

SUPREME COURT OF NIGERIA
9TH JANUARY, 1996. SC. 24/1992
CORAM:- M. L. UWAIS CJN, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC.

OLU OGUNSOLA APPELLANT
AND
NATIONAL INSURANCE
CORPORATION OF NIGERIA RESPONDENT

APPEALS - *Issues* - New issues raised by the appellant - Where they are points that arose for the first time in the Court of Appeal - They can be raised without leave of court.

APPEALS - *Error in judgment* - Where Court of Appeal erroneously attributed respondent's grounds of appeal to the appellant - The judgment is in a confused state.

COURTS - *Accidental slip* - Whether error committed by the lower court - Is mere accidental slip - Or will lead to ordering a rehearing.

FACTS

The appellant filed an action against the respondent before the Ibadan High Court claiming inter alia, an order setting aside the consent judgment between the parties. The action was dismissed and the appellant appealed to the court of Appeal. Meanwhile, appellant secured the trial court's order vide an application, to maintain the status quo ante pending the determination of his appeal. The respondent appealed against the High Court's ruling on status quo to the Court of Appeal.

In delivering the judgment in respect of the appellant's appeal, the Court of appeal erroneously attributed the grounds of appeal filed by the respondent in its interlocutory appeal to the appellant and dismissed the appeal. Appellant has further appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

(a) *Whether the Court of Appeal considered and can be seen to have considered the appeal filed by the Appellant before it.*

(b) *If the answer to the first issue is in the negative whether original appeal ought not to be sent back for rehearing by the court of Appeal or whether sufficient materials exist upon which the appeal can be allowed*

and the judgments of the High Court and the Court of Appeal set aside by the Supreme court. Etc, see p. 86 H

HELD (Unanimously allowing the appeal per lead judgment of **UWAIS C.JN**)

New issues raised by the appellant

1. I think the preliminary objection can be summarily dealt with by stating that the points raised in the first two issues formulated by the Appellant, to wit, issues nos. (a) and (b) above are points that could never have been raised in either the Court of Appeal or the trial Court. They are points which arose for the first time in the Court of Appeal. Since the error alleged by the points originated in the Court of Appeal as part of its decision, the Appellant has a constitutional right of appeal to raise the points in this Court - See section 213 subsection (2) (a) of the Constitution of the Federal Republic of Nigeria, 1979. Therefore, the Appellant is not under any obligation to seek leave to raise the points as issues which were neither raised in the Court of Appeal or the High Court. Clearly this is an exception to the general principle stated. (p. 87 G)

Error in judgment

2. It is very clear that in determining the appeal before it, the Court of Appeal was in serious error to have attributed the grounds of appeal in respect of the Respondent's interlocutory appeal to the Appellant. The error was compounded when the Court rejected the issues formulated in the Appellant's brief of argument and it decided to determine the appeal on the grounds of appeal wrongly attributed to the Appellant. The error is obvious. Not only that, the decision, which is meant to be based on the grounds of appeal considered by the lower court, is inconsistent with what the Respondent's grounds of appeal alleged. In the circumstances, the judgment of the lower court is in a confused state. (p. 88 C)

Courts - Accidental slip

3. Therefore, the error committed by the lower court goes beyond accidental slip as contended by the Respondent. The words "accidental slip" have been judicially considered to, inter alia, mean a clerical mistake in a judgment or order. Such error must be an error in expressing the manifest intention of the court surely the situation in the present case is different. On the whole I am satisfied that this appeal must be allowed on these issues for determination. It is not necessary, therefore, to consider the remaining issues for determination raised by the Appellant and the Respondent. The appeal succeeds and it is hereby allowed. The decision of the Court of

Appeal is accordingly set aside. The case is hereby remitted to the Court of Appeal to be determined on the grounds of appeal filed thereat by the Appellant and the issues raised by the parties in their respective brief of argument. (p. 88 D)

REPRESENTATION

Appellant absent and unrepresented
Chief A. Delano for the Respondent

CASES REFERRED TO

Agu v. Ikewibe (1991) 3 N.W.L.R. (Part 180) 385 at p. 403
The Stool of Abinabina v. Enyimadu 12 WACA 171
Ejiofodomi v. Okonkwo (1982) N.S.C.C. (Part 2) 959 at p. 993
Osakwe v. Governor of Imo State (1991) 5 N.W.L.R. (Part 191) 318
Sutherland and Company v. Hannevig Brothers Ltd (1921) 1 K.B. 336 at D pp. 340 - 341
Asiyanbi v. Adeniji (1967) All N.L.R. 88 at p. 94 (Reprint)
Adigun v. A-G of Oyo State (No.2) (1987) 2 N.W.L.R. (Part 56) 197

LEAD JUDGMENT BY UWAIS C.JN

The appellant instituted a case in the High Court of Oyo State holden at Ibadan against the respondent, in which he asked for the following:-

“(a) An order setting aside the consent judgment in Suit No. 1/239/83 and dated the 11th day of March 1985.

