

SUPREME COURT OF NIGERIA
5TH MARCH, 1996. SC. 47/1990
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, Y. O. ADIO, JJSC.

PATRICK A. ABUSOMWAN PLAINTIFF/APPELLANT

AND

G. O. AIWERIOBA & ANOR DEFENDANTS/RESPONDENT

APPEALS - Trial de novo - Where judgment was given in favour of the appellant - Whether the Court of Appeal was right in ordering trial de novo.

APPEALS - Trial de novo - Is to be ordered only in justified circumstances.

APPEALS - Order - Where the lower courts failed to make the proper order - Circumstances under which the Supreme Court will intervene.

FACTS

The Plaintiff/Appellant filed an action against the Defendant/Respondent before the High Court Benin-City. Plaintiff claimed inter-alia an order that, the defendants render account of the plaintiffs goods. The trial court dismissed the plaintiffs claim on the ground that he failed to prove his case.

Plaintiff appealed to the Court of Appeal. The lower court found in favour of the plaintiff. But instead of granting the order prayed by the plaintiff, it ordered a trial de novo. Being dissatisfied plaintiff has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

After upholding the appellant's contentions on the issues for determination, was the Court of Appeal right in making an order for trial denovo?

HELD (Unanimously allowing the appeal per lead judgment of **BELGORE JSC**)

Whether court was right in ordering trial de novo

1. None the less that Court after upholding the appellant's contentions on the issues for determination made an order for trial de novo. I find this to be an error by the Court of Appeal in that the remittance of the case for trial de novo is improper after the appellant had been vindicated and judgment was given in his favour. The general power of the Court of Appeal, as in

section 16 Court of Appeal Act is clear. All the issues triable had been determined and what remained is for the Court to order the respondents to render full account. The parties formulated the same issues for determination and looking at the claims in the trial Court, and in the appeal the issues formulated for the Court of Appeal the ultimate order for trial de novo is not justified. (p. 508 G)

Trial de novo - Circumstances

2. Trial de novo should only be ordered where the justice of the case, looked at in all its special circumstances justifies it. However, where all the facts pertinent to the decision of the Court of trial had been put right and no C new issues are on the face of record triable again the Court of Appeal should not order retrial; a retrial in such a case will be against the very foundation of decision-making process by the appellate Court. In allowing the appeal in this case all the grounds of appeal and issues for determination pursued by the appellant were allowed; what remained was consequential order to make on monies received or collected by respondents in the sale of appellant's goods, Section 16 Court of Appeal Act ought to have been invoked. (p. 509 A)

Where the lower courts failed to make the proper order

3. There are no new issues not decided and the order for account not made, could be made by this Court by virtue of Section 22 Supreme Court Act. [See *Agbonifo vs Aiwerioba* (1988)1 NWLR (Pt.70) 347, 248]. There are documents recording the sale of appellant's goods paid into the defendants account and the appropriate order to make is for the respondents to render F full account of the proceeds to the appellant. I allow this appeal, and by virtue of Section 22 Supreme Court Act I order the defendants to render account of the proceeds of sale of the Plaintiff/appellant's goods paid wrongly into the defendants/respondents' account. (p. 509 E)

NOTABLE POINT OF INTEREST

ONU JSC

1. Retrial - Whether appropriate

An order for retrial inevitably implies that one of the parties, usually the plaintiff, is being given an opportunity to relitigate the same matter. Indeed, before deciding to make such an order an appellate court or tribunal should satisfy itself that the other party is not thereby being wronged to such an extent that there would be a miscarriage of justice. A retrial is not appropriate where it is manifest that the plaintiff's case has failed in toto and that

no irregularity of a substantial nature is apparent on the Records shown to the court. In the instant case where the appellant's appeal succeeded in its entirety there was in fact no need to have ordered a trial de novo but an order for accounts. (p. 514 D)

B REPRESENTATION

T. J. O. Okpoko, SAN for the appellant with C.A. Ajujah

R. I. I. Ogbebor for the respondents.

CASES REFERRED TO

Agbonifo v. Aiwerioba (1988) 1 NWLR (Pt. 70) 347 248

Adeyemi v. Arokopo (1988) 2 NWLR 703 711

Datumbu v. Adene (1987) 4 NWLR (Part 65) 314

Solomon v. Mogaji (1982) 11 S.C. 1 at 24

Mogaji v. Odojin (1978) 4 S.C.91

Ayoola v. Adebayo (1969) All N.L.R. 159

Ayisa v. Akanji (1995) 7 NWLR (Part 406) 129

LEAD JUDGMENT BY BELGORE JSC

Both the plaintiff/appellant and first respondent were businessmen in Benin. They proposed to jointly float a company so that they would trade together in certain commodities. It seemed that joint venture company could not be incorporated in time and it was decided that for the time being each should carry on business in his name or private capacity. It was however agreed that the plaintiff could bring his goods into the premises of the first defendant who would arrange for marketing the same and pay into the account of plaintiff with International Bank for West Africa Limited, Benin-City. The second defendant was a company exclusively owned by first defendant who was sole signatory to its account with a bank.

