

SUPREME COURT OF NIGERIA
14TH MARCH, 1997. SC. 173/1994
CORAM:- I.L. KUTIGI, M.E. OGUNDARE, E. O. OGWUEGBU,
S. U. ONU, Y. O. ADIO, JJSC

PAN ATLANTIC SHIPPING & TRANSPORT APPELLANT
AGENCIES LTD
AND
RHEIN MASS UND SEE SCHIFFARTS KONTOR GMBH RESPONDENT

***APPEALS** - Error in trial court's judgment - Not every slip will result in the judgment being upset on appeal.*

***PRACTICE & PROCEDURE** - Summary judgment - Averred defence to the claim - Which has been preliminarily determined - Cannot be a reason for not being indebted.*

***PRACTICE & PROCEDURE** - Summary judgment - Statement of defence that disclosed no defence - Can entitle plaintiff to summary judgment.*

FACTS

The plaintiff/respondent was a shipping company registered in West Germany. It sued the defendant/appellant before the Lagos High Court for the sum of Deutsche Marks (DM) 2,799,754.83 allegedly due on account of monies had and received by the appellant to the respondent's use. The appellant vide a motion unsuccessfully sought to have the action dismissed for violating the exchange control regulations. It applied for leave to appeal against the ruling. Meanwhile, the respondent filed an application seeking a striking out of the defence for not disclosing a reasonable answer to the claim and prayed for summary judgment.

The trial court refused appellant's application for leave to appeal and granted respondent's motion for summary judgment. Appellant's appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court raising a lone issue.

ISSUE FOR DETERMINATION

"Whether the court of Appeal was right to affirm the judgment of the learned judge entering summary judgment under order 22 rule 4 of the High Court of Lagos (Civil Procedure) Rules, 1972 in favor of the respondent."

HELD (Unanimously dismissing the appeal per lead judgment of **ADIO JSC**)
Averred defence to the claim

1. The court below rightly pointed out, and I agree with it, that the averment in paragraph 6 of the statement of defence gave a reason why it was being contended that the appellant was not owing the respondent any sum at all, that the reason was that the transaction was contrary to law, and that question whether the transaction was contrary to law had earlier been considered and determined as a preliminary issue against the appellant. (p. 581 G)

Error in trial court's judgment

2. It is not enough merely for an appellant to point to or identify an error in the judgment of trial court. The legal position is that not every slip or an error will result in the judgment in question being upset. For an error or a slip or mistake to so result or to have that effect, it must be substantial in the sense that it affected the decision appealed against. The foregoing principles apply with equal force to the alleged remark by the learned trial Judge that a counter-claim was necessary to disprove existence of the respondent. (pp. 583 G & 584 B)

Statement of defence that disclosed no defence

3. The statement of defence also attempted to show, without success, that the respondent was no longer in existence. The affidavit in support of the notice of intention to defend the suit should contain enough facts and particulars to satisfy a reasonable tribunal to remove the case from the undefended list. Where the affidavit in support of the notice of intention to defend discloses no defence, the case should not be in the general cause list. Even if a statement of defence is filed, a plaintiff can still apply for summary judgment if the statement discloses no defence. (p. 584 E)

NOTABLE POINT OF INTEREST

ADIO JSC

1. Obtaining summary judgment

It is possible under the procedure set out in Order 22 of the High Court of Lagos (Civil Procedure) Rules, 1972, for a plaintiff to obtain summary judgment without the necessity for a full hearing in court, as it is generally or ordinarily always the case. A plaintiff, pursuant to the procedure applies that judgment be entered summarily in his favor and, for that purpose, he supports his application with a verifying affidavit, stating his belief, that though the defendant had filed a statement of defence, the statement of defence discloses no reasonable answer to the plaintiff's claim. The crucial issue in the

(PT 49) 577; (1997) 3 NWLR (PT. 493) 248

circumstances of this case, was whether the statement of defence filed by the appellant disclosed a reasonable answer to the respondent's claim. (p. 580 C)

