

IN THE FEDERAL COURT OF APPEAL
ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU
2ND OCTOBER, 1978. FCA/E/110/77

BEFORE THEIR LORDSHIPS

JOHN ANIEMEKA PHIL-EBOSIE, BOONYAMIN OLADIRAN
KAZEEM, KALU OKPANANYAH, JJCA

MRS. ANGELINA EMEMBOLU	DEFENDANTS/
2. HENRY EMEMBOLU		APPELLANTS
AND		
MRS. PAULINA EMEMBOLU	PLAINTIFF/
(Suing for herself and on behalf		RESPONDENT
of her children as their next friend)		

JUDGMENTS - *Final or interlocutory judgment - contention that leave to appeal ought to be obtained - On the ground that an aspect of the judgment was interlocutory - Objection overruled as judgment was held to be final.*

PRACTICE & PROCEDURE - *Condition of appeal - That the appellants enter into a bond towards providing security for costs - Bond executed by only one appellant - Is non compliance with the condition.*

PRACTICE & PROCEDURE - *Condition of appeal - Where not complied with - Registrar's certificate that all conditions have been complied with - Cannot cure the defect.*

PRACTICE & PROCEDURE - *Condition of appeal - Power of Court of Appeal to waive non compliance therewith - Circumstances under which waiver may avail.*

FACTS

The plaintiff/respondent and the 1st defendant/appellant are the widows of one Henry Osita Emembolu (deceased) who died in February, 1968. The deceased also left behind some children that survived him. Thereafter, the 2 appellants obtained letters of administration to administer the estate of the deceased, without the probate Registrar taking cognizance of the caveat filed by the respondent against the grant of such letters of administration. The respondent then filed an action against the appellants before the High Court. Respondent inter alia, claimed a declaration that the appellants are not entitled to a grant of the letters of administration. An order for account and paying over what is found due was also sought.

At the conclusion of the trial the court found in favour of the respondent but refused to order payment of any sum since there was no evidence on the system of distribution that is applicable. Being aggrieved, the defendants appealed to the Court of Appeal. The principal registrar during the settlement of record of appeal, made an order that the appellants should pay the sum of N150.00 or enter into bond by way of security for cost with one surety in the like sum. It was only the 1st appellant who entered into bond with one surety and it was not shown prima facie that the 2nd appellant authorized her to enter the bond on his behalf. It is the preliminary objection raised by the respondent that the court had no jurisdiction to entertain the appeal on the grounds that the conditions of appeal were not perfected and that leave to appeal was not obtained since the decision was interlocutory, that the Court now has to determine.

HELD (Unanimously overruling the objection per ruling delivered by **B. O. KAZEEM JCA**)

Final or interlocutory judgment

1. In applying this test to item (3) of the final order made by the learned trial Judge in his judgment vis-a-vis item (C) of the claims of the respondent, it seems to us that the learned Judge has finally disposed of the rights of the parties in that claim. It is not disputed that the judgment of the trial court with respect to the filing of an account of the real and personal

estate of the deceased was not final; but the complaint of learned counsel for the respondent as we understood it, was that the making of the order as to what was due to the respondent and her children was left in abeyance pending the filing of the account. We do not share that view. Surely, the learned Judge did not say that he could not accede to the request of the respondent until the account of the estate which he ordered has been filed, but until he has heard evidence on the mode of distribution. That in our view finally disposes of the rights of the parties in the case before the trial court. It may well be that the respondent can obtain in fresh proceedings an order for the distribution of the estate when adequate evidence has been adduced. In the circumstances, we find no substance in this objection which is hereby overruled. (pp. 96 A & 97 A)

Condition of appeal - That the appellants enter into a bond

2. It is clear from both the writ and the statement of claim filed by the respondent that the appellants were sued jointly and severally for the claims made against them. Equally, the orders made by the Learned Trial Judge against the appellants were made against them in their joint and several capacity as administrators of the estate of the deceased. It was in recognition of that fact, that the Principal Registrar, ordered the defendants either to deposit the costs of the appeal in court or to enter into a bond as an alternative. It is therefore in our view a non-compliance of that Order for only one appellant to enter into the bond for and on behalf of the appellants particularly when there is nothing on the face of the bond to show that the 1st appellant was authorized by the 2nd appellant to enter into on his behalf the bond, which is a legal obligation. (p. 97 G)

