

SUPREME COURT OF NIGERIA
28TH MAY, 1996. SC. 95/1990.
CORAM: - M. L. UWAIS CJN, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, Y. O. ADIO, JJSC.

ALHAJI MURIANA KAREEM APPELLANT
(Trading under the name and style of United
Concrete Products)
AND
1. UNION BANK OF NIGERIA LTD. RESPONDENTS
2. NEW NIGERIAN BANK LTD

APPEALS - Retrial - Substantial irregularity - That cannot be corrected -
So as to be consistent with a decision on the merit - Is a ground for ordering
a retrial.

APPEALS - Retrial - Exempting one of the defendants from the ordered
retrial - Whether proper.

PRACTICE A PROCEDURE - Retrial - Issues joined on the pleadings -
Where not considered adequately by the trial court - Whether retrial Or-
dered by the Court of Appeal is proper.

FACTS

Before the High Court Ibadan, the plaintiff/ 1st respondent filed an action against the 2nd respondent and appellant as defendants. Plaintiff claimed the sum of N885,000.00 being the amount wrongfully credited by the 2nd respondent to the appellant's account pursuant to a cheque drawn on the Agodi, Ibadan branch of the plaintiff. The 2nd respondent was said to have credited the appellant's account in respect of the said cheque within less than 4 working days, which plaintiff contended was the Central Bank's period for deeming a cheque as cleared. Plaintiff claimed the said amount in the alternative as money had and received.

The trial court refused the 1st arm of the claim but gave judgment to the plaintiff in respect of the said amount. The court arrived at its judgment upon a finding of fraud which was not pleaded, and failed to adequately consider the issues joined by the parties. The defendants appealed to the Court of Appeal which ordered a retrial of the case but exempted the 2nd respondent from participating in the retrial. Being dissatisfied, the 2nd defendant/appellant had now appealed to the Supreme Court raising 5 issues which the apex Court reduced to a lone issue.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right in ordering a retrial and if so, whether the 2nd Respondent should be exempted from being a party to the retrial.

HELD (Unanimously dismissing the appeal and varying the Court of Appeal retrial Order per lead judgment of **UWAIS CJN**)

Retrial - Substantial irregularity

1. The general principle is that where a court fails to deal with a material point, such failure may result in an appellate court ordering a retrial or a hearing *de novo*. Therefore, a retrial of a case may be ordered on the ground of an irregularity in the conduct of the proceedings before the trial court (or even an appellate court) when the irregularity or the lapse complained of is so substantial that it cannot be corrected so as to be consistent with a decision on the merit of the case in favour of any of the parties. (p. 976 C)

Retrial - Issues joined in the pleadings

2. Since the issues joined on the pleadings were not adequately considered by the learned trial judge because of the aforesaid misdirection, it became necessary for the Court of Appeal to set-aside his decision and order a retrial. This is in consonant with a number of authorities in which it was held that where a trial judge has failed in his primary duty to make findings of fact on issues joined on the pleadings and the evidence is such that an appellate court cannot make its findings and come to a decision on all the relevant issues, a retrial is the proper order. (p. 977 B)

Exempting of the defendant from the ordered retrial

3. It follows that there is nothing to stop the 2nd Respondent from relying, as a defence at the retrial, on the repayment made of the sum of N660,000.00 to the 1st Respondent, to avoid liability on that amount. But there will remain the question of the balance of N225,000.00 paid to the Appellant by the 2nd Respondent. The High Court will have to determine whether, in the context of the claim before it, the Appellant and the 2nd Respondent are at all liable to the 1st Respondent and, if so, jointly or severally. It is obvious, therefore, that the order exempting the 2nd Respondent from the retrial is; with respect, premature and therefore wrong. (p. 978 E)

