

SUPREME COURT OF NIGERIA

17TH JULY, 1997. SC. 230/1992

**CORAM:- M. L. UWAI S CJN, S. M. A. BELGORE, I. L. KUTIGI,
M. E. OGUNDARE, A. I. IGU H, JJSC**

MAJOR-GENERAL ZAMANI APPELLANTS/
LEKWOT (RTD) & 6 ORS. APPLICANTS

AND

1. JUDICIAL TRIBUNAL ON CIVIL AND
COMMUNAL DISTURBANCES IN RESPONDENTS
KADUNA STATE
2. ATTORNEY-GENERAL OF THE FEDERATION

APPEALS - *Nullification of proceedings - Failure to exhibit the proceedings and judgment sought to be nullified - Makes the application improper.*

APPEALS - *Jurisdiction - Where the High Court's jurisdiction in an ex parte application is in issue - The issues related to the proceedings or judgment of a Tribunal should not arise.*

COURTS - *Appeal if successful - Courts have the duty to ensure it is not rendered nugatory - But the appeal in this case is abnormal.*

FACTS

By a motion on notice the appellants/applicants prayed inter alia for an order setting aside the judgment of the Judicial Tribunal on Civil Disturbances in Kaduna State presided over by Justice B. O. Okadigbo delivered on the 2nd February, 1993 and nullifying all the proceedings of the said Tribunal from 4th December 1992 until the said date of judgment. The motion was supported by a nine paragraph affidavit. The present appeal by the appellants/applicants to the Supreme Court is in respect of the ruling of a Kaduna High Court under the Fundamental Human Rights (Enforcement Procedure) Rule 1979 which granted them leave to bring the application prohibiting the Tribunal from proceeding with the trial of the appellants/applicants but refused to stay proceedings of same.

On appeal to the Court of Appeal it held that the High Court had no jurisdiction to hear the motion. It therefore struck out the motion before the Kaduna High Court. The appellants/applicants have further appealed to the Supreme Court.

HELD (Unanimously striking out the application per lead ruling of **KUTIGI JSC**)

Jurisdiction

1. It appears to me therefore from the facts stated above that there is nothing directly emanating from the proceedings of the Tribunal before the High Court or the Court of Appeal or this Court. The issue is simply about the jurisdiction of the High Court regarding the ex-parte application made at the High Court by the appellants themselves. Chief Ajayi in his address has made no attempt to show to us that an appeal lies from a decision of the Tribunal to the High Court or to the Court of Appeal or to this Court. And clear enough no decision of the Tribunal is involved either in the motion before the High court or in the appeal. (p. 1911 D)

Appeal if successful

2. I agree with Chief Ajayi when he submitted that both the court from which an appeal lies as well as the court to which the appeal lies have the duty of ensuring that the appeal if successful, is not rendered nugatory and that the court will make an order to that end. But as I have shown above, the appeal before this Court has its origins in the High Court, Kaduna and not in the Tribunal. This made the application look rather abnormal or unusual. (p. 1911 F)

Nullification of proceedings

3. Added to this is the fact that chief Ajayi has not deemed it necessary to exhibit to his motion the proceedings and judgment of the Tribunal from 4/12/92 to 2/2/93 (both dates inclusive) which he wanted us to nullify and set aside. The omission I believe is a serious irregularity as no court would make an order setting aside or nullifying proceedings or judgment on which it has never set its eyes! I think mere affidavit evidence verifying the facts would to my mind be insufficient. And I so hold. On these grounds I have without hesitation come to the conclusion that this application is not properly before us. The circumstances are such that it is only just that the application should be struck-out as incompetent. And it is hereby struck-out. (p. 1911 H)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Court cannot set aside any decision not before it

No Court in this country can set aside, nullify or quash any proceedings or decisions not before it. Courts rely on concrete facts before them and not on guess-work and to ask any Court to make a decision on guess-work and

matters not exhibited before it is unjust and can, depending on the circumstance of the case, amount to abuse of Court process. It is therefore obvious that the prayers before this Court are not supported by facts the senior advocate argued in his brief and viva voce. (p. 1913 D)