REPRESENTATION

O. Agbakoba for the Appellant

F. I. Agu and Miss S. A. Ordia for the Respondent

CASES REFERRED TO

Ibrahim v. Osim (1988) 1 NSCC vol. 19, 1184

Nzeoke v. Nwagbo (1988) 1 N.W.L.R. (Pt. 72) 616

Udeze v. Chidebe (1990) 1 N.W.L.R. (pt. 125) 141

Macaulay v. NAL Merchant Bank Ltd. (1990) 4 N.W.L.R. (pt. 144) 283

U.T.C. N.g. Ltd. v. Pamotei (1989) 2 NWLR (Part 103) 244

Spira v. Spira (1934) 3 All E.R. 924

Mora v. Nwalusi (1962) 1 All N.L.R. 681

Ayoola v. Adebayo (1969) 1 All N.L.R. 159

LEAD JUDGMENT BY ADIO JSC

The respondent was a shipping company which was registered in West Germany. It sue the appellant in High Court, Lagos, for Deutsche Marks (DM) 2,799, 754 83 allegedly due on account of monies had and received by the appellant to the respondent's use. On the 8th February, 1988, the appellant brought an application asking that the suit be dismissed on the ground that the respondent wanted payment of a debt in foreign currency without compliance with exchange control regulations. The application was refused. There was a statement of defence filed by the appellant in anticipation of an unfavorable ruling by the learned trial judge.

Consequently, the respondent subsequently brought a motion praying the court to strike out the appellant's statement of defence on the ground that it did not disclose a reasonable answer to the respondent's claim and that judgment should be summarily entered for the respondent. The appellant filed an application for leave to appeal against the ruling on the application to dismiss the suit. The application by the respondent to strike out the statement of defence for the disclosing a reasonable answer and enter summary judgment for the respondent was heard on the same day with the appellant's application for leave to appeal. The application for leave to appeal was refused and application of the respondent for summary judgment was granted.

Dissatisfied with the judgment of the learned trial Judge, the appellant lodged an appeal against it to the Court of Appeal. In dismissing the appellant's appeal, the court below held that the only defence raised in the

appellant's statement of defence was on the question of illegality which had earlier been determined as a preliminary objection by the learned trial Judge. The court also held that the word "disintegrated" used by the appellant in its statement of defence did not put the existence of the respondent in issue. The appellant was dissatisfied with the judgment of the court below and has lodged
B a further appeal to this court.

In accordance with the rules of this court, the parties filed and exchanged briefs. The one and only main issue canvassed in the briefs filed by parties was as follows:-

*"Whether the court of Appeal was right to affirm the judgment of the
C learned judge entering summary judgment under order 22 rule 4 of the High Court of Lagos (Civil Procedure) Rules, 1972 in favor of the respondent."*

It is possible under the procedure set out in Order 22 of the High Court of Lagos (Civil Procedure) Rules, 1972, for a plaintiff to obtain summary judgment without the necessity for a full hearing in court, as it is generally or
D ordinarily always the case. A plaintiff, pursuant to the procedure applies that judgment be entered summarily in his favor and, for that purpose, he supports his application with a verifying affidavit, stating his belief, that though the defendant had filed a statement of defence, the statement of defence discloses no reasonable answer to the plaintiff's claim. The crucial issue in the
E circumstances of this case, was whether the statement of defence filed by the appellant disclosed a reasonable answer to the respondent's claim. The court below gave due consideration to that aspect of the matter and came to the conclusion that after the issue of illegality raised by the appellant as a preliminary objection, in respect of which there was a ruling against the appellant,
F there was nothing in the pleading of the appellant which could be regarded as an answer to the respondent's claim. The court below stated, Inter alia, as follows:-

*"The real crux of the matter in this case is whether there is anything
G left in the pleading of the defendant after the issue of illegality had been disposed of, that could be regarded as an answer to the plaintiff's claim. Where the defendant's statement of defence amounts to an admission or does not contain a denial or any averment that can be accepted as a denial of the plaintiff's claim, it may seem illogical to proceed to inquire whether what is an admission and is by that reason no answer at all, is a reasonable
H answer.....In short, the defendant's contention in paragraph 6 is that it was not indebted to the plaintiff because of the illegality of the transaction. As has been said, that issue had already been taken as a preliminary point at the instance of the defendant and had been resolved against it. If the defendant and had wanted to deny specifically that it was indebted to the*

plaintiff that ought to have been so stated and the illegality of the transaction pleaded in the alternative and not as a reason for a general denial of illegality."

