

IN THE FEDERAL COURT OF APPEAL  
HOLDEN AT LAGOS  
26TH DAY OF JULY, 1978. FCA/L/246/77

BEFORE THEIR LORDSHIPS  
SAMUEL ADETUNJI OGUNKEYE, DAHUNSI OLUGBEMI COKER,  
ROWLAND OBIORA OKAGBUE, JJCA

WARNER & WARNER INTERNATIONAL  
ASSOCIATES (NIG.) LIMITED ..... PLAINTIFF/RESPONDENT

AND

DR. T. A. KUMOLU-JOHNSON  
...DEFENDANT/APPELLANT/APPLICANT

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***APPEALS** - Relisting application for leave to appeal - Applicant has done enough - To justify that he was not aware of the hearing.*

***PRACTICE & PROCEDURE** - Relisting a struck out appeal - On a balance of probabilities - Applicant has satisfied the Court to exercise discretion in his favour.*

***LEGAL PRACTITIONERS** - Absence of counsel - Adjournment - Where counsel insisted he could not go on with a motion - Being handled by another counsel from same Chambers who was absent - Whether the proper procedure was for that counsel to have asked for adjournment.*

**FACTS**

This is an application brought under order 7 r 21 (2) S.C.R. 1961 to relist an application for leave to appeal which was struck out on the 1st June,

1978. When the application for leave to appeal was called on that day i.e. 1st June, 1978, the applicant was not in court but Mr. Awoniyi, learned counsel from the Chambers of Obafemi Awolowo & Co., Solicitors for the applicant said he was not aware that the matter was coming before the court and he did not know whether Mr. Sogbesan, one of the counsel in the same Chambers and who was handling the matter was aware whether the matter was coming up that day. At that stage the court called for a proof of service and was satisfied that service was effected. Mr. Awoniyi still refused to move the application and it was therefore struck out.

In support of the present application, the applicant swore to an affidavit to show that he was not aware of the hearing on the 1st June, 1978. One Rasheed Adenuga Odukale, office Manager in the Chambers of Obafemi Awolowo & Co., also swore to an affidavit to show that notice of hearing of the application for leave to appeal on the 1st June 1978, was not received in their office. Exhibits showing signatures of all the members of staff in the said chambers at all material times were attached to the affidavit. Mr. Sogbesan, learned counsel who was said to be handling the matter also swore to an affidavit to which was attached an exhibit showing the signatures of all the legal practitioners in the firm of Obafemi Awolowo & Co., as they were between January, 1978 and the time the affidavit was sworn.

#### **ISSUE FOR DETERMINATION**

Whether this is a proper case for the court to cause the struck out motion to be relisted.

**HELD** (Unanimously granting the application per Ruling of the Court delivered by **OGUNKEYE JCA**)

#### ***Relisting application for leave to appeal***

1. We have compared the signatures on the Court's despatch book against the hearing notice with those on the exhibits attached to the affidavits before us and we are satisfied there was no similarities between the one in the despatch book and any of those on the exhibits. We think that applicant has done enough to justify his claim that he was not aware of

the hearing of his application for leave to appeal on 1st June, 1978.  
(p. 418 H)

***Relisting a struck out appeal***

2. We also commend the effort of the applicant's Solicitors in bringing before us all the exhibits relied upon to support this application. In a civil matter as the one in hand is, proof is not required to be beyond reasonable doubt. On a balance of probabilities, the applicant has satisfied us that we can exercise our discretion in his favour.

Order 7 r 21(2) S.C.R. 1961 provided:-

*"21(2) When an appeal has been struck out owing to the non-appearance of the appellant the Court may, if it thinks fit, and on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for hearing."* (p. 419 B)

***Absence of counsel***

3. Considering this rule and all that we have said above we would have proceeded straight away to make the order sought for, but for the points raised by Chief Williams, S.A.N., learned counsel for the respondent. He submitted that since Mr. Awoniyi who was from the same chambers as Mr. Sogbesan was present in Court on the 1st June. 1978 he should rather have asked for an adjournment and not insist that he could not go on. We do not think that the submission is well founded. It would have been a different matter if Mr. Awoniyi were handling the matter and he was not aware it was coming up that day and therefore was not prepared for it. In the present case, since he was not handling the matter, we cannot attach blame to him for not asking for an adjournment. (p. 419 D)

**REPRESENTATION**

Mr. E. Omagbomi, for the appellant.

