

SUPREME COURT OF NIGERIA
18TH JULY, 1995. SC. 259/1989
CORAM:- M.L. UWAI, I.L. KUTIGI, E.G. OGWUEGBU,
S.U. ONU, Y.O. ADIO, JJSC

ADKINS SCIENTIFIC LIMITED APPELLANT
AND
1. DR. MICHAEL ALADETOYINBO
2. KENTER LIMITED RESPONDENTS

EVIDENCE - Affidavit - Where strongly contested - It is unsafe to act thereon

EVIDENCE - Affidavit - Conflicts in affidavit evidence - Need to call oral evidence - To resolve irreconcilable conflicts.

PRACTICE & PROCEDURE - Error in procedure - For resolving conflicts in affidavit evidence - Consequence thereof.

FACTS

Following certain allegations of misfeasance levied against the 1st Respondent, who was a member and Managing Director of the Appellant company, he withdrew his participation in and resigned from the appellant company setting up the 2nd Respondent to compete with the appellant. Whereupon the appellant, as plaintiff instituted the action leading to this interlocutory appeal in the High Court of Ondo State, Ado-Ekiti claiming various sums of money from, and account of various money entrusted to the 1st Respondent, the return of certain properties and an injunction restraining the respondents from carrying on any business of the type engaged in by the plaintiff within Ado-Ekiti and Ondo State generally. The matter went to trial at which, the respondents brought a motion on Notice praying the trial court to strike out the Plaintiffs name from the suit, on the ground that there was no authorization by the Company and or its Board of Directors to institute this action in its name.

The trial court refused to grant the respondent's application. Their appeal to the Court of Appeal was upheld. Being dissatisfied, the appellant has now appealed to the Supreme Court raising six issues from which the court picked only Issue 4 as sufficient for determination of this appeal.

ISSUE FOR DETERMINATION

Was the Court of Appeal right in law by investigating and resolving complex issues of fact on conflicting affidavits without calling oral evidence?

HELD(Unanimously allowing the appeal per lead judgment of **ONU JSC**)
Conflicts in affidavit evidence - How resolved

1. Not only are the matters the court below attempted to resolve in the foregoing extracts crucial issues, they disclosed, based on affidavit evidence, in part, irreconcilable conflicts that called for resolution by adducing oral evidence. (p. 1466 F)

Affidavit evidence - When unsafe to act thereon

2. Furthermore, this court has held, times without number, that while a court, in a given case, may act on affidavit evidence, it would be unsafe to do so, where the evidence is strongly contested and where issues of credibility can only be resolved upon the court's view of witnesses. (p. 1466 H)

Error in procedure

3. It is for the above reasons that I hold that both the trial court and the court below were in error in the procedure they adopted in resolving the conflicts latent or patent in the affidavits placed before them. My answer to Issue 4 is accordingly rendered in the negative. In the result, this appeal succeeds

and it is allowed by me. The decisions of the Court of appeal sitting in Benin City dated 2nd June, 1989 and the trial court's Ruling of 27th October, 1987 are hereby set aside. The case is hereby remitted to the Ondo State High Court, Ado-Ekiti for hearing de novo by another Judge. (p. 1467 F)

NOTABLE POINT OF INTEREST

OGWUEGBU JSC

1. Failure to properly resolve conflicts in affidavit evidence

I have myself gone through them and I am of the view that the facts disclosed in the supporting affidavit, counter-affidavit and further affidavit are irreconcilably in conflict. In order to resolve the conflicts, the learned trial judge as a matter of practice, ought to have invited the parties to call oral evidence which would have enabled him to test the affidavit evidence before acting on them. Instead of the courts below resorting to the old established practice, they proceeded to guess and speculate on the affidavit evidence which were in direct conflict on crucial facts. A decision arrived at in such an exercise cannot be sustained. The appeal therefore succeeds and it is allowed by me. (p. 1468 F)

