

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 1998. SC 234/1990
CORAM:- S. M. A. BELGORE, A. B. WALL, M. E. OGUNDARE,
E. O. OGWUEGBU, U. MOHAMMED, JJSC

DR. OSWALD J. VANDERPUYE APPELLANT
AND
COKER GBADEBO RESPONDENT
(Trading under the name and style
of Coker Gbadebo & Sons)

***APPEALS** - Concurrent findings of fact - By the two lower courts - Will not be disturbed by the Supreme Court - Without any convincing ground.*

***CONTRACTS** - Breach of contract - Termination by the appellant without justification - He is solely responsible for the breach.*

***PRACTICE AND PROCEDURE** - Counter claim - Is entitled to fail - Where cogent reason was not advanced to buttress it.*

***PRACTICE AND PROCEDURE**- Pleadings - Evidence on facts not pleaded - Is worthless and goes to no issue.*

FACTS

The plaintiff/respondent who is a builder and Civil Engineering Contractor instituted an action against the defendant/appellant at the Lagos High Court claiming N90,000.00 damages for breach of contract by the appellant. The appellant on his part counter claimed against the respondent's claim and asked for N105,002.48 being general and special damages for the respondent's breach of contract. The appellant wanted two buildings to be constructed for him at his two landed properties, No. 14 Enia Soro Beyioku Street, Surulere and plot 839, Victoria Island, Lagos. The parties, on 6th October, 1976, agreed both orally and in writing that the respondent should proceed to construct the two buildings. When

the two buildings were almost completed, the appellant, in August 1977, terminated the contract agreement and barred the respondent from carrying on with the remaining work on the two buildings.

At the end of the hearing the learned trial Judge entered judgement for the respondent and awarded him N51,612.00 damages while the appellant's counter-claim was dismissed. Dissatisfied with the judgment, the appellant appealed to the Court of Appeal which, in a considered judgment dismissed the appeal. The appellant in this further appeal to the Supreme Court canvassed 7 issues as calling for determination but the appeal was decided on 3 of the issues.

ISSUES FOR DETERMINATION

"(1). Whether the learned Justices of Appeal were correct in re-affirming the finding of the High Court in holding that time was not of essence of the contract in issue.

(2). Whether on the facts of this case the appellant was justified in terminating the contract in the manner he did. (Note: This is another way of asking whether the Respondent was in breach of the contract).

(3). Whether in view of the evidence led and the documents tendered in this case the learned trial Judge was justified in allowing Respondent's claims and in dismissing the Appellant's counter-claim, wherefore it now arises as an issue whether the Court of Appeal was right in upholding the finding of facts made by the learned trial Judge on this issue, and on their own showing in other important particulars listed hereunder.

HELD (Unanimously dismissing the appeal per lead judgment of **MO-HAMMED JSC**)

Pleadings - Evidence on facts not pleaded

1. Law reports are replete with authorities which need not be repeated every day that if evidence led is at variance with the pleadings it goes to no issue and should be disregarded - see among many decisions Chief Victor Woluchem and Ors. v. Chief Simon Gudi & ors. (1981) 5 S.C. 319 at 320; George and ors. v. Dominion Flour Mills Ltd. (1963) 1 ALL N.L.R. 71 at 77. The Court of Appeal is therefore right to affirm the

decision of the learned trial judge that the nine months period within which the contract was to be completed was not pleaded nor was the fact that time was made of the essence of this contract pleaded. Evidence given by the appellant showing such understanding is indeed worthless. (p. 294 E)

Breach of contract

2. The lower court considered these conclusions in its judgment and agreed that the learned trial judge was justified in reaching them. I have also analyzed the conclusions, and taking into consideration the evidence and facts adduced I entertain no doubt in my mind that the lower court is justified in affirming the decision reached by the learned trial judge that the appellant was solely responsible for the breach of the agreement to build the houses and that there was no justification shown for it. (p.296B)

Counter claim

3. I agree that the counter-claim had to fail because the appellant had not advanced any cogent reason for taking over the building projects from the respondent. The Court of Appeal is therefore right in affirming the dismissal of the appellant's counterclaim. (p. 296 G)