Both the plaintiff and the second defendant, by separate letters of credit ordered boxes of nails and iron rods from Britain. The vessel bringing these building materials docked at Ogharefe Jetty, near Sapele. Seagul Agencies, a clearing agent, was contracted by each party to clear the cargoes of nails and rods. Plaintiff sold some of his consignment at Sapele. The remaining items for plaintiff, 121 boxes of nails, were finally delivered to the premises of second defendant at 14 Ugomoson Street, Benin-City evidenced by Way Bills from port of delivery by Seagul Agencies aforementioned. The consignment belonging to second defendant were similarly delivered along with the plaintiff's. According to the plaintiff, the defendants, in whose premises the plaintiffs goods were delivered, in accordance with

their understanding sold the goods. But instead of paying the entire proceeds to the account of the plaintiff at International Bank for West Africa Limited, who gave him loan facility to order the goods the defendants paid only N43,4040.00 instead of N89,298.00 realised from the sales. Similarly, the remaining consignment of plaintiff's iron rods delivered to the premises of the second defendant under the same understanding valued at N268,246.00 was sold by defendants and only N126,770.90 was credited to plaintiff's account. For the nails the defendants were to account for the outstanding N45,894.00 and for iron rods N141,475.30. After several demands for payment of these sums of money, with defendants refusing or failing to pay, the action leading to this appeal was taken. Several amendments were made to the pleadings by both sides. At the end of the trial the Judge inter alia found in his conclusion as follows:

"The goods ordered by plaintiff and those ordered by 1st defendant were about equal. As at 26th January 1978 the sum of N104,024.44 was paid into the Account of 1st defendant with New Nigeria Bank Limited Benin-City while the sum of N139,915.00 was

The plaintiff agreed taking part though not fully in the marketing of the rods and nails. 1st defendant was the Managing Director while the plaintiff was the Executive Director/General Manager. Plaintiff signed Exhibits 16 to 22 as the General Manager of Grand Brothers.

The plaintiff did not plead that any quantity of the 1/2" rods were sold by him at the wharf. Any evidence given to that effect goes to no issue.

Apart from the consignment of the goods to the premises of the 2nd defendant, I do not see anything done by 1st or 2nd defendant regarding their participation in the sales more than what the plaintiff did. While the sales lasted the sellers were "marked out as staff of Grand Brothers" according to the plaintiff. See paragraph 7, 8 and 15 of the further amended statement of defence and Mr. Aiwerioba's evidence.

In the event I hold that the plaintiff has not proved his case. The claim is hereby dismissed."

In the event, according to learned trial Judge, the plaintiff failed to prove his case and it was dismissed. This led to the appeal to the Court of Appeal. The grounds of appeal, three grounds on misdirection in law and fact and one on general grounds, complained of the trend of evidence based on pleadings before learned trial Judge differed from his conclusions. There was copious evidence that the goods were delivered to the premises of the respondents and this was confirmed by John Ibagun (PW.1) and Edward Obaze (PW.2) which trial Judge erroneously or inadvertently overlooked. The evidence in the Court of trial was mainly documentary and on

appeal the appellant raised the following issues for determination:

(1) *“Was it established on the evidence on record that any part of the proceeds of the sale of plaintiff’s goods paid into the account of the defendants?”*

B (2) *Was the amount due to plaintiff for his goods delivered to the defendants ascertained or ascertainable?*

(3) *Was the learned trial Judge right to hold that the defendants, into whose accounts proceeds of the sale of plaintiff’s goods have been paid were not liable to pay the plaintiff or render an account on the said money to the plaintiff?*

C (4) *Was the learned trial Judge right to dismiss the plaintiff’s claims on the grounds set out by him for doing so as shown in this judgment?*

(5) *Having set out what plaintiff must prove to succeed in the action and having resolved these matters in favour of the plaintiff, was the learned trial Judge right to dismiss the plaintiff’s claim as he did?*

D (6) *On the evidence on record, was the learned trial Judge entitled to hold that the defendants and/or their servants did not sell the plaintiffs goods?*

(7) *Was the judgment of the learned trial Judge supported by the evidence on record?”*