(b) A declaration that the defendant is not entitled to exercise any power of sale on the plaintiff's landed property at Plot 10 Block 'A' Ibadan Planning Authority Lagos Road Scheme Ibadan the subject of a purported mortgage agreement between the plaintiff and the defendant made in August 1981.

(c) An injunction restraining the defendant its servants agents and or privies from taking any steps in furtherance of the said exercise of purported power of sale.

And or in the alternative.

(d) An order that the plaintiff be at liberty to redeem the said property.”

The claim was dismissed in its entirety by the learned trial Judge (Kolawole, J.). Dissatisfied with the decision the appellant appealed to the court below and filed only one ground of appeal which reads:-

“The learned trial Judge erred in law in dismissing all the plaintiffs claims he held that there was no basis for setting aside the consent judg-

ment in Suit No. 1/129/83 when all the essentials necessary for setting aside a consent judgment were present."

Later the appellant brought an application before the Court of Appeal in which he prayed for an order as follows:-

(1) Granting him an extension of time within which to file the appellant's brief herein;

(2) that the appellant's brief already filed herein be deemed to have been filed within time.

(3) Granting him leave to file and argue additional grounds of appeal

4) Such further or other order or orders as the court may deem fit to make in the circumstances."

The application was heard on the 23rd day of May 1989 and was granted by the Court of Appeal in the following terms:

"Court: Time for filing appellant's brief extended to today. Leave to file two additional grounds of appeal is hereby granted. The brief deemed properly filed. Costs of N50.00 costs to the respondent,"

The additional grounds of appeal in question read:-

"(1) Error in law

The learned trial Judge erred in law in failing to allow the plaintiff to redeem the mortgaged property when

(1) The property had not been sold and (2) when it was still redeemable.

(2) Error in law and Oil the facts

The learned trial Judge erred in law and on the facts when he held that "once the main claims fail, there is no basis upon which I can grant the alternative claim that the plaintiff be at liberty to redeem the said property when:-

(1) There was evidence that the property was still pending;

(2) The court had earlier given an order of injunction against the defendant."

In the brief of argument deemed to have been properly filed, the appellant stated the following issues for determination:-

"(i) Whether the ingredients necessary for consent judgment were present in this case and whether the learned trial Judge was right to have refused to set aside the consent judgment?

(ii) Whether the defendant could lawfully sell a property the subject of litigation while the matter is on in court?

(iii) Whether the learned trial Judge was right in refusing the plaintiff the right to redeem his property which had been unlawfully sold."

Earlier on, the appellant had brought an application in the High

Court on the 2nd day of February 1988 asking “for an order that the status quo ante the judgment (of the High Court) be maintained until the determination of the appeal” he filed. The application was heard by the trial court on the 4th day of March, 1988 and it was granted as follows:-

The order I will make is as follows:- “that the possession of the plaintiff of the property lying and being at Plot 10, Block A’ Ibadan Metropolitan Planning Authority, Lagos Road Scheme, Ibadan shall not be disturbed by the defendants, their agents, servants or privies pending the determination of the appeal in this suit. There will be no order as to costs.”

Dissatisfied with the ruling the respondent appealed to the court below on the 21st day of March, 1988. The following grounds were filed by C it:-

“(iii) Grounds of Appeal

(1) The learned trial Judge erred in law when he held.

The plaintiff in this case is asking for the status quo ante the judgment to be maintained. What I understand by that is that before the judgment, the relationship of mortgagor and mortgagee existed between him and defendants and he wants that relationship to continue pending the determination of the appeal. In other words he wants to retain the position of mortgagor in possession of the property. Or to put in another way, he wants the rights of the defendants to sell the property to be suspended E pending the determination of the appeal.

Particulars

It is not the duty of the court to interpret the claim of the party before it.

(2) The learned trial Judge erred in law when he held.

The sale, during the pendency of this action is one of matters on which I pronounced upon in my judgment. I said it was right but in case the Court of Appeal says I am wrong, what would be the position of the plaintiff?

Particulars

(i) It was not part of the claim of the plaintiff in the court of trial that the sale by the defendant to a third party during the pendency of the action be set aside.