Concurrent findings of fact

4. Finally, this appeal is based on facts. There are two concurrent findings of fact by the two lower courts. The appellant has not established any ground to convince me that the decisions of the two lower courts ought to be disturbed. This appeal is without any merit and it is accordingly dismissed. (p. 296 H)

NOTABLE POINT OF INTEREST

MOHAMMED JSC

1. Brief writing - Need for lawyers to master the art

It is pertinent to point out for the education of those Lawyers who are yet to learn the art of brief writing that brief writing has been introduced in the legal system of this country many years ago and books have been

written on the subject. In the Supreme Court, brief writing was imposed through Order 9 of the Supreme Court Rules, 1977, and in the Court of Appeal it was introduced as from 1st September, 1984. It is quite a long time now for all lawyers to master the art of brief writing. Learned B counsel should endeavour to learn the format of writing a good brief. It will be educative if counsel can read the remarks made by this court on Brief Writing - See Engineering Enterprises etc. v. A/G. Kaduna (1987) 2 NWLR (Pt. 57) 396-397; Philip Obiora v. Paul Osele (1989) 1 NWLR (Part 97) 297 at pp. 300 to 302. (p. 293 F)

REPRESENTATION

Appellant not present and not represented

M. A. O. Okulaja for the respondent

CASES REFERRED TO

Engineering Enterprises etc. v. A/G/ Kaduna 2 NWLR (Pt. 57) 396 - 397

Obiora v. Osele (1989) 1 NWLR (Part 97) 297 at pp. 300 to 302

E Woluchem v. Gudi (1981) 5 S.C. 319 at 320

George v. Dominion Flour Mills Ltd. (1963) 1 ALL N.L.R. 71 at 77

Emegokwe v. Okadigbo (1973) 4 SC. 113

British India Insurance Co. Ltd. v. Thawardes (1978) 3 SC. 143

LEAD JUDGMENT BY MOHAMMED JSC

In this appeal, Dr. Oswald J. Vanderpuye, is contesting a decision of the Court of Appeal, Lagos Division, in which the lower court affirmed the judgment of trial Lagos High Court. The respondent who was G plaintiff at the trial High Court is a builder and civil engineering contractor. The appellant wanted two buildings to be constructed for him at his two landed properties, No. 14, Enia Soro Beyioku Street, Surulere, and Plot 839, Victoria Island, Lagos. The appellant approached the respondent and requested him to undertake the two jobs. The parties on the H October, 1976, agreed both orally and in writing that the respondent should proceed to construct the two buildings.

When the two buildings were almost completed, the appellant, in

August 1977, terminated the contract agreement and barred the respondent from carrying on with the remaining work on the two buildings. The respondent went to court and claimed N90,000.00 damages against the appellant for the breach of the contract agreement. The appellant, on his part, counter-claimed against the respondent's claim and asked for N105,002.48 being general and special damages for the respondent's breach of the contract. B

Pleadings were called and delivered and the trial opened. At the end of the hearing the learned trial judge, Olusola Thomas J (as he then was), entered judgment for the respondent and awarded him N51,612.00 damages against the appellant. The learned trial judge dismissed the appellant's counter-claim. Dissatisfied with the judgment, the appellant appealed to the Court of Appeal which, in a considered judgment, dismissed the appeal. C D

The appellant has now come before us armed with 14 grounds of appeal. From those grounds, the appellant formulated the following 7 issues and urged that the appeal be determined on them:

"(1). Whether the learned Justices of Appeal were correct in re-affirming the finding of the High Court in holding that time was not of essence of the contract in issue. E

(2). Whether on the facts of this case the appellant was justified in terminating the contract in the manner he did. (Note: This is another way of asking whether the Respondent was in breach of the contract). F

(3). Whether in view of the evidence led and the documents tendered in this case the learned trial Judge was justified in allowing Respondent's claims and in dismissing the Appellant's counter-claim, wherefore it now arises as an issue whether the Court of Appeal was right in upholding the finding of facts made by the learned trial Judge on this issue, and on their own showing in other important particulars listed hereunder. G

(4). Was the Court of Appeal right to have said that there was no pleading in Defendants Amended Statement of Defence and Counter-claim to the effect that time was an essence of the contract between the plaintiff and the Defendant? H

