in those circumstances invoke such appellate jurisdiction as may apply"

The inherent jurisdiction of the court to amend or alter a judgment which has not been enrolled is one on which there have been several judicial pronouncements in this country and in England some of them conflicting with others. The learned trial judge was no doubt influenced by the views of Lord Denning M.R. in *Varty (Inspector of Taxes v. British South African Company (1965) CH.D.508, 515*. Let me reiterate, however, that this matter is really not in issue before this Court. If it were, I would have thought that this Court had clearly stated the law in such cases as *Minister of Lagos Affairs etc. v. Akin Olugbade and Ors. (Supra); Daniel Ashiyanbi and Ors. v. Adeniji and Ors (1967) 1 A.N.L.R.82, 86 and 87; Ogbu v. Urum (1981) 4 S.C.1*.

The next matter I would wish to advert to is the conduct of the learned trial Judge in visiting the chambers of respondents' counsel. Chief Sobo Sowemimo S.A.N. has submitted that that conduct was reproachable and irregular. I think those were fair descriptions. I would myself say that it was unfortunate as it was ill-advised. The learned trial Judge could not have fully adverted his mind to the implications for his dignity as a Judge of the events of 10th March, 1979. I can myself see no circumstances that could justify the learned trial Judge turning himself into a Bailiff serving Hearing Notices on counsel when it was open to him to make an order for Hearing Notices to issue, or if it was too late to make such an order on Friday 9th March, 1979, instruct his Registrar to invite counsel to the parties to the Court hearing on 12th March, 1979. If the learned trial Judge had considered the matter, it would have occurred to him that it would seem strange in the extreme to respondents against whom he had delivered judgment the previous day, that he could visit their counsel and proceed on the 12th March to confirm the judgment he had given against them on the 9th March, 1979.

Furthermore, it would have been obvious to him that learned counsel to the respondents, Mr. Olunwa as well as his professional colleagues, would oppose his proposed amendment or rectification. Would it not have been reasonable for counsel to have serious misgivings about the motive of that visit? Would Counsel in those circumstances not have been entitled to wonder whether the learned trial Judge was intent on undermining the grounds of appeal which they had prepared for the Court of Appeal? Mr. Olunwa in his letter to the Judge dated 12th March, 1979, to which reference was earlier made, stated that a copy of the proposed grounds of appeal against the judgment of 9th March, 1979 which was to be amended was shown to the learned trial Judge. Having regard to the amendment ultimately made by the learned trial Judge it is instructive to have a cursory glance at those grounds of appeal. Ground 2 complained that

> "The learned trial Judge erred in law when he having held that the Plaintiffs/Appellants' family are the original owners of the land in dispute went on to decide that their right and or title over the land in dispute must be defeated under the doctrine of laches and acquiescence, when it was not proved nor found in the judgment that any purported possession by the defendant was clearly to the knowledge of the plaintiffs or their knowledge at all"

Chief Sowemimo, as earlier indicated, forcefully argued that whatever else the learned trial Judge may have done bias cannot be placed at his door. The question of bias and likelihood of bias in adjudicators has recently been dealt with by this Court in *Donald Ikomi and 2 Ors. v. The State (1986) 3 N.W.L.R. (Pt. 28) 340*. In *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon (1969) 1 Q.B.D. 577,599* Lord Denning M.R. said of the bias which would vitiate proceedings.

> "In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was real likelihood that he would or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand"

On the face of it, it would appear that there was a likelihood of bias in this case. I am of the view, however, that if one looked closely at the records of proceedings, and the circumstances what one finds is really not bias or likelihood of it, but rather some slight erosion of confidence in the judicial process. There is nothing on record indicating that the learned trial Judge was minded to favour one side or the other. Although the respondents in their grounds of appeal had contended that the learned trial Judge was personally interested in the judgment of Monday 12th March, 1979 there was no allegation that any pecuniary interest was involved. Indeed the respondent's only reason for alleging personal interest was the failure of the learned trial Judge to cause hearing notice to issue instead of trying to serve it himself. It is perhaps understandable that it is the respondents who, in the circumstances of this case, would suspect bias but it has to be remembered that as was decided in the Whitford case (supra).