REPRESENTATION

Chief S. A. Adejumo with G. A. Adeniran for the Appellant

S. B. Ajayi for the 1st Respondent

S. B. Latinwo for the 2nd Respondent

CASES REFERRED TO

Green v. Green (1987) 3 N.W.L.R. (Part 61) 480 at p. 482

Lajumoke v. Doherty (1969) 1 N.M.L.R. 281

Onifade v. Olayiwola (1990) 7 N.W.L.R. (Part 151) 458

Okeowo v. Migliore (1979) 11 S.C. 138

Bakare v. Apena (1986) 4 N.W.L.R. (Part 33) 1

Morah v. Okwuayanga (1990) 1 N.W.L.R. (Part 125) 225

Agbonmagbe Bank v. C.F. A.O (1960) 1 All N.L.R 140

Underwood v. Bank of Liverpool & Maritime Ltd (1924) IK.B 775

STATUTES & RULES REFERRED TO

Court of Appeal Act Cap. 75 LFN 1990 s. 16

Court of Appeal Rules 0.1 r. 21(1)

Supreme Court Act s.22

LEAD JUDGMENT BY UWAIS CJN

The appellant herein was the 2nd defendant in an action brought by the 1st respondent, as plaintiff, claiming jointly and severally against the appellant and 2nd respondent (as 1st defendant) as follows:-

“(i) Declaration that the period for regarding, deeming and/or presuming a cheque presented for clearance through the Central Bank of Nigeria as cleared is four (4) working days.

“(ii) Declaration that the sum of N885,000.00 held by the 1st defendant at Ibadan and deemed credited to the account of the 2nd defendant on 28th October, 1983 being proceeds on a cheque No. 066058 allegedly issued to the 2nd defendant and paid into his account with the 1st defendant is the property of the plaintiff.

“(iii) An order compelling the 1st defendant to credit the account of the plaintiff through the Central Bank Clearing House, Ibadan with the said amount or any part thereof as money had and received - - an order against the defendants jointly and severally to refund the said amount or any part thereof direct to the plaintiff as money had and received.

“(iv) An order that the defendants refund the said sum of N885,000 (sic) to the plaintiff as money had and received.”

The facts of the case may be stated thus. On or about the 26th day of October, 1983, a cheque leaf No. 066058 for the sum of N885,000.00

deposited with the 2nd respondent was received at the Branch of the 1st respondent at Agodi, Ibadan. The cheque which was drawn on the 1st respondent was purportedly issued by Messrs. Robatek Nigeria Limited - an industrial company with headquarters at Lagos, in favour of the appellant. On 27th October, 1993, the 1st respondent in attempt to balance its accounts for the previous day, discovered that the cheque was missing. This was at the close of the day. Consequently, the account for that day could not be balanced. On the following day, that is 28th October, 1983, a thorough search was made at the Branch and it was found that the amount of N885,000.00, which could not be accounted for, was represented by the missing cheque issued by Messrs. Robatek Nigeria Limited. When by 11.00 a.m. on that day it became clear that the cheque could not be traced, the Manager of the Branch contacted the Main Branch in Ibadan of the 1st respondent which is situate at Bank Road, Ibadan, in order to find out who it was that presented the cheque to the latter Branch. The Manager was informed that the cheque was lodged by the 2nd respondent and he immediately got in touch on telephone with the Manager of the 2nd respondent in Ibadan. The former requested the latter not to honour the cheque on the ground that it had been lost. But to his surprise, the Manager of the 2nd respondent stated that the cheque had already been honoured, the account of the appellant having been credited and that two cheques issued by the appellant for the sums of N150,000.00 and N75,000.00 had been paid out from the account to the appellant and his wife respectively. The payments were said to have taken place after the representative of the 2nd respondent returned from a session of the Central Bank of Nigeria Clearing House which took place earlier in the morning of that day.

The 1st respondent felt that the 2nd respondent was wrong in honouring the cheque because the stipulated period before payment on the cheque could be made was four working days. The 2nd respondent countered by contending that Banking Regulations required four clearing sessions of the Central Bank Clearing House to be held before the payment could be effected and that it acted accordingly. Hence the institution of the action by the 1st respondent against the appellant and the 2nd respondent jointly.