Condition of appeal - Where not complied with

3. We are also of the view that the certificate issued by the Principal Registrar of the lower court that all the conditions of appeal had been duly and punctually complied with, cannot operate to cure that defect, when his Order with respect to the bond had not been strictly complied with. (p. 98 B)

Condition of appeal - Power of Court to waive non compliance

4. Also Order IX Rule 28 of the rules (which provides for waiver of non-compliance with rules) permits this court, in the interest of justice, to waive this non-compliance, and to direct the appellant to remedy the non-compliance so that the appeal shall proceed. Having considered the submissions, we are of the opinion that the non-compliance by the appellants with the Order of the Principal Registrar made under Order VII rule 10 of the Rules is a mere technicality because only one sum of N150 will have to be paid by the appellants if at all it becomes necessary; and that sum can be paid by either appellant. Accordingly, we hereby waive the non-compliance, but direct that a new bond be entered into by both appellants and a surety in strict compliance with the order of the Principal Registrar within a period of 30 days from today. (p. 98 E)

REPRESENTATION

C. E. Agbu, for the Appellants

G. N. A. Okafor, for the Respondent.

CASES REFERRED TO

Bozson v. Altricham U.O.C. (1907) 1 K.B 547

Blay v. Solomon (1947) 12 W.A.C.A.175

Ude v. Agu (1961) ALL N.L.R. 65

Nwokolo v. Nnaji FCA/E/32/77

RULING OF THE COURT DELIVERED BY

B. O. KAZEEM JCA

Sometime in February, 1968, one Henry osita Emembolu (hereinafter called "the deceased") died intestate leaving surviving him two wives namely the plaintiff/respondent and her children and also the 1st defendant/appellant and her children including the 2nd defendant/appellant. Thereafter the two defendant/appellants applied for and obtained letters of administration to administer the estate of the deceased, without the probate Registrar taking cognizance of the caveat filed by the plaintiff/respondent against the grant of such letters of administration. Consequently,

the plaintiff/respondent brought an action against the defendants/appellants jointly and severally claiming the following reliefs:-

"(a) A declaration that the defendants are not entitled to a grant of the letters of Administration without the court determining the plaintiff's rights and those of the children as against the estate of the deceased. B

(b) A declaration that the grant of letters of Administration to the defendants is null and void or Alternatively, a revocation of the said grant.

(c) An order of the court for survey and an account of the estate property and estate money in bank of N2,448.65 (Two thousand four hundred and forty eight Naira, sixty five kobo) in the deceased's account with the standard Bank of Nigeria Limited and African continental Bank Limited, Onitsha and to pay over to the plaintiff what is found due. C

(d) Injunction restraining the defendants, their servants and agents from further acts of administration in respect of the estate of the deceased to the exclusion of the plaintiff." D

At the conclusion of the trial, the learned Judge found for the plaintiff/respondent and made the following orders:- E

"In the final result:

(1) I declare that the grant of letters of administration to the defendants to administer the state of Henry Osita Emembolu without the notice to prohibit grant given by the plaintiff being tried or removed is invalid. In the alternative I hereby set aside the grant of letters of administration made by the Probate Registrar, Enugu on the 7th day of June, 1974, to the defendants to administer the estate of Henry Osita Emembolu. F

(2) I declare that on the facts of this case the defendants are not entitled to a grant of letters of administration without the court determining the plaintiffs' right in the estate of the deceased. Henry Osita Emembolu. G

(3) It is hereby ordered that the defendants do file in court within 30 (thirty) days hereof a verified survey of the real estate of the deceased and an account of all income that has accrued to the estate from rents or otherwise and of the sum of N2,000.00 withdrawn by them from the H

Standard Bank of Nigeria Limited Onitsha.