> "The test of bias, whether there is a reasonable suspicion of bias looked at from the objective stand point of a reasonable person and not from the subjective stand point of an aggrieved party"

In the learned Judge's favour, it was conceded on all sides both in the Court of Appeal and this Court, that there was no question about his integrity. It seems to me that the learned trial Judge was motivated by nothing more than what Nnaemeka-Agu, J.C.A. aptly described as :

> "his characteristic enthusiasm for the job"

It was an enthusiasm which clearly and unfortunately robbed him of his better judgment in this matter. One cannot fail to see this enthusiasm if one reads through the judgment of 12th March, 1979. It was clear from the preliminary remarks made by the learned trial Judge before he read the judgment of 12th March, 1979, that he was anxious to effect this amendment before the judgment of 9th March, 1979 was enrolled. It is fair to deduce from the records that he appeared anxious to correct whatever errors there were probably to obviate this being discovered at the Court of Appeal. Perhaps the single thing which more than any other thing shows that the learned trial judge was actuated by a desire to contribute to the development of the law as he conceives it, is his approach to the question of his power to recall and amend his judgment of 9th March, 1979. It is this consuming desire that pushed him into making all those journeys that have led to these proceedings. After quoting several authorities on the question of the inherent jurisdiction of a Court to amend its judgment before it is enrolled, the learned trial Judge said:-

> "It is also right to bear in mind that there has been in recent times in Nigeria some controversies in High Governmental quarters, (and some doubts expressed by some members of the legal profession in Nigeria) as to the existence of this inherent jurisdiction. When this case came up this morning before me, learned counsel for both parties were absent at first. But soon as the proceedings began, Mr. Adejonwo learned counsel for the defendant appeared. However, Chief Olunwa, learned counsel for the Plaintiffs was still absent and he did not appear throughout today's proceedings, and I assume that his failure to appear is that he does not wish to be heard on this matter or to assist the court in this difficult task of deciding whether or not to recall the judgment of Friday, 9th March, 1979, and alter it to correct the apparent errors on the face of the record. It could be that Chief Olunwa felt, and rightly perhaps, that any correction of the judgment must mean more damage to the Plaintiff's Claim".

Further in the judgment the learned Judge went on –

> "I thereupon made a formal order recalling the oral judgment which I pronounced in this action on Friday 9th March, 1979, to enable me correct the errors in the same. I did not consider it expedient to adjourn to any other day because the errors in that judgment were too apparent on a careful study of that judgment and from the state of the pleadings of the parties and also because the authorities on this point were equally too clear. Furthermore, I had no doubt that in the special circumstances of this case which was exceptional, the remedy by way of appeal (although available) was not the most appropriate or the only remedy, I thought that this was an opportunity for me to state the law on this subject as best I can"

Then at the end of his judgment of 12th March, 1979, the learned trial Judge concluded thus:-

> "One last word. I must confess that it has been with some reluctance that I have in this case decided to exercise the inherent jurisdiction of the Court to recall the oral judgment which I delivered on Friday, 9th March, 1979, bearing in

> mind the recent controversies in Nigeria in Governmental organs and otherwise, (and the doubts expressed even by some members of the legal profession in Nigeria) as to the jurisdiction of a court of record to recall and amend its judgment or order before it is entered, and as to which I had earlier made reference in this judgment. However, having given the matter the most serious considerations which I can, and on the fact of the numerous authorities, both English and Local, to which I have also referred I have arrived at the conclusion that, in the exceptional circumstances of the present case (and as the errors which I made are apparent from the pleadings in the action) I must exercise that inherent, but delicate, jurisdiction. *It may be declared by another Court that I had acted too boldly in exercising the jurisdiction, or, even that I had acted wrongly, but I am satisfied that I have endeavoured in this case to do justice to all the parties".*
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> *(Italics mine)*

Strange as the conduct of the learned trial Judge has been, the passages show a mind anxious and determined to make corrections which he thought he had power, and above all the duty, to make. The passages do not show bias or likelihood of bias. They rather show a misconception, in all good faith, of what ought to be done in the circumstances. It certainly would have been safer to leave the matter to the Court of Appeal.

The question which arises then is this. If there is no question of bias or likelihood of bias ought Chief Sowemimo's contention that the judgment of 9th March, 1979 should stand not be accepted? I would answer that it ought not and I still do not accept it. I think I can best state my reason for agreeing that judgment too cannot stand, as due to the erosion of confidence in the adjudicative process brought about by the conduct of the learned trial Judge. Lord Hewart C.J. in *R. v. Sussex Justices Ex-parte Macarthy (1924) 1K.B. 256,259* stated these words which have come down the ages –

> "It is said, and no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while this is so, a long line of cases show that it is not merely of some importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"

I cannot do better than set down the views of the learned Justices of the Court of Appeal which in my view gave sufficient reasons for holding the judgment of 9th March, 1979 also vitiated. Said Uthman Mohammed. JCA,

> "It is my strong view that whatever decision the learned trial Judge had passed down in the second judgment, after his visit to the chambers of Chief Olunwa, the generality of the members of the public are bound to call for question on the impartiality of the learned trial Judge, and in the end even the first judgment would not escape the public screening"

In the view of Ademola, J.C.A.