The submission made for the appellant was that the statement of defence filed for the appellant disclosed an answer to respondent's claim. The contention of the respondent was that the court below was right in holding B that the statement of defence did not contain a reasonable answer to the respondent's claim. In paragraph 2 of page 5 of the appellant's brief is the following statement:-

"For their part, the Appellant denied that the Respondent was entitled as claimed because:

(a) *Rhein Mass Und See Schiffarts Kontor GmbH (the Respondent) had "disintegrated" and was no longer in existence.*

(b) *It was not indebted to the respondent in the sum claimed or any sum at all.*

(c) *The entire transaction between the respondent and the appellant was illegal in that it violated the exchange Control Laws of Nigeria".*

What was stated in paragraph 2(b) above was not the correct statement in the averment, on the point, in paragraph 6 of the statement of defence which was as follows:-

"6. In further answer to paragraph 5 of the statement of claim the defendant denies that the sum of DM2, 799,734 is due to the plaintiff or any other sum at all the entire transaction between the parties being contrary to law".

A fair comparison of paragraph 2(b) of the page 5 of the appellant's brief and paragraph 6 of the Statement of Defence, which was what the lower F Courts had to consider, shows that there was, at least, one significant different between the two. The significant different between the two was that paragraph 6 of the Statement of Defence included the following additional phrase at the end of it.

"the entire transaction between the parties being contrary to law". G

The court below rightly pointed out, and I agree with it, that the averment in paragraph 6 of the statement of defence gave a reason why it was being contended that the appellant was not owing the respondent any sum at all, that the reason was that the transaction was contrary to law", and that question whether the transaction was contrary to law had earlier been considered and determined as a preliminary issue against the appellant. H What had been decided as a preliminary issue at the instance of and against the appellant could not be reasonably given as reason for not being indebted to the respondent by the appellant. What was stated in paragraph 2(b) of page

5 of the appellant's brief was, therefore, misleading. It was an inaccurate content of the statement of defence.

The foregoing was not all or the end of the matter. What occurred in the case of paragraph 2(b) of page 5 of the appellant's brief also occurred in the case of paragraph 2(a) of the same page of the appellant's brief. Paragraph 2 of the Statement of Defence was as following:-

"2. *The defendant denies paragraph 1 of the Statement of claim as the entity known and called Rhein Mass Und See Schiffarts Kontor Gmbh has disintegrated* ".

The learned trial Judge made a finding and expressed an opinion on the question of the alleged disintegration of the respondent which the court below affirmed. The Court below state, Inter alia, as follows:

"Here again the defendant did not deny that the plaintiff is a company registered in west Germany but averred that paragraph 1 of the Statement of claim was denied because the entity know by the name given has 'disintegrated'. It is difficult to know what the defendant meant by the disintegrated ' which, applied to incorporated association, has no meaning in our law.....when in a pleading a party uses words which are incapable of bringing the parties to an issue. The court will be entitled to hold that no issue, has been raised by the use of those words. It would have been a different matter if the defendant had averred that the respondent company never has existence or that even though it had existed, it ceased to exist as a corporate entity according to law for instance, by cancellation of its registration".

