

**SUPREME COURT OF NIGERIA**  
18TH JULY, 1997. SC. 186/1989  
**CORAM:- M.E. OGUNDARE, E. O. OGWUEGBU, U. MOHAMMED,**  
**S. U. ONU, A. I. IGUH, JJSC**

CHIEF FRUKAMA BOMOR ..... PLAINTIFF/RESPONDENT  
(Carrying on business as F. B. Deigha & Sons)  
AND  
GODWIN EKIYOR & ANOR. .... DEFENDANTS/APPELLANTS

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***FAIR HEARING*** - Denial - Where a court decides a case on the evidence of one party alone - Ignoring the evidence for the other side - There is a denial of fair hearing.

***PRACTICE & PROCEDURE*** - Dismissal of appeal - By the Court of Appeal - Without looking at the counter-affidavit filed that morning - Is in breach of audi alteram partem rule.

**FACTS**

At the Warri Judicial Division of former Bendel State, the plaintiff/respondent had sued the defendants/appellants claiming N200,000 general damages for trespass, nuisance and injunction. In the course of evidence of one of the defence witnesses, objection was raised by the plaintiff's counsel to that line of evidence. After counsel for the parties had addressed court, the trial Judge upheld the objection and expunged that line of evidence objected to. Counsel for the defence prayed for an adjournment which was refused by the trial court. Upon defence counsel's failure/refusal to proceed with the case, the judge closed the case of the defence and after hearing address of plaintiff's counsel gave judgment in favour of the plaintiff.

The defendants appealed to the Court of Appeal against the ruling on the objection, and the judgment of the trial court. When the defendants failed to file their brief, the plaintiff's counsel filed a motion praying the court of Appeal to dismiss the defendants' appeal for want of diligent prosecution. On the day the motion was fixed for hearing, the defendants' counsel filed a counter affidavit in the morning but the counter-affidavit was not before the court. The motion was heard only on the affidavit of the plaintiff's counsel and the defendant's appeal was dismissed. The defendants have further appealed to the Supreme Court raising three questions.

**ISSUE FOR DETERMINATION**

2. Was the Court of Appeal wrong to hear and determine the motion to

*dismiss the appeal before it in the way it did?*

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

**Dismissal of appeal**

1. In ruling on the plaintiff's motion to dismiss Defendants' appeal, the counter-affidavit filed by them was not considered. The fact of the existence of that counter-affidavit was brought to the notice of the court by learned counsel for the Defendants. The Court below at the stage ought either to adjourn the proceedings on terms in order to have the counter-affidavit placed before them for consideration along with the plaintiff's affidavit evidence before ruling on the motion or call for it that morning and consider it along with the affidavit in support of the motion. As things turned out, the Court determined the motion only on plaintiff's affidavit evidence. There was a breach of the rule of natural justice audi alteram partem and the hearing on the motion cannot be described as fair as enshrined in section 33(1) of the 1979 Constitution. (p. 1577 D)

**Fair hearing - Denial**

2. It cannot be seriously contended that, where a court decides a case on the evidence of one of the parties alone while ignoring the evidence for the other side, the hearing is a fair one. Clearly, the Defendants were denied a fair hearing. It might be, as is argued in plaintiff's brief, that the counter-affidavit would have made no difference to the decision of the Court below. But this is beside the point. The defect complained of is a fundamental one that goes to the root of the whole hearing of the motion. It is fatal to the proceedings and renders same a nullity. And being a nullity, it must be set aside notwithstanding that it might have been well decided. (p. 1578 A)

**NOTABLE POINTS OF INTEREST**

**IGUHJSC**

*1. Natural justice - Requirements thereof*

Natural justice requires that a party to a cause must be given the opportunity to put forward his case fully and freely and to apply to the court to hear any material witnesses and consider relevant documentary evidence with a view to reaching a fair and just decision in the matter. (p. 1582 F)

*2. True test of fair hearing*

It has been said that the true test of a fair hearing is the impression of a reasonable person who was present at the trial whether, from his observation,

justice has been done in the case. The burden is on the appellant to show that the seeming irregularity and the conduct of the trial complained of led to a failure of justice. The real issue therefore is what the impression of reasonable person in court would be where he saw the court refuse to look at or consider a material counter-affidavit in an application before delivering its ruling against the respondent who filed such counter-affidavit. In my view he can come to no other logical conclusion other than that the hearing has been anything but fair. An appeal against such a decision where the conduct or irregularity complained of has led to a failure of justice cannot but succeed. (p. 1582 G)