(ii) There was abundant evidence before the court to the effect that the defendant had already transferred the property to a H third party who was not joined as a party to the proceeding.

(iii) The considerations are all irrelevant to granting of an

application of this nature.

(3) The learned trial Judge erred in law when he held.

I believe that the best thing to do is to maintain the status quo so that the property may be presented pending the determination of the appeal. This is the moreso as the plaintiff cannot part with the property while the appeal is pending as he has no documents of title with him and the property is subject to a legal charge, whereas the defendants are in position to do so.

Particulars

(i) An application of this nature is not quoted as a matter of course.

(ii) The transaction between the plaintiff and the defendant related to a Mortgage of the property for security a loan of N225,000.00.

(iii) There was undisputed evidence before the court that the plaintiff had paid only the amount of N65,000.00 out of N225,000.00 owed to the defendant and there has been no attempt on his part to repay the balance outstanding.

(iv) The affidavit of the plaintiff did not disclose any exceptional circumstance which assuming they were true cannot be remedied by award of damages.

(v) The learned trial Judge did not examine the ground of appeal filed in order to discover that the appeal was only filed in order to deprive the defendant of the fruits of its judgment.

(4) Additional grounds of appeal will be filed on receipt of the record of proceedings."

No brief of argument was filed by the respondent in support of its appeal. The issues for determination as formulated in the respondent's brief which was filed in response to the appellant's brief simply read thus:-

"(i) Whether the ingredients necessary for a valid consent judgment were present in Suit No. 1/239/83 to justify the refusal of the learned trial Judge to set aside the consent judgment.

(ii) Whether the defendant could lawfully sell the mortgaged property under and in virtue of the judgment in Suit No. 1/239/83 whilst the suit No. 1/473/85 was pending in respect of the selfsame mortgaged property."

In effect the appeal by the respondent was not ripe for hearing when the appeal by the appellant came up for hearing on the 19th day of November, 1990 before the Court of Appeal. In its judgment which was delivered on the 18th day February, 1991 the lower court (Sulu-Gambari, J.C.A.; Ogwuegbu.J.C.A. as he then was and Akpabio. J.C.A.) stated as follows as per Sulu-Gambari J.C.A., who prepared the lead judgment with which the other members of the panel were in agreement:-

.....the plaintiff has appealed to this court filing three grounds

of appeal which are hereunder reproduced as follows:-

"1. The learned trial Judge erred in law when he held -

'The plaintiff in this case is asking for the status quo ante the judgment to be maintained. What I understand by that is that before the judgment, the relationship of mortgagor and mortgagee existed between him and defendant and he wants that relationship to continue pending the determination of the appeal. In other words he wants to retain the position of mortgagor in possession of the property. Or to put in another way, he wants the property to be suspended pending the determination of the appeal.'

Particulars

It is not the duty of the court to interpret the claim of the party before it.

2. The learned trial Judge erred in law when he held -

'The sale during the pendency of this action is one of matters on which I pronounced upon in my judgment. I said it was right but in case the court of appeal says I am wrong, what would be the position of the plaintiff?'

Particulars

(i) It was not part of the claim of the plaintiff in the court of trial that the sale by the defendant to a third party during the pendency of the action be set aside.

(ii) There was abundant evidence before the court to the effect that the defendant had already transferred the property to a third party who was not joined as a party to the proceedings.

(iii) The considerations are all irrelevant to granting of an application of this nature.

3. The learned trial Judge erred in law when he held:-

I believe that the best thing to do is to maintain the status quo so that the property may be preserved pending the determination of the appeal. This is moreso as the plaintiff cannot part with the property while the appeal is pending as he has no documents of title with him and the property is subject to a legal charge, whereas the defendants are in a position to do so.

Particulars

(i) An application of this nature is not granted as a matter of course.

(ii) The transaction between the plaintiff and the defendant related to a Mortgage of the property for security of a loan of N225,000.00.

(iii) There was undisputed evidence before the court that the plaintiff had paid only the amount of N65,000.00 out of N225,000.00 owed to the defendant and there has been no attempt on his part to repay the balance outstanding.

(iv) The affidavit of the plaintiff did not disclose any exceptional

circumstances which assuming they were true cannot be remedied by award of damages.

(v) The learned trial Judge did not examine the grounds of appeal filed in order to discover that the appeal was only filed in order to deprive the defendant of the fruits of its judgment."

