

SUPREME COURT OF NIGERIA
TUESDAY 18TH JUNE, 1996. SC. 110/1990
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
E. O. OGWUEGBU, U. MOHAMMED, Y. O. ADIO, JJSC

TUNDE OSHUNRINDE APPELLANT

AND
OLUFEMI AKANDE RESPONDENT

APPEALS - Concurrent findings - That did not occasion miscarriage of justice - Will be affirmed.

COURTS - Discretion - Exercised by the lower courts - Where not shown to be perverse - Supreme Court will not interfere.

EVIDENCE - Admissibility - Hearing date endorsed on counsel's file - Stumbled upon by trial judge in the course of proceedings - Whether admissible

EVIDENCE - Relevant fact - Entry on counsel's file about the hearing date - Whether admissible as a relevant fact.

FACTS

The plaintiff/respondent filed an action before the Lagos High Court the defendant/appellant claiming the sum of N210,218.04 as damages for breach of contract. The case suffered several adjournment and on 11-11-83 it was adjourned to 18-4-84 for hearing. Neither defendant nor his counsel was present on the said hearing date. The plaintiff led evidence in proof of his case and the court delivered its judgment on 4-7-84.

Soon after the judgment, the defendant filed a motion seeking inter extension of time within which to apply to set aside the judgment lined in default of defendant's appearance. In the course of hearing the motion, the trial court admitted into evidence defending counsel's file jacket. The file jacket contained an endorsement adjourning the case to 18-4-84 for ling. Trial court then refused to grant the prayers contained in the defendant's motion. His appeal to the Court of Appeal was dismissed. Defendant has further appeal to the Supreme Court raising 5 issues, but the honourable Court found the 2 issues raised by the respondent to be sufficient.

ISSUES FOR DETERMINATION

“(1) Whether the Court of Appeal was right in refusing to interfere with the exercise of the learned trial judge’s discretion as embodied in his Ruling or in holding that the learned trial judge exercised his discretion improperly

(2) Whether the Appellant has led sufficient evidence to show that the concurrent findings of facts by the two lower courts are perverse as to in the intervention of the Supreme Court.”

HELD (Unanimously dismissing the appeal per lead judgment of **MOHAMMED JSC**)

Admissibility - Hearing date endorsed on counsel’s file

1. The Court of Appeal considered the submission of appellant’s counsel the admission of the file jacket and quite rightly rejected it. I find the argument of counsel on this issue unconvincing as I believe that the trial judge stumbled on the endorsement on the file jacket during the proceedings before him. The endorsement’s very relevant to the proceedings fore the judge because it showed in a document that the counsel for the appellant was aware of 18/4/84, the date fixed for the hearing of the substantive claim. (p. 1175 E)

Relevant fact - Entry on counsel’s file

2. I therefore entirely agree that the Court of Appeal was right in holding that the file jacket was rightly admitted in evidence and the entry thereon about the date of hearing of the substantive case was rightly used by the learned trial judge being a relevant fact necessary for the determination of the issue being considered before the court. (p. 1176 A)

Courts - Discretion

3. It is crystal clear that the appellant has failed to establish any convincing argument which would invite the interference of the exercise of discretion made by the lower courts in this appeal. I hesitate to repeat what this court has said many times over that an appellate court will not interfere with the exercise of the discretion by a lower court so long as the exercise of the discretion by the lower court has not been found to be perverse, arbitrary and not judicial. (p. 1176 E)

Concurrent findings

4. This appeal becomes more difficult for the appellant having been brought against concurrent findings of two lower courts. Since the appellant has failed to show that any decision of the courts below has occasioned a mis-

carriage of justice, the rightful conclusion for me is to affirm those concurrent findings of the two lower courts. (p. 1176 F)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. Whether evidence is relevant to the issue

When it is a question of admission of evidence, strictly, it is not whether the method by which it is obtained is tortious but excusable but whether what has been obtained is relevant to the issue being tried. In the case in hand, Exhibit “A2” is very relevant to the issue whether the appellant had knowledge that the claim against him was fixed for hearing on 18:4:84 as well as establishing the falsity of both oral and affidavit evidence of the appellant’s counsel that he was not aware of the date of trial. (p. 1177 E)