E The Court of Appeal after hearing the parties on the appeal relative to the issues for determination by both parties found for the appellant on the issues and allowed the appeal on issues 3,4,5,6 and 7 raised by the appellant. The Court of Appeal also held that there was clear evidence that some of the goods of the plaintiff/appellant in the yard of the defendants were sold and the proceeds paid into defendant’s accounts rather than
F plaintiff’s account as agreed between the parties when the goods were delivered to the defendants. The Court of Appeal similarly found that the justice of the case ought to be to order for account as the real amount could be easily ascertained from documents. The respondents who were victorious in the High Court never cross-appealed to the Court of Appeal,
G nor filed respondent’s notice on contention that judgment be affirmed or varied on other grounds (as in Order 3 Rule 4 Court of Appeal Rules);none the less that Court after upholding the appellant’s contentions on the issues for determination made an order for trial de novo. I find this to be an error by the Court of Appeal in that the remittance of the case for trial de novo is improper after the appellant had been vindicated and judgment was
H given in his favour. The general power of the Court of Appeal, as in section 16 Court of Appeal Act is clear. All the issues triable had been determined and what remained is for the Court to order the respondents to render full

account. The parties formulated the same issues for determination and looking at the claims in the trial Court, and in the appeal the issues formulated for the Court of Appeal the ultimate order for trial de novo is not justified.

Trial de novo should only be ordered where the justice of the case, looked at in all its special circumstances justifies it. However, where all the facts pertinent to the decision of the Court of trial had been put right and no new issues are on the face of record triable again the Court of Appeal should not order retrial; a retrial in such a case will be against the very foundation of decision-making process by the appellate Court. In allowing the appeal in this case all the grounds of appeal and issues for determination pursued by the appellant were allowed; what remained was consequential order to make on monies received or collected by respondents in the sale of appellant's goods, Section 16 Court of Appeal Act ought to have been invoked. A trial de novo certainly will put the trial Court in a dilemma of hearing fresh evidence, but that alone cannot amount to blank cheque for reversing findings already made by the Court of Appeal a power a trial Court no longer has in this circumstance. The alternative claim for rendering accounts ought to be the order.

The respondents have not cross-appealed and there was no reason why trial de novo should come in except by error which I find in the consequential order of that Court after allowing the appeal. There are no new issues not decided and the order for account not made, could be made by this Court by virtue of Section 22 Supreme Court Act. [See *Agbonifo v. Aiwereoba* (1988) 1 NWLR (Pt. 70) 325, 348]. There are documents recording the sale of appellant's goods paid into the defendants account and the appropriate order to make is for the respondents to render full account of the proceeds to the appellant.

I allow this appeal, and by virtue of Section 22 Supreme Court Act 1 order the defendants to render account of the proceeds of sale of the plaintiff/appellant's goods paid wrongly into the defendants/respondents' account.

In consequence of this I make the following orders as in the alternative claim of the plaintiff as follows:

(i) An order that the defendants jointly and/or severally do render account within 30 days of the sale of the plaintiffs said nails and 1/2" rods and

(ii) that order that the sum of money found due and payable to the plaintiff be paid by both or either of the defendants to the plaintiff forthwith.

(iii) interest on the total sum due and payable to the plaintiff at the

rate of 11 % per annum from the 1st day of September, 1978 until the date of this judgment.

I award the cost of N1,000.00 in favour of the plaintiff/appellant against the defendants/ respondents in this Court. The cost ordered in the Court of Appeal if paid, should be refunded to the plaintiff/appellant and I hereby order a cost of N200.00 in favour of the plaintiff/appellant as the cost in the Court of Appeal against the defendants/respondents.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Belgore, J.S.C. just read. For the reasons given by him in the judgment which I adopt as mine, I too allow this appeal, set aside the judgments of the two courts below and enter judgment in favour of the plaintiff on his alternative claims for -

(i) an order that the defendants and or severally do render account of the sale of the plaintiff's nails and (1/2") half-inch rods;

(ii) an order that the sum of money found due and payable to the plaintiffs be paid by both or either of the defendants to the plaintiff forthwith

(iii) interest on the total sum due and payable to the plaintiff at the rate of 11 % per annum or at such rate of interest as the court shall deem fit from the 1st day of September, 1978 until judgment is given."

The Court below made the following findings per Ejiwunmi J.C.A.