Chief F.R.A. Williams, SAN for the respondent.

**CASE REFERRED TO**

Mabinuori v. Ogunloye (1970) 1 ALL N.L.R. 17 (19, 20)

**B RULING OF THE COURT DELIVERED BY OGUNKEYE JCA**

This is an application brought under order 7 r 21 (2) S.C.R. 1961 to relist an application for leave to appeal which was struck out on the 1st June, 1978. When the application for leave to appeal was called on that day i.e. 1st June, 1978, the applicant was not in court but Mr. Awoniyi, learned counsel from the Chambers of Obafemi Awolowo & Co., Solicitors for the applicant said he was not aware that the matter was coming before the court and he did not know whether Mr. Sogbesan, one of the counsel in the same Chambers and who was handling the matter was aware whether the matter was coming up that day. At that stage we called for a proof of service and we were satisfied that service was effected.

Mr. Awoniyi still refused to move the application and it was therefore struck out.

In support of the present application, the applicant swore to an affidavit to show that he was not aware of the hearing on the 1st June, 1978. One Rasheed Adenuga Odukale, office Manager in the Chambers of Obafemi Awolowo & Co., also swore to an affidavit to show that notice of hearing of the application for leave to appeal on the 1st June 1978, was not received in their office. Exhibits showing signatures of all the members of staff in the said chambers at all material times were attached to the affidavit.

Mr. Sogbesan, learned counsel who was said to be handling the matter also swore to an affidavit to which was attached an exhibit showing the signatures of all the legal practitioners in the firm of Obafemi Awolowo & Co., as they were between January, 1978 and the time the affidavit was sworn.

**We have compared the signatures on the Court's despatch book against the hearing notice with those on the exhibits attached to the affidavits before us and we are satisfied there was no simi-**

larities between the one in the despatch book and any of those on the exhibits. We think that applicant has done enough to justify his claim that he was not aware of the hearing of his application for leave to appeal on 1st June, 1978.

We also commend the effort of the applicant's Solicitors in bringing before us all the exhibits relied upon to support this application. In a civil matter as the one in hand is, proof is not required to be beyond reasonable doubt. On a balance of probabilities, the applicant has satisfied us that we can exercise our discretion in his favour.

Order 7 r 21(2) S.C.R. 1961 provided:-

*"21(2) When an appeal has been struck out owing to the non-appearance of the appellant the Court may, if it thinks fit, and on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for hearing."*

Considering this rule and all that we have said above we would have proceeded straight away to make the order sought for, but for the points raised by Chief Williams, S.A.N., learned counsel for the respondent. He submitted that since Mr. Awoniyi who was from the same chambers as Mr. Sogbesan was present in Court on the 1st June, 1978 he should rather have asked for an adjournment and not insist that he could not go on. We do not think that the submission is well founded. It would have been a different matter if Mr. Awoniyi were handling the matter and he was not aware it was coming up that day and therefore was not prepared for it. In the present case, since he was not handling the matter, we cannot attach blame to him for not asking for an adjournment.