2. Whether counsel misdirected the court

The court below was therefore right in coming to the conclusion that the two counsel for the appellant lied to the court when they deposed that they were mistaken as to the correct date of hearing. I agree with learned counsel for the respondent that this is not a case of the appellant being punished for the deliberate falsehood of his counsel. It is equally not a case of visiting the sins of counsel on the appellant. (p. 1177 G)

3. Date of hearing is not a privileged communication

The above provision of the law is very clear and plain. In no circumstance can it be interpreted that the date of hearing endorsed in Exhibit “A2” which is a date fixed by the court for the hearing of the substantive case is a privileged communication between counsel and client. This provision of the law is enacted for the protection of the client and not of counsel and is based on the impossibility of conducting legal business without professional assistance, and on necessity, in order to render that assistance effectual, of securing free and unreserved intercourse between the two. (p. 1178 C)

ADIO JSC

4. Where failure to be present in court is deliberate

Where the failure to turn up or be present in the court on the scheduled date of hearing is, as it was in this case, deliberate, for reasons best known to the applicant, for example, delaying the hearing of the case, the application to relist the case for hearing will not be granted because, in the circumstance, it cannot reasonably be said that the default on the part of the applicant has been satisfactorily explained to the satisfaction of the court. On the other hand, if the failure of the applicant to turn up or be present in

the court on the scheduled date of hearing was not deliberate or due to any default on the part of the applicant, it is most likely that the application to relist the case for hearing will be granted. (p. 1178 H)

B REPRESENTATION

V.A. Olutona - For the Appellants

Dr. E.O. Ometan - For the Respondents

CASES REFERRED TO

- C Torti v. Ukpabi (1984) 1 S.C. 270 at 392
 C Kuramoa v. The Queen (1955) A.C. 197 at 200
 Jones v. Great Central Railing (1910) A.C. 5
 Ugwu v. Aba (1961) All N.L.R. 438

STATUTES AND RULES REFERRED TO

- D Lagos State (Civil Procedure) Rules 1972 O. 32 r. 4
 Evidence Act ss. 222, 169

LEAD JUDGMENT BY MOHAMMED JSC

- This is an appeal against the judgment of the Court of Appeal,
 E Lagos Division, upholding a ruling of Ayorinde J (as he then was) of Lagos State High Court.

- Before I go further into the substance of this appeal I find it relevant to explain, in a short narrative, the cause of the dispute which brought about the subject matter of this appeal. The respondent who was plaintiff
 F before the High Court of Lagos State sued the appellant, as defendant and claimed N210,218,04 as damages for breach of contract. The case which was originally filed on 22/7/80 suffered several adjournments, and on 11/11/83, when both counsel for the parties were present in court the case was fixed for hearing on 18/4/84. On the adjourned date neither the defendant
 G nor his counsel appeared and the Court directed the counsel for the plaintiff to call evidence in proof of the plaintiff's claim. At the conclusion of the hearing the court adjourned and delivered its judgment on 4/7/84.

Soon after Ayorinde J (as he then was) delivered his judgment, the appellant filed a motion and prayed for the following orders:

- H “(1) *Granting extension of time within which to apply for an Order setting aside the Judgment/Order obtained herein on the 4th July, 1984;*
 (2) *Setting aside the Judgment/Order obtained by the plaintiff in this matter on Friday, the 4th of July, 1984 in default of appearance of the*

defendant and his counsel at the trial;

(3) Setting aside the Writ of Execution/Attachment obtained by the plaintiff in this case pending the determination of this application; and/or

(4) Staying the execution (by the plaintiff, his agents and privies) of the said JUDGMENT/ORDER pending the determination of the application.” B

The application was supported by the affidavit of the appellant himself. There was also a counter-affidavit from the respondent and a reply to the counter-affidavit from a counsel in the chambers of the plaintiff's solicitor. It is quite clear from the averments in the affidavits that the parties had given conflicting evidence and in order to resolve the conflict, the learned trial Judge ordered parties to adduce oral evidence. C