### **REPRESENTATION**

Mr. Scott-Emuakpor for the Appellants

T. J. Onomigbo Okpoko Esq. SAN for the Respondents

### **CASES REFERRED TO**

Whyte v. Police (1966) N.M.L.R. 215 at 219

Onajobi v. Olanipekun (1985) 4 SC. 156 at 163

Mohammed v. Kano Native Authority (1968) 1 ALL NLR 424, 428-429 (1968) ANLR 411, 413

Madukolu v. Nkemdilim (1962) ANLR (Part 2) pages 581, 590

Nwokoro v. Onuma (1990) 3 N.W.L.R. (Pt. 136) 22

Amadi v. Aplin (1972) 4 S.C. 228 at 237

Onajobi v. Bello (1985) 4 S.C. (part 2) 156 at 163

Kano Native Authority v. Obiora (1959) 4 F.S.C. 226

### **STATUTE AND RULES REFERRED TO**

Supreme Court Rules. Order 6 Rule 8(6)

Constitution of Federal Republic of Nigeria 1979 s. 33(1)

### **LEAD JUDGMENT BY OGUNDARE JSC**

The plaintiff who is respondent in this appeal, had sued the Defendants, now appellants, in the Warri Judicial Division of the former Bendel state, claiming N200,000 general damages for trespass, nuisance and injunction. Pleadings were ordered, filed and exchanged. Evidence was led at the trial by both sides. In the course of the evidence of the 3rd defence witness, objection was taken by learned counsel for the plaintiff to the line of evidence. After learned counsel for the parties had addressed the court on the objection, the learned trial Judge in a ruling upheld the objection and expunged the evidence of the witness from the record. Thereupon learned counsel for the Defendants applied for an adjournment. The application on being opposed

by counsel for the plaintiff was refused by the learned trial Judge who directed that "the defendants should go on with their case". I quote below what followed next:

*"Mr. Scot-Emuakpor: At this stage the defendants cannot go on with their case as directed by the Court.*

B *Court: The case of the defendants is hereby closed. Counsel should address me. The case has lingered for too long.*

*Mr. Scott-Emuakpor: I have no address to offer. Mr. Okpoko addresses:"*

Upon conclusion of Mr. Okpoko's address, the trial Judge reserved Judgment.

C In the meantime, the Defendants filed a Notice of appeal to the Court of Appeal against the ruling of the learned trial Judge on the objection taken to the evidence of D.W.3 and refusal of adjournment. They at the same time applied by way of motion for a stay of proceedings in the suit pending appeal. The application for stay was refused on 26/9/85 and, on the same date, the D learned trial Judge delivered his judgment in the case wherein he found for the plaintiff and awarded him N75,000.00 damages and an injunction. The defendants appealed against this judgment to the Court of Appeal on 30/9/85 incorporating in their grounds of appeal complaints against the conduct of the case as a whole in the trial court.

E Defendants' two appeals were entered in the Court of Appeal as Appeals Nos. CA/B/199/85 and CA/B/301/87. On the Defendants not filing their written brief of argument the plaintiff on 29/6/88 applied to the Court of Appeal for an order dismissing the appeal for want of diligent prosecution. In the affidavit in support of the motion, plaintiff averred:

F *"1. On the 27th of September, 1985 the Appellants/Respondents appealed to this Honourable Court against the decision of Uwaifo, J. sitting at High Court 1 Warri in this case.*

*2. The Assistant Registrar of the Warri High Court informed me and I verily believe him that he compiled the Records of this appeal and duly G notified the parties of the availability of the records by a Notice dated 22/12/87 with reference No.W/52/80-Tempo/E2.*

*3. Solicitors T.J. ONOMIGBO OKPOKO & CO. informed me and I verily believe them that they received the aforementioned Notice on 5/1/88. A copy of the Registrar's notice is attached hereto and marked Exhibit A.*

H *4. Pursuant to this Notice, I collected the records of Appeal on the 15/1/88.*

*5. The Registrar of the Warri High Court also informed me and I verily believe him that on the 18th of January, 1988 the Appellants/Respondents received through their solicitors the Registrar's notice informing the*

parties of the availability of the Records of Appeal for collection. A certified copy of the proof of service is attached hereto and marked Exhibit B.

