IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

ON FRIDAY THE 6TH DAY OF MARCH, 2026
BEFORE THEIR LORDSHIPS

EMMANUEL AKOMAYE AGIM	**JUSTICE, SUPREME COURT**
CHIDIEBERE NWAOMA UWA	**JUSTICE, SUPREME COURT**
MOORE ASEIMO A. ADUMEIN	**JUSTICE, SUPREME COURT**
OBANDE FESTUS OGBUINYA	**JUSTICE, SUPREME COURT**
MOHAMMED BABA IDRIS	**JUSTICE, SUPREME COURT**

SC.414/2016

BETWEEN:

1. VINCENT UGO
2. ANTHONY NWANZE
3. ANTHONY OKOLIE
(For themselves and on behalf of Members of Unuogbor family, Odafe-isiuzor, Ibusa)

APPELLANTS

V.

1. DIOKPA MAHA
2. STEPHEN NWABUOKU
3. MICHAEL NWABUOKU
4. LOUIS ODITA
(For themselves and on behalf of Members of Umuobi family, Odafe-isiuzor, Ibusa)

RESPONDENT

JUDGEMENT

(DELIVERED BY OBANDE FESTUS OGBUINYA, JSC)

This appeal quarrels with the rightness of the decision of the Court of Appeal, Benin Division (hereunder labelled as "the lower court"), *coram judice:* J. O. Bada, I. M. M. Saulawa and P. M. Ekpe, JJCA, in Appeal No. CA/B/246/2013, delivered on the 10th November, 2015. In its judgment, the lower court struck out the appellants' appeal against the decision of the High Court of Delta State (the trial court), in Suit No. AKU/52/2011, delivered on the 17th January, 2013, wherein H. O. Akpotohwo, J. struck out the appellants' suit.

The resumé of the material facts of the case, which transfigured into this appeal, are disobedient to verbosity and complexity. By a writ of summons, filed on the 21st October, 2011, the appellants sued, in a representative capacity, the respondents, in a representative capacity too, over a parcel of land known and called Ani-Ugwude Ogbor situate at Umogbor, Odafe Isiuzo Ibusa, Delta State before the trial court. In their statement of claim, they tabled against the respondents, jointly and severally, a declaratory relief, general damages for trespass and perpetual injunction in respect of the disputed land.

The respondents, upon being served with appellants' processes, entered a conditional appearance and subsequently filed a notice of preliminary wherein they challenged the competence of the suit on quartet grounds. The appellants joined issue with the respondents on

the preliminary objection which was duly heard by the trial court. In a considered ruling, delivered on the 17th January, 2013, documented between page 71 – 80 of the record, the trial court upheld the preliminary objection and struck out the suit.

The appellants were dissatisfied with the decision. Hence, on the 20th March, 2013, they launched a one – ground notice of appeal before the lower court which is reflected at pages 81 and 82 of the record. The lower court heard the appeal. In a considered unanimous judgment, delivered on the 10th November, 2015, lying between pages 122 – 137 of the record, the lower court struck out the appeal.

The appellants were peeved by the decision. Consequently, on the 18th January, 2016, the appellants lodged a two - ground notice of appeal, copied at pages 138 – 140 of the record, wherein they prayed this court for:

> **An order allowing the appeal, set aside part of the decision of the court below striking out the appeal for incomplete record of appeal and the finding that the 1st, 3rd and 4th respondents were served on the basis of a process that was not before it.**

Thereafter, the appellants filed their brief of argument in line with the procedure regulating the hearing of civil appeals in this court. They

obtained leave of this court to hear the appeal on the appellants' brief alone. The appeal was entertained on the 8th December, 2025.

During its hearing learned counsel for the appellants, N. A. Erondu, Esq., adopted the appellants' brief of argument, filed on the 11th July, 2016, as representing his arguments for appeal. He urged the court to allow the appeal.

