

IN THE FEDERAL COURT OF APPEAL
BENIN JUDICIAL DIVISION
27TH NOVEMBER, 1978. FCA/B/32/77
CORAM:- J. O. EBOH, A. G. O. AGBAJE, P. NNAEMEKA-AGU,
JJCA

AMOS A. IRUVBE APPELLANT
(For himself and on behalf of the
late JOSEPH ARHATA IRUVBE
AND