OGUNDARE JSC

2. Certiorari - Sufficient explanation must be given for failure to exhibit the proceedings

The application now before us is akin to an application for certiorari whereby the proceedings and judgment of the tribunal are sought to be quashed. Such an application will not be granted where the proceedings and judgment are not placed before the Court or sufficient explanation given for failure to do so. Neither is the case here. The judgment and proceedings sought to be quashed are public documents (see section 109 of the Evidence Act) and can only be proved in the manner provided in the Act. There is no such proof before us of the existence of these documents. (p. 1914 C)

REPRESENTATION

Chief G. O. K Ajayi, S.A.N., with S. B. Barry for the Appellants/Applicants. Tochukwu Onwugbufo (Solicitor-General of the Federation) with Okpoko Chiesonu (Legal Officer), for the Respondents.

CASES REFERRED TO

Vaswani Trading co. v. Savalakh (1972) 1 ALL NLR 483
Ojukwu v. Gov. of Lagos State (1985) 2 NWLR 806
Mohammed v. Olawunmi (1993) 4 NWLR 254 at 277
Kalu v. Odili (1992) 5 NWLR (Part 240) 130 at 164
Ogunremi v. Dada (1962) 1 ALL NLR 863
Ezegbu v. First African Trust Bank Ltd. (1992) 1 NWLR (pt. 220) 699 703

STATUTES AND RULES REFERRED TO

Decree 55 of 1992
Fundamental Human Rights (Enforcement Procedure) Rules 1979
Evidence Act. s. 109

LEAD RULING BY KUTIGI JSC

By a Motion on Notice the appellants/applicants pray for the following orders -

"(i) Setting aside the judgment of the Judicial Tribunal on Civil and Communal Disturbances in Kaduna State, presided over by Hon. Jus-

tice B.O. Okadigbo delivered on 2nd February, 1993, in charge No. KD/C&CDT/5/92 Federal Republic of Nigeria v. Major-General Zamani Lekwot & 6 others.

(ii) Nullifying all the Proceedings of the said Tribunal from the 4th day of December, 1992 until the said date of judgment.

(iii) Fixing a date for the hearing of application filed by the applicants on the 2nd of December 1992 for stay of proceedings of the 1st respondent Tribunal pending the determination of the appeal.

AND for such further order or other orders as Honourable Court may deem fit to make in the circumstances.

AND FURTHER TAKE NOTICE that the grounds of the said application are as follows:

(i) On the 2nd day of December, 1992, the appellants filed in the Supreme Court an application on Notice for an order for stay of proceedings in charge No. KD/C&CDT/5/92 then pending before the 1st Respondent until the final determination of the appeal then pending before the Supreme Court.

(ii) On the same day the appellants filed an Ex-Parte application for stay of the aforesaid proceedings until the determination of the Motion on Notice referred to above.

(iii) Notwithstanding the fact that the said applications were duly served upon the 1st respondent on the 4th of December, 1992, the 1st respondent continued with the said proceedings until 2nd February, 1993, when it delivered its judgment.

(iv) By thus proceeding with the trial, the Tribunal had pre-empted the exercise of the jurisdiction of the Supreme Court to grant a stay of proceedings.

(v) Notwithstanding the fact that the application for stay of proceedings pending appeal was patently urgent, the Supreme Court Registry has failed to list the application for hearing."

The motion was supported by an affidavit of 9 paragraphs sworn to by one Adewale Adesokan, a legal practitioner in the Chambers of Messrs G. O. K. Ajayi & Co. Solicitors to the appellants/applicants. Paragraph 2 to 9 read thus -

"2. On 2nd of December 1992 we filed in the Supreme Court on behalf of the Appellants a Motion Ex-Parte and a Motion on Notice for an order granting a Stay of Proceedings in Charge No. KD/C & CDT/5/92 which was pending before the 1st Respondent.

3. I served a copy of the Motion on Notice on the 1st Respondent on 4th December 1992 and the same was received and signed for by one Y.K.