1. *"In view, from all the evidence that I have reviewed, the contention of the appellant in respect of issue 1 must be upheld. That issue, it would be recalled relate to the question as to whether there was evidence on record that any part of the proceeds of the sale of plaintiffs goods were paid into the account of the defendants."*

2. *"In effect my view is that the learned trial Judge should not have dismissed the appellant's claim. The proper course of action of the learned trial Judge was for him to have considered the alternative claim of the appellant for an order for account.... "*

The learned Justice of the Court of Appeal further made the following observations:

"In my view an order for accounts should have been made by the learned trial Judge in view of the evidence that dominated the trial that the proceeds of sale of the nails and the iron rods were paid into the accounts of the appellant and the respondent indiscriminately. Surely, the best way to ascertain what were sold out of the goods ordered by either party, was for the court to order that the documents before the court should be exam

ined by those qualified to carry out such an exercise. In the case under consideration there can be no doubt that the learned trial Judge in his judgment was clearly unable to apportion what each party was entitled to, as the issue before the court was what each party could lawfully claim. And as this was not clearly ascertainable, the justice of the case demanded that an order for account ought to have been made by the learned trial Judge.” B

In view of the above findings and observations, it is strange to find that court remitting the case to the lower court for trial de novo by another Judge of the State High Court. What it should have done, in my respectful view, is to have entered judgment for the plaintiff in terms of his alternative claims as rightly observed in the lead judgment of Ejiwunmi J.C.A. As held by this Court in Adeyemo v. Arokopo (1988) 2 NWLR (Pt. 79) 703, 711 an order of the retrial is not necessary if an appeal court can, in exercise of its appellate jurisdiction, do justice in the case and bring the litigation to an end. C

For the reasons given herein and the fuller reasons contained in the lead judgment of my lord Belgore, J.S.C. I enter judgment for the plaintiff for - D

- (i) an order that the defendants jointly and/or severally do render account of the sale of the plaintiff's nails and (1/2") half-inch rods; and
- (ii) an order that the sum of money found due and payable to the plaintiffs be paid by either or both of the defendants to the plaintiff forthwith; E

On the claim for interest the plaintiff gave evidence and deposed as follows:

“I claimed interest on the amount due at the rate of 11 % from 1/9/78 to date of judgment. I loaned the capital from the bank at 11 % interest. I borrowed money from International Bank of West Africa Ltd.” F

Under cross-examination he exclaimed -

“I took money from New Nigeria Bank to offset my loan from IBWA. I was sued for the loan I got for importation of nails and rod.”

He was not challenged on this evidence. On the strength of this evidence therefore, claim (iii) ought to succeed. I accordingly enter judgment in favour of the plaintiff for interest on the total sum found due and payable to him at the rate of 11 % per annum from the first day of September 1978 until the date of this judgment. G

I award N1,000.00 costs of this appeal and N200.00 costs of the appeal in the court below, to the plaintiff against the defendants jointly and severally. H

MOHAMMED JSC

I agree with the opinion of my Lord Belgore, J.S.C. in the judgment

just read that this appeal ought to be allowed for the reasons disclosed in the said judgment. I have nothing more to add. I also order the respondents to render a full account of the proceeds of sale of appellant's goods paid into the defendants accounts. I award N1000 costs in favour of the appellant.

B

ONU JSC

I had the advantage before now to read the judgment of my learned brother Belgore, J.S.C. just delivered and I agree with him that this appeal be allowed. I wish to add by way of elaboration the following comments.

C

When at the end of the argument proffered by learned Senior Advocate, Okpoko, Esq, for the appellant at the hearing of this appeal on 29th January, 1996, Mr. R.I.I. Ogbemor, learned counsel for the respondents in response, said:

D

"I concede that an accountant ought to be called upon to reconcile the accounts. I leave the court to determine the matter in the interest of justice."

E

he was in effect endorsing that part of the conclusion arrived at by the Court of Appeal, Benin Division (hereinafter referred to as the court below) (Coram: Omo J.C.A. as he then was, Salami and Ejiwunmi, JJ.C.A.) wherein it held (per Ejiwunmi, J.C.A.) thus:

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"In the light of the above findings of the learned trial Judge, it is clear that the appellant's goods were received into the premises of the respondents, and in my view, having regard to all the evidence, I must hold that the learned trial Judge fell into error to have held that the sale of the iron rods and nails were not carried out with those of the respondents from the premises of the respondents. In my view, from all the evidence that I have reviewed the contention of the appellant in respect of issue I must be upheld." Be it noted that the appeal on issue 2 like all other issues had earlier been upheld.

G

The grouse in issue No. I as couched before the court below was:

"Having upheld the appeal and resolved all the issues raised therein in favour of the appellant, was the Court of Appeal right in ordering a retrial of the case?"