(5). *Was the Court of Appeal right to have held that the Defendant completed the contract, if ever at all, within a reasonable time?*

(6) *Was the Court of Appeal right in its perception and evaluation of the printed evidence before it when it purported to have made the following findings of fact;*

(a) *That it came to a certain conclusion from a few of the letters written by Plaintiff to the Defendant, when there was not a single letter emanating from the plaintiff to the Defendant*

(b) *That "On the part of the Respondent there was the evidence of disappointment of provision of money by the Appellant." etc. (306-307) when those facts were neither pleaded by the plaintiff, notwithstanding the fact that it held that parties are bound by their pleadings and that evidence given but never pleaded go to no issue and should be rejected as shown and stated at page 302 paragraph 6, i.e. lines 22 - 26.*

(c) *That the Defendant by his conduct breached the contract while absolving the Plaintiff in spite of overwhelming oral and documentary evidence to the contrary.*

(7). *Was the Court of Appeal right in its failure to disprove the Appellant's contention about the erroneous calculation of monetary award made by the Plaintiff whereby he under-estimated the outstanding work on the sites when these are palpably and prima facie clear as pointed out by the Defendant at paragraphs 4. 8.3 of pages 14 - 16 of Appellant's Brief and as reflected at pages 262 - 264 of the record.*

It is clear from the three briefs of arguments filed to wit; the Appellant's Brief, the Respondent's Brief and Reply to Respondent's Brief, both counsel for the appellant and the respondent have no idea about brief writing. Learned counsel for the appellant in the Appellant's brief which he wrote, after giving the outline facts of the case and reproducing the additional grounds of appeal, listed the 7 issues for the determination of the appeal. Thereafter, the learned counsel started to write comments on the grounds of appeal instead of the issues formulated on them. At the end of the brief he discussed about the 7 issues he formulated for the determination of this appeal in one paragraph only.

Respondent's counsel is not good either in brief writing. In the Respondent's brief, after giving the resume of the facts of the case, learned counsel wrote a reply to each of the 14 grounds of appeal listed in the appellant's brief. It was after this unnecessary exercise that the Respondent's counsel gave a brief synopsis of the facts of the case. At the end of the brief learned counsel listed the following three issues and said that they were for the determination of the appeal:

"ISSUE FOR DETERMINATION

1. *Whether there is evidence that the respondent abandoned the building project so as to amount to a breach of Oral Agreement.* C

2. *Whether there was evidence of any delay at all on the part of the plaintiff in prosecuting the buildings.*

3. *Whether the learned Justices of Appeal were right in re-affirming the finding of the Lagos High Court and the judgment."* D

Learned counsel for the respondent made no comment or advanced any argument in support the 3 issues. He however concluded his brief with the following words:

"ARGUMENT

With regard to the issues for determination in this brief the respondent humbly maintains his reply to appellant (sic) for determination." E

It is impossible to understand what the Learned Counsel is deducing in the extract above. It is pertinent to point out for the education of those Lawyers who are yet to learn the art of brief writing that brief writing has been introduced in the legal system of this country many years ago and books have been written on the subject. In the Supreme Court, brief writing was imposed through Order 9 of the Supreme Court Rules, 1977, and in the Court of Appeal it was introduced as from 1st September, 1984. It is quite a long time now for all lawyers to master the art of brief writing. Learned counsel should endeavour to learn the format of writing a good brief. It will be educative if counsel can read the remarks made by this court on Brief Writing - See Engineering Enterprises etc. v. A/G. Kaduna (1987) 2 NWLR (Pt. 57) 396-397; Philip Obiora v. Paul Osele (1989) 1 NWLR (Part 97) 297 at pp. 300 to 302. F G H

In view of the above observation I have to sift from the two awk-

ward briefs and consider the relevant arguments for the determination of this appeal. It is clear from the facts disclosed in the evidence adduced and the grounds of appeal filed that this appeal could be determined on issues 1 - 3 raised by the appellant in the appellant's brief.