I cannot, however, order any sum to be paid over by the defendants to the plaintiffs because I have not had any evidence on the system of distribution - whether it is per capital or per stirpes and what share if any, is due to the girls.

(4) I hereby restrain the defendants, their agents and servants from further acts of administration in respect of the said estate of the deceased to the exclusion of the plaintiffs."

Against that judgment, the appellants have appealed to this court; and during the settlement of Record of Appeal, the Principal Registrar of the lower court inter alia made the following order as a condition of appeal:

"The appellants shall pay into court against costs on appeal the sum of N150.00 or in the alternative enter into bond with one surety in the like sum."

In purported compliance with that order, the 1st appellant and one surety entered into the following bond:-

"(CIVIL FORM 15)

IN THE FEDERAL SUPREME COURT OF NIGERIA

BOND FOR COSTS OF APPEAL

Order VII, Rule 10)

BETWEEN:- SUIT NO. 0/92/1974:

1. Mrs. Angelina Emembolu Defendants/

2. Henry Emembolu Appellants

Mrs. Paulina EmemboluPlaintiff/

(Suing for herself and on behalf of her Respondent children as their next friend):

KNOW ALL MEN, by these presents, that we, Mrs. Angelina Emembolu of C/o Her Solicitor, C. E. Agbu, Esq., C/o No. 82, Oguta road, Onitsha, and Felix Onwuemeli of No. 3A, Mba Road Onitsha are jointly and severally held and firmly bound to Mrs. Paulina Emembolu for the sum of N150.00 (One hundred and fifty naira) of lawful money to be paid to the said Mrs. Paulina Emembolu, her executors, administrators of assigns, for which payment well and truly to be made, we bind

ourselves and each of us for themselves, in the whole our and every of our heirs, executors and administrators firmly by these presents.

SEALED with our Seal;

DATED the 6th day of April, in the year of our Lord, 1976.

WHEREAS a suit is now pending in the Court at Onitsha High Court wherein the above bounded Mrs. Paulina Emembolu is the Plaintiff and the said Mrs. Angelina Emembolu & Anor. are the defendants;

AND WHEREAS a judgment was given by the Court therein, on the 16th June, 1975 for the said Mrs. Angelina Emembolu and Anor. has filed Notice of Appeal from the said Judgment;

AND WHEREAS it is by law provided that the party appealing shall give security to the satisfaction of the Registrar of the Court below for the due prosecution of the appeal and for the payment of any costs which may be ordered to be paid by the appellants;

AND WHEREAS the above-named Felix Onwuemeli, at the request of the said Mrs. Angelina Emembolu has agreed to enter into this obligation for the purpose afore-said;

Now the condition of this obligation is such, that if the said Mrs. Angelina & Anor. shall duly prosecute the appeal and if the above bounden Mr. Felix Onwuemeli, any or either of them shall pay costs which may be ordered to be paid by the appellants this obligation shall be void, otherwise remain in full force.

SIGNED, Sealed and delivered by the above-named Mrs. Angelina Emembolu and Mr. Felix Onwuemeli:

(Sgd.) A. Emembolu

for herself and on behalf of Henry Emembolu.

APPELLANTS.

(Sgd.) F. Onwuemeli

S U R E T Y"

Subsequently, the Principal Registrar of the Lower Court in compliance with Order VII r. 12 (1) (b) of the rules of the Supreme Court (hereinafter referred to as "The Rules") issued this certificate:
(CIVIL FORM 17)

IN THE FEDERAL SUPREME COURT

94 Emembolu v. Emembolu (1998) 1 KLR Kazeem JCA
CERTIFICATE OF REGISTRAR THAT CONDITIONS OF APPEAL
HAVE BEEN FULFILLED (Order VII, Rule 12(1) (b))

SUIT NO. 0/92/1974

BETWEEN"

B 1. Mrs. Angelina Emembolu Defendants/Appellants

2. Henry Emembolu

AND

Mrs. Paulina Emembolu

C (Suing for herself and on behalf of her Plaintiff/Respondent
children and their next friend)

.....
I, do hereby certify that the above-named Appellants have duly
and punctually complied with the conditions of appeal imposed on them
D in the above-named case.