Pleadings were filed and exchanged by the parties. They were also amended in the case of the appellant and 1st respondent and further amended in the case of the 1st respondent. At the end of the trial before Ademakinwa J. of the then Oyo State High Court, the first arm of the 1st respondents claim was refused and the remaining arms of the claim were granted in the following terms:-

"In the result, the plaintiff bank succeeded on all the reliefs (except the first relief) claimed and it is hereby ordered as follows:-

1. Declaration that the sum of N885,000 (sic) held by the 1st defendant bank at Ibadan and deemed credited to the account of the 2nd defendant on the 28th of October, 1983, being proceeds on a cheque No. 066058 allegedly issued to the 2nd defendant and paid into his account with the 1st defendant bank is the property of the plaintiff bank.

2. That the 1st defendant bank shall credit the account of the plaintiff bank through the Central Bank Clearing House, Ibadan with the sum of N660,000 (sic). Alternatively, that both defendants shall jointly, and severally refund the said sum of N660,000 (sic) to the plaintiff bank as money had and received.

3. That both defendants shall jointly and severally pay to the plaintiff bank interest on the said sum of N660,000 at the prevailing fixed deposit rate with effect from 28th of October, 1983.

4. That the 2nd defendant shall refund to the plaintiff bank the sum of N225,000 (sic) withdrawn out of the proceeds of the forged cheque and shall pay to the plaintiff bank interest on the said sum of N225,000 (sic) at the prevailing fixed deposit rate with effect from the 28th of October, 1983."

It came to light, in the course of the proceedings before the trial court, that the cheque for the sum of N885,000.00 purportedly issued by Messrs. Robatek Nigeria Ltd. was in fact not issued by the company. Also that the company had no account with the 1st respondent at the Agodi Branch of the latter in Ibadan. It is pertinent to quote here the observation made by the learned trial Judge, as relevant:-

"The next issue to be determined in this case is whether the cheque in dispute was forged. Forgery has been defined in section 465 of the Criminal Code, Cap. 30, Laws of Oyo State as the making of a false document or writing, knowing it to be false and with the intent that it may be used or acted upon as genuine.

By virtue of section 137(1) of the Evidence Act, Cap. 62, Laws of the Federation of Nigeria, if the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. It follows therefore that the allegation that the cheque was forged must be proved beyond reasonable doubt.

It has not been possible to produce the cheque and the explanation offered for the failure is that the cheque is missing. I must say that I accept this explanation. That notwithstanding there is the evidence of the 2nd P.W. who maintained that Robatek (Nig.) Limited which was supposed to have issued the cheque to the 2nd defendant had no account with the

plaintiff bank. The 2nd P.W. had also disclosed that No. 066058 which was supposed to be on the cheque was in fact the number for the cheque for the sum of N20 (sic) issued on the 22nd of November, 1982 by one G.A. Awolabi, who was a customer of the plaintiff bank. This cheque for N20 (sic) was tendered and admitted as Exhibit "V".

There is also the evidence of the 3rd P.W. who identified himself as the Managing Director of Robatek (Nig.) Limited during the month of October, 1983 when the controversial cheque was supposed to have been issued. He has maintained firstly that Robatek (Nig.) Ltd. had no business dealings with the 2nd defendant and therefore had no need to make any payment to him either by cheque or otherwise and secondly that Robatek (Nigeria) Limited had no account with the plaintiff bank or any Bank in Ibadan - area for that matter.

The 2nd P.W. and 3rd P.W. have impressed me as witnesses of truth. There is no doubt from the circumstantial evidence adduced that the cheque in dispute was not a genuine one issued by Robatek (Nigeria) Limited. It is equally not in doubt that the cheque was issued to deceive any holder that the said company had an account with the plaintiff bank. I therefore find as a fact that the cheque No. 066058 for the sum of N885,000 (sic) alleged to have been issued in favour of the 2nd defendant by Robatek (Nigeria) Limited was forged."

Dissatisfied with the judgment of the High Court, the appellant and 2nd respondent herein appealed to the Court of Appeal. They contended inter alia that the forgery of the cheque was not proved beyond reasonable doubt; that the learned trial Judge was wrong in holding that they should both jointly and severally return and pay interest on the sum of N660,000.00 and that the appellant should also refund the sum of N225,000.00 with interest.