B Learned counsel for the appellant made heavy weather in the appellant's brief on the issue that time has been made of the essence of the contract. He referred to paragraph 12 of the Amended Statement of Defence and Counter-claim and submitted that nine months period within which the houses should be completed was pleaded therein. I have strained
C my eyes in looking for such averment and was unable to find in paragraph 12 (a) to (o) of the Amended Statement of Defence and Counter-claim where the appellant stated that he pleaded it. I entirely agree with the learned trial Judge where he said;

D *"Although it came out in the course of evidence from the plaintiff that the buildings were to be completed within 9 months it was not pleaded by either party that time is of essence for completion of the buildings. The evidence as to time for the contract goes to no issue and I shall
E disregard it."*

**Law reports are replete with authorities which need not be repeated every day that if evidence led is at variance with the pleadings it goes to no issue and should be disregarded - see among many
F decisions Chief Victor Woluchem and Ors. v. Chief Simon Gudi & ors. (1981) 5 S.C. 319 at 320; George and ors. v. Dominion Flour Mills Ltd. (1963) 1 ALL N.L.R. 71 at 77. The Court of Appeal is therefore right to affirm the decision of the learned trial judge that the nine months period within which the contract was to be completed was not pleaded nor was the fact that time was made of the
G essence of this contract pleaded. Evidence given by the appellant showing such understanding is indeed worthless.**

H The second issue is whether on the facts of this case the appellant was justified in terminating the contract in the manner he did. Learned counsel for the appellant referred to a finding of the Court of Appeal on this issue where it held thus:

"..... from the analysis above, in respect of evidence in this

case, it was found conclusively or at least on the preponderance of evidence that the appellant was the person who acted in breach of the agreement between the parties." Record 309 1 - 4.

The observation of the Court of Appeal is correct that the parties in their agreement did not put it in writing the conditions, mode and manner of terminating the contract. But it is plain from the correspondence of letters between the parties, a number of which had been made exhibits in this case, that the appellant had taken control and execution of the contract. The learned trial judge summarized the orders and threats of the appellant to the respondent, through those letters in the following narrative;

"From this laborious exercise, it is quite clear that the defendant was the supervising authority of the two building projects. He was actively involved in every step virtually taken in the building construction, short, of carrying bricks himself. He gave directions at every turn and compelled variations. He would coax, cajole and flatter the plaintiff as a good boy where his work pleased him and would rebuke, lash out and scold as his whipping boy where he was displeased. He was always pushing and a tone of urgency and importance ran through all his instructions. Again, I observe that yet on the face of his pleadings, there was no averment that time was of the essence of the projects.

Taking a far view of the over all effect of the defendant's letters, I can hardly see any point in projects that would suggest that the plaintiff had abandoned them at any time before 30/6/77 when the defendant demanded the keys of the Surulere buildings. Indeed, there could have been no room for it as the letter showed, that the defendant was breathing down the plaintiff's neck. Again, I cannot see any question of delay arising in the circumstance of this case. The building projects were going simultaneously at two places. While the defendant was putting pressure on seeing to the completion of a part of the Surulere building project within 5 months of the commencement of the work, the Victoria Island project was expected to continue. My considered judgment is that the prevention of the plaintiff from proceeding with the project could not be attributed to anything but a sudden fancy of the defendant for whatever

reason or reasons. I have not found that the plaintiff abandoned the projects. I have not found any delay in the prosecution of the projects. I therefore hold that the defendant was solely responsible for the breach of the defendant's agreement to build the house and that there was no justification shown for it."

The lower court considered these conclusions in its judgment and agreed that the learned trial judge was justified in reaching them. I have also analyzed the conclusions, and taking into consideration the evidence and facts adduced I entertain no doubt in my mind that the lower court is justified in affirming the decision reached by the learned trial judge that the appellant was solely responsible for the breach of the agreement to build the houses and that there was no justification shown for it. Appellant has failed in this issue D too.