> "what happened on the 10th March by the visit to the counsel's chambers and the attitude of their counsel to the request made by the Judge had their worst fears confirmed by what the Judge did on the 12th March. The issue here is that of confidence in the Judge who writes a judgment and not the soundness of his judgment. A Court of Appeal cannot be indifferent to the mood of the parties in the situation present here"

In his own judgment Nnaemeka-Agu, J .C.A. said –

> "The question is whether, the appearance in counsel's chambers and his running around to play the role of court bailiff giving notice of rehearing and engaging in an argument with the appellant's counsel all in the full view of the appellants would inspire confidence in the appellants that their case had been decided on its merits. In my view the circumstances of the second judgment go far beyond the question of his being *functus officio*: One is inclined to agree with Mr. Olunwa that it casts some doubts on the merit of the first"

The last matter which I would wish to discuss is the order of retrial made by the Court of Appeal which Chief Sowemimo also fiercely attacked. The principles which govern the order of retrial were settled by this Court in *Yesufu Abodundu and Ors. v. The Queen (1959) 4F.S.C. 70 at 73*. There the Court stated:

> "We are of the opinion that, before deciding to order a retrial, this court must be satisfied
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> (a) that there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such character that on the one hand the trial was not rendered a nullity and on the other hand the court is unable to say that there has been no miscarriage of justice, and to invoke the proviso to Section 11(1) of the Ordinance;
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> (b) that leaving aside the error of irregularity, the evidence taken as a whole discloses a substantial case against the appellant;
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> (c) that there are no such special circumstances as would render it oppressive to put the appellant on trial a second time;

(d) that the offence or offences of which the appellant was convicted or the consequences to the appellant or any other person of the conviction or acquittal of the appellant, are not merely trivial;

(e) that to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it"

Although this was a criminal case those principles are applicable to civil matters and principle (a) is particularly relevant, as I shall shortly show, to this case. These principles have been upheld by this Court in *Okafor v. The State (1976) 5 S.C. 13 Ikhanev. C.O.P. (1977) 6SC.119; Okpara v. The Republic (1977) 4 S.C. 53 and Evorokoromo v. The State (1979) 6-9 S.C.* 3. In *Ayoola v. Adebayo (1969) 1 ALL NLR 199* this Court stated the further principle in these words:

> "An order for retrial inevitably implies that one of the parties, usually the plaintiff, is being given another opportunity to re-litigate the same matter and certainly before deciding to make such an order we think that an appellate tribunal should satisfy itself that the other party is not thereby being wronged to such an extent that there would be a miscarriage of justice A retrial is not appropriate where it is manifest that the plaintiff's case has failed *in toto* and that no irregularity of a substantial nature is apparent on the records or shown to the Court"

To return to the instant appeal, it must be conceded that the appellant is in no way responsible for the events that have now enveloped the judgment of 9th March which was in his favour. Nevertheless, I do not think that a retrial would be so oppressive on him as to amount to a miscarriage of justice. He would have equal opportunity with the respondents to present his case before a new Judge and one assumes that he would want to win in circumstances which would raise no eyebrows. Apart from the question of lack of confidence in the two judgments of the learned trial Judge, he himself had admitted a fundamental error in his judgment of 9th March which made a retrial inevitable. In his remarks on 12th March, 1979, he said –

> "On the basis of the erroneous finding that the defendant admitted paragraph 5 of the Statement of Claim which I had made (as is clear from the state of pleadings of the parties) *I proceeded to draw conclusions of law and facts which, being based on an erroneous foundation were all equally wrong and unjustified on the basis of the pleadings"*
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> (Italics mine)

If as has happened here the learned trial Judge admits that his judgment was based on a wrong foundation there would be no justification for allowing such a judgment to stand. A slightly similar situation arose in *Bamidele v. Adeyemi (1963) 1 ALL NLR 146, 148* where the learned trial Judge's decision was based on the use of a statement not proved to be a statement of a party in an action to discredit the party. Bairaman, F.J. delivering the judgment of the Federal Supreme Court said,

> "Now the trial Judge used that statement, which was not proved to be a statement made by the 2nd defendant and which he made as a means of discrediting his evidence on a point which would have exonerated him. It has been argued for the plaintiffs that the trial judge would have disbelieved him anyway, even without the rest of the statement, for other reasons for disbelieving him were also given in the judgment. We cannot say, we are faced with a flaw in the consideration of the vital issue of negligence, and the only proper course is to have a fresh trial."

It would seem to me that in the circumstances of this case a refusal to grant a retrial would have occasioned a greater miscarriage of justice than to grant it. It was for these reasons that I dismissed this appeal on 28th April, 1986.

Reasons for judgement given by
Ayo Gabriel Irikefe. CJN

I had had the privilege before now of reading the lead reasons just delivered by my learned brother, Nnamani, J.S.C and the said reasons are in full accord with mine. What happened here was most unfortunate. I agree that the learned Judge here, whom we all know for his high probity and excessive zeal for development of the law went just a step too many. His behaviour, though technically condemnable, was not intended to benefit either of the contesting parties. In the result, and in view of the dictum that the appearance of justice having been done is more important than the actuality of it, I ruled that the Court of Appeal was right in ordering a retrial, before another Judge and proceeded to dismiss the appeal with costs.