B Further on the Court of Appeal per Sulu-Gambari, J.C.A. remarked thus:-

Learned counsel for the appellant filed the appellant's brief and formulated issues for determination of the appeal. Learned counsel for the respondent also filed a brief for the respondent and he, too, formulated
C *issues for the determination of the appeal.*

Learned counsel for the appellant, as it most (sic) usual, despite repeated directives from this court on the matter, proceeded to direct his arguments on the grounds of appeal filed by him. Perhaps in order to compromise, learned counsel for the respondent also canvassed his arguments
D *on the grounds filed in reply to the points made by the learned counsel for the appellant.*

Because the two counsel to the parties did not base their arguments on the issues posed by them and since they have argued solely on the grounds of appeal filed, not only have they rendered the purposes for the formulation of issues unnecessary, they have also rendered it useless for
E *me to incorporate the issues so formulated by both counsel in the consideration of this judgment. It follows in effect that all the issues posed by them would not be referred to at all.*

(Underlining mine)

F Be that as it may, the Court of Appeal finally concluded its judgment as follows:-

"The learned trial Judge was right (and I so hold) in refusing to set aside the consent judgment. The two grounds of appeal argued together therefore lack merit.

On the whole, having dealt with all the matters raised in this appeal,
G *it is sufficient to say that most of the matters canvassed before us could not justify, in my view, any interference with the findings and conclusions of the learned trial Judge. Consequently, I am of the view that the appeal wholly fails and it is accordingly dismissed with costs of N400.00 in favour of the respondent."*

H It is obvious from the foregoing that the court below confused the appeal before it. Aggrieved by the decision, the appellant has appealed before us and raised the following issues for determination in his amended brief of argument:-

(a) Whether the Court of Appeal considered and can be seen to have considered the appeal filed by the appellant before it.

(b) If the answer to the first issue is in the negative, whether the original appeal ought not to be sent back for rehearing by the Court of Appeal or Whether sufficient materials exist upon which the appeal can be allowed and the judgments of the High Court and the Court of Appeal set aside by the Supreme Court.

(b) Whether the provisions of the consent judgment entered into between the parties which purported to confer upon the respondent the right to sell the appellant's landed property independent of any mortgage or other instrument duly consented to, under the Land Use Act (Cap. 202) was contrary to the provisions of that Land Use Act?

The respondent filed an amended brief of argument also raising three issues for determination, which state:-

"(a) Whether the judgment of the Court of Appeal which correctly represents the Court's decision can be set aside where there is an error arising from accidental slip.

(b) Whether the operation of the doctrine of lis pendens is to prevent absolutely any disposition of real property the subject matter of a suit during the pendency of the suit or to make the disposition subject to the outcome of such suit and whether the sale by the respondent pursuant to the consent judgment in suit No. 1/239/83 was made during the pendency of an action with the doctrine of lis pendens.

(c) Whether the provisions of the consent judgment entered into between the parties which purported to confer upon the respondent the right to sell the appellant's landed property independent of any mortgage or other instrument duly consented to under the Land Use Act (Cap.202) was contrary to the provisions of that Land Use Act?"

A preliminary objection has been raised in the respondent's amended brief on the ground that the points being now raised by the appellant are new, since they were not raised in the lower courts, and that leave to raise them in this court is needed, but that such leave has not been obtained from us. The case of *Agu v. Ikewibe*, (1991) 3 NWLR (Pt.180) 385 at P. 403 was cited in support of the objection.

I think the preliminary objection can be summarily dealt with by stating that the points raised in the first two issues formulated by the appellant, to wit. Issues nos. (a) and (b) above are points that could never have been raised in either the Court of Appeal or the trial court. They are points which arose for the first time in the Court of Appeal. Since the error alleged by the points originates in the Court of Appeal as part of its decision, the appellant has a constitutional right of appeal to raise the points in this court - See section 213 subsection (2) (a) of the Constitution of the Federal

Republic of Nigeria, 1979. Therefore, the appellant is not under any obligation to seek leave to raise the points as issues which were neither raised in the Court of Appeal of the High Court. Clearly this is an exception to the general principle stated in *The Stool of Abinabina v. Enyimadu*, (1953) 12 WACA, 171; *Ejiofodomi v. Okonkwo* (1982) 11 S.C. 74. 422; *Mogaji & Ors. v. Cadbury Nigeria Ltd.*, (1985) 2 NWLR (Pt.7) 393; (1985) N.S.C.C. (Pt.2) 959 at P.993 and *Osakwe v. Governor of Imo State*, (1991) 5 NWLR (Pt.191) 318 cited in support of the preliminary objection.