In the appellants' brief of argument, learned counsel distilled two issues for determination, to wit:

1. **Whether the learned justices of the Court of Appeal were right in striking out the Appellant's (sic) appeal for incomplete record of appeal with out hearing the parties on the issue they raised suo motu.**
2. **Whether learned justices of the Court of Appeal were right in finding non-service on the 1st, 3rd and 4th respondents on the strength of a process not before it.**

A close scrutiny of the duo issues shows that issue one is determinative of the appeal. I will, therefore, handle the appeal on the basis of that issue as a singular issue for determination herein.

Arguments on the issue.

Learned appellants' counsel submitted that the respondents never filed any better and further affidavit that should have been transmitted to the lower court as required by order 8 rules 4 and 5 of the Court of Appeal Rules, 2011. He asserted that if the process existed, the respondents had the right to transmit it to the lower court by way of an additional record as required by order 8 rule 6 of the Court of Appeal Rules, 2011 or they would not have been heard on incompleteness of the record. He relied on ***Michael v. B.O.N*** (2015) 12 NWLR (Pt. 1473) 370. He posited that the lower court wrongly raised the issue of non-inclusion of the process in the record *suo motu* which breached appellant's right to fair hearing and occasioned a miscarriage of justice against them. He cited ***Araka v. Ejeagwu*** (2000) 15 NWLR (Pt. 692) 684; ***Oyekanmi v. NEPA*** (2000) 15 NWLR (Pt. 690) 414; ***Owhonda v. Ekpechi*** (2003) 17 NWLR (Pt. 849) 326; ***Victino Fixed Odds Ltd. v. Ojo*** (2010) 8 NWLR (Pt. 1197) 486; ***Hambe v. Hueze*** (2001) 4 NWLR (Pt. 703) 372. He declared the authorities relied on by the lower court, in arriving at its decision, as inapplicable to the case.

Learned counsel contended that the lower court evaluated and relied wrongly on a process not before the court, further and better affidavit, for service on the third and fourth respondents. He referred to ***Mobil Producing Nig. Limited v. Monokpo*** (2003) 18 NWLR (Pt.

852) 346; ***Ekpemupolo v. Edremoda*** (2009) 8 NWLR (Pt. 1142) 166. He stated that a record of appeal binds the parties and the court. He relied on ***Audu v. FRN*** (2013) 5 NWLR (Pt. 1348) 397. He argued that the respondents are bound by the order of the lower court on the merit of the appeal, which set aside the decision of the trial court, since they did not cross-appeal against it. He cited ***Iyoho v. Effiong*** (2007) 11 NWLR (Pt. 1104) 31.

Resolution of the issue.

An intimate reading of the stubborn issue reveals that its mainstay is circumscribed within the perimeter of a narrow compass. It probes into the propriety *vel non* of the lower court's decision which struck out the appellants' appeal on the footing of an incomplete record. The issue breeds binary limbs. I will attend to them seriatim.

The appellants' *coup de main* against the decision on the first limb orbits around the chastisement of the lower court's decision, which was staked on absence of complete record, as one that germinated from raising an issue *suo motu*. Put simply, that the lower court's decision, which midwifed this appeal, is an offspring of raising an issue *suo motu* which is an offensive exercise in our *corpus juris.*

It is an elementary law, in the days of the yore, that a court of law is showered with the discretion to raise an issue *suo motu*, on its own motion, but has the bounden duty, heaped on it by law, to invite parties in the matter and afford them the opportunities to address it before a