Reasons for judgement given by
Andrews Otutu Obaseki. JSC

After hearing counsel for the appellant in this appeal on the 28th day of April, 1986 and studying the briefs of argument filed by counsel for the parties, I dismissed this appeal and reserved my reasons for the judgment till today. I now give my reasons.

Before now, I had the advantage of reading in draft, the Reasons for Judgment just delivered by my learned brother, Nnamani, JSC and found that those reasons gave full expression to the reasons on which my judgment of dismissal was founded. I therefore adopt them as my own. However, in view of the extreme importance of the issue for determination in this appeal, I am inclined to add these few additional comments by way of emphasis. The issue raised by the only ground of appeal may be stated thus:

> "Where the trial Judge, after delivering a considered judgment on 9th March, 1979 recalls the judgment on the grounds of errors of law and fact and proceeded to write and deliver an amended judgment on 12th March, 1979 which was held on appeal to have been delivered without jurisdiction the trial Judge being *functus officio*, is the Court of Appeal in error in setting aside both judgments and remitting the case for trial *de novo*?"

I do not see what validity the judgment of the 9th day of March, 1986 condemned by the learned trial Judge who delivered it can enjoy when the errors in the judgment were clearly highlighted in the second judgment delivered on the 12th of March, 1979. Counsel for the appellant's contention that the judgment of the 12th of March, 1979 being a nullity as the Judge was *functus officio* when he delivered it, the Justices of the Court of Appeal should have disabused their minds of the content of the said judgment, overlooked the fact that the reasons that led the learned trial judge to write and deliver the said amended judgment of the 12th of March, 1979 are matters of record. I doubt whether if those reasons had been communicated to the Court of Appeal without the exercise of writing and delivering the amended judgment of the 12th of March, 1979, the Court of Appeal would not have, in my view, considered it a wiser decision justified by the circumstances to order a retrial.

There is a basic assumption that Judges are supposed to be convinced of the correctness of their judgments and the reasons for their judgments.

On the submission of counsel for the appellant that it was a misdirection on the part of the Court of Appeal to hold that the conduct of the learned trial Judge in visiting Chief Olunwa's Chambers and engaging in a debate with Counsel in his chambers on the question of the necessity and propriety of recalling and amending the judgment of the 9th March, 1979 is seriously objectionable as to vitiate the validity of the judgment of the 9th March, 1979, I think that the real point of the direction has been missed. If a Judge walks up to learned counsel for one of the parties to a case which has been determined by him and informs him that he has committed errors of law and fact in writing the judgment delivered such counsel has duty to bring the fact to the notice of the Court of Appeal and request a retrial. The judgment is not invalid by reason of the bias of the learned trial Judge but by failure of efficiency in approaching the task before him - the task of proper adjudication. The admission of the learned Judge that his trend of thought was led astray by a wrong appreciation of the pleadings with the consequent misapplication of the law can attract no blame to the Judge. But the admission in my view, is fatal to the validity of the judgment of the 9th of March, 1979. This is brought out clearly in the learned trial Judge's words which read:

> "On the basis of the erroneous finding that the defendant admitted paragraph 5 of the statement of claim which I had made (as is clear from the state of the pleadings) I proceeded to draw conclusions of law and facts which being based on erroneous foundation were well equally wrong and unjustified on the basis of the pleadings. " .
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> (Underlining mine) "

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This amounts to a misdirection on the facts and the law. On when misdirection occurs, this Court in the case of *Chidiac v. Laguda (1964) NMLR. 123 at 125* observed that:

> "A misdirection therefore occurs when the issue of fact in the case for the plaintiff or defence or the law applicable to the issues raised are not fairly submitted for the consideration of the jury. Where however the Judge sits without a jury, he misdirects himself if he misconceives the issues or summarises the evidence inadequately or incorrectly or makes a mistake of law but provided there is some evidence to justify a finding it cannot properly be described as a misdirection."

The Judge's visit to Chief Olunwa's Chambers and the dialogue that took place there.

In addition to what my learned brother has said on this issue, I would add that a trial Judge ought to know that he is on trial for any improper conduct during the trial of a case before him and immediately thereafter. He therefore has no business to pay a working visit to the counsel to any of the parties no matter how disturbed he is by the error in his judgment. It is unethical to engage in any argument with counsel in counsel's chambers about the judgment and to say the least, provocative to try to convince counsel of the need to reinforce the judgment against any of the parties with better well considered reasons. Although the mind of the learned Judge may not have been afflicted with bias, it is doubtful whether such conduct does not smack of likelihood of bias. It is however true as Lord Watson said in the case of *Bray v Ford (1895) A.C. 44 at 49* that: -

> "Every party to a trial by a jury has a legal and constitutional right to have the case which he has made either in pursuant or in defence, fairly submitted to the consideration of that tribunal."