During the proceedings the learned trial Judge admitted in evidence a file jacket, belonging to the appellant's solicitor, in which an entry was made showing that the hearing of the substantive claim to damages for breach of contract had been fixed for hearing on 18/4/84. In his ruling, Ayorinde J (as he then was) disbelieved the argument of counsel for the appellant that they were not aware of the date on which the substantive claim was fixed for hearing and in consequence therefore the learned Judge refused all the prayers applied for in the motion. D

Dissatisfied with that decision the appellant went before the Court of Appeal. He was not successful, because the Court of Appeal believed that the learned trial Judge exercised his discretion both judicially and judiciously. The appellant has finally come before us armed with twelve grounds of appeal. It is plain that most of the grounds are repetitive of the issues upon which the appellant based his arguments for the prosecution of this appeal. Learned counsel for the appellant, Mr. Olutola, formulated five issues from the twelve grounds. The issues are as follows:- E

“(1) Whether the Court of Appeal was wrong in refusing to review/interfere with the exercise of the learned trial Judges discretion taking into consideration all the circumstances of the case.” F

(2) Whether the Court of Appeal was right in the circumstances to hold that the appellant had been notified of the default judgment before its execution.” G

(3) Whether the Court of Appeal was right in holding that the appellant and his counsel constantly delayed the hearing of the case to cause mischief when there was no evidence to justify reaching such a conclusion.” H

(4) Whether the Court of Appeal was right in holding that the case file jacket and its contents were rightly admitted by the learned trial Judge

by virtue of the provisions of S. 222 of the Evidence Act and that its contents did not fall within privileged communication between a solicitor and his client and that the procedure adopted in obtaining and acting on the contents were proper.

B (5) *Whether the Court of Appeal, assuming that the appellant's former counsel were guilty of blunder, gross negligence, fault and inadvertence in their handling of the case was right to mete this on the appellant in all the circumstances of the case bearing in mind that he filed a substantial counterclaim."*

C I however believe that all the points raised in the grounds of appeal have been condensed into the two issues formulated by the respondent's Counsel, in the respondent's brief. The two issues are:-

D *"(1) Whether the Court of Appeal was right in refusing to interfere with the exercise of the learned trial Judge's discretion as embodied in his Ruling or in holding that the learned trial Judge exercised his discretion improperly.*

(2) Whether the appellant has led sufficient evidence to show that the concurrent findings of facts by the two lower courts are perverse as to justify the intervention of the Supreme Court."

E The first issue is against the failure of the lower court to disturb the decision of the learned trial Judge refusing to exercise his discretion in favour of the appellant by refusing to extend the time within which to set aside the judgment entered against him. The learned counsel submitted that Order 32, Rule 4, of High Court of Lagos State (Civil Procedure) Rules, 1972, gives the Court discretion to grant or refuse any application under the Rule and that such discretion must be exercised judiciously according to laid down principles of law and by taking into consideration the circumstances of each case. He referred to: N.A. Williams v. Hope Rising Voluntary Funds Society (1982) 2 SC 145 and Bank of Baroda v. Merchantile Bank Ltd. (1987) 3 NWLR (Pt. 60) 233.

G The centre core of this appeal is the question whether the appellant was aware of the date (18/4/84) on which the claim of the respondent had been fixed for hearing. The Court of Appeal affirmed the decision of the learned trial Judge that the appellant's counsel was aware of the date of hearing. In the lead judgment on the issue, Babalakin J.C.A. (as he then was), held as follows:-

H *"To further confirm that the appellant's counsel were aware of the correct date of hearing, one of the findings of the learned trial Judge was that the appellant and his counsel had the Cause List which showed that the case was listed for trial on 18/4/84 and for judgment on 4/7/84 as pro-*

vided by Order 31 Rule 3 of the Lagos High Court (Civil Procedure) Rules which reads:

"The registrar shall post up every Friday a "Weekly Cause List" which shall set out the arrangement of fixtures before each of the Judge sitting in court during the following week."