In dealing with the issue of forgery, the Court of Appeal (Akanbi, J.C.A. as he then was, Omololu- Thomas, J.C.A. and Ogwuegbu, J.C.A., as he then was) held as follows, as per Akanbi, J.C.A. who delivered the lead judgment:-

"There is no doubt in my mind that the trial Judge was of the view that the claim was founded on an allegation that the cheque was forged.

.....
An examination of the pleadings of the parties, the evidence led and the submissions of the plaintiffs counsel emboldens me to say that this case was not founded on any allegation of forgery. No where in the statement of claim was forgery pleaded. It was never alleged that the 2nd defendant knew that the cheque was false

Be that as it may, from the analysis I have made above I cannot

but agree with the submission that the learned trial Judge was wrong to have based his conclusion on an allegation of forgery that was not pleaded or made the basis of the claimSo having regard to the conclusion I have reached above, I do not find it all that necessary to consider these submissions relating to the standard of proof required to establish forgery in order to determine whether it was raised as a collateral issue or not.”

Next the learned justice considered authorities on a claim for money had and received and concluded that what the trial court would be required to decide in such a case might not be the same as when the claim was predicated on an allegation of forgery. The judgment of the Court of Appeal was, as a result, concluded thus:-

“In the instant case, the trial Judge held that the 2nd defendant ought not be allowed to keep the money credited to his account; hence he granted four out of the five declarations sought. I have already found that he based his decision on an allegation of forgery that was neither pleaded, nor proved; and failed to decide relevant pleadings of the parties. That being so I do not think the judgment ought to be allowed to stand; but this is not to say that 2nd defendant ought to be allowed to keep the money I am inclined to the view that the justice of the case demands that neither of the parties should on principle be allowed to take advantage of the defective judgment. The case was (sic) to go through, albeit sadly, the gamut of a retrial before another Judge of the High Court so that relevant issues may be properly set out and determined between the plaintiff and the 2nd defendant.” (Underlining mine)

The learned Justice then made the following order:-

“In the result, the appeal of the 1st defendant succeeds in toto and in so far as the 2nd defendant is concerned the judgment of the trial court will be and is hereby set aside and a retrial of the case between him and the plaintiff is ordered before another Judge of the High Court.”

Aggrieved by this decision, the appellant appealed further before us. He formulated five issues for determination in his brief of argument. They read:-

“(i) Whether the plaintiff actually paid the said sum of N885,000.0 into the account of the 2nd defendant with the 1st defendant by mistake of fact and without any negligence on its part or in a situation in which it will be unconscionable for the 2nd defendant to keep money belonging to the plaintiff?

(ii) If the sum was not so paid, whether the Court of Appeal was right to have refused to dismiss the case of the plaintiff in its entirety?

(iii) Whether from the totality of the evidence proffered in this case, the plaintiff's claims ought to have succeeded notwithstanding the subsisting finding that the cheque was cleared within the required period?

(iv) Whether the Court of Appeal, having negatived forgery was right in holding that the 2nd defendant who was a bonafide holder for value of the cheque was not entitled to keep the money being proceeds of the cheque? B

(v) Whether the Court of Appeal was right in ordering a retrial in this case, not between the original parties, but only between the 2nd defendant and the plaintiff?"

The 1st respondent also formulated five issues for determination in its brief of argument. They are:- C

"(1) Whether the cheque for N885,000.00 was actually cleared or was merely deemed to be cleared;

(2) Whether the question of forgery was central or collateral to the determination of the case before the lower courts; D

(3) Whether in the circumstances of this case, the appellant ought to be allowed to keep the proceeds of the said cheque;

(4) Whether the appellant could infact be held to be a bona fide holder of the said cheque.