REPRESENTATION

A. Olujimi for the Appellant

L.A. Adeniji for the Respondent

CASES REFERRED TO

Owe v. Oshinbajo (1965) WNLR 84 at 87

Akinsete v. Akindutire (1966)1 All NLR 147 at p. 148

Eboh v. Oki (1974)1 S.C. 179 at 189

Ibukun v. Ibukun (1974)2 S.C. 41 at 47-48

Uku v. (1974)3 S.C. 35 at 56, 64 - 65

Falobi v Okumagba. Falohi (1976)9-10 S.C. 1 (1976)1 NMLR 169 at 178

National Bank v. Are Brothers (1977)6 S.C. 97

Ashanti v. Korko 4 W.A.C.A. 83 at 85

LEAD JUDGMENT BY ONU JSC

This interlocutory appeal which emanated from the Court of Appeal holden at Benin City had its beginnings in the High Court of Ondo State sitting at Ado-Ekiti where the plaintiff, herein appellant, took out a Writ of Summons dated 16th December, 1986 against the defendants, now respondents, claiming various amounts of money both in local and foreign currencies: return of certain properties including motor cars of the appellant in possession of the 1st respondent, an account of various sums of money entrusted solely to the 1st respondent and an injunction restraining the respondents from carrying out business similar in nature to the type in which the appellant was engaged within Ado-Ekiti (where the appellant was based) and Ondo State in general for the next two years.

It is noteworthy to point out as background facts that the suit was commenced following certain allegations of misfeasance made against 1st respondent, who was a member and Managing Director of the appellant company. He, in consequence withdrew his participation in, and resigned his appointment from the appellant in 1985 having before then set up his own company, the 2nd respondent, in competition with the appellant. Part of the allegations of misfeasance included the fact that 1st respondent used his position to transfer part of the business of the appellant to the 2nd respondent.

The claim having been denied, pleadings were ordered, filed and exchanged by the parties. The respondents in addition to their defence filed a counter-claim while the appellant delivered a Reply to the counter-claim.

The suit proceeded to hearing but soon thereafter, the respondents brought a motion on notice praying the court as follows:-

“1. An order striking out the plaintiff/respondent’s name from this action on the ground stated in the schedule herein.

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SCHEDULE

That the court lacks jurisdiction to entertain this action in that it is not properly constituted because there was no authorisation by the Company and/or its Board of Directors to institute this action in its name”

The motion which invoked the placing before the learned trial Judge a conglomeration of other documentary evidence, was heard and sifted by the learned trial Judge, Akintan. J. (as he then was) who, in a reserved ruling, concluded in the following words:

“In conclusion therefore and for the reasons given hereon I am satisfied that the applicants have failed to make a sufficient case to warrant the granting of their prayers. I am also satisfied from the facts deposed to in the counter-affidavit and the documents exhibited along with it that the institution of the action was duly authorized by the directors of the company at their meeting held on 28/6/86 and the director’s action was later ratified by the members of the company at its general meeting which was held on 17/1/87. Even if the institution of the action was in fact not authorized, the nature of the claim falls within those which the court would not strike out but the hearing of which could be adjourned for the purpose of allowing the directors or members meet to carry out the necessary authorisation or ratification. (See Halsbury’s Laws of England. 4th Edition Vol. 7 para. 767 at p. 457. That situation does not however arise in the present case since the action was duly authorised.

The motion therefore lacks any merit and it is hereby dismissed.”

Whereupon, the respondents appealed to the Court below. That court (per Omo, J.C.A. as he then was, Musdapher and Salami, J.J.C.A.) after hearing counsel for both sides in its judgment delivered on 2nd June 1981, answered the sole question posed therein for determination in the negative: ruled that the decisions of the two main organs of the appellant were incompetent, allowed the appeal, and in consequence, set aside the ruling of Akintan J. inclusive of the costs awarded therein.

Being dissatisfied with the judgment of the court below, the appellant has appealed to this Court upon a Notice of Appeal containing ten grounds dated 26th November, 1990 and filed on 27th November 1990.

Parties later exchanged briefs in accordance with the rules of court with the appellant filing a Reply brief. While the appellant submitted six issues (the first of which was resolved at the hearing of this appeal) as arising for determination, the respondents adopted all but issue 3, which they contended, bears close affinity to and is a repetition of Issue 2.

The six issues are set out hereunder. viz:

1. Had the Court of Appeal the jurisdiction to entertain the respondents appeal in the absence of leave or at the complaint of an outsider?

2. Was the Court of Appeal right by placing the onus of proof of authority to institute this action on the company or its directors/shareholders?

3. If the answer is in the positive, was the onus not effectively discharged on the law and the evidence before the Court?

4. Was the Court of Appeal right in law by investigating and resolving complex issues of fact on conflicting affidavits without calling oral evidence? B

5. Whether the lower court was right in holding that the suit against the respondents in the name of the company was not authorised or subsequently ratified.