The name of the counsel in the said list was Mr. Alumba, the very B counsel who was in court on the said 18/4/84 and took notes about the case.

From the above examination of matters on which the appellant based his application it is obvious that they are tissues of lies and no reasonable tribunal will exercise its discretion in favour of an applicant who bases his C request of exercise of such discretion on tissues of falsehood."

It is relevant to consider whether the Court of Appeal was right in believing that the file jacket which the trial court found with the correct endorsement of the date of hearing of the substantive action, had been admitted in evidence correctly. Learned counsel for the appellant submitted that, notwithstanding the provisions of section 222 of the Evidence Act, D the learned trial Judge wrongly and in coercive circumstances admitted information privileged by S. 169 of Evidence Act, i.e. the endorsement on the file jacket and that the cases relied on by the Court of Appeal of Torti v. Ukpabi (1984) 1 SCNLR 214, (1984) 1 SC 270 at 392 and Kuramo v. The Queen (1955) AC 197 at 200, are distinguishable from the facts of the E present case. These cases, counsel argued, dealt with the circumstances under which legally admissible evidence is obtained and the weight to attach to it and not matters dealing with privileged communications.

The Court of Appeal considered the submission of appellant's counsel F on the admission of the file jacket and quite rightly rejected it. I find the argument of counsel on this issue unconvincing as I believe that the trial Judge stumbled on the endorsement on the file jacket during the proceedings before him. The endorsement is very relevant to the proceedings before the Judge because it showed in a document that the counsel for the appellant was aware of 18/4/84, the date fixed for the hearing of the substantive G claim. It is pertinent to reproduce the provisions of section 222 of the Evidence Act which permitted the use of such a document in evidence in order to discover or to obtain proper proof of relevant facts of the issues in dispute before the court. That Section states:

"222. The court or any person empowered by law to take evidence H may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be

1176 Oshunrinde v. Akande (1996) 6 KLR Mohammed JSC
entitled to make any objection to any such question or order or, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question; provided that the judgment must be based upon facts declared by this ordinance to be relevant, and duly proved."

I therefore entirely agree that the Court of Appeal was right in
B holding that the file jacket was rightly admitted in evidence and the entry thereon about the date of hearing of the substantive case was rightly used by the learned trial Judge being a relevant fact necessary for the determination of the issue being considered before the court.

Learned counsel for the appellant now referred to section 169
C of the Evidence Act and further argued that the endorsement on the file jacket was a privileged communication between the counsel and his client. The Court of Appeal rightly rejected this submission in the following short but relevant finding:

*"To my mind this is stretching the doctrine of privilege between
D counsel and client too far. That entry of date was for the guidance of counsel and for the information of his client if he was proved to be absent from court on the day the case was adjourned. It can never, by any stretch of imagination, be considered correspondence between solicitor and client, let alone being privileged."*

E It is crystal clear that the appellant has failed to establish any convincing argument which would invite the interference of the exercise of discretion made by the lower courts in this appeal. I hesitate to repeat what this court has said many times over that an appellate
F court will not interfere with the exercise of the discretion by a lower court so long as the exercise of the discretion by the lower court has not been found to be perverse, arbitrary and not judicial- Bank of Baroda v. Mercantile Bank of Nigeria Limited (supra) and Bakare v. African Continental Bank Ltd. (1986) 3 NWLR (Pt. 26) 47.

This appeal becomes more difficult for the appellant having
G been brought against concurrent findings of two lower courts. Since the appellant has failed to show that any decision of the courts below has occasioned a miscarriage of justice, the rightful conclusion for me is to affirm those concurrent findings of the two lower courts.

In the result, this appeal has failed and it is dismissed. The con-
H current decisions of the two lower courts are hereby affirmed. The respondent is entitled to the costs of this appeal which I assess at N1,000.00.

BELGORE JSC

I read in advance the judgment of my learned brother, Mohammed, J.S.C. and for the reasons ably adumbrated therein, I also find no merit in this appeal. I adopt his decision as mine in dismissing this appeal and making the same consequential order as to costs.