(5) Whether the plaintiff/respondent had behaved in any way or whether there existed circumstances between the presentation of the said cheque and the discovery of the fraud, that caused the appellant to alter his position as to make it inequitable to make him refund so much of the proceeds of the cheque already obtained by him." E

In its brief of argument, the 2nd respondent postulated 3 issues for us to determine. They read thus:- F

"1. Whether the 1st defendant/respondent, the New Nigerian Bank Limited can be made a party in a trial ordered de-novo when it cannot be affected in anyway by the result of the retrial being a "STAKE HOLDER" who has returned the balance of N660,000.00 to the plaintiff/respondent with whom the 2nd defendant/appellant is competing for the title to the funds. G

2. Whether the 2nd defendant/appellant being a co-defendant with the 1st defendant/respondent in the original suit in the High Court instituted by the plaintiff/respondent can now insist in making the 1st defendant/respondent a party when the plaintiff/respondent who has collected the balance of N660,000.00 with the 1st defendant/respondent is not interested in litigating against the 1st defendant/respondent. H

3. Whether the 1st defendant/respondent who acted without negli

gence throughout the proceedings as a “Stake holder” and held to be free from any blame can be made a party to the proceedings de-novo when its proper role is that of a witness who is not claiming any relief whatsoever.”

I think, flowing from all the above issues for determination is the simple question: whether the Court of Appeal was right in ordering a retrial and if so, whether the 2nd respondent should be exempted from being a party to the retrial.

At the hearing of this case before us, all the counsel representing the parties adopted their briefs only and did not advance any argument or address us by way of expatiation of the written arguments in their briefs.

The appellant’s contention, in his brief of argument, is that the order for retrial made by the Court of Appeal is inappropriate in this case because the court found that there had been misdirection in fact and law by the High Court, thereby implying that there had been a mistrial in the High Court. It is argued that the Court of Appeal should have given a decision on the merit of the case as properly guided by the facts and law in the case. The order for retrial will lead to miscarriage of justice as the 1st respondent, who had *“failed to plead all the ingredients upon which money paid under a mistake of fact could be recovered, will then be able to amend his pleadings to the prejudice of the defendants.”* It is urged upon us, since the crucial findings of the trial court did not depend on the credibility of the witnesses, to look at the accepted evidence on the record of proceedings and enter judgment accordingly by dismissing the claims of the 1st respondent.

On the other hand, it is contended in the brief of argument that the Court of Appeal erred in law in making the retrial not between the original parties to the case but as between the appellant and the 1st respondent herein. It is argued further that it is clear from the totality of the evidence in this case that the 2nd respondent is a necessary party since it will be absurd or impracticable to determine the real question or questions in controversy between the parties, with the 2nd respondent, through which money was paid to the appellant on a cleared cheque absent. The definition of *“necessary parties”* to a case by Oputa, J.S.C. in the case of *Green v. Green* (1987) 3 NWLR (Pt.61) 480 at p. 482 is cited.

It is canvassed that the basis on which the Court of Appeal ordered a retrial is manifestly wrong as it emanated from a misconception of the doctrine of payment made under a mistake of fact or payment made in a situation in which it will be unconscionable for one party to keep money belonging to another, which is not the position in the present case, as the Court of Appeal had itself negatived forgery on the part of the appellant. Since the 1st respondent failed to show that the 2nd respondent was aware

of any invalidating circumstances in the issuance of the cheque for N885,000.00, it is then precluded from recovering the sum in question.

The issues formulated in the brief of argument of the 1st respondent do not touch on the issue of retrial. However, the point was argued in the brief as part of the reply to the argument of the appellant on issues (iv) and (v) of his brief of argument. It is submitted that since the Court of Appeal found that no negligence had been established against the 2nd respondent in crediting the account of the appellant with the sum of N660,000.00 and paying over to him and his wife the sum of N225,000.00, the court below was right to exclude the 2nd respondent from being a party to the retrial. It is further argued that by that decision of the Court of Appeal the 2nd respondent is not a necessary party for the just determination of the dispute between the appellant and the 1st respondent. The case of *Green v. Green* (1987) 3 NWLR (Pt.61) 480 which was cited by the appellant in support of his case is said to be inapposite because it was concerned with the joinder of parties and not retrial as ordered by the Court of Appeal.

In the brief of argument of the 2nd respondent, it is submitted that the 2nd respondent acted honestly throughout the transaction concerning the cheque and hence it was not found to be negligent to either the appellant or the 1st respondent.