DATED at Onitsha, this 4th day of March, 1977.

(Sgd.) S. M. CHIDOM

PRINCIPAL REGISTRAR."

E At the hearing of the appeal, the respondent filed a motion on
notice wherein she raised a preliminary objection that the court has no
jurisdiction to entertain the appeal on two grounds namely that:

F "(1) The conditions of appeal were not perfected, and therefore
the appeal is not properly before the Court in that the appellants did not
enter into a bond for costs, nor deposit N150.00 in the alternative.

(2) No leave was obtained by the appellants before appealing,
since the decision was interlocutory."

G We propose to deal with ground two of the objection first. With
respect to that ground, learned counsel for the respondent referred to item
(c) of the reliefs claimed in the amended statement of Claim for "an order
of the court for survey and an account of the estate property and estate
money in bank of N2,448.65 (Two thousand four hundred and forty eight
H Naira sixty-five kobo) in the deceased's account with the Standard Bank
of Nigeria Ltd. and African Continental Bank Limited and to pay over to
the Plaintiff what is found due" (underlining ours).

He also referred to the third order in the judgment of the learned

trial Judge to this effect:

(3) It is hereby ordered that the defendants do file in court within 30 (thirty) days hereof a verified survey of the real estate of the deceased and an account of all income that has accrued to the estate from rents or otherwise and of the sum of N2,000.00 withdrawn by them from the Standard Bank of Nigeria Limited Onitsha. B

I cannot, however, order any sum to be paid over by the defendants to the plaintiffs because I have not had any evidence on the system of distribution - whether it is per capital or per stirpes and what share, if any, is due to the girls." C

It was then submitted that in so far as the appellants are expected to file an account of the real and personal estate of the deceased within 30 days, it is therefore clear that it was that account when filed, that will enable the court to determine the share of the estate due to the respondent and her children. In such a case, it was argued that the judgment on that claim was not final, but interlocutory, and as such, leave of the lower court or this court will be required before the appeal can be entertained. Certain authorities were cited in support of this contention. Learned counsel however conceded that the judgment on the other three claims was final. D E

In reply, learned counsel for the appellant submitted that the judgment of the lower court was final because the learned trial Judge had finally disposed of the claims of the respondent by granting her all her reliefs except that one relating to the shares due to her for which no evidence was adduced before that court. F

The test as to whether a decision is interlocutory or final has long been settled by Alverstone C.J. in Bozson v. Altricham U.O.C. (1907) 1 K.B. 547 thus: G

"Does the Order as made finally dispose of the rights of the parties? If it does then I think it ought to be treated as a final order, but if it does not, it is then in my opinion, an interlocutory order."

That test was adopted by the West African Court of Appeal in Blay v. Solomon (1947) 12 W.A.C.A. 175; by the Supreme Court in Ude & ors. v. Agu & ors. (1961) All N.L.R. 65; and by this Court in Nwokolo & ors. v. Nnaji & ors. FCA/E/32/77 ruling delivered on 9th June, 1977. H

In applying this test to item (3) of the final order made by the learned trial Judge in his judgment vis-a-vis item (C) of the claims of the respondent, it seems to us that the learned Judge has finally disposed of the rights of the parties in that claim.

B It is not disputed that the judgment of the trial court with respect to the filing of an account of the real and personal estate of the deceased was not final; but the complaint of learned counsel for the respondent as we understood it, was that the making of the order as to what was due to the respondent and her children was left in
C abeyance pending the filing of the account. We do not share that view.