Adeyemi a Deputy Secretary. A copy of the Motion Paper on which the Secretary to the 1st Respondent Tribunal acknowledged service thereof is now produced and shown to me marked "AA1".

4. *The said Motion on Notice was also served on the office of the Honourable Attorney-General of the Federation and Minister of Justice on 3rd December 1992.*

5. *That when we realized that the Tribunal had adjourned the said Charge NO.KD/C&CDT/5/92 to the 14th of December 1992 for continuation of trial notwithstanding the service upon it of the application to stay the same proceedings Chief G.O.K. Ajayi S.A.N., our Principal, Wrote a letter to the Tribunal urging it not to proceed with the trial. A copy of the said letter is now produced and shown to me marked "AA2".*

6. *That the letter referred to in paragraph 5 was delivered by me to the Registrar of the Tribunal before the Tribunal commenced sitting on the 14th of December 1992.*

7. *That when the Tribunal commenced sitting on the 14th of December 1992 and called upon the Prosecution to call his next witness I drew the attention of the Tribunal to the Motion for Stay of its proceedings which was and is still pending before this Honourable Court and to the aforementioned letter of Chief Ajayi to the Tribunal but the Tribunal ignored me and proceeded with the trial.*

8. *I have now become aware that the Tribunal delivered judgment in the said Charge No. KD/C/CDT/5/92 on the 2nd of February 1993, in which it convicted the 1st and the 3rd-7th appellants/Applicants of culpable homicides punishable with death.*

9. *Unless the judgment of the Tribunal is first set aside it will be impossible for this Honourable Court to begin to exercise its undoubted jurisdiction to consider the Appellants' application and to decide whether or not it will grant Stay of Proceedings prayed for."*

Moving the motion Chief Ajayi, SAN. learned counsel for the applicants, relied on the affidavit in support and the brief of argument filed on 23/6/93 as earlier ordered by this Court on 27/5/93. He said the respondents have filed no counter affidavit in opposition and as such the court should treat all averments of facts as undisputed. He said notwithstanding the fact that the Motion on Notice for stay of proceedings was served on the Tribunal, it nevertheless proceeded to hear the case against the applicants until it concluded same on 2/2/93 when it delivered its judgment. That, that was an attempt by the Tribunal to frustrate the exercise by this court of its undoubted jurisdiction to hear the said motion. He said that was also an unjustifiable attack on the due process of administration of justice. It was submitted that

nobody however highly placed should be allowed to pre-empt the decision of a court of law. When an application for stay of execution or proceedings is pending before any court, such court must remain "master of the situation", and one litigant must not be allowed to assume that role at the expense of the other litigant or of the court. It was further submitted that by proceeding with the trial of the applicants the Tribunal was guilty of contempt of court in that it had pre-empted the exercise of the jurisdiction that belonged to this court. A number of authorities were cited including -

VASWANI TRADING CO. V. SAVALAKH (1972) 1 ALL NLR 483
OJUKWU v. GOV. OF LAGOS STATE (1985) 2 NWLR 806
GOV. OF LAGOS STATE v. OJUKWU (1986) 1 NWLR 621 at 638
ATTORNEY-GENERAL v. TIMES C NEWSPAPERS LTD. (1974) AC. 277 at 307
EZEGBU v. F.A.T.B. (1992) 1 NWLR 699
MOHAMMED v. OLAWUNMI (1993) 4 NWLR 254 at 277.

The court was urged to follow the authorities above and set aside, undo or nullify the pre-emptive act of the Tribunal and that after the "Slate" must have been wiped clean, this court would then be in a position to exercise its jurisdiction to grant or refuse the application for stay of proceedings. When asked by the court why copies of the proceedings of the Tribunal and the judgment to be set aside were not exhibited or attached to the motion, Chief Ajayi replied that the affidavit in support contained all the relevant facts necessary for the application and that it is the trial of the applicants that is in issue and not their conviction as they have not appealed against their conviction in any court. When reminded that the Tribunal had since been wound up, Chief Ajayi said the ceasure of a Tribunal or judge should not stop this court from exercising its powers or jurisdiction to grant the application. The court was urged to set aside the proceedings and judgment of the Tribunal from 4/ 12/92 to 2/2/93 when it delivered its judgment.