Where a Judge has completed his task of adjudication, he should disengage his mind from the case and leave any party dissatisfied with his decision to pursue the matter on appeal if he desires. If a Judge cannot support his own judgment, the task of supporting the said judgment by anyone else is impossible. It was for the above reasons that I dismissed the appeal on the 28th day of April, 1986.

Reasons for judgement given by
Anthony Nnaemezie Aniagolu. JSC

This is an appeal which, unanimously with other Justices on the panel, I had dismissed on 28th April, 1986 stating in the order of dismissal that I would give my reasons for so doing, today. I now proceed to give the reasons.

My learned brother, Nnamani, J .S.C., has comprehensively, in his own reasons for judgment, which had been made available to me in draft, narrated the background facts leading to the appeal. Nothing useful will be gained in repeating those facts here. I adopt, in their entirety, those background facts set out by him. The *gravamen* of the complaint in this appeal is the conduct of the trial Judge which, as my learned brother Nnamani has aptly put it, has had the undesirable effect of some "erosion of confidence in the judicial process".

A Judge will not adopt a method of adjudication, alien to procedural rules of justice, upon a plea that he is actuated by the noblest and an impassioned zeal for Justice, which propels him into bizarre methods of arriving at that justice, holding as it were, as a justifying Machiavellian principle, that 'the end justifies the means'.

In *Alhaji Raimi Edun v Odan Community (1980) 8-11 S.C. 103*, I laid stress upon the desirability of following legal procedure for arriving at justice. At page 123, this Court held:

> "It is clear from his argument that Chief Sofola, in his pursuit of what he considers to be the intrinsic justice in his clients' case, is less mindful of the procedure he has chosen to intervene in the appeal proceedings before this court. But however strongly he may feel (and he may possibly have genuine complaints for so feeling) this Court must be sure that it is properly seized of a matter before embarking upon its determination. The Court is an appellate Court whose foundations are firmly laid in the Constitution and barring the provision in the Constitution giving it original jurisdiction in certain specific matters (See S. 212), it has no original jurisdiction."

This Court agreed that even in the case of a Court of last resort the procedure has to be followed. At page 127, it continued and said:

> "the Court of last resort will indeed do justice but must do the justice by procedures laid down by the law and the Constitution. The moment a court ceases to do justice in accordance with the law and procedure laid down for it, it ceases to be a regular court to become a kangaroo court."

The reason for all this is that in the end where procedure is ignored justice is usually at a loss; the judiciary, in its image, is worsted in the encounter; and the general public for whom the entire drama was meant to serve ends up with a low opinion of the Judiciary.

Experience and the test of time have shown that justice has never profited from eccentric or bizarre methods and that painstaking procedural modes have always satisfied the more, the yearning desires of a just society.

The saving grace in this otherwise embarrassing appeal - embarrassing to the Judiciary as a whole and to the Higher Bench in particular - is that all counsel concerned in this appeal are agreed that A.L.A.L. Balogun, J. (the trial Judge) is a Judge of avowed integrity and that there is no suggestion whatever that he acted either from improper motives or from a desire for financial enrichment. I am particularly heartened by this universal testimony which tends to take the sting out of the entire episode.

Be that as it may, one must always bear in mind the reaction of the general public who may not have the specialized knowledge of the trial Judge as members of the Bar who work with him daily in the courts, have. Lush, J., has stated in *Serjeant v Dale (1877) 2 Q.B.D. 558 at 567* that

> "One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security.'

Lord Denning in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon (1969) 1 Q.B. 577 at 599* gave the reason why a Judge must always act in such a way as to retain the confidence of the people in the judicial process when he said at page 599

> "The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The Judge is biased'."

These principles have been mentioned with approval by this Court in *A. U. Deduwa and Ors v Okorodudu And Ors. (1976) 9-10 SC. 329*.

A trial Judge must not, in the conduct of the proceedings before him, either by words or actions, scandalize the public. But it is right to say that in the instant case, Balogun, J. was not shown to have been biased.

Chief Sowemimo, of Counsel, has asked us not to determine the justice of the adjudication leading to the first judgment of Friday, 9th March 1979 by the conduct of the trial Judge in going to Counsel's Chambers on Saturday, 10th March 1979 or by the amended judgment of Monday 12th March 1979. He has asked us to pronounce in favour of the first judgment of Friday, 9th March 1979 so that the defendants - his clients - who stand to benefit by the judgment will not suffer the loss of the benefit of the judgment by reason of the subsequent conduct of the trial judge in visiting the Chambers of Counsel the morning after the judgment.

