

SUPREME COURT OF NIGERIA
FRIDAY 16TH MAY, 1995. SC. 212/1994
CORAM:- M L. UWAIS, A. B. WALI, I. L. KUTIGI,
M. E. OGUNDARE, A. I. IGUH, JJSC

N. A. B. KOTOYE APPELLANT
AND
1. MRS. F. M. SARAHI
2. DR. SOLA SARAHI RESPONDENTS

APPEALS - *Extension of time to appeal - Conditions under which the Application will be granted.*

LITIGANTS - *Mistake of counsel - Not to be visited on lay litigant - Whether applicable - Where the litigant, is a legal practitioner.*

STAY OF PROCEEDINGS - *Grant of stay - Will not be made where it will be futile - And where other grounds on which the prayer is predicated fail.*

FACTS

The defendant/applicant applied before the Supreme Court for extension of time within which to seek leave to appeal, leave to appeal, extension of time within which to appeal and stay of proceedings pending the determination of his appeal. During the pendency of the substantive suit before the Lagos High Court, a piece of evidence sought to be given by the defendant was refused on the ground that it was not pleaded. Defendant's appeal to the Court of Appeal against the trial court's ruling was refused. The defendant failed to appeal promptly to the Supreme Court because he felt that an issue on lack of jurisdiction raised by him upon the promulgation of a Banking Decree No. 25 of 1991, would succeed. It was when he failed on this issue, from the High Court to the Supreme Court that he now wants to continue with the present application before the Supreme Court.

Meanwhile, the trial court has finished with the matter sought to be stayed fixed a date for judgment. The Supreme Court had to determine whether proper conditions exist to warrant the granting of the applicant's prayers.

HELD (Unanimously refusing the application per lead ruling of **UWAIS JSC**)

Extension of time to appeal

1. Now, is settled that for an application for extension of time to succeed there must be first, good and substantial reasons for the failure to appeal within the period prescribed and secondly, the proposed grounds on which

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to appeal must show prima facie, good cause why the appeal should be heard. The only reason given, by the defendant/applicant, in this application is that learned counsel for the applicant in *Kotoye v. Saraki* (supra) had reasonable expectation that the appeal in that case to this court would succeed. This to me is like taking a gamble. With respect, it shows neither diligence nor competence on the part of the counsel for the appellant therein.

Mistake of counsel

2. Any act of gambling involves risk taking and no gambler can claim not to be aware of that. When a counsel makes a mistake, such mistake or consequences should not, in general, be visited on his client who, in most cases, is a layman. Can the defendant/applicant who has been or is a legal practitioner be such a client? I certainly think not. There is, therefore, no good reason given for the delay in bringing this application.

Grant of stay of proceedings - When not to be made

3. As we have been made to understand by Chief Williams, the judgment in the substantive suit before the High Court was to be delivered by the beginning 20th March, 1995 and learned counsel for the applicant has controverted this fact; can we now grant a stay of proceedings in a case has been determined and the trial judge has become functus officio? Surely such exercise of discretion by this Court will be futile and merely academic. This is to be avoided since the Court does not act in vain. Moreover, proceedings cannot be granted in this application in the face of prayers (i) to (iii) inclusive, on which prayer (iv) is predicated, being refused. In words, there cannot be a stay of proceedings pending the determination of an appeal, when in fact the appeal in question is non-existent or has been aborted. Consequently, there is no good reason for us to grant prayer (iv) for stay of proceedings.

REPRESENTATION

O. Ayanlaja, with E.E. Akpan and B.O. Ajayi (Miss) for the Defendant Applicant

Chief F.R.A. Williams SAN, with Lady Williams; F.R. A. Williams, Jnr.; J.I. Nweze and U.B. Anekwe for the Plaintiffs/Respondents

CASES REFERRED TO

International Agricultural Industries Ltd. v. Chika Bros. Ltd., (1990) 1 N.W.L.R. (part 124) 70

Ireogbu v. Okwordu (1990) 6 N.W.L.R. (Part 159) 643 at pages 660 - 661 H-B

Kigo (Nig) Ltd. v. Holman Bros (Nig) Ltd (1980) N.S.C.C. 204

Mobil Oil (Nig.) Ltd. v. Agadaigho (1988) 1 N.S.C.C. 777

Akilu v. Fawehinmi (No. 2) (1989) 2 N.W.L.R. (part 102) 122 at page 168 F-G

Leary v. National Union of Vehicle Builders (1971) Ch. 34 at pages 48-49

Kotoye v. Saraki (1994) 7 N.W.L.R. (part 357) 414 at page 445 H

Ibodo v. Enarofia (1980) 5-7 S.C. 42 at page 51

University of Lagos v. Olaniyan (1985) 1 N.W.L.R. (Part 1) 156 at pages 166, 168 and 171