6. That up till 20/6/88 when I made a search at the Registry of the Court of Appeal, Benin City, I discovered that the Appellants had failed, refused and or neglected to file their Appellants' Brief.

7. This Honourable court on the 23/1/86 ordered a stay of Execution of the judgment debt of N75,000.00 awarded in my favour by Uwaifo J of the Warri High Court on the 26/9/85.

8. The appellants/Respondents have not shown interest in prosecuting this appeal and are contended with the stay of execution granted by this Honourable Court." C

A counter-affidavit was filed in the morning of 13/7/88, the day fixed for the hearing of the motion.

Because of the importance of what took place in court that day, to the determination of this appeal I quote hereunder the proceedings for the day: D

"Applicant in person. J.O. Onurhorho (Miss) for the Applicant G. Ohanideje for the Respondent.

Onurhorho: This is a motion praying for the dismissing the appeal the appeal for failing to file brief and want of diligent prosecution. The application is supported by an affidavit of 10 paragraphs. Judgment was given in September, 1985. E

Records of appeal was ready since December, 1987 and we have since collected our record. The Appellant's have not yet filed their brief. I move the Court to dismiss the appeal. F  
Ohanideje.

I oppose the application.

Court: On what grounds?

Ohanideje: I have filed a Counter affidavit this morning-we have not collected the record. G

Court: It is not before us.

Ohanideje: Nothing to say.

Court: The appellant filed the Notice of appeal in the court below on the 27/9/85. The record of appeal was ready for collection since the 22/12/87. The appellant had done nothing towards the prosecution of the appeal. Learned Counsel for the Appellant informed this Court that they are yet to go and collect the record of appeal. From all indication the Appellants are not keen or ready to prosecute the appeal. The appeal is accordingly dismissed with N150 naira costs to the Respondent." H

The Defendants have now appealed to this court against the Order of the Court below dismissing their appeal No. CA/B/301/87 it would appear nothing was said about appeal No. CA/B/199/85 .

Pursuant to the rules of this Court. The parties filed and exchanged their respective briefs of argument. In the Appellants' brief the following 3 B questions are formulated, to wit:

1. *"Is it open to a respondent who finds that an appellant has delayed paying for and collecting his record of appeal to apply to dismiss the appeal for want of diligent prosecution?"*

2. *Does it not constitute the violation of the principle of fair hearing for a court to accede to a prayer to dismiss and appeal for want of diligent prosecution -*

(a) *Without considering a counter-affidavit filed, albeit in the morning of the hearing of the motion, of which the court is aware?*

(b) *When the court knows or ought reasonably to have known that D notice of motion was served on respondents' counsel in less than 2 days of the return date.*

3. *Does it not amount to a wrong exercise of discretion for a court to accede to a prayer to dismiss an appeal for want of diligent prosecution without bringing to bear upon that discretion the fact that the grounds of E appeal are very substantial in nature and ought to be heard on merits?"*

For his part, the plaintiff, in his brief, set down the following 2 questions:

1. *"Was the Court of Appeal wrong to dismiss this appeal for want of prosecution?"*

2. *Was the Court of Appeal wrong to hear and determine the motion to dismiss the appeal before it in the way it did?"* F

Question 2 above is identical with Defendants' question 2 and shall be considered first since, if it succeeds, it is sufficient to dispose of the appeal.

At the oral hearing of the appeal the Defendants were absent and G were not represented by counsel. Pursuant to Order 6 rule 8 (6) the appeal was taken as argued on the Briefs. The plaintiff's counsel relied on his brief and offered no oral arguments.

On question 2, Defendants, in their brief of argument, contended that there was a breach of section 33(1) of the Constitution when the Court H below in deciding to grant plaintiff's application to dismiss their appeal for want of diligent prosecution, refused to consider their counter-affidavit on the ground that it was not before them as it was filed in the morning of the hearing of the application. It is further contended that once breached, it is irrelevant that the decision made subsequently is correct, Reliance is placed

on Alhaji Tukur v. Govt. of Gongola State (1989) SCNJ 1.

It is contended by the plaintiff that as the Defendants were represented in court by counsel who was given a hearing and had the opportunity to argue before the court below any reasons why the appeal should not be dismissed, there was no breach of the fundamental right to fair hearing. Reference is made to paragraphs 4 and 6 of the counter-affidavit and it is argued that no reason was advanced in the counter-affidavit why record of appeal was not collected and that on Defendants' showing, the court below was right in holding that they were not ready to prosecute the appeal. It is further argued that -

*"even if the Court of Appeal was wrong in not calling for the counter-affidavit, that error did not occasion a miscarriage of justice which will warrant upsetting the judgment of the Court."*

Support for this submission is found in R. Onajobi & Anor. vs. Bello Olanipekun & Ors. (1985) 4 SC. (pt. 2) 156 at 163.