The contention of the appellant was, Inter alia, that the word "disintegrated" even if it did not have any meaning in our law still conveyed a meaning which raised a reasonable answer to the respondent's claim sufficient to put the issues to trial and that the court below should have construed the word liberally. The fundamental thing was that if it was difficult to know that the appellant meant by the word "disintegrated" which applied to incorporated association had no meaning in our law, how could the word be construed liberally or be said to convey a meaning which raised a reasonable answer to the respondent's claim? It was argued for the appellant. In its brief, that the respondent was not entitled to summary judgment in view of the alleged challenge of the continued corporate existence of the respondent under West German law raised in paragraph 2 of the Statement of Defence. The real question is whether the issue of the continued corporate existence of the respondent was clearly or distinctly raised paragraph 2 of the Statement of Defence. In this connection, paragraph 2 of the Statement of Defence is, to say the least, defective and the appellant was aware of the defect that the

word "disintegrated" therein had no meaning or did not convey what the appellant intended it to convey. One was, therefore, not surprised, that in setting out the reasons why the appellant was not liable in paragraph 2 (a) of page 5 of the appellant's brief, the learned counsel for the appellant added the expression; "and was longer inexistence" after the word "disintegrated" in the said paragraph 2(a). The aforesaid expression was not inserted after the word "disintegrated" at the end of the paragraph 2 of the Statement of Defence. It was the learned counsel for the appellant who submitted in the appellant's brief, and I agree with the submission, that when considering whether a statement of defence disclosed a reasonable answer evidence would not be admissible because the application to strike out a defence/answer must necessarily rely on the defect, contained in the statement of defence, to succeed. See Ibrahim v. Osim, (1988) 1 NSCC. Vol. 19, 1184. B C

It was one of the complaints of the appellant that, in accordance with the principle stated in Ibrahim's case supra, the court below should have set aside the judgment of the learned trial judge on account of his looking at a letter. Exhibit "A", and probably having regard to its contents in arriving at his decision. The true position, as rightly held by the court below, was that the letter, Exhibit "A", did not influence or have any significant effect on the decision of the learned trial Judge. The court below stated, in relation to he letter, Inter alia, as follows:- D E

"In this case, the relevant materials were before the judge consisting of the pleadings of the parties. They were adequate to enable him exercise a discretion. Although the learned Judge erroneously referred to the alleged letter of admission written by the defendant and misconstrued its contents, it is evident that at the end of the day, he decided the matter on the contents of statement of defence and not on the letter relied upon by the plaintiff as an admission. Nothing turns in this appeal on the use he made of Exhibit "A" or his misconception of its contents. This appeal is by way of rehearing and this court is in as good a position to form its own views of the facts without the said letter. It follows that even if the letter Exhibit A is left out of consideration, as I think it ought to be, the conclusion would still remain that, properly understood, the statement of defence had disclosed no other question other than of illegality". F G

It is not enough merely for an appellant to point to or identify an error in the judgment of trial court. The legal position is that not every slip or an error will result in the judgment in question being upset. For an error or a slip or mistake to so result or to have that effect, it must be substantial in the sense that it affected the decision appealed against. See Nzeoke v. Nwagbo, (1988) 1 N. W. L. R. (Pt. 72) 616; Mora V. Nwalusi, (1962) 1 All N. L. R. H

681; and Udeze v. Chidebe, (1990) N. W. L. R. (Pt , 125) 141. Further, where the complaint of an appellant is about errors of law or misdirection, the success of the grounds of appeal alone is not sufficient to warrant the reversal of the decision unless the errors of law or misdirection affected the judgment in a way which is crucial to the decision. See Ayoola v. Adebayo & Ors., (1969) 1 All N. L.R. 159. **The foregoing principles apply with equal force to the alleged remark by the learned trial Judge that a counter-claim was necessary to disprove existence of the respondent.** The following was the view of the court below on that aspect of the matter:-

"In the result even though the learned Judge was in error in his opinion that a counter-claim was necessary to disprove the existence of the plaintiff, it is clear that the statement of defence had not put such existence in issue".