STATUTE REFERRED TO

Evidence Act s. 227 (2)

LEAD JUDGMENT BY UWAIJS JC

This is an application by the defendant/applicant seeking the following orders -

“(i) Extending the time within which to seek leave to appeal on the grounds of mixed law and fact against the Ruling of the Court of Appeal, Lagos Division (sic) dated the 2nd day of December, 1991, refusing stay of proceedings of the trial of the Consolidated Suit pending before Olusola Thomas, J., pending the determination of the appeal lodged against the Ruling of the High Court of Lagos delivered on the 30th and 31st of May, 1991;

(ii) Leave to appeal against the said Ruling;

(iii) Extension of time within which to appeal against the said Ruling;

(iv) Stay of proceedings in file Consolidated Suits Nos: LD/845/87 and LD/938/87 before the High Court of Lagos State (Coram Olusola Thomas, J.,) pending the determination of the foregoing orders and thereafter provided a Notice of Appeal is filed within 7 days of the orders sought and granted, further stay of proceedings until the hearing and determination of the appeal to this Honourable Court;”

The following facts relating to the application are disclosed in the affidavit and further affidavit sworn to in support of the application by one Bolajoko Ajayi, of Ayanlaja, Adesanya & Co. Counsel to the applicant. Both the plaintiffs/respondents and the defendant/applicant brought cross actions in the High Court of Lagos State. These were Suit No. LD/845/87 and Suit No. LD/93/87 respectively. The actions were consolidated and were being heard together in the High Court. The plaintiffs/respondents adduced evidence and closed their case. The defendant/applicant opened his defence and was giving evidence-in-chief on the 30th day of May, 1991 when he sought to adduce evidence about the poor financial state of the clinic business of the 2nd plaintiff/respondent while in detention in 1984 and to show that the defendant/applicant gave financial assistance from his own resources to sustain the clinic, which did not generate money sufficiently to run itself. In addition, the defendant/applicant said that the 2nd

plaintiff/respondent wrote him series of letters requesting for money from the account of the clinic, and that when he provided money from his resources, the 2nd plaintiff/respondent would write to him, thanking him for his kindness.

Counsel for the plaintiff/respondents in the High Court raised an objection on the admissibility of the aforesaid evidence on the ground that the evidence was not pleaded by the defendant/applicant. The learned trial Judge upheld the objection on the ground that issue was not joined on the fact. The learned trial Judge further held-

"I will for this reason ignore the evidence so far adduced and rule that as the pleadings stand the evidence tending to show that the defendant gave financial assistance to the plaintiff in the manner being proffered by the defendant is not admissible."

The defendant/applicant then continued with his evidence-in-chief and was shown a letter by his counsel, which he identified. His counsel sought to tender the letter after it was identified by the defendant/applicant. Counsel for the plaintiffs/respondents raised objection on the admissibility of the letter, on the ground that the letter purported to give credence to the fact that the defendant gave financial assistance to the 1st plaintiff/respondent at the time the 2nd plaintiff/respondent was in detention. Counsel for the defendant/applicant argued that the letter was admissible. The learned trial Judge ruled as follows -

"in the first place, if the letter is being tendered for purported evidence to establish that the defendant gave financial assistance to the 2nd plaintiff, it is caught within my earlier ruling as no issue was joined on the facts in the pleadings.

In the second place, if the letter is now being tendered to negative the fact of the allegation that the defendant lived on the 2nd plaintiff's charity, this new ground does not follow from the antecedent evidence of the witness. Learned counsel's statement from the bar cannot be a substitute for the witness's testimony. I therefore rule that the document tendered is not admissible. Unless it is being withdrawn, the document shall be marked tendered and rejected."

The defendant/applicant appealed to the Court of Appeal against the two rulings of the learned Judge. He brought an application before the High Court for the stay of the proceedings before it and it was dismissed. The same application was brought in the Court of Appeal pending the determination of the appeal filed thereat. The Court of Appeal (Sulu-Gambari, Achike and Kalgo, J J.C.A)delivered its ruling on the 2nd day of December, 1991 refusing to grant the application inter alia for the following reasons,per Achike,JCA.,with whom Sulu-Gambari, and Kalgo,JJCA agreed:-

"In the present case, the crux of the controversy on appeal before this Court as already observed, borders on the question of admissibility of

already admitted evidence. It is inconceivable that the success of this point will terminate the proceedings of the lower court. Indeed, Chief Williams had submitted, and rightly in my view, that any such wrongful exclusion of evidence would be remedied by the provisions of section 227(2) of the Evidence Act. That subsection states as follows:-

‘The wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to the Court of Appeal that had the evidence so excluded been admitted it may reasonably be held that the decision would have been the same.