Next, I propose to consider issues nos. (a) and (b) in the appellant's brief of argument together with issue No. (a) in the respondent's brief of argument. It is very clear that in determining the appeal before it, the Court of Appeal was in serious error to have attributed the grounds of appeal in respect of the respondent's interlocutory appeal to the appellant. The error was compounded when the court rejected the issues formulated in the appellant's brief of argument and it decided to determine the appeal on the grounds of appeal wrongly attributed to the appellant. The error is obvious. Not only that, the decision, which is meant to be based on the grounds of appeal considered by the lower court, is inconsistent with what the respondent's grounds of appeal alleged. In the circumstances, the judgment of the lower court is in a confused state. Therefore, the error committed by the lower court goes beyond accidental slip as contended by the respondent. The words "accidental slip" have been judicially considered to inter alia, mean a clerical mistake in a judgment or order. Such error must be an error in expressing the manifest intention of the court - see *Sutherland and Company v. Hannevig Brothers Ltd.* (1921) 1 K.B. 336 at Pp. 340 - 341; *Asiyanbi & Ors. v. Adeniji* (1967) All NLR 88 at P.94 (Reprint) and *Adigun v. A.G. of Oyo State*, (No.2) (1987) 2 NWLR (Pt.56) 197. Surely the situation in the present case is different.

On the whole I am satisfied that this appeal must be allowed on these issues for determination. It is not necessary, therefore, to consider the remaining issues for determination raised by the appellant and the respondent.

The appeal succeeds and it is hereby allowed. The decision of the Court of Appeal is accordingly set aside. The case is hereby remitted to the Court of Appeal to be determined on the grounds of appeal filed thereat by the appellant and the issues raised by the parties in their respective brief of argument. The lower court shall also determine what to do with the interlocutory appeal filed by the respondent, if it is still pending before it. I award costs of N1,000.00 in favour of the appellant against the Respondent.

OGUNDARE JSC

I have read in advance the judgment of my learned brother, Uwais, C.J.N. just delivered. I agree entirely with him. I have nothing more to add.

I too allow the appeal and subscribe to the consequential order made by my learned brother. I also abide by the order for costs made by him.

B

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Uwais, C.J.N. in the lead judgment just read. It is crystal clear, as explained in the lead judgment, that the grounds of appeal which the lower court considered in its determination of this appeal were not what the appellant filed before the Court of Appeal. They were grounds filed by the respondent against the ruling of the learned trial Judge which was delivered on the 4th March, 1988. The mix up has led to this erroneous decision. I therefore agree that this appeal should be allowed. The judgment of the lower court is hereby set aside. I abide by all the consequential orders made in the lead judgment.

C

D

ONU JSC

Having had the privilege of a preview of the judgment of my learned brother Uwais, C.J.N. just read, I am in entire agreement with him that this appeal succeeds and it is accordingly allowed by me.

E

I need only add in respect of the appellant's issues (a) and (b) considered simultaneously with the respondent's issue (a) briefly as follows:-

Where as in the instant case, the court below has committed a serious and fatal error to have attributed the grounds of appeal in respect of the respondent's interlocutory appeal to the appellant as well as proceeding to compound same by rejecting the issues formulated in the appellant's brief of argument before opting to determine the appeal on the grounds of appeal rather than the issues-grounds it wrongly attributed to the appellant and so inconsistent with what the respondent's grounds of appeal alleged and where the error committed cannot, in my view, be said to be merely an "accidental slip." See *Milson v. Carter* (1983) A.C. 638 at 640; *Asiyanbi v. Adeniji* (1967) 1 All NLR 82 at page 90 and *Minister of Lagos Affairs, Mines & Power & anor. v. Akin -Olugbade & Ors.* (1974) 1 All NLR (Pt.2) 226; (1974) 11 S.C. 11 at 19. The confusion attendant to the instant case indeed arose out of a conglomeration of errors not least among which was the misplaced treatment of the grounds of appeal as against the issues. It is now well settled principle that arguments are to be canvassed on the basis

F

G

H

of issues formulated and not on the grounds of appeal; for while a resolution of an issue which is a question in dispute between the parties may determine an appeal, a ground of appeal which forms a part of that issue may not, vide *Ala Mazi Aja & Anor v. John Okoro & ors.* (1991) 7 NWLR (Pt.203) 260 at 277 and *Adejumo v. Ayanlegbe* B (1989) 3 NWLR (Pt.110) 417 at 430. This is a clear case with which this court must interfere to set aside.

For these reasons and the fuller ones set out in the lead judgment of my learned brother Uwais, C.J.N. with which I had expressed my concurrence, I too, allow the appeal and make the same consequential orders inclusive of costs as contained in that judgment. C

IGUH JSC

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

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

E I endorse the order as to costs therein contained.

F

G

H