decision is arrived at on the point. Thus, the law, seriously, frowns on a court raising an issue *suo motu* and deciding same without an input from the parties. Such an injudicious judicial exercise will drag the court into the foggy arena of conflict as well as impinge on the inviolable rights of parties to fair hearing as ingrained in section 36 (1) of the Constitution, as amended, see ***INEC v. Ogbadibo LG*** (2016) 3 NWLR (Pt. 1498) 167; ***Gwede v. INEC*** (2014) 18 NWLR (Pt. 1438) 56; ***Egbuchu v. Continental Merchant Bank Plc.*** (2016) 8 NWLR (Pt. 1513) 192;***Adedayo v. PDP*** (2013) 17 NWLR (Pt. 1382) 1; ***Odedo v. Oguebego*** (2015) 13 NWLR (Pt. 1476) 229; ***Mainstreet Bank Ltd. v. Binna*** (2016) 12 NWLR (Pt. 1526) 316 ***Mabamijie v. Otto*** (2016) 13 NWLR (Pt. 1529) 171 A-G., ***Fed. v. A-G., Anambra State*** (2018) 6 NWLR (Pt. 1615) 314; ***Ogar v. Igbe*** (2019) 9 NWLR (Pt. 1678) 534. In ***Hambe v. Hueze,*** (2001) 4 NWLR (Pt. 703) 372 at 388 and 389, Achike, JSC, of the blessed memory, incisively, proclaimed:

> **…Perhaps, it is important to state at the outset that generally an appellate court cannot *suo motu* raise issues at the judgment stage which the parties did not raise without the perilous risk of stepping into the arena of conflict. Nevertheless, the appellate court, in its discretion, in special circumstances involving issues of fundamental nature, may raise issues on its own part. In**

such circumstance, the court cannot found its decision on such new issues without first affording both parties or their counsel opportunity to address the court on the new issues. So an appeal would succeed on a point taken by the appellate court *ex proprio Motu*. See *Aburime V. NPA* (1978) 4 SC 11, *Adiase V. Agho* (1971) 3 SC 71 … *Olusanya V. Olusanya* (1983) ISCNLR 134. Therefore, an appellate court must be wary to raise issues not raised and fully contested by the parties in the trial otherwise it may fall into the error of making a case that the parties themselves neither contemplated nor contested. See *A.G Anambra v. Onuselogu Enterprises Ltd* (1987) 4 NWLR (pt 66) 549.

The procedure adopted by the lower court in raising an issue and disposing of same in its judgment without affording the appellant the opportunity of reacting to that issue that was clearly unfavourable to it smacked of lack of fair hearing. It also runs foul of the principle of *audi alteram partem.* The approach is fundamentally erroneous and fatal to

the judgment of the lower court it cannot be allowed to stand.

There is a crying need to place on record, pronto, that this hallowed principle of law, legal proscription of a court raising an issue *suo motu,* is a flexible rule of law. It admits of certain exceptions. The need for address by parties becomes unnecessary when: "(a) the issue relates to the courts own jurisdiction; (b) both parties are/were not aware or ignore a statute which may have bearing on the case…. (c) … on the face of the record serious questions of the fairness of the proceedings is evident," see ***Omokuwajo v. FRN*** (2013) 9 NWLR (Pt. 1359) 300 at 332, per Rhodes – Vivour, JSC; ***Aderibigbe v. Abidoye*** (2000) 10 NWLR (Pt. 1150) 592; ***Effiom v. C. R. S. I. E. C.*** (2010) 14 NWLR (Pt. 1213) 106; ***Gbagbarigha v. Toruemi*** (2013) 6 NWLR (Pt. 1350) 289; ***Kusamotu v. APC*** (2019) 7 NWLR (Pt. 1670) 51; ***Garba v. Tsoida*** (2020) 5 NWLR (Pt. 1716) 1.

At this juncture, it is important to consult the record, the touchstone of the appeal, at the premises of the lower court's decision – under the heavy yoke of indictment – which colonises pages 122 – 137 of the record. The reasoning of the lower court is firmly propagated at pages 128 and 129 thereof. In this wise, it is necessary to pluck it out, *ipsissima verba* of the lower court, thusly:

In my humble view, the further and better affidavit filed on behalf of the

Respondents should form part of the record of the lower court being transmitted to this court. But the learned counsel for the Appellants failed to transmit the said further and better affidavit filed by the Respondents to this court. Instead of putting his house in order by transmitting the entire record of the lower court in this matter to this court, he emphatically stated that the Respondent did not file further and better affidavit.