As observed by Chief Williams, the Supreme Court had on several occasions frowned on an application for stay of proceedings pending an appeal which is contested on admissibility of evidence. Thus in International Agricultural Industries Ltd v. Chika Bros. Ltd (1990) 1 NWLR (Pt. 124) 70, Obaseki, J.S.C., chiddingly (sic) remarked at page 80:-

‘It is sad to observe that it was at the tail end of the proceedings in the High Court that this interlocutory decision to reject the document was made. It is even sadder to observe that the proceedings before the High Court had to be stayed to allow the pursuit of appeal proceedings against the decision. Although the hearing before this court did not take more than an hour to conclude, it took 8 years for the appeal to travel from the High Court through the Court of Appeal to this Court. If the plaintiff had allowed the learned trial Judge to conclude the hearing and deliver his judgment, he could still have had the opportunity to raise the issue of admissibility in the appeal courts. He would have enjoyed the added advantage that if the point raised succeeded, the decision in the case could have been reversed in his favour and the rights of the parties in the matter determined finally.

Finally, it may be observed that this case commenced in 1987 in which the respondents closed their case in December, 1990, after calling 17 witnesses. The defence opened in January 1991, and about nine witnesses have testified. The applicant was still testifying when the present impasse occurred. No doubt, whichever way this ruling is given there is the likelihood that the matter may be pursued to the Supreme Court. The appellate courts ought not to encourage such interlocutory appeals which can always be taken on appeal at the end of the trial.”

In the brief of argument filed by the defendant/applicant in support of the application before us, the defendant/applicant stated that following the promulgation of the Banks and Other Financial Institutions Decree, 1991, No. 25 of 1991, which came into force on the 20th day of June, 1991, the issue of the jurisdiction of the High Court to hear the consolidated cases of the parties to this application arose. The point was raised by the defendant/applicant in the High Court in an interlocutory application. The application was dismissed. There was an appeal by the defendant/applicant to the Court of Appeal, which he lost before he further appealed to this Court. (See

Kotoye v. Saraki (1994) NWLR (Pt. 357) 414). The appeal was determined on the 15th day of July, 1994. When the appeal on jurisdiction was pending in the Court of Appeal, a stay of the proceedings in the High Court was ordered by the Court of Appeal and that remained as the state of affairs until the determination of the appeal in Kotoye v. Saraki (supra) by this Court in July, 1994. It is stated that it was because there was expectation by counsel to the defendant/applicant that the issue of jurisdiction which was raised would succeed that the appeal proposed in the present case to this Court, was not brought. It is then submitted that on the authority of Onyebuchi Ireogbu & Anor v. Richard Okwordu & Anor. (1990) 6 NWLR (Pt. 159) 643 at pages 660-661 H-B the plaintiffs/respondents would not be prejudiced if the application before us should be granted.

In opposing the application, Chief Williams, learned Senior Advocate for the plaintiffs/respondents, argued that the first three prayers in the application, that is prayers (i) (ii) and (iii) for extension of time to apply for leave to appeal, leave to appeal and extension of time within which to appeal, should not be granted because the applicant has been guilty of delay in making the application. He pointed out that the reason for the delay was that the defendant/applicant had appealed on the issue of jurisdiction and had expected to succeed. This reason, he said, is not sufficient for this court to grant the application. The defendant/applicant took chance in pursuing his appeal on jurisdiction and since the appeal failed, the defendant/applicant should bear the consequences of the chance he took. With regard to the fourth prayer for stay of proceedings, learned Senior Advocate submitted that there cannot be a stay of proceedings where there is no appeal pending in this court. He referred to paragraph 29 of the affidavit in support of the application where it is deposed that after the failure of the appeal on jurisdiction of the trial court, that court had fixed the 17th and 18th November, 1994 for the continuation of the proceedings before it, and stated that the proceedings has since been completed and that judgment in the suit had been fixed for the week beginning on the 20th March, 1995. Therefore, he argued that if stay of proceedings is granted the trial Judge would have to contravene the mandatory provisions of the Constitution, which enjoin him to deliver his judgment within 3 months of hearing the final address by the parties.