Chief Williams also submitted that there was no point relisting the application because it is incompetent in the sense that leave to appeal from a decision of the Federal Revenue Court is unnecessary as appeal lies as of right from that Court to this court. He relies on Section 2 of the Constitution (Amendment) (No. 2) Decree 1976 which provides:-

*"The provisions of the Constitution of the Federation and of the other enactments set out in the Schedule to this Decree shall have effect*

*subject to the amendments specified in that Schedule being amendments consequential on the provisions of this Decree."*

He referred to Section 6(b) of the Schedule which states:-

*"6. In the Federal Revenue Court Decree 1973 -*

B *(b) for section 31 there shall be substituted the following section*

*-*  
*31. Subject to the provisions of the Constitution and of any applicable law and rules of court, appeal shall lie from the decisions of the Federal Revenue Court in its original or appellate jurisdictions to the Federal Court of Appeal."*

C He referred to a similar provision in the Registration of Title Act as laid down in the case of Mabinuori v. Ogunloye (1970) 1 ALL N.L.R. 17 (19, 20)

D He also referred to section 121 E (2) (f) and (3) of the same decree and section 15(1) of the Federal Court of Appeal Decree 1976. He submitted that the effect of the amendment to section 31 of the Federal Revenue Court Decree 1973 is to enable a party to appeal as of right  
E and because section 15(1) of the Federal Court of Appeal Decree 1976 says appeal shall be by leave in the cases mentioned therein, there is therefore a conflict that must be resolved. That if this Court were to hold that leave is necessary, it will be destroying the law and the Consti-  
F tution.

In reply to these submission all that Mr. Omagbomi, learned counsel for the applicant said was that Section 121 E (3) of the Constitu-  
tion (Amendment) (No. 2) Decree 1976 allows the applicant to come to  
G this court only by leave. Since leave was refused in the lower court, it was competent to being another application in this court by virtue of Section 25(2) (a) of the Federal Court of Appeal Decree 1976.

We entirely agree with Mr. Omagbomi. With all respect to  
learned counsel for the respondent, the amendment to section 31 of the  
H Federal Revenue Court Decree does not remove, neither is it is conflict with, the provisions that in interlocutory matters, appeal lies from the Federal Revenue Court to this Court only by leave.

We have quoted above section 31 of the Federal Revenue Court Decree

1973 as amended. Section 31 as it stood before the amendment reads:

*"31. subject to the provisions of the Constitution, the Supreme Court Act and the Rules of the Supreme Court, appeals shall lie from the decisions of the Federal Revenue Court in its original or appellate jurisdictions to the Supreme Court."*

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It will be seen that by a comparison of the old and the new, all that the amendment effected is to substitute the Federal Court of Appeal for the Supreme Court and "any applicable law and rules of the Court" for "the Supreme Court Act and the rules of the Supreme Court." Section 31 of the Federal Revenue Court Decree 1973 as it now stands is clearly subject to the provisions of the Constitution. The provisions of the Constitution relevant in this case is section 121 E (3)(d) which states:-

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*"(3) Subject to the provisions of subsection*

*(2) of this Section, an appeal shall lie from decisions of the High Court of a State or the Federal Revenue Court with the leave of the High Court of, as the case may be, the Federal Revenue Court, or with the leave of the Federal Court of Appeal in the following cases -*

D

*(d) any interlocutory decision of the High Court or the Federal Revenue Court."*

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Subsection (2) of the same section provides for appeal that can come to this court "as of right." It does not include an appeal in an interlocutory decision, and paragraph (f) of that subsection which provides for

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*"such other cases as may, from time to time be prescribed by any enactment."*

does not, in our view, cover the specific provision in subsection (3) (d).

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The main difference between the case of Mabinuori v. Ogunloye (above) is that in that case, the appellant had come to the Supreme Court without leave when appeal lies only by leave. That Court held that on a construction of section 98(6) of the Registration of Title Act which reads:-

*"98(6) Every person aggrieved by an order of the court may appeal to the supreme Court within such time and in such manner as may be provided by the law and rules of court for the time being in force relating to appeals to that court in civil cases."*

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appeal lies as of right. In the case in hand, the appellant has come to ask for leave. Even if we agree that no leave is required, we cannot thereby say the application is incompetent.

As we have said above the appellant has satisfied us that we can  
B exercise our discretion in his favour and since we find no merit in the objection raised against the application, we hereby make the order as prayed. The application for leave to appeal is hereby relisted.

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