It is trite law that no appellate court has jurisdiction to hear an appeal upon an incomplete record, particularly when the missing portion of the record is so material and very crucial. See – ORUGBO VS. BULARA UNA & OTHERS (2002) 9 SCNJ page 12.

- **EKPEMUPOLO & OTHERS VS EDREMODA & OTHERS (2009) 8 NWLR Part 1142 page 166.**

In view of the foregoing, I am of the view that the record of appeal transmitted to this court is incomplete, and that being the case, this appeal is hereby struck out.

It is gleanable from the terse and comprehension-friendly reasoning of the lower court, culled and catalogued above, that it was woven around the absence of complete record flowing from the appellants' abandonment of their duty *vis-à-vis* the transmission of record to the lower court. It will unfold anon that the court's *raison d'etre* for the decision, warehoused in the laconic excerpt, chronicled supra, is a classic exemplification of a jurisdictional point/issue. Jurisdiction, which is *numero uno* in adjudication, is the power/authority of a court to determine any dispute submitted to it by feuding parties. The case law has characterised as the spinal cord, lifeline, lifeblood, fulcrum, epicentre, touchstone, bedrock and linchpin of adjudication. It nourishes the power and duty of courts in adjudication. A court without jurisdiction is akin to a deoxygenated animal. An issue of jurisdiction can be raised at any stage of the proceedings, even before this apex court, without leave of court. Any party is at liberty to invite it in any manner, either *viva voce* or writing. The law grants to any court the unbridled licence to invoke an issue of jurisdiction *suo motu* without any insult to the law. Hence, it occupies an Olympian position in the pyramid of adjudication.

It admits no argument, as anatomised supra, that an issue of jurisdiction rotates outside the universe of raising an issue *ex proprio motu.* In other words, once the point/issue is hinged on jurisdiction, a

court of law can, *proprio vigore,* on its own strength, rake it up without being injurious to the law.

That is not all. A clinical examination of the record, the soul of the appeal, amply discloses that the feuding parties proferred diametrically submissions on the existence or otherwise of the further and better affidavit before the trial court. Indeed, it is *a priori* the record that the nagging point was a casus belli *inter partes* before the trial court. Similarly, the trial court made a finding, rightly or wrongly, on its existence; a finding that irked and propelled the appellants to lodge an appeal to the lower court to review its propriety. The appellants, in their own volition, made an undiluted admission of the fact, at page 9 of their brief of argument, that the vexed point was contentious between the parties. Thus, the contending parties joined issue on the thorny point throughout the gestation period of the respondents' preliminary objection before the trial court. In the eyes of the law, an issue is joined on a particular fact, necessitating its proof, when its assertion is disputed by an opposing party/adversary, see ***Galadima v. State*** (2018) 13 NWLR (Pt. 1636) 357. The lower court made a finding on the existence of the further and better affidavit – unfavourable to the appellants – which occasioned their agitation against it in this temple of justice of this court. The law mandates a court to make a finding on an issue joined by parties, see ***Odunukwe v. Ofomata*** (2010) 18 NWLR (Pt. 404); ***Aba v. Monday*** (2015) 14 NWLR (Pt. 1480) 569;

Ikpeazu v. Otti (2016) 8 NWLR (Pt. 1513)38. In essence, the lower court acted *ex debito justitiae* when it made a finding on the existence of further and better affidavit. The rightness *vel non* of the finding is on a different pedestal which is the bounden duty of this court to decide. In ***Ikenta Best (Nig.) Ltd v. A. -G., Rivers State*** (2008) 6 NWLR (Pt. 1084) 612 at 642, Tobi, JSC, confirmed:

> **A court can only be accused of raising an issue, matter or fact *suo motu*, if the issue, matter or fact did not exist in the litigation. A court cannot be accused of raising an issue, matter or fact *suo motu* if the issue, matter or fact exist in the litigation. A Judge, by the nature of his adjudicatory functions, can drew inferences from stated facts in a case and by such inferences, the Judge can arrive at conclusions. It will be wrong to say that inferences legitimately drawn from facts in the case are introduced *suo motu*. That is not correct.**

The domino effect of the foregoing is plain. The finding of the lower court on the existence of the further and better affidavit cannot, under any guise or imagination and in the presence of the law digested supra, snowball into raising an issue *ex proprio motu.* The propriety or otherwise of the finding/reasoning, which is the nucleus of the appeal,

is a different consideration. It follows that the allegation of raising issue *suo motu,* paraded and brandished brazenly by the appellant, is not only uncharitable, but unsustainable in the legal hemisphere. The decision was not guilty of the pseudo-charge as the lower court acted in due allegiance to the letters and spirit of the law.

That takes me to the treatment of the appellants' grouse on the second limb – the heartbeat of the issue, nay, the appeal. The pith of the appellants' nursed grievance under the limb, indeed their trump card and thrust on the issue and the appeal, is against the lower court's finding that the further and better affidavit, allegedly filed by the respondents, should have formed part of the record before it. The appellants' contention is that there was no further and better affidavit, filed by the respondents, in support of their preliminary objection to warrant its transmission as part of the record before the lower court. In other words, it is the appellants' rigid stand that the alleged further and better affidavit was a non-existent process as to make their record an incomplete one.

In the first place, a record of appeal is a reproduction of the proceedings or happenings in the court from which the case has passed through. A complete record of appeal, which is a question of fact, consists of all the proceedings in the lower court, including the processes filed that are relevant to the just determination of the appeal as well as the exhibits tendered before the lower court. An incomplete

record is the opposite of a complete record. It is one that is deficit or in short supply of certain proceedings of court. Record of proceeding is the only indication of what took place in court; it is a final reference of events, step by step, that took place in a court. The record of proceedings serves as the reference material for the appellate court upon which to base any of its finding. The record is the bedrock, soul, touchstone, keystone and bible of every appeal. It binds the parties and the court. Neither a party nor court is granted the latitude to add or subtract from the contents of the record. Nor is either permitted to stray away from it. Hence, the importance of transmission of complete record to the appellate court cannot be over emphasised. Generally, an appellate court is not bestowed with the jurisdiction to entertain an appeal based on an incomplete record. In other words, an appellate court is only clothed with the jurisdiction to adjudicate over an appeal that is greeted by a complete record. Howbeit, this cardinal principle of law is a malleable one. Its elasticity is located in the realm of irrelevancy of the missing process/proceeding, *id est,* an appellate court can hear an appeal on an incomplete record where the missing part of the record is so immaterial such that its absence cannot affect the decision of the appeal, one way or the other, see ***Audu v. A, -G., Fed.*** (2012) LPELR – 155277 (SC); ***Okochi v. Animkwoi*** (2003) 18 NWLR (Pt. 851) 1; ***Garuba v. Omokhodion*** (2011) 15 NWLR (Pt. 1269) 145; ***Fawehinmi Construction Co. Ltd v. Obafemi Awolowo***

University (1998) 6 NWLR (Pt. 553) 171/(1998) 5 SC 43; ***Maku v. Sule*** (2019) 9 SC 1; ***Access Bank Plc. V. Onwaliri*** (2021) 6 NWLR (Pt. 1773) 391; ***Ogbeide-Ihoma v. Iduoriyekemwen*** (2023) 11 NWLR (Pt. 1896) 395. The knotty question, which cries for an answer, is this: did the respondents file a further and better affidavit in support of their preliminary objection as to make the record an incomplete record by its non-inclusion by the appellants? The appellants' contention is that there was no such a process.