The following additional cases were cited by learned counsel for the applicant, Mr. Ayanlaja, in support of his argument - Kigo (Nig.) Ltd v. Holman Bros. (Nig.) Ltd & Anor (1980) NSCC. 204; (1980) 5-7 S.C. 60 (1988) 2 NWLR (Pt. 77) 383; Mobil Oil (Nig.) Ltd v. Agadaigho, (1988) 1 NSCC 177; The Khedive, (1879) 5 P.D. 1; Akilu v. Fawehinmi (No.2) (1989) 2 NWLR (Pt. 102) 122 at page 168 F-G and Leary v. National Union of Vehicle Builders, (1971) Ch. 34 at pages 48-49. Chief William also made reference to Kigo's case (supra) at page 209 lines 35-43; Mobil Oil's case (supra) at page 787 lines 8-10 and Kotoye v. Saraki. (1994) 7 NWLR (Pt. 357) 414 at page 445 H.

Now, it is settled that for an application for extension of time to succeed there must be first, good and substantial reasons for the failure to appeal within the period prescribed and secondly, the proposed grounds on which to appeal must show *prima facie*, good cause why the appeal should be heard - see Ibodo

& Ors v. Enarofia & Ors. (1980)5-7 SC42 at page 51; University of Lagos v. Olaniyan, (1985) 1 NWLR (Pt. 1) 156 at pages 166, 168 and 171 and Mobil Oil case (supra) at page 784 line 1 - page 785 line 39. The only reason given, by the defendant/applicant, in this application is that learned counsel for the applicant in Kotoye v. Saraki (supra) had reasonable expectation that the appeal in that case to this court would succeed. This to me is like taking a gamble. With respect, it shows neither diligence nor competence on the part of the counsel for the appellant therein. It is indeed a matter of general knowledge to all counsel that have practiced in this Court that it conservatively takes not less than 3 years from the time the notices of appeal are filed to the time when the appeals get disposed of in this Court. In the light of this fact how can any counsel that is diligent ignore the filing of a proposed appeal on the ground that another appeal might succeed in the Supreme Court? The reasonable action that should have been taken would have been for the proposed appeal in this case to be filed and its hearing be requested to be deferred until the appeal challenging the jurisdiction of the High Court had been finally disposed of by this Court. Any act of gambling involves risk taking and no gambler can claim not to be aware of that when a counsel makes a mistake, such mistake or its consequences should not, in general, be visited on his client who, in most cases, is a layman. Can the defendant/applicant who has been or is a legal practitioner be such a client? I certainly think not. There is, therefore, no good reason given for the delay in bringing this application.

What of the proposed grounds of appeal exhibited to the application? There are 4 of them. They all relate to the refusal of the Court of Appeal to grant the stay of proceedings pending the determination of the appeal lodged in the Court of Appeal against the refusal by the learned trial Judge to admit oral and documentary evidence. The relief to be sought in the proposed appeal, should leave to appeal be granted by us, is -

"An order allowing the appeal and staying further proceedings in the Consolidated Suits before the High Court of Lagos State pending the determination of the appeals lodged against the Rulings of the High Court of Lagos State dated 30th and 31st May, 1991."

As we have been made to understand by Chief Williams, the judgment in the substantive suit before the High Court was to be delivered by the week beginning 20th March, 1995 and learned counsel for the applicant has not controverted this fact can we now grant a stay of proceedings in a case which has been determined and the trial Judge has become functus officio? Surely such exercise of discretion by this Court will be futile and merely academic. This is to be avoided since the Court does not act in vain. Moreover, a stay of proceedings cannot be granted in this application in the face of prayers (i) to (iii) inclusive, on which prayer (iv) is predicated, being refused. In other words, there cannot be a stay of proceedings pending the determination of an appeal, when in fact the appeal in question is non-existent or has been aborted. Consequently, there is no good reason for us to grant prayer (iv) for stay of proceedings.

I, therefore, come to the conclusion that this application lacks merit and must be dismissed in toto. It is accordingly hereby dismissed with N100.00 costs to the plaintiffs/respondents.

B

WALI JSC

I have had the privilege of reading in advance the lead Ruling of my learned brother, Uwais, J.S.C., and I entirely agree with the reasoning and conclusion therein.

C For those same reasons which I adopt as mine, I also hereby dismiss the application as lacking in merit. I endorse the order of costs contained in the lead Ruling.

D

WALI JSC

I read before now the ruling just delivered by my learned brother Uwais, J.S.C. I agree with him and dismiss the application as lacking in merit with N100.00 costs to the respondents.

E

OGUNDARE JSC

F I have had the advantage of a preview of the Ruling of my learned brother Uwais, J.S.C. just delivered. I agree entirely with him and I have nothing more to add. I too refuse the application with costs as assessed by him.

IGUH JSC

G

I have had the privilege of reading in advance, the lead ruling just delivered by my learned brother, Uwais, J.S.C.

I entirely agree with the reasoning and conclusion therein and I have nothing to add.

I endorse the order as to costs therein contained.

H