In view of this, the 2nd respondent cannot be affected by whatever judgment will be given at the retrial of the case, particularly since the balance of N660,000.00 in its possession had been paid over to the 1st respondent following the judgment of the High Court in its (1st respondent) favour. Therefore, the 1st respondent will have nothing to claim from the 2nd respondent at the rehearing of the case. The law on the joinder of parties is said to be that where a court can decide finally and effectually all the issues in controversy between the parties before it, the court will refuse an application to join another party as co-defendant. The dictum of Eso, J.A. (as he then was) in the case of *Lajumoke v. Mrs. Doherty* (1969) 1 NMLR 281 is cited in support. It is submitted that the appellant quoted the principle in *Green v. Green* (supra) out of context since the ratio in the case is against the appellant's contention in the present case.

Now the power of the Court of Appeal to remit a case to the lower court for retrial is derived from the provisions of section 16 of the Court of Appeal Act, Cap. 75 of the Laws of the Federation of Nigeria, 1990 and Order 1 rule 21(1) of the Court of Appeal Rules, Cap. 62. The former provides, as relevant, as follows:-

"16. The Court of Appeal may, from time to time and generally shall have full jurisdiction over the whole proceedings as if the

proceedings had been instituted in the Court of Appeal as court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or in the case of an appeal from the court below in that court's appellate jurisdiction, order the case to be reheard by a court of competent jurisdiction."

B While the latter reads thus:

"21(1) On hearing of any appeal the court may, if it thinks fit, make any such orders as could be made in pursuance of an application for a new trial"

C It is clear from the foregoing provisions that the power of the Court of Appeal to order a retrial in any event is discretionary. That it has the power to order a retrial in the present case is not in issue but whether it exercised its discretion properly in doing so.

D The general principle is that where a court fails to deal with a material point, such failure may result in an appellate court ordering a retrial or a hearing de novo. Therefore, a retrial of a case may be ordered on the ground of an irregularity in the conduct of the proceedings before the trial court (or even an appellate court) when the irregularity or the lapse complained of is so substantial that it cannot be corrected so as to be consistent with a decision on the merit of the case in favour of any of the parties - see *Onifade v. Olayiwola* (1990) 7 NWLR (Pt.161)458, *Adio, J.C.A.*
E (as he then was) observed as follows:-

*"An order for a retrial invariably implies that one of the parties, usually the plaintiff, is being given another opportunity to relitigate the same matter. In exercising its discretion in favour of making an order for retrial of a case, the paramount and only consideration is to ensure that justice is done to both parties and the power should not be exercised in a manner that will make it appear that the court is only concerned with one party being permitted or encouraged to harass the other by means of unjustified or unnecessary litigation. Therefore, where a plaintiff failed to prove his case in the court below, an appellate court will neither order a retrial nor enter a judgment of non-suit, if it so (sic) would amount only to giving the plaintiff another opportunity of proving what he failed to prove in the first instance-*Elias v. Disu* (1962) 1 SCNLR 361; (1962) 1 All NLR 214. Consequently, an appellate court before deciding to make an order for retrial should satisfy itself that the other party is not thereby being wronged to such an extent that there would be a miscarriage of justice. See *Ayoola v. Adebayo* (1969) 1 All NLR 159."*
G
H

I endorse this statement of the principle applicable to order for retrial. In the present case the learned trial Judge relied fundamentally on the allegation of the cheque being forged to arrive at his decision. The

Court of Appeal was right when it stated as follows, as per Akanbi, J.C.A.:-

"In the instant case, the trial Judge held that the 2nd defendant ought not be allowed to keep the money credited to his account; hence he granted four out of the five declarations sought. I have already found that he based his decision on an allegation of forgery that was neither pleaded, nor proved; and failed to decide relevant issues and make proper findings based on the pleadings of the parties. That being so I do not think the judgment ought to be allowed to stand."

(Underlining mine)

Since the issues joined on the pleadings were not adequately considered by the learned trial Judge because of the aforesaid misdirection, it became necessary for the Court of Appeal to set aside his decision and order a retrial. This is in consonant with a number of authorities in which it was held that where a trial Judge has failed in his primary duty to make findings of fact on issues joined on the pleadings and the evidence is such that an appellate court cannot make its findings and come to a decision on all the relevant issues, a retrial is the proper order - See Okeowo v. Migliore (1979) 11 S.C. 138; Bakare v. Apena (1986) 4 NWLR (Pt.33) 1; Awote v. Owodunni (No.2) (1987) 2 NWLR (Pt.52) 367; Adeyemo v. Arokopo (1988) 2 NWLR (Pt. 79) 703 and Morah v. Okwuayanga (1990) 1 NWLR (Pt.125) 225.