H

Now, it is trite law that when one holds property beneficially owned by another person, the property remains that of its true owner and the holder is merely to account for such goods. That the learned Justices in the instant case appreciated this point in the instant case can be seen when they held, inter alia, that -

"In effect, my view is that the learned trial Judge should not have

dismissed the appellant's claim. The proper course of action of the learned trial Judge was for him to have considered the alternative claim of the appellant for an order for accounts."

and concluded thus:

".....The justice of the case demanded that an order for accounts B ought to have been made by the learned trial Judge."

In the face of the appellant's alternative claim to paragraph 9(a) and (b) wherein he had asked in his Further Amended Statement of Claim as follows:-

(i) an order that the defendants jointly and/or severally do render C account of the sale of the plaintiff's said nails and 1/2 inch rods and

(ii) that order that the sum of money found due and payable to the plaintiff be paid by both or either of the defendants to the plaintiff forth-with."

the above conclusion for the respondent to render an account to the D appellant arrived at by the court below became inevitable. Thus, when the court below made an order for retrial and advanced no legal reason therefor, they, in my respectful view, misdirected themselves when they took refuge in the following passage of their judgment:-

"In my view an order for accounts should have been made by the E learned trial Judge in view of the evidence that dominated the trial that the proceeds of sale of the nails and the iron rods were paid into the accounts of the appellant and the respondent indiscriminately. Surely, the best way to ascertain what were sold out of the goods ordered by either party, was for the court to order that the documents before the court should be examined by those qualified to carry out such an exercise. In the case under F consideration there can be no doubt that the learned trial Judge in his judgment was clearly unable to apportion what each party was entitled to, as the issue before the court was what each party could lawfully claim. And as this was not clearly ascertainable, the justice of the case demanded that an order for account ought to have been made by the learned trial Judge." G

The above stance is the same as what the same court had earlier H taken in saying that the learned trial Judge should not have dismissed the appellant's claim. And when it further held that the proper course of action for the learned trial Judge to have taken was to have considered the alternative claim for accounts, it was as an appellate court, in a position to have considered the alternative claim for accounts itself by exercising its general powers under section 16 of the Court of Appeal Act, 1976 instead of making an order for trial de novo as it erroneously did.

Indeed, the learned trial Judge had had no difficulty in resolving the

matter when it observed thus:-

"There were 121 boxes of nails, each box contained 36 cases and each case had 72 cartons sold at N20.50 per case the sum of N89,298.00 would be realised. See the evidence of the plaintiff. The rods were sold at N250.00 per metric tone (sic). The sum of N268,246.20 would be realised. See Exhibit 11. The total amount that would be realised on the sale of rods and nails of the plaintiff would be N357,544.20 according to the plaintiff. The plaintiff now claims the outstanding sum of N187,369.30. Both P.W.8 Okunobowa and Uhunmwangho D.W.5 said that the amount recovered from sales were paid into plaintiff's account and 2nd defendant's account 50/50 irrespective of what was sold. In my view this would constitute no problem as we now know the quantity of 1/2" rods and nails owned by plaintiff that were delivered to premises of the 2nd defendant and what was the selling price of rods and nails."

From the above passage of the judgment the trial court found the quantity of goods and their respective prices as well as the amount due to appellant. As the respondents did not appeal against these findings nor did the court below reverse same, it amounted to a grave error on the part of court below to have ordered a retrial. An order for retrial inevitably implies that one of the parties, usually the plaintiff, is being given an opportunity to relitigate the same matter. Indeed, before deciding to make such an order an appellate court or tribunal should satisfy itself that the other party is not thereby being wronged to such an extent that there would be a miscarriage of justice. A retrial is not appropriate where it is manifest that the plaintiff's case has failed in toto and that no irregularity of a substantial nature is apparent on the Records shown to the court. See *Dantubu v. Adene* (1987) 4 NWLR (Pt. 65) 314; *Solomon v. Mogaji* (1982) 11 S.C. 1 at 24; *Mogaji v. Odojin* (1978) 4 SC 91; *Ayoola v. Adebayo* (1969) 1 All NLR 159 and *Ayisa v. Akanji* (1995) 7 NWLR (Pt. 406) 129. In the instant case where the appellant's appeal succeeded in its entirety there was in fact no need to have ordered a trial de novo but an order for accounts.

For the reasons given and the fuller ones set out in the judgment of my learned brother Belgore, J.S.C., I too allow this appeal and order accounts to be rendered between the parties vide section 22 Supreme Court Act.

I will also make the same order as to costs as contained therein.

ADIO JSC

I have had a preview of the judgment just delivered by my learned brother, Belgore, J.S.C., and I agree that the appeal should be allowed. Accordingly, I too allow the appeal and abide by the consequential Orders.