6. Whether in the particular circumstances of this case an order adjourning or staying proceedings in order to allow the Company to regularise the issue of authorisation would not meet the interest of justice than an order declaring action incompetent. C

At the hearing of the appeal on 8th May, 1995, counsel on either side adopted their briefs and elaborated thereon by making oral submission. The learned counsel for the respondents applied to withdraw his application filed on 13th of December, 1994 which sought leave of this Court to compile supplementary record of appeal. The application not having been opposed by learned counsel for the appellant, it was accordingly struck out with no order as to costs. D

The learned counsel on both sides having resolved Issue 1 which poses the question as to whether the Court below had jurisdiction to entertain the respondents' appeal in the absence of leave or at the complaint of an outsider (Issues 2,3,5 and 6) the gravamen of whose complaints related to the burden of proof of authority to institute the action, its discharge and who by coupled with whether the case could be adjourned or stayed for the appellant to regularise the issue of authorisation or ratification, which by and large, are subsidiary matters as to the competence of parties or the jurisdiction of court already resolved in Issue 1 (supra) the only dominant or live issue left for argument in this appeal and which will effectively dispose of the appeal, as I perceive it, is Issue 4. That issue which is related to ground 2, relevantly asks: Was the Court of Appeal right in law by investigating and resolving complex issues of fact on conflicting affidavits without calling oral evidence? The learned counsel for the appellant in both the appellant's brief and Reply brief as well as in his oral argument made a comprehensive submission by drawing our attention to the fact that the issue in the respondents' application in the trial court giving rise to this appeal was whether the decision to sue in the company's name was authorised. I find appellant's grouse to be well grounded. In the first place, I agree that the material facts upon which a decision of the issue was based E
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were contained on conflicting affidavit, counter-affidavit, further affidavit and supporting exhibits. This much learned counsel for the respondents has conceded when at page 10 of his brief he gave the following qualified answer:

B *“..... on the materials available to the High Court the conflicting facts are not such that cannot be resolved by the proper application of the appropriate law. The mere fact that affidavits of opposing parties are conflicting as they are bound to be in any case, it does not automatically follow that they are irreconcilable.”*

Among the disputed material facts or questions to be resolved were:-

C (i) Whether at incorporation or any time thereafter appellant company had 2 or 3 members

(ii) Whether Mrs. Akeju was a director of the appellant at incorporation, or whether she was subsequently so appointed.

(iii) Who crossed out Mrs. Akeju's name as a director from Exhibit SM1 and why and when was it crossed out?

D (iv) Is it true that there had been further appointment of directors as indicated in Exhibits B, C, F, H and J.

(v) Are Mrs. C.A. Folarin-Akeju and Mrs. Folarin Akeju one and the same person?

E (vi) Was the original certificate of Mrs. Folarin Akeju sealed or not? While the answer to (v) above would appear to be that Mrs. C.A. Folarin-Akeju may be one and the same person as Mrs. Folarin Akeju, the questions posed in (i), (ii), (iii), (iv) and (vi) are crucial issues for which the court had a duty to call oral evidence to resolve the conflict.

F With regard to question (v) as to whether Mrs. C.A. Folarin-Akeju and Mrs. Folarin Akeju are one and the same person, that, in my view, does not pose a conflict for resolution as the two names were shown to emanate from the same address, 44 Okeyimin Street, Ado-Ekiti and can safely be regarded as one and the same person. However, in many portions of its judgment, as I shall seek to demonstrate hereunder, the court below G even though recognizing the fact that further oral evidence ought to have been adduced to clarify some of the issues for its determination in the case as the parties' affidavits were in conflict, nevertheless proceeded to resolve them by making assumptions, examining documents on its own and raising issues for the parties, suo motu instead of referring those issues to the parties to clear by oral evidence. The following excerpts from the judgment H of the court below are such instances where it went wrong.

“1. Apart from the filing of Form C07 Exhibit 'A' there is no evidence of appointment of these directors and by whom they were appointed. It is not sufficient in the peculiar circumstances of this case to produce

Form C07 without referring to how the directors came by their respective appointments especially so when Dr. Aladetoyinbo left the company on 1st July, 1985 and the Form C07 dated 7th June, 1986 was apparently filed on 28th August, 1987."