It is not in dispute - and the proceedings for 13/7/88 bear this out - that **in ruling on the plaintiff's motion to dismiss Defendants' appeal, the counter-affidavit filed by them was not considered. The fact of the existence of that counter-affidavit was brought to the notice of the court by learned counsel for the Defendants. The Court below at the stage ought either to adjourn the proceedings on terms in order to have the counter-affidavit placed before them for consideration along with the plaintiff's affidavit evidence before ruling on the motion or call for it that morning and consider it along with the affidavit in support of the motion. As things turned out, the Court determined the motion only on plaintiff's affidavit evidence. There was a breach of the rule of natural justice audi alteram partem and the hearing on the motion cannot be described as fair as enshrined in section 33(1) of the 1979 Constitution** which provides:

*"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."*

What is the meaning of "fair hearing"? This Court, per Sir Ademola, CJN provided an answer in Mohammed v. Kano Native Authority (1968) 1 All NLR 424, 428-429; (1968) ANLR 411, 413 Wherein it was said:

*"It has been suggested that a fair hearing does not mean a fair trial. We think a fair hearing must involve a fair trial, and a fair trial of a case consists of the whole hearing. We therefore see no difference between the two. The true test of a fair hearing, it was suggested by counsel, is the*

*impression of a reasonable person who was present at the trial whether, from his observation, justice has been done in the case. We feel obliged to agree with this."*

**It cannot be seriously contended that, where a court decides a case on the evidence of one of the parties alone while ignoring the evidence for the other side, the hearing is a fair one. Clearly, the Defendants were denied a fair hearing.**

**It might be, as is argued in plaintiff's brief, that the counter-affidavit would have made no difference to the decision of the Court below. But this is beside the point. The defect complained of is a fundamental one that goes to the root of the whole hearing of the motion. It is fatal to the proceedings and renders same a nullity. And being a nullity, it must be set aside notwithstanding that it might have been well decided - see: Madukolu & Ors. vs. Nkemdilim (1962) ANLR (part 2) pages 581,590. I, therefore, resolve Question 2 in favour of the Defendants. And in view of the conclusion reached, it is unnecessary to consider Question 1.**

The net result is that this appeal succeeds and it is allowed by me. I hereby set aside the decision of the Court below dismissing the Defendants' appeal together with the order for costs made by it and remit the plaintiff's motion to the Benin Division of the Court below to be heard and determined by another panel of that court.

I make no order as to the costs of this appeal.

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### OGWUEGBUJSC

I have had the privilege of a preview of the judgment just read by my learned brother Ogundare, J.S.C. I am in entire agreement with his views on the issues canvassed by the parties and I also allow the appeal.

The plaintiff/respondent brought an application before the Court of appeal pursuant to Order 6, Rule 10, Court of Appeal (Amendment) Rules, 1984 praying the court for an order:

*"Dismissing the appellants' appeal for want of diligent prosecution."*

It was supported by an affidavit of ten paragraphs. The legal practitioner representing the appellants deposed to a counter affidavit of seven paragraphs which was filed on 13:7:88. The application was heard on the same 13th day of July, 1988 and the learned counsel for the appellants, respondents in the application drew the attention of the court to the fact that he filed a counter-affidavit in opposition to the motion that morning.

The Court below peremptorily determined the application and dis-



missed the appeal without considering the counter affidavit whose existence had been brought to its attention. This to my mind is a clear breach of the appellants' right to a fair hearing enshrined in our Constitution. The right to be heard is a very fundamental principle of the adversary system of administration of justice in this country. See Nwokoro & Ors v. Onuma & Or. (1990) 3 N.W.L.R. (pt. 136) 22. Had the court below considered the counter-affidavit, they might have arrived at the same conclusion. The decision of the Court of Appeal is a nullity. I therefore allow the appeal and endorse all the orders contained in the lead judgment.

C

### MOHAMMED JSC

I agree with my learned brother, Ogundare, JSC., in the lead judgment, just read, that this appeal ought to be allowed for the reasons disclosed in that judgment. I agree to remit the plaintiff's motion to the Court of Appeal, Benin Division, for its determination by another panel of that court. I make no order as to costs.