This brings me to the observation made by Nnaemeka-Agu, J.S.C. in the case of Imonikhe v. A-G., Bendel State (1992) 6 NWLR (Pt.248) 396 at p. 408C, to wit:-

"..... the discretion whether or not to order a retrial was that of the Court of Appeal and not that of this court. I also believe that the clear principle discernible from any decided cases is that unless that court comes to the conclusion that the exercise of it was manifestly wrong, arbitrary, reckless, injudicious or contrary to justice, it cannot interfere, even if it might have exercised the discretion differently, if the discretion were that of this court. See on this The University of Lagos & Anor. v. C.I.O. Olaniyan & 2 Ors. (1985) 1 NWLR (Pt.1) 156 at p. 165; The University of Lagos & Anor. v. M.I. Aigoro (1985) 1 NWLR (Pt.1) 143; John Akujobi Nwabueze v. Obioma Nwosu (1988) 4 NWLR (Pt.88) 257 at p. 160 and so many other cases."

From the foregoing I am satisfied that the Court of Appeal exercised its discretion properly to order the retrial of this case in the High Court of Oyo State before another Judge.

There is, however, one lingering point on the matter; and that is whether the court below was right in excluding the 2nd respondent from being a party at the retrial it ordered. The Court of Appeal arrived at the decision to order a retrial on the basis that the issues joined, by the parties

to the case, on their pleadings and the evidence adduced, had not been properly considered by the trial court because its judgment was based on the allegation of forgery. For that reason the proceedings in the High Court were irregular and there was no finding or the findings of the trial court were insufficient to justify the case of any of the parties to be determined on the merits. That is, in fact, the reason for the court below to order a retrial. How, then could the court rightly arrive at the conclusion that the 2nd respondent was not liable to the 1st respondent for the claims he brought jointly and severally against the 2nd respondent and the appellant? It is either the trial was properly conducted, in which case there would be no order for retrial or that there was a mistrial and, therefore, a retrial must take place. In the case of the former it is possible for the 2nd respondent to be found not liable to the 1st respondent but not so in the case of the latter. It of course transpired in the course of this appeal, as stated in the briefs of argument of both the 1st and 2nd respondents, that the sum of N660,000.00 being part of the sum of N885,000.00 claimed by the 1st respondent, had been paid over by the 2nd respondent to the 1st respondent after the judgment of the High Court was delivered and application for stay of execution pending appeal to the court below was unsuccessfully made to the High Court. Though this fact was available at the time the judgment of the Court of Appeal was delivered, it does not appear from the judgment of the court that the 2nd respondent was exempted from the retrial because of the payment of the amount. It follows that there is nothing to stop the 2nd respondent from relying, as a defence at the retrial, on the repayment made of the sum of N660,000.00 to the 1st respondent, to avoid liability on that amount. But there will remain the question of the balance of N225,000.00 paid to the appellant by the 2nd respondent. The High Court will have to determine whether, in the context of the claim before it, the appellant and the 2nd respondent are at all liable to the 1st respondent and, if so, jointly or severally. It is obvious, therefore, that the order exempting the 2nd respondent from the retrial is, with respect, premature and therefore wrong.

In the result, this appeal, fails in the main. The decision of the Court of Appeal is upheld but varied with regard to the participation of the 2nd respondent in the retrial it ordered. It is accordingly hereby ordered that the case be remitted to the High Court of Oyo State for retrial before another Judge, other than Ademakinwa, J. All the parties herein shall participate in the retrial. The 1st respondent is entitled to N1,000.00 costs against the appellant.

OGUNDARE JSC

I agree with the judgment of my learned brother Uwais, C.J.N, just read. I too dismiss the appeal and vary the order for retrial made by the court below. All parties to the action are to be parties to the retrial of it. I abide by the order for costs made in the lead judgment of Uwais, C.J.N.