Responding, Mr. Onwugbufo learned Solicitor-General of the Federation, submitted that the application which is to set aside the proceedings and judgment of the Okadigbo Tribunal is not properly before this court. He referred to the Notice and Grounds of Appeal in the record and said they only raise issue of jurisdiction pertaining to proceedings in respect of Fundamental Human Rights before a Kaduna High Court. In addition he said the relevant proceedings of the Tribunal and its judgment sought to be set aside do not form part of the record before the court. The prayers in the motion, he said, are not necessary for the determination of the appeal which is only on jurisdiction. It was also submitted that the VASWANI and OJUKWU cases relied upon by the applicants are clearly distinguishable from the case herein in that in the former cases the court was dealing with physical houses subject matters of the suits, whereas in this case a Tribunal that has since been disbanded

or wound up is involved. Another important difference between the cases cited by Chief Ajayi and this case is that in all the cases cited, the acts complained of were those of the parties themselves and not that of the court or tribunal simpliciter. He said any appeal from the decision of the Tribunal would go to a Confirming Authority and will not come to this court. He added B that the judgment and sentence of the Tribunal had in fact long been confirmed, part of the sentences served, and the appellants released. He said the motion is an indirect way of asking this court to do what it has no power to do, not being a Confirming Authority of the Tribunal decision. He said Decree No. 55 of 1992 which came into force on 1/12/92 before the motion for stay of C proceedings was filed in court on 2/12/92, and served on the Tribunal on 4/12/92, expressly provides that everything pertaining to the Tribunal cannot be questioned in any court. We were therefore asked to take the Decree into consideration in deciding the motion.

It was further submitted that the Tribunal was never in contempt of D this court because in the first place no order of court was made or issued against the Tribunal throughout its sittings, and secondly that the action of the Tribunal was amply protected by Decree No. 55 of 1992. He referred to the cases of -

KALU v. ODILI (1992) 5 NWLR (Part 240) 130 at 164
E ATTORNEY-GENERAL OF ANAMBRA STATE & ORS. V OKAFOR & ORS.
(1992) 2 NWLR (Part 224) 396 at 429 AKIBU V. ODUNTAN (1991) 2 NWLR
(Part 171) 1 at 10

He said this court should not lend its power to set aside the proceedings and judgment of the tribunal through the back door, except by way of a F proper and valid appeal which is non-existent in this case. We were urged to dismiss the application.

Chief Ajayi in reply agreed that the appeal before this court is on jurisdiction only, but added that despite Decree No. 55 of 1992, the court can still decide whether or not it has jurisdiction. He said the court should grant G the application.

I have given careful consideration to the submissions of counsel on both sides. But because of the nature of the order which I intend to make finally, I do not wish to dwell too much on the merit or otherwise of the application itself.

H Clearly the appellants/applicants' appeal before this court is in respect of the ruling of Kaduna High Court under the Fundamental Human Rights (Enforcement Procedure) Rules 1979, whereby the appellants/applicants were granted leave to bring the application for prohibiting the Tribunal from proceeding or further proceeding with the trial of the appellants and were

refused the prayer for stay of proceedings of same. The appellants appealed to the Court of Appeal Kaduna division against the order refusing them stay of proceedings of the Tribunal. The Court of Appeal by majority of 2:1 held that the Kaduna High Court lacked jurisdiction to have entertained the motion. It therefore struck-out the motion before the Kaduna High Court for lack of jurisdiction. The appellants thereafter appealed to this court. They filed B only two grounds of appeal, which without particulars read thus -

"ERROR IN LAW

(1) *The Court of Appeal (Mustapha and Oduwole JJ.C.A.) erred in law in holding that the Kaduna High Court had no jurisdiction to hear and determine the appellants' application on the ground that the jurisdiction of C the courts had been ousted by section 8 of the Civil Disturbances (Special Tribunal) Act Cap. 53 Laws of the Federation of Nigeria.*