I shopping for an answer to this nagging poser, I have, in due fidelity to the expectation of the law, taken another excursion into the record before the lower court. I have burrowed through and given a panoramic examination to the record *in solidum* with the finery toothcomb. Admirably, its contents are disobedient to woolliness and ambiguity. In paragraphs 2 and 3 of the respondents' affidavit in support of the preliminary objection, encased at page 37 of the record, the second respondent, Stephen Nwabuaku, deposed that, *videlicet:*

> **2. That on 16/5/2012 we filed a similar motion which the court struck out because we filed our written address and further affidavit out of time. This was on the 17/7/2012.**
>
> **3. That the real issue for determination was not decided in the said**

application. Hence we had to re-file the said application.

The respondents' preliminary objection was entertained by the trial court on the 19th November, 2012 as manifest in page 69 and 70 of the record. On that day, the respondents' counsel, B. O. Okoji, Esq., argued it thusly:

Okoji: It is for adoption on (sic) written addresses. The motion for Preliminary Objection is dated 23/07/12 and filed 24/07/12. It is supported by a 12 paragraph affidavit with one annexure Exhibit "A". We filed a written address in support dated 6/08/12 and filed same date. We filed a Reply on Points of Law this morning. It is dated 19/11/12. We humbly wish to adopt our written address and Reply on Points of Law in support of our objection to this suit.

It is decipherable from these extracts, the deposition and proceedings displayed above, that the further and better affidavit, which is the marrow of this issue, was never filed in support of the respondents' preliminary objection. If there was any such process, it related to a previous application which was disposed of by the trial court. It is my, humble, view that were a further and better affidavit filed, the learned respondents' counsel would have alluded to it as a

process available in their armoury in the prosecution of their preliminary objection. Even if it was filed, the mere fact that the respondents' counsel did not mention it as one of the processes that propped the preliminary objection, it became enveloped in the dense fog of irrelevancy/insignificance. Thus, by the respondents' own showing, the further and better affidavit, to all intents and purposes, was an absent process. It was a *pessimi exampli* of a pseudo - process. In this wise, the lower court's insistence on transmission of the process was tantamount to asking the appellants to "build castle in the air" which is both a natural and physical impossibility. The appellants are sheltered properly under the canopy of the legal maxim: *Lex non cogit ad impossibilia* – the law does not compel to impossible ends. Methinks, the existence of a process is the valid passport for its inclusion in the record of appeal. In effect, the appellants did not, in the least, fracture the law on transmission of record as to magnet the dire penalty of an incomplete record meted out to their appeal by the lower court.

In the light of this juridical survey on the concept of incomplete record, conducted in due obeisance to the law, the lower court's categorisation of the appellants' appeal as one marooned in the murky ocean of an incomplete record, with its attendant toxic consequence in law, was, with due respect, a flagrant defilement of the law. It was *ultra vires* the power of the lower court. The law does not grant this

court the requisite jurisdiction to allow such an injudicious finding to stand. It has to be mowed down by the unbiased judicial sword of this court. In the end, I have no choice than to resolve the solitary issue in favour of the appellants and against the respondents.

On the whole, having resolved the solo issue in favour of the appellants, the destiny of the appeal is obvious. It is imbued with merit. Consequently, I allow the appeal. Accordingly, the judgment of the lower court, in Appeal No. CA/B/246/2013, delivered on the 10th November, 2015, which struck out the appellants' appeal, on account of an incomplete record, is set aside. The appellants' appeal before the lower court is allowed. For the avoidance of doubt, the appellants' suit, Suit No. AKU/52/2011, is remitted to the Chief Judge of Delta State for an expeditious determination, on its merit, by the trial court other than H. O. Akpotohwo, J. No order as costs.

OBANDE FESTUS OGBUINYA,
JUSTICE, SUPREME COURT.

COUNSEL:

N. A. Erondu, Esq. for the appellants.

No appearance for the respondents.