### ONU JSC

I have read in draft the judgment just delivered by my learned brother Ogundare, JSC and I entirely agree with him that the appeal ought to succeed and it is accordingly allowed by me.

In expatiating briefly on the case whose facts my learned brother Ogundare, JSC in his lead judgment has so ably set out to need any further review that I only wish to add the following few words of mine.

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This court has over the years laid down through decided cases what constitutes fair hearing and its twin concomitant, fair trial. It will suffice here to mention only three of such cases, to exemplify what I mean, viz.

#### CASE NO. 1

Isiyaku Mohammed v. Kano Native Authority (1968) 1 All NLR 426 G wherein Ademola C.J.N. said:

*"It has been suggested that a fair hearing does not mean a fair trial. We think a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing. We therefore see no difference between the two.*

H

*The true test of a fair hearing ..... is the impression a reasonable person who was present at the trial whether from his observation, justice has been done in the case."*

#### CASE NO. 2

In U.A. Amadi v. Thomas Aplin & Co. (1972) 4 S.C. 228 at 237 where Udo Udoma, JSC opined

"Further more, the high handed manner in which the learned trial judge dealt with the application by dismissing it summarily without hearing the plaintiff at all was, in our view, a denial to the plaintiff of his right to be heard a direct infringement of the fundamental maxim audi alteram partem which in effect, is a denial of a fair trial."

CASE NO. 3

In Donatus Ndu v. The State (1990) 7 NWLR (part 164) 550 at 578 Nnaemeka-Agu, JSC expressed the following opinion with respect to fair hearing forcefully thus:

"The very essence of fair hearing under Section 33 of the Constitution is a hearing which is fair to both parties to the suit be they plaintiffs or defendants or prosecution and defence. The Section does not contemplate a standard of justice which is biased in favour of one party and to the prejudice of the other. Rather it imposes and ambidextrous standard of justice in which the court must be fair to both sides in the conflict."

In applying the principle enunciated in the above three decisions vis a vis the one in hand wherein one of two issues formulated at the appellants' instance as set out thereunder and which I am of the opinion is decisive as well as capable of disposing of the contentions of the parties, asks:

Was the Court of Appeal wrong to hear and determine the motion to dismiss the appeal before it in the way it did?

In other words, what would the attitude of this Court be to the Defendants' contention that there was a breach of Section 33(1) of the constitution of the Federal Republic of Nigeria, 1979 when the Court below (Court of Appeal, Benin Division) in deciding to grant the plaintiff's application to dismiss the Defendants' appeal for want of diligent prosecution, refused to consider the latter's counter - affidavit on the ground that it was not before them (Court below) as it was only filed that morning when the application came up for hearing; and further that once that fundamental right of fair hearing was breached, it was of no moment that the decision made subsequently was correct.

In contradistinction to the above views, it is the plaintiff's contention that the deponent to the counter-affidavit, one Godstime Okandiji, is the same person who appeared as counsel for the Defendants at the court below, had clearly stated from his ipse dixit and averments in the counter-affidavit that the Defendants had not collected the records of appeal. No reason, it is further argued, was advanced which therefore led to the court below on their own showing to have held:

*"The Appellants had done nothing towards the prosecution of the appeal. Learned Counsel for the Appellants informed this Court that they are yet to go and collect the record of appeal. From all indication the Appellants are not keen or ready to prosecute the appeal."*

It was further contended on the plaintiff's behalf that there was no affidavit from the Defendants themselves giving reasons which would have to be exceptional for their lethargy in failing to collect the records and that no such reason had been advanced in their brief in this appeal. In effect, it is maintained, the averment in the Defendants' counter-affidavit amounts to no more than that they had neither paid for nor collected their copy of the record as Godstime Okandeji rightly informed the court below. Reliance was also placed on paragraphs 4 and 6 of the Defendant's Counter-affidavit while the learned counsel for the plaintiff in his written brief in conclusion submitted as follows:-

*"There was nothing that the counter-affidavit could have changed the situation. To say that the Court of appeal ought to have called for the counter-affidavit which was not mentioned until Respondent's Counsel had fully moved the motion would be putting on the judicial process constraints which it does not deserve. Even if the Court of Appeal was wrong in not calling for the counter affidavit, that error did not occasion a miscarriage of justice which will warrant upsetting the judgment of the court. See Onajobi & Anor. v. Bello Olanipekun & ors. (1985)4 S.C. (part 2) 156 at 163".*