B

MOHAMMED JSC

I have had a preview of the judgment of my Lord the Chief Justice of Nigeria, M.L. Uwais, and I agree with him that this appeal ought to be dismissed. The Court of Appeal is quite right to observe that the judgment of the learned trial Judge was not based on the pleadings and the evidence adduced before him. It is plain that the trial court based its decision on the allegation of forgery. Forgery being a criminal offence must be specifically pleaded and proved before a trial court can act on its allegation. Relevant issues which the parties have joined in the pleadings were not also fairly considered in the judgment of the High Court. I therefore entirely agree that the proper course to follow in this appeal is an order for retrial which the Court of Appeal had quite correctly ordered.

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Accordingly, this appeal fails and it is dismissed. I endorse all the consequential orders made in the lead judgment, including the assessment on costs.

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ONU JSC

I had the privilege to read in draft form the judgment just delivered by my learned brother Uwais, Chief Justice of Nigeria, I agree with him that the appeal should be dismissed in that I hold the firm view that the appropriate order to make in the circumstances and which the court below did make, and rightly too, is a trial de novo.

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I wish to add by pointing out that in a properly constituted action such as this, wherein the cause of action is competent, the issues are fully joined inter-partes with the "necessary parties" before the court, and founded on a claim based on money had and received to the plaintiff/respondent's use, it will be wrong to exculpate the 2nd defendant (appellant herein) or hold that the appellant should be allowed to keep the proceeds of the cheque for N885,000.00 or be held to be a bona fide holder of the said cheque presented and drawn on plaintiff/respondent, though wrongly in favour of the 1st defendant/respondent and out of which the appellant had withdrawn N225,000.00 on the pretext that the period provided by the regulations for effecting payment on the cheque was strictly complied with

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by the 1st defendant/respondent, the stake holder, before such payments were made out to the appellant and his wife.

It has been decided by this court in Agbonmagbe Bank v. C.F.A.O. (1966) 1 All NLR 140, inter alia, that bankers may in certain circumstances be liable to persons who are not their customers for the tort of negligence which causes them pecuniary damage. Thus, although it was held by Lord Lindley as long ago as 1903 in Gordon's Case (1903) A.C. 240 at 249 that:-

"It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it"

nevertheless, such withdrawal, in my opinion, ought to be predicated upon an overriding need to be cautious where, for instance, as in the case herein, no prior banker/customer relationship existed between the appellant and the plaintiff/respondent. See A. L. Underwood v. Bank of Liverpool & Maritime Ltd. (1924) 1 K.B. 775 where it was held that a paying bank is bound to make proper inquiries and to be cautious not to be negligent.

The court below in the instant case was, in my firm view, therefore justified to have ordered a retrial although not in the form it held, as between the appellant and the 1st respondent, but as between the plaintiff/respondent (as plaintiff) on the one hand, and the appellant and 1st defendant/respondent jointly (as defendants), on the other hand. In other words, that the entire case be tried de novo to ensure that even-handed justice is done to all sides vide section 16 Court of Appeal Act, Laws of the Federation of Nigeria, 1990 (Cap. 75) and section 22 of the Supreme Court Act, 1960 Cap. 424 Laws of the Federation of Nigeria, 1990; moreso that the learned trial Judge in this case had erroneously based his decision on an allegation of forgery that was not pleaded. As a matter of fact, had the plaintiff/respondent herein cross-appealed, I would have unhesitatingly allowed its appeal. See also Order 1 rule 21(1) Court of Appeal Rules.

It is for these reasons and the fuller ones contained in the judgment of my learned brother Uwais, C.J.N. with which I had herein-before concurred that, I too dismiss this appeal, order a retrial and make the same consequential orders including those for costs as therein contained.

ADIO JSC

I have had the advantage of reading in advance, the judgment just delivered by my learned brother, Uwais, C.J.N., and I entirely agree with it. The appeal fails in the main and the decision of the Court of Appeal is upheld to the extent stated in the lead judgment. I abide by the consequential orders, including the order for costs.