(2) *The Court of Appeal (Mustapha and Oduwole JJ.C.A.) erred in law in holding the view that the words "as amended" after the words "the Constitution of the Federal Republic of Nigeria 1979" incorporated all D Decrees that had repealed or suspended or modified the 1979 Constitution."*

It appears to me therefore from the facts stated above that there is nothing directly emanating from the proceedings of the Tribunal before the High Court or the Court of Appeal or this Court. The issue is simply about E the jurisdiction of the High Court regarding the ex-parte application made at the High Court by the appellants themselves. Chief Ajayi in his address has made no attempt to show to us that an appeal lies from a decision of the Tribunal to the High Court or to the Court of Appeal or to this Court. And clear enough no decision of the Tribunal is involved either in the motion F before the High court or in the appeal. I am therefore inclined to agree with Mr. Onwugbutor that the appeal pending in this Court has nothing to do with the proceedings or judgment of the Tribunal which we were told started on 4/12/92 and ended on 2/2/93 with the judgment. I agree with Chief Ajayi when he submitted that both the court from which an appeal lies as well as the court G to which the appeal lies have the duty of ensuring that the appeal if successful, is not rendered nugatory and that the court will make an order to that end (see for example KIGO (NIGERIA) LTD. v. HOLMAN BROS. (NIGERIA) LTD. (1980) 5-7 SC. 60; OGUNREMI v. DADA (1962) 1 ALL NLR 863; VASWANI V. SAVALAKH (supra); SHODEINDE & ORS. V. AHMADIYYA MOVEMENT- H IN-ISLAM (1980) 1-2 SC. 163). But as I have shown above, the appeal before this Court has its origins in the High Court, Kaduna and not in the Tribunal. This made the application look rather abnormal or unusual.

Added to this is the fact that chief Ajayi has not deemed it necessary

to exhibit to his motion the proceedings and judgment of the Tribunal from 4/12/92 to 2/2/93 (both dates inclusive) which he wanted us to nullify and set aside. The omission I believe is a serious irregularity as no court would make an order setting aside or nullifying proceedings or judgment on which it has never set its eyes! I think mere affidavit evidence verifying the facts B would to my mind be insufficient. And I so hold.

On these grounds I have without hesitation come to the conclusion that this application is not properly before us. The circumstances are such that it is only just that the application should be struck-out as incompetent. And it is hereby struck-out. The respondents are awarded costs of one C hundred (N100.00) naira only.

UWAIS CJN

I have had the privilege of reading in draft the ruling read by my D learned brother Kutigi, JSC. I entirely agree.

Accordingly I too hold that the application is incompetent and it is hereby struck out with N100.00 costs to the Respondents.

BELGORE JSC

E Only the Confirming Authority can receive the decision of the Tribunal and confirm, reject or modify it. The Decree No. 55 of 1992 clearly ousts the jurisdiction of any other Court except the Confirming Authority. I wonder, therefore, why the learned counsel should overlook this very vital provision F in the Decree and come here. When this was pointed out to Chief Ajayi, S.A.N., he insisted this Court could still entertain the prayers and grant them; he however never advanced any authority for this. All Courts in this country derive their authority and therefore jurisdiction either under the Constitution or specific statutes made under the Constitution. By Constitution, I refer to G Constitution of the Federal Republic of Nigeria as variously modified by Decrees of the Military Government. Without pointing out any statutory provision allowing this Court to assume jurisdiction in matters under Decree 55 of 1992, it will amount to judicial defiance to ignore lack of jurisdiction.

Chief Ajayi S.A.N., to my mind deliberately ignored the issue of juris- H diction and loaded his argument with issue of contempt by a Tribunal that no longer exists. It is like trying to resurrect a dead horse so as to ride it.