With utmost due respect, since on the morning of 13/7/88 it dawned on the court below that there was filed that morning a counter-affidavit by the defendants before it, albeit that they (Defendants) had yet to collect the record of appeal in one of two pending appeals, the dismissal of the Defendants' appeal in disregard of the counter-affidavit which was already before that court, clearly amounted to a breach of the audi alteram partem principle which is rooted in the proposition that either party to a case must be given an opportunity to be heard. See George & ors. v. Dominion Flour Mills Ltd. (1963) 1 All NLR 71 at 77-78 and Oguntimehin v. Gubere (1964) 1 All NLR 176. The defendants having been glaringly denied a hearing of their motion and a pronouncement thereon, there was clearly a 'jumping of the gun' which has led to a miscarriage of justice.

For these reasons and the fuller ones contained in the judgment of my learned brother Ogundare, JSC I have no hesitation in resolving the one issue herein considered in the Defendant's favour. I to make the same consequential orders inclusive of costs in the Defendants' favour.

IGUH JSC

I have had the advantage of reading in draft the leading judgment just delivered by my learned brother, Ogundare, J.S.C. and I agree entirely with him that there is merit in this appeal.

B The facts of the case have been fully set out in the leading judgment of my learned brother and no useful purpose will be served by my recounting them all over again. It suffices to state that this appeal is from the order of the Court of Appeal, Benin City Division, dismissing the appellant's appeal in limine for want of diligent prosecution. This was following a motion on notice C brought by the respondent for that purpose. The motion was supported by a ten paragraph affidavit in reply to which the appellants filed a counter-affidavit deposing to facts they relied on in opposition to the application.

It is clear from the record of proceedings that the Court of Appeal peremptorily granted the application and dismissed the appellants' appeal D without bothering to look at, never mind considering, the depositions in the appellants' counter-affidavit. The reason advanced by the court below for not considering this vital document was that the counter-affidavit was said not to be before the court as it was only filed in the morning of hearing but before the application was called up for hearing. The fact that it had been filed in court E before the actual hearing of the application was however brought to the notice of the court by the learned counsel for the appellants.

It is a fundamental principle of the administration of natural justice that a party and his witnesses should be heard before the case against him is determined. This basic principle is in compliance with the audi alteram partem F doctrine. In my view, it is a denial of justice to refuse to hear a party to a cause, his witnesses or for the court to shut its eyes against material documentary evidence before it relevant to the issue in controversy between the parties. See Mallam Sadan of Kunya v. Abudul Kadir of Fagge (1956) 1 F.S.C. 39 at 41.

Natural justice requires that a party to a cause must be given the G opportunity to put forward his case fully and freely and to apply to the court to hear any material witnesses and consider relevant documentary evidence with a view to reaching a fair and just decision in the matter. See Kano Native Authority v. Raphael Obiora (1959) 4 F.S.C. 226.

H It has been said that the true test of a fair hearing is the impression of a reasonable person who was present at the trial whether, from his observation, justice has been done in the case. The burden is on the appellant to show that the seeming irregularity and the conduct of the trial complained of led to a failure of justice. See Alhaji Isiyaku Mohammed v. Kano N.A. (1968) 1 All N.L.R. 474 and Whyte v. Police (1966) N.M.L.R. 215 at 219. The real issue

therefore is what the impression of reasonable person in court would be where he saw the court refuse to look at or consider a material counter-affidavit in an application before delivering its ruling against the respondent who filed such counter-affidavit. In my view he can come to no other logical conclusion other than that the hearing has been anything but fair. An appeal against such a decision where the conduct or irregularity complained of has led to a failure of justice cannot but succeed. B

The conclusion I therefore reach is that it amounted to unfair hearing when the court below, although aware that a counter-affidavit stating the other side of the case had been filed in the morning of the hearing of the application, refused to call for same from the Registry and to consider the facts deposed to therein along side those in the affidavit in support of the motion. I think that for the Court of Appeal to have dismissed the appeal by stating that the counter-affidavit was not before it and making no enquiries as to why it was filed late was clearly irregular and amounted to an unfair hearing of the application. D

It is for the above and the more elaborate reasons contained in the leading judgment that I, too, allow this appeal and remit the application to the court below for hearing de novo before a different panel of that division. I abide by all the consequential orders including those as to costs contained in the leading judgment. E

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