The simple answer to this is that the trial Judge himself has stated that that judgment of Friday 9th March 1979 contains a fundamental error. Surely, where the trial Judge himself has conceded that he has committed an error in his judgment and that the judgment cannot stand (hence his desire for an amendment) it cannot stand to reason that an appeal court should hold that the judgment should stand inspite of that fundamental error. Thus, the judgment of 9th March 1979 is made defective by the fundamental error.

The amending judgment of Monday 12th March 1979 was not only delivered without jurisdiction (Chief Sowemimo said it was a nullity) but also was tainted by the conduct of the trial Judge of Saturday 10th March 1979. The result is that both judgments cannot stand and must be ruled against.

The best approach therefore, in the interest of justice, is that the stream of justice having been sullied, all the muddy waters must be removed in order to make way for the new and fresh waters from the source of the stream, to take over.

There must therefore be a retrial before a different Judge. The two judgments of the High Court, per A.L.A.L. Balogun, J., dated 9th March 1979 and 12th March 1979, are hereby set aside and a retrial of the case before another Judge hereby ordered. The judgment of the Court of Appeal is hereby affirmed. I abide by all the reasoning of my learned brother, Nnamani, J .S.C., in his Reasons for Judgment, just delivered.

Reasons for judgement given by
Dahunsi Olugbemi Coker. JSC

The appeal in this case was heard on the 28th day of April, 1986 and judgment was given immediately by dismissing the appeal and I ordered that the case be heard *de-novo* in the High Court of Lagos before another Judge. And as indicated, I now give my reasons for the judgment.

The facts and issues in this appeal have been clearly set out in the lead reasons for judgment just delivered by my learned brother, Nnamani, J .S.C., who before now has kindly shown me the draft. I accept as accurate both the statement of facts and the issues raised in the appeal and adopt them as mine. I also accept his reasons for the decision to be in accord with mine.

It is common ground as agreed by both the appellant and respondent's Counsel that the second judgment purportedly delivered on the 12th March 1979 is a nullity, The learned trial Judge was *functus officio* after delivery of his judgment on 9th March 1979. The real question is whether that judgment of the 9th March should be allowed to stand.

As admitted by the learned trial Judge himself:-

> "the errors in the oral judgment which I have delivered therein on Friday 9th March 1979 are too apparent if one studies the pleadings of the parties."

He further admitted that he

> "was clearly in error in the findings and in all the conclusions based thereon."

These admissions of error by the trial learned Judge are sufficient apart from any other reasons why his judgment (of the 9th March 1979) should not be allowed to stand. It is difficult to appreciate any argument to the contrary. It is a confession of misdirections of the facts which go to the very root of the case. His subsequent visit to the Chambers of Chief Olunwa further complicated the matter, albeit borne out by his over zealousness for accuracy and a desire to exhibit his undoubted industry and erudition of the law. His conduct was not only despicable, undignifying and unbecoming of his high judicial office as an impartial arbiter between the two contesting parties. It is comforting that his integrity was unquestionable in the matter in that no improper or corrupt motive was ever imputed against him. But enthusiasm on the part of a Judge is hardly consistent with impartiality. It is not enough that he was actuated by the best of motives when he said on the 12th March 1979:

> "So, in this full court today, in which I can see some eminent counsel amongst the thirty-one members of the legal profession now present, I shall proceed to consider the jurisdiction of a court of record to recall and alter a judgment or order made by it but which has not been entered. I am happy that the following eminent counsel are present here, Mr. M. O. (sic) Molajo, S.A.N., Professor Jegede, Dean of the Faculty of Law, University of Lagos; Mr. D. A. Omotade, Senior State Counsel, Federal Ministry of Justice, Lagos, and Mr. J. O. Jegede, Principal State Counsel, Oyo State. There is also present with us today at this moment, Mr. L. O. Yare, the Divisional Police Officer, Ikeja, who is the 2nd Defendant in another matter touching upon the liberty of the subject. I hope they will all bear lasting testimony to the occasion."

It is clear to me that the trial Judge got himself emotionally involved in the case when he stated:

> "It seems to me very clear that the present case is a simple case of error which I made in the previous judgment which I read on Friday, 9th March, 1979. So long as that error remains the Plaintiffs would have in their favour a finding of fact and conclusions of law to which they are not entitled, having regard to the true state of the Pleadings. The Defendant never admitted paragraph 5 of the Statement of Claim. Rather, he denied it specifically. The question then is this; must the error be allowed to remain in that judgment or has this Court jurisdiction (to) withdraw and alter it so

far as the judgment has not (been) enrolled and entered. It seems to me that it would be intolerable if in such an exceptional case as the present, exceptional in the sense that every case must be decided on the correct basis of the pleadings of the parties - the judge himself who has found out his error and who regrets it very much cannot withdraw the judgment and vary it to correct the error, but must leave it to the Court of Appeal to do so. That will not be right."