There is however a fundamental defect in the application itself, especially the ruling sought to be set aside. As this court or any court for that matter, lacks jurisdiction to entertain any matter subject to jurisdiction of the

Tribunal set up under Decree 55 of 1992, it is not known where to place this application. Is it interlocutory? If it is, this Court as well as the two Courts below will have no jurisdiction. Or is it a final decision of the Tribunal? Similarly neither this Court nor the High Court or the Court of Appeal will be seized of it. This then brings me to the next stage. Where are the orders or judgments of the Tribunal complained of? They are not exhibited for the benefit of this Court. Perhaps by way of lack of jurisdiction by that Tribunal, the normal Court might be asked to step in and so declare, but in the absence of the decision of the Tribunal being exhibited for the benefit of this Court, how will this Court interfere with what it has not seen?

This application is so flawed ab initio that I find it completely unjust to call this Court to adjudicate on it. The judgment of the Tribunal complained against, allegedly delivered on 2nd February, 1992 and the proceedings of the Tribunal of 4th day of December, 1992 are unfortunately mere guess-work as they are not exhibited with this application before us. Are we to rely on newspaper reports, which are no more than news items, with variations in different media on the same facts as alternatives to exhibiting the certified true copies of the decisions and proceedings? No Court in this country can set aside, nullify or quash any proceedings or decisions not before it. Courts rely on concrete facts before them and not on guess-work and to ask any Court to make a decision on guess-work and matters not exhibited before it is unjust and can, depending on the circumstance of the case, amount to abuse of Court process. It is therefore obvious that the prayers before this Court are not supported by facts the senior advocate argued in his brief and viva voce. It must be pointed out that the cases cited by learned counsel, to wit, Vaswani Trading Company v. Savalekh (1972) 1 ALL NLR 483; Ojukwu v. Governor of Lagos State (1985) 2 NWLR 621, 638; Attorney-General v. Times Newspapers Ltd. (1974) A.C. 277, 307; Ezegbu v. First African Trust Bank Ltd. (1992) 1 NWLR (pt. 220) 699, 7033; and Mohammed v. Olawunmi (1993) 4 NWLR 254, 277, are based on concrete facts put before the Court unlike this one where what we are asked to interfere with are not placed before us.

This application is also incompetent as its nature is not known to our procedure. It is not an appeal; as a motion it cannot be entertained by virtue of Decree 55 of 1992 whose provisions left no ground for ambiguity. Chief Ajayi, S.A.N. agreed the provisions of Decree 55 (supra) oust the jurisdiction of any court but in the same breadth submitted we could entertain the application. This court is a creation of the Constitution and the statute and can only act in accordance with these laws, to do otherwise will amount to our deciding not "in accordance with the Constitution and the law"; the solemn oath each judge must subscribe to by taking office is to decide all cases according to the

Constitution and the law.

For the foregoing reasons and the reasons adumbrated in the ruling of my learned brother, Kutigi, J.S.C., I find no merit in this application as it is incompetently before this Court and it is struck out with N100.00 costs to the respondents.

B

OGUNDARE.JSC

I, too, am of the view that this application be struck out. The applicants who seek to set aside a judgment and nullify proceedings of a tribunal have failed to put before the Court the judgment and proceedings they seek to have set aside or nullified. It is not clear what is the nature of the proceedings they seek to nullify or the judgment they seek to have set aside. The application now before us is akin to an application for certiorari whereby the proceedings and judgment of the tribunal are sought to be quashed. Such an application will not be granted where the proceedings and judgment are not placed before the Court or sufficient explanation given for failure to do so. Neither is the case here. The judgment and proceedings sought to be quashed are public documents (see section 109 of the Evidence Act) and can only be proved in the manner provided in the Act. There is no such proof before us of the existence of these documents. For this reason alone this application must be refused.

In view of the conclusion I have just reached I do not think it necessary to consider whether, in the circumstances of this case, this is a proper case to invoke the power of this Court and grant the prayers sought in this application.

I, too, strike out this application with costs assessed at N100 (one hundred Naira) only.

G

IGUHJSC

I have had the opportunity of reading in draft the leading ruling just delivered by my learned brother Kutigi, J.S.C. and I agree that this application lacks merit and should be struck out.

For the same reasons contained in the said ruling, I too, strike out this application. I abide by the order for costs therein made.