2. Notwithstanding the provisions of these articles it is incumbent on the respondent to establish that the directors whose list were filed in Exhibit A with the Registrar of companies were properly appointed. There was no evidence of such appointments other than Exhibit A before the Court below. It also does not lie in the mouth of the respondent to say it relied upon the provisions of article 78 of the Article of Association to appoint, the directors whose names, are contained in Exhibit A. Because the respondent convinced the Court below that, apart from the 1st appellant there were three other directors as per Exhibit B and C which were annexed to the respondent's counter affidavit. The respondent did not include their names in Exhibit A. The respondent cannot approbate and reprobate otherwise the impression will be created that its documents are a farce. It has a duty to account for Messrs. A.B. Shehu Ajijola and Chief S.B. Falegan who according to the respondent are directors but their names are missing from Exhibit A dated 7th June, 1986. This document pre-dates the meeting of Board of Directors of 28th June, 1986 and the so called annual general meeting of January 17, 1987, the minutes of which the respectively exhibited to the counter affidavit as Exhibits H and J. According to the respondent, the composition of its board of directors is 11 as against 6 allowed by its article of association; since, it appears that the court below accepted the respondent's version. The constitution of the board which is unauthorised either as per Exhibit A or addition of the number of directors contained in Exhibits A, B and C renders, to my mind, the decision of the board, which itself is an illegal body, unlawful.

3. This brings me to the annual general meeting of the company held on January 17th 1987. The 1st appellant averred in paragraph 5 of the affidavit in support of the motion that "the only two members and/or directors of the plaintiff are Dr. S. A. Akeju and myself and that since the incorporation of the company on 20th March, 1980 there has been no new members nor was there appointment of additional directors. The respondent challenged this averment by seeking to show that Mrs. Folarin Akeju has been a member from the inception of the company by virtue of her being a subscriber to the Memorandum and Articles of Association. I have had a close look at the subscribers to the Memorandum and Article of Association attached to 1st appellant's affidavit in support of the motion as Exhibit SM1. Exhibit SM1 is a photographic copy which is certified by the Registrar of Companies. The certificate is dated 17/6/87. The name of one Mrs. Folarin Akeju is crossed out as one of the three subscrib

ers. The respondent who filed a counter affidavit has not challenged this deletion, if at all very feebly. Since the respondent saw Exhibit SMI when they were reacting to the affidavit in support of the motion they owed it as a duty to themselves and the court to explain the cancellation. It was open to them to produce another copy of the Memorandum and Articles of Association in which her name is not cancelled. They have not attributed the deletion to fraud or foul play. All they could do was to produce a share certificate to show that she is a member who holds one share in the company. The certificate is Exhibit G to the counter affidavit. Exhibit G is issued in the name of one C.A. Folarin -Akeju (Mrs.) for one share of N1.00. There is no evidence that Mrs. C.A. Folarin Akeju and Mrs. Folarin Akeju are one and the same person. There is, however, evidence that they are both of 44, Okeyimin Street, Ado Ekiti.

Be that as it may, Exhibit G is not sealed with the respondent's seal. Section 83 of the Companies Act, No.51 of 1968 states that a certificate under the common seal of the company shall be prima facie evidence of the title of the members to the shares specified to be held by such members. Article 10 of the Articles of Association also provides that every member shall, within two months after allotment or lodgment or transfer, be entitled to receive a certificate under seal specifying the shares allotted to him. In the absence of a certificate issued under the respondent's common seal I am unable to hold that Mrs. C.A. Folarin-Akeju is a member or share-holder of the respondent. In the result she is not a member of the respondent."

Not only are the matters the court below attempted to resolve in the foregoing extracts crucial issues, they disclosed, based on affidavit evidence, in part, irreconcilable conflicts that called for resolution by adducing oral evidence.

This court held in *Owe v. Oshunbanjo* (1965) WNLR 84 at 87 that - ".....Where it is necessary that a point or points arising for determination in a case should be further clarified by evidence after the close of the trial, it is the duty of the court trying the case to invite the parties to supply such evidence or explain such point or points and it is wrong for the court in these circumstances to substitute its own views for matters on which there should be, and there was no evidence before the court."

See also *Onibudo v. Akibu* (1982) 7 S.C. 60 at 62.

Furthermore, this court has held, times without number, starting from *Akinsete v. Akindutire* (1966) 1 All NLR. 147 at p. 148 followed by *Eboh v. Oki* (1974) 1 SC 179 at 189: *Olu Ibukun v. Olu Ibukun* (1974) 2

SC 41 at 47-48 and Uku v. Okumagba (1974) 3 SC 35 at 56, 64-65 through Falobi v. Falobi (1976) 9 - 10 SC 1: (1976) 1 NMLR 169 at 178 and National Bank v. Are Brothers (1977) 6 SC 97, that while a court, in a given case, may act on affidavit evidence, it would be unsafe to do so, where the evidence is strongly contested and where issues of credibility can only be resolved upon the court's view of witnesses. See also the analogous case to the one in hand of Pharmacists Board v. Adebesein (1978) 5 S.C. 43 where this court reiterated its view that where a trial court is faced with conflicting affidavits, oral evidence should be taken to determine the truth. B