(Words in bracket mine).

No doubt he was anxious to impress not only the galaxy of eminent lawyers present in the Court but also to perpetuate his profound knowledge of the law not only for the present generation but also for posterity. The conduct of the learned trial judge maybe compared to that of Hallett. J. (in *Jones v National Coal Board (1957) 2 K.B.55*) who, in his anxiety to understand the details of the complicated case he was hearing asked too many questions to clear his mind and unduly intervened in the cross examination of witnesses and these were grounds of appeal by both sides of the case. Both sides acknowledged his worthy motives. His judgment, notwithstanding, was set aside and new trial was ordered by the Court of Appeal. A judge is not liable in damages at the suit of an aggrieved party for anything done while acting judicially; even though he may be mistaken in fact or in law in the honest belief that it is within his jurisdiction. The remedy of the aggrieved person is to appeal against the decision. See *Sirros v Moore (1974) 3 W .L.R. 459*.

I agree that the only satisfactory order to make in the peculiar circumstance of this case is to allow a fresh blood to flow into the rehearing of the proceedings. I agree with and do adopt all the orders made by Nnamani, J.S.C.

Reasons for judgement given by
Saidu Kawu. JSC

I have bad the advantage of reading, in draft, the reason for judgment just read by my learned brother, Nnamani, J .S.C. I am in entire agreement with his reasons for dismissing the appeal on 28th April, 1986, and will respectfully adopt those reasons as mine. I am also in agreement with the orders proposed in the said judgment by my brother, Nnamani, J.S.C.

Reasons for judgement given by
Chukwudifu Akunne Oputa. JSC

On the 28th day of April, 1986, the court heard this appeal. After a careful perusal of the Briefs filed on both sides and after listening to Mr. Sobo Sowemimo, S.A.N. of Counsel for the Appellant in elaboration of the vital issue raised, namely - the conduct of the trial Judge, the court unanimously decided to dismiss the appeal without even calling upon learned counsel for the Respondent. The appeal was then summarily dismissed with costs to the Respondent assessed at ₦300.00. The Court then reserved its reasons for judgment to Friday, 27th June, 1986. Hereunder are my reasons.

I will reproduce verbatim the Introduction to the Appellant's Brief of Argument to show that on the Appellant's own showing this appeal should in any event be dismissed:

"The judgment which forms the subject matter of this appeal was delivered by the Court of Appeal, Lagos on 26th March, 1984. The action which gave rise to the said judgment of the court was commenced by a Writ of Summons dated 20th June, 1975 and filed at the Ikeja High Court, wherein the Plaintiffs claimed as follows:

(a) Declaration of title under native law and custom to all that piece or parcel of land situate, lying and being at Ikeja, near Alade Village, in the Ikeja District of the Lagos State of Nigeria.

(b) ₦500.00 damages for acts of trespass committed by the Defendant, his privies, servants and/or agents on the said land.

(c) Perpetual injunction restraining the Defendant, his privies, agents and/or servants from further acts of trespass.

The case was tried by Justice A.L.A.L. BaLogun who delivered judgment in the matter on 9th of March, 1979 by dismissing the Plaintiffs claim On the very next day i.e. the 10th March, 1979, which was a Saturday, the judge having discovered that he had made an error in his judgment with regards to a misconstruction of a paragraph in the Statement of Defence decided to recall and amend his judgment consequentially"

If one stops here, it is obvious that from the facts stated above certain serious legal consequences are bound to follow:-

(i) The learned trial judge delivered his judgment of the 9th March 1979. After delivering that judgment his authority over the case expired, he ceased to function as judge exercising judicial authority or control over the case save as provided for by any other written laws empowering him to grant say - a stay of execution of his judgment or the payment of the judgment debt or costs by instalments etc. He became *functus officio* as far as that case was concerned.

(ii) Both in the Brief of the Appellant and at pages 344-347 of the record, it is clear that the judge himself admitted he erred. He himself said:

> "On Friday, the 9th of March, 1979, I read the judgment in this action in open court; but soon thereafter when I retired into the Chambers I discovered to my dismay, that although I have found "that the land in dispute originally belonged to the ancestors of the Plaintiffs one Amore in that the Defendant had admitted the averments of fact in paragraph 5 of the Statement of Claim relevant thereto" the Defendant in fact did not do so."
>
> (The underlining is mine to show how radical the mistake was).

If a Judge makes an error (barring typographical errors of course) in a judgment which he has read in open Court to the hearing of all - parties and non-parties alike - he has no business correcting that error himself. If he does so, he is usurping both the jurisdiction and the functions of the Court of Appeal.