The next issue is where the appellant questioned the rationale behind the lower court's affirmation of the trial court's entry of judgment in favour of the respondent and dismissing the counter-claim of the appellant in view of the evidence led and documents tendered during the trial. It is evidently clear that the learned trial judge considered the detailed evidence adduced by the respondent. The documentary evidence is very helpful because the parties had written them when neither was contemplating any court action. The learned trial judge had enough evidence through which all the documentary exhibits had been explained. He dealt with each of the two building projects and in the end, quite rightly, concluded that the respondent was entitled to judgment in the sum of N51,612.00 being damages for the appellant's breach of the agreement the two parties entered. **I agree that the counter-claim had to fail because the appellant had not advanced any cogent reason for taking over the building projects from the respondent. The Court of Appeal is therefore right in affirming the dismissal of the appellant's H counterclaim.**

Finally, this appeal is based on facts. There are two concurrent findings of fact by the two lower courts. The appellant has not established any ground to convince me that the decisions of the two

lower courts ought to be disturbed.

This appeal is without any merit and it is accordingly dismissed. The judgment of the Court of Appeal in which it dismissed the appellant's appeal and affirmed the decision of the trial High Court is hereby also affirmed by me. I award N10,000.00 costs in favour of the respondent. B

BELGORE JSC

The purport of pleadings is to let the adversary know the case he is to meet. As pleadings state clearly facts upon which a party relies for his case, he is bound to present before the Court evidence in support of those facts only and nothing more. However, where a party departs from facts pleaded by him and offers evidence on matters not pleaded, that evidence will go to no issue and must be disregarded by the trial Court if it had inadvertently received such evidence. This is because cases must be determined only on legally received evidence. [Woluchem & Ors. v. Gudi & Ors. (1981) 5 SC. 319, 320; George & Ors v. Dominion Flour Mills Ltd. (1963) 1 ALL NLR 71, 77; Emegokwe v. Okadigbo (1973) 4 SC. 113; British India Insurance Co. Ltd. v. Thawardes (1978) 3 SC. 143]. C D E

This appeal is glaringly on matters of facts - the two lower Courts decided on facts. The concurrent findings of facts by the two lower Courts could not be faulted and it is not competent for this Court to interfere with them. This appeal, as held by my learned brother, Mohammed, J.S.C., has no merit. I also agree and dismiss it with N10,000.00 costs to the respondent. F

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WALI JSC

I have read in advance the lead judgment of my learned brother, Uthman Mohammed JSC and I agree with his reasoning and conclusion H for dismissing the appeal.

The learned trial Judge meticulously considered the evidence adduced before him and arrived at correct decisions on the plaintiff's case

and the defendant's counter claim. The Court of Appeal was right in affirming the judgment of the trial court. The concurrent findings of the two lower courts are well justified and I see no reason in the appellant's arguments to justify interfering with them.

B The appeal lacks merit and for the more articulate reasons in the lead judgment, I also hereby dismiss this appeal with N10,000.00 costs to the respondent.

The judgment of both the trial Court and the Court of Appeal are hereby further confirmed.
C

OGUNDARE JSC

I agree with the judgment of my learned brother, Mohammed, D JSC just delivered. The appeal is essentially against concurrent findings of the two Courts below. I am not satisfied that the Appellant has shown that those Courts are wrong in their findings. I therefore, dismiss this appeal, it is totally lacking in merit.

E I abide by the order for costs made in the judgment of my brother Mohammed, JSC.

OGWUEGBU JSC

F I have had the privilege of reading in advance, the draft of the judgment just delivered by my learned brother Mohammed, J.S.C and I agree that the appeal should be dismissed.

G The learned trial judge made far reaching findings of fact as to the conduct of the appellant in the performance of the contract by the respondent. He found no delay in the prosecution of the building contract, that the respondent did not abandon it and that the appellant virtually took complete control of its execution by being actively involved in every step H taken in the building construction short of carrying bricks himself. The Court of Appeal came to the conclusion that the findings of the learned trial judge were amply supported by oral and documentary evidence and that time was not of the essence of the contract.

I entertain no doubt that the court below was justified in affirming the findings of the learned trial judge. I too agree that time was not of the essence of the contract and if the respondent had been guilty of undue delay which was not the case, the appellant did not give him notice requiring the contract to be performed within a reasonable time. The B appellant prevented the respondent from completing the performance of the contract and the latter was justified in treating the contract as discharged and suing for damages for the breach.

There is no merit in this appeal and I hereby dismiss it with C N10,000.00 costs in favour of the respondent.

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