The court below was in right in identifying the crux of this matter. It was of the view that it was whether there was anything left in the pleading of the appellant after the issue of illegality had been disposed of, that could be regarded as an answer to the respondent's claim. The below was also right in holding that the answer to the question was in the negative. The thing was that the statement of defence of the appellant was defective because it gave as the reason for alleging that the appellant did not owe the respondent any amount, the issue of the alleged illegality of the transaction which had been raised as a preliminary objection and decided against the appellant. **The statement of defence also attempted to show, without success, that the respondent was no longer in existence. The affidavit in support of the notice of intention to defend the suit should contain enough facts and particulars to satisfy a reasonable tribunal to remove the case from the undefended list. Where the affidavit in support of the notice of intention to defend discloses no defence, the case should not be in the general cause list. Even if a statement of defence is filed, a plaintiff can still apply for summary judgment if the statement discloses no defence.** See Macaulay v. NAL Merchant Bank Ltd., (1990) 4 N. W. L. R (pt. 144) 283. The appeal lacks merit. The judgment of the court below is affirmed. The appeal is accordingly dismissed with N1,000.00 costs to the respondent.

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KUTIGIJS

I read in advance the judgment just delivered by my learned brother Adio J.S.C. I agree with his reasoning and conclusions. The appeal is dismissed with N1,000.00 cost in favor of the respondents.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Adio JSC just delivered. I agree with him that this appeal lack merit.

In the statement of claim, the plaintiff (who is now respondent) pleaded, inter alia, as follows:-

"1. The plaintiff is a company registered in West Germany. It is engaged in shipping industry with office at 4100 Daisbury 13, West Germany.

2. The Defendant is a Limited Liability Company incorporated under the Companies Act of 1968, with a place of business at No 25 Calcutta Crescent Apapa.

3. At all times material to this claim, the Defendant was the Agent to the plaintiff in Nigeria in respect of all plaintiff's vessels know as PACO Liners.

4. As at 22nd October, 1985, the total indebtedness of the defendant to the plaintiff was ascertained to be DM2,799,754.83 and admitted by the plaintiff.

5. The plaintiff avers that pursuant to the admission referred to in paragraph 4 supra, the defendant executed two Bills of Exchange in the respective sums of DM1,000,000.00 in favor of the Plaintiff in Daisbury, West Germany, on the 22nd October, 1985, aforesaid.

6. On the 9th December, 1985, the Defendant addressed a letter to the Plaintiff admitting a total indebtedness of DM2 799,754.83, but proceeded to debit various sums of money against the admitted amount. The plaintiff shall hold the Defendant to the admitted sum of DM2 799,754.83, and to the strictest proof of all the debits.

7. The plaintiff avers that inspite of the repeated demands the defendants has refused, failed and/or neglected to pay the said sum of DM2 799,754.83 or any part thereof."

The defendant (now Appellant) countered by pleading thus:

"2 The Defendant denies paragraph 1 of the Statement of claim as the entity know and called Rhein Mass Und See Schiffarts Konotor GmbH has disintegrated.

3. The Defendant admits paragraph 2, and 3 of the Statement of claim.

4. The defendant denies paragraph 4 of the Statement of claim and will art the trial of this action put the plaintiff to strict proof.

5. The Defendant admits paragraph 5 to the extent only that it issue 2 promissory notes as a guarantee for payment to the plaintiff of the

any monies as may be due to the plaintiff.

6. *In further answer to paragraph 5 of the Statement of claim the Defendant denies that DM2 799,754.83 is due to the plaintiff or any other sum at all the entire transaction between the parties being contrary to law.*

7. *At the trial of this action the defendant shall contend by way of preliminary objection that the plaintiff's suit is based on an illegality in that it contravenes the Exchange Control laws of Nigeria and is by reason thereof not justiciable".*

A part from general denial, the only defence raised in the Defendant's pleadings was illegality raised in the paragraphs 6 and 7. That issue was tried as a preliminary point and found against the defendant with the defence of illegality rejected by the trial court, the defendant had no other defence to the action. The two courts below were, therefore, right in entering judgment summarily in favor of the plaintiff as claimed in its writ. The arguments proffered in this court by the Plaintiff are the same arguments raised in the court below and adequately covered by that Court in the lead judgment of Ayoola JCA, particularly where the learned justice found:

1. *".....the defendants contention in paragraph 6 is that it was not indebted to the plaintiff because of the illegality of the transaction. As has been said, that issue had already been taken as a preliminary point at the instance of the defendant and had been resolved against it. If the defendant had wanted to deny specifically that it was indebted to the plaintiff that ought to have been so stated and the illegality of the transaction pleaded in the alternative and not as a reason for a general denial of indebtedness. In the result, the learned Judge was right when he held that the issue of substance raised was as illegality".*

2. *" Here again the defendant did not deny that the plaintiff is a company registered in West Germany but averred that paragraph 1 of the statement of claim was denied because the entity known by the name given 'has disintegrated'. It is difficult to know what the defendant meant by the word 'disintegrated' which, applied to incorporated association, has no meaning in our law. Our law in the absence of proof to the contrary, is presumed to be the same as that of the relevant foreign law. When in a pleading a party uses words which are incapable of bringing parties to an issue, the court will entitled to hold that no issue has been raised by the use of those words. It would have been a deferent matter if the defendant had averred that the defendant company never had existence or that even though it had existed, it ceased to exist as a corporate entity according to German law for instance, by cancellation of its registration. But that was not the averment. In the result even though the learned Judge was in error in his*

opinion that a counter-claim was necessary to disprove the existence of the plaintiff, it is clear that the statement of defence had not put such existence in issue.

On the whole, I am of the view that the learned trial Judge came to a right conclusion when he held that the only defence contained in the statement of defence is on the question of illegality which had already been determined. The rest of the statement of defence contained not have been accepted as putting the plaintiff to proof of any allegation". B

3. *"In this case, the relevant materials were before the Judge consisting of the pleading of the parties. They were adequate to enable him exercise a discretion. Although the learned Judge erroneously referred to the alleged letter of admission written by the defendant and misconstrued its contents, it is evident that at the end of the day, he decided the matter on the contents of the statement of defence and not on the letter relied on by the plaintiff as an admission.."* C

I agree entirely with the above findings. D

This appeal is completely bereft of any merit. I too dismiss it with costs as assessed by Adio, JSC.

OGWUEGBUJSC

I have had the privilege of reading in draft the lead judgment just delivered by my brother Adio. J. S. C. and I entirely agree that it has carefully dealt with all the issues raised in this appeal. E

I will also dismiss the appeal with costs as assessed in the lead judgment. F

ONUJSC

I have had the privilege of a preview of the judgement just read by my learned brother Adio. J. S. C. I am in entire agreement with him that this appeal lacks merit and must perforce fail. G

I wish to add a few words of mine to the lead judgment of my learned brother if only in expatiation thereof as follows:-

Summary judgment procedure hitherto nicknamed Order 10 procedure in the Lagos State (Civil Procedure) Rules, 1972, means a judgment that is given without taking the defence of the defendant. The procedure which has been given interpretation in such decided cases as Macaulay v. NAL Merchant Bank Ltd. (1990) 7 NWLR (part 160) 1 at pages 11 - 13 and U.T.C. (Nig.) Ltd. v. Pamotei (1989) 2 NWLR (part 103) 244, has come in handy and most H

appropriately in the instant appeal by the application now under Order 22 rule 4 of the High Court of Lagos (Civil Procedure) Rules, 1972. The Court below having affirmed the decision of the trial court by upholding the respondent's contention that the statement of defence did not contain a reasonable answer to the respondent's claim- the issue of illegality raised by the appellant as a preliminary objection having earlier on been ruled upon against it, leaving nothing in the statement of Defence that could be regarded as an answer to the respondent's claim, the dismissal of the appellant's claim summarily constitutes, in my view, an unimpeachable and unassailable decision that ought not to be interfered with or disturbed. See Spira v. Spira (1934) 3 All E. R. 924. The decision of the court below which affirmed that of the trial court is accordingly hereby confirmed.

For these and the fuller reasons set out in the lead judgment of my learned brother Adio, J. S. C., I too dismiss this appeal and make the same consequential orders inclusive of those as to costs.

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