In the course of his judgment on this point, the learned trial Judge made the following observations:-

D "As for the children of both wives, the right of the children of the 1st defendant was not an issue before the court and, I think, rightly too. As for the children of the plaintiff, I am satisfied that the four children Benjamin Ogugua Emembolu, Isidore Chukwuemeka Emembolu, Hilary
E Ikechukwu Emembolu and Doris Ngozi Emembolu are the children of the plaintiff and the deceased, Henry osita Emembolu, by his second customary law marriage; that they were, expecting Doris that was born
F en ventre as mere, so recognized by the deceased since their birth till his death; that they were so recognized by the relations of the deceased, including Barrister Joseph Emembolu who put them in the house at 26 Obanye Street, Onitsha, a part of the deceased estate, after the Civil War, and also D.W.2. They are on the above facts and the customary law marriage between their father and their mother legitimate and entitled
G to a share of their deceased father's estate. I am not yet asked to distribute the estate for those beneficially entitled; and there is no evidence of the custom of distribution." (Underlining ours)

H It was in pursuance of that observation that the learned Judge concluded in his final order on item (3) thus:

"I cannot, however, order any sum to be paid over by the defendants to the plaintiffs because I have not heard any evidence on the systems of distribution - whether it is per capital or per stirpes and what

share, if any, is due to the girls."

Surely, the learned Judge did not say that he could not accede to the request of the respondent until the account of the estate which he ordered has been filed, but until he has heard evidence on the mode of distribution. That in our view finally disposes of the rights of the parties in the case before the trial court. It may well be that the respondent can obtain in fresh proceedings an order for the distribution of the estate when adequate evidence has been adduced. In the circumstances, we find no substance in this objection which is hereby overruled.

As regards ground one of the objection, it was argued by the learned counsel for the respondent that the bond entered into by the 1st defendant/appellant for and on behalf of the appellants, together with a surety cannot be regarded as made in compliance with the order of the principal Registrar since the two defendants/appellants were specifically ordered to do so; and there is nothing on the face of the bond showing that 1st defendant/appellant was authorized to do so by the 2nd defendant/respondent on his behalf. Reference was made to the provisions of Order VII Rules 17(3) of the Rules that the respondent is entitled to point out any defect in the non-compliance with the Order made as a condition of appeal, and that it is at the discretion of this court either to dismiss the appeal on that ground or to order that the defect be rectified.

Although learned counsel for the appellants at first contended that the bond is in order, and that the Principal Registrar has so certified, yet he later conceded the point made by learned counsel for the respondent with reference to the provisions of the Rules.

We are of the view that there is substance in the submission of learned counsel for the respondent on this point.

It is clear from both the writ and the statement of claim filed by the respondent that the appellants were sued jointly and severally for the claims made against them. Equally, the orders made by the Learned Trial Judge against the appellants were made against them in their joint and several capacity as administrators of the estate of the deceased. It was in recognition of that fact, that the Principal

Registrar, ordered the defendants either to deposit the costs of the appeal in court or to enter into a bond as an alternative. It is therefore in our view a non-compliance of that Order for only one appellant to enter into the bond for and on behalf of the appellants particularly when there is nothing on the face of the bond to show that the 1st appellant was authorized by the 2nd appellant to enter into on his behalf the bond, which is a legal obligation. We are also of the view that the certificate issued by the Principal Registrar of the lower court that all the conditions of appeal had been duly and punctually complied with, cannot operate to cure that defect, when his Order with respect to the bond had not been strictly complied with.

However, Order VII r. 17(3) of the Rules provides that:

"If the respondent alleges that the appellant has failed to comply with a part of the requirements of Rules 2, 9, or 10 of this Order, the Court is satisfied that the appellant has so failed, may dismiss the appeal for want of due prosecution or make such other order as the justice of the case may require." (Underlining ours)

Also Order IX Rule 28 of the rules (which provides for waiver of non-compliance with rules) permits this court, in the interest of justice, to waive this non-compliance, and to direct the appellant to remedy the non-compliance so that the appeal shall proceed.

Having considered the submissions, we are of the opinion that the non-compliance by the appellants with the Order of the Principal Registrar made under Order VII rule 10 of the Rules is a mere technicality because only one sum of N150 will have to be paid by the appellants if at all it becomes necessary; and that sum can be paid by either appellant.

Accordingly, we hereby waive the non-compliance, but direct that a new bond be entered into by both appellants and a surety in strict compliance with the order of the Principal Registrar within a period of 30 days from today. It is also ordered that thereafter, the appeal shall proceed. We make no order as to costs.