That would be to say the least unconstitutional, and in our Nigerian situation highly suspicious being an open affront against the brittle bond of confidence binding our people with the judicial process. It is well to restate here again that judges like Caesar's wife should be above suspicion.

(iii) Because on his own *ipse dixit* the learned trial judge himself admitted that the judgment he read on the 9th of March, 1979 was erroneous, it then follows that, that same judgment that was admitted to be erroneous cannot be allowed to stand. It has to be upset and reversed. Mr. Sowemimo for the Appellant urged passionately that the first judgment of 9/3/79 should be allowed to stand. The simple answer there is that no court is allowed to persist in error. A judgment that is admittedly erroneous ought to be reversed.

The most alarming aspect of this case is that the learned trial Judge personally undertook to visit the Chambers of learned Counsel for the Plaintiffs who lost by his judgment of 9/3/79. The Plaintiffs were present. They saw him go in and come out from their Lawyer's Chambers. This visit was in breach of all known rules of judicial conduct, etiquette and decorum. The only redeeming feature is that on both sides, learned Counsel agree that the learned trial Judge had no other motive except "perfection". He is so keen on the law that he does not want to make any mistakes. Perfection is a laudable aspiration. But for a trial judge, it is not necessarily a virtue. For one thing, strive as you can, you may never attain perfection. No judge however brilliant, however hardworking can claim an immunity from error. If therefore in the search for perfection a judge should descend to visiting the Chambers of counsel appearing before him in a case, then that elusive virtue - perfection - becomes a vice. The constitutional existence of the Court of Appeal and the Supreme Court of Nigeria is an open admission that the trial judge may sometimes fall into error. The right of appeal will be valueless if there is in any event no possibility of error on the part of the trial Court. The very existence of appellate courts assumes that the Court of first instance may sometimes be in error. Then it becomes the duty of those appellate Courts to correct that error. It is the glory and wisdom of our Constitution, that to prevent any injustice, no man is to be concluded by the first judgment, but that if he apprehends himself to be aggrieved, he has another court to which he can resort for relief.

Therefore a judge having found that he made a mistake, it is not being fair to the party aggrieved if he tries to plug all the holes. Equally he is not obeying the Constitution which entrusted the Court of Appeal with the power to correct those mistakes. But I think the most important lesson to learn from the facts and surrounding circumstances of this case is that it is a matter of public policy that, so far as is possible, judicial proceedings shall not only be free from actual bias or prejudice of the judges, but that they shall be free from any suspicion of bias or prejudice. The character of the judges is public property. The awareness of the above fact will help check the exuberance of the learned judges in cases similar to the one now on appeal.

I now come to the second judgment delivered by the learned trial Judge on Monday, the 12th day of March, 1979. The learned trial Judge having become *functus officio* on Friday, 9/3/79, suffered from a total lack of jurisdiction which could not even have been cured by both parties agreeing to attend his court on 12/3/79, to address him further or to hear him deliver the judgment of 12/3/79. No judge is allowed by our law to overstep his jurisdiction or to confer on himself a jurisdiction not conferred on him by law.

The Court of Appeal in a lead judgment delivered by Othman Mohammed, J.C.A. (to which Ademola and Nnaemeka-Agu, JJ.C.A. concurred) went into the details of the facts and surrounding circumstances of this peculiar case and at the end of it all set aside the two judgments of A.L.A.L. Balogun, J. delivered on 9/3/79 and 12/3/79 and ordered a retrial of the case before another judge. In my view that Court was perfectly right. Ademola, J.C.A., in his concurring judgment observed that an appellate court has a duty *ex debito justitiae* to set aside the judgment of 9/3/79. I fully agree with that view. Nnaemeka-Agu, J.C.A., in his own concurring judgment dealt with the fundamental concept and precept that justice must not only be done but should appear to all to have been done, and the devastating effect on public confidence in the judicial process which the visit of the learned trial judge to the Chambers of learned Counsel for the defendant would create. I agree entirely with his remarks.

The appeal against the judgment and order for retrial made by the court below cannot be faulted and have not been faulted by Mr. Sowemimo's passionate advocacy. What really surprised me is that there was an appeal to the Supreme Court in this

case. That was one of the reasons why the court did not call on learned counsel for the Respondent because the appeal was totally lacking in merit. It was for the above reasons and the fuller reasons given by my learned brother Nnamani, J.S.C., with which I agree, and which I now adopt as mine that I dismissed this appeal on 28/4/86. I abide by all the other consequential orders made in the lead Reasons for Judgment.

Counsels

Chief Sobo Sowemimo. S.A.N	……	For the Appellants
with him		
S.A. Abayomi		
Seyi Sowemimo		
Mrs. F. Aboyade		
Chief M.E. Olunwa	……	For the Respondents
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A.F. Okunuga	……	