In all these cases, the overriding consideration has been whether the conflicts are irreconcilable. In Falobi v. Falobi (supra) Fatayi-Williams, J.S.C. (as he then was) said as follows:- C

"We have pointed out on numerous occasions that when a court is faced with affidavits which are irreconcilably in conflict, the Judge hearing the case, in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call. It does not matter whether none of the parties asked to be allowed to cross-examine any of the deponents or call any witness. Such omission by the parties should not be taken to amount to consent that affidavit evidence should be used in such circumstances." D

Thus, in the instant case, it is of no avail for the respondents to argue as they have done in their brief of argument as well as in oral submission through their counsel that, *"the issue of member and directorship of the appellant was reconcilable on the available affidavit evidence having regard to the applicable law and therefore no useful purpose will be served by invitation for oral evidence, which apparently was the attitude of the High Court on the subject that the appellant then found acceptable."* F

We finally submit that the appellant is estopped from raising this point at this very late stage of the matter."

It is for the above reasons that I hold that both the trial court and the court below were in error in the procedure they adopted in resolving the conflicts latent or patent in the affidavits placed before them. My answer to G Issue 4 is accordingly rendered in the negative.

In the result, this appeal succeeds and it is allowed by me. The decisions of the Court of Appeal sitting in Benin City dated 2nd June, 1989 and the trial court's Ruling of 27th October, 1987 are hereby set aside. The case is hereby remitted to the Ondo State High Court, Ado-Ekiti for hearing de novo by another Judge. Costs are assessed in appellant's favour in the sum of N 1,000.00 only. H

UWAIS JSC

I have had the privilege of reading in draft the judgment read by my learned brother Onu, J.S.C. I agree with the reasoning and conclusion therein. I too find merit in the case. The conflict in the affidavits filed by the parties should have been resolved by taking oral evidence from the deponents therein. Since this was not done by the lower courts, their decisions on the substance of the case became faulty.

The appeal succeeds and it is hereby allowed. I adopt the consequential order contained in the judgment read by my learned brother Onu, J.S.C.

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KUTIGI JSC

I read before now the judgment just delivered by my learned brother Onu, J.S.C. I agree with his reasoning and conclusion. It is obvious that the lower courts attempted to resolve vital issues on the face of irreconcilable affidavit evidence without first of all hearing oral evidence from either side. They were wrong to have done so. (See for example *Falobi v. Falobi* (1976) 1 NMLR 169, (1976) 9-10 S.C. 1). The appeal therefore succeeds and it is allowed. I subscribe to the consequential orders made in the lead judgment.

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OGWUEGBU JSC

I had the privilege of reading in draft the judgment just delivered by my learned brother, Onu, J.S.C. I agree with his reasoning and conclusion.

I only desire to add a few words on the conflicting affidavit, counter-affidavit, further affidavit as well as the exhibits in the motion for the order to strike out the name of the plaintiff from the action.

I have myself gone through them and I am of the view that the facts disclosed in the supporting affidavit, counter-affidavit and further affidavit are irreconcilably in conflict. In order to resolve the conflicts, the learned trial Judge as a matter of practice, ought to have invited the parties to call oral evidence which would have enabled him to test the affidavit evidence before acting on them. See *Uku & Ors. v. Okumagba & Ors.* (1974) 3 S.C. 35, *Government of Ashanu v. Adjuah Korkor & Ors.* (1938) 4 WACA 83 at 85; *Akinsete v. Akindutire* (1966) 1 All NLR 147 at 138 and *Falobi v. Falobi* (1976) 1 NMLR 169 at 178.

Instead of the courts below resorting to the old established practice, they proceeded to guess and speculate on the affidavit evidence which were in direct conflict on crucial facts. A decision arrived at in such an exercise cannot be sustained.

The appeal therefore succeeds and it is allowed by me. I abide by all the consequential orders made by my learned brother, Onu, J.S.C. including those of a retrial by another Judge of the High Court of Ondo State, Ado-Ekiti and costs.

ADIO JSC

I have had the opportunity of reading, in advance, the judgment just read by my learned brother, Onu, J.S.C. and I agree with him that the appeal succeeds. I too allow the appeal and abide by the consequential orders, including the order for costs.

Appeal allowed.

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