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OGUNDARE JSC

I agree entirely with the judgment of my learned brother, Mohammed, J.S.C. just read. I have nothing more to add. I too dismiss the appeal with costs as assessed by him.

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OGWUEGBU JSC

I have had the opportunity of reading in draft the judgment just delivered by my learned brother Mohammed, J.S.C. I agree entirely with him and adopt his reasoning and conclusions therein as my own. I need only add a few comments of my own on the admissibility of Exhibit "A2" (the case file jacket) in evidence and whether the endorsement on the said exhibit is a privileged document.

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When it is a question of admission of evidence, strictly, it is not whether the method by which it is obtained is tortious but excusable, but whether what has been obtained is relevant to the issue being tried. See *Kuruma v. R.* (1955) AC 197. In the case in hand, Exhibit "A2" is very relevant to the issue whether the appellant had knowledge that the claim against him was fixed for hearing on 18:4:84 as well as establishing the falsity of both oral and affidavit evidence of the appellant's counsel that he was not aware of the date of trial.

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The appellant's counsel made the entry in the file jacket. He offered no explanation as to how he came to make the entry of the correct date if he was not aware of that date. The court below was therefore right in coming to the conclusion that the two counsel for the appellant lied to the court when they deposed that they were mistaken as to the correct date of hearing. I agree with learned counsel for the respondent that this is not a case of the appellant being punished for the deliberate falsehood of his counsel. It is equally not a case of visiting the sins of counsel on the appellant. See *Ojikutu v. Odeh* 14 WACA 640 at 641. The courts below also disbelieved the appellant when he said that he was not informed of the date of hearing by his counsel.

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It was also submitted by the learned appellant's counsel that the information contained in Exhibit "A2" is privileged under section 170 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990.

Section 170 (i) of the Act provides:

"Section 170(i) No legal practitioner shall at any time be permitted, unless with the client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment."

The above provision of the law is very clear and plain. In no circumstance can it be interpreted that the date of hearing endorsed in Exhibit "A2" which is a date fixed by the court for the hearing of the substantive case is a privileged communication between counsel and client. This provision of the law is enacted for the protection of the client and not of counsel and is based on the impossibility of conducting legal business without professional assistance, and on necessity, in order to render that assistance effectual, of securing free and unreserved intercourse between the two. See *Jones v. Great Central Railing (1910) AC 5*. Privilege should not be invoked to subvert the machinery of justice.

In this appeal, the appellant faced two uphill tasks, namely, the invitation of this court to interfere with the exercise of the discretion of trial court and the concurrent findings of the two lower courts. He woefully failed to establish a case that will warrant such interference.

This appeal lacks substance and I accordingly dismiss it. I abide by all the orders made in the lead judgment of my learned brother Mohammed, J.S.C.

G **ADIO JSC**

I have had a preview of the judgment just delivered by my learned brother, Mohammed, J.S.C., and I agree that the appeal does not succeed. I too dismiss it and I abide by the consequential orders, including the order for costs.

Where the failure to turn up or be present in the court on the scheduled date of hearing is, as it was in this case, deliberate, for reasons best known to the applicant, for example, delaying the hearing of the case, the application to relist the case for hearing will not be granted because, in the

circumstance, it cannot reasonably be said that the default on the part of the applicant has been satisfactorily explained to the satisfaction of the court. On the other hand, if the failure of the applicant to turn up or be present in the court on the scheduled date of hearing was not deliberate or due to any default on the part of the applicant, it is most likely that the application to relist the case for hearing will be granted. In *Ugwu v. Aba & Ors*, (1961) All NLR 438 the court exercised its discretion in favour of applicants who showed to the court by evidence that they were illiterates and that they did not understand the nature or purpose of a hearing notice. B

For the foregoing reasons and the fuller reasons given in the lead judgment of my learned brother, Mohammed, J.S.C. I agree that the appeal should be dismissed. I dismiss it and abide by the consequential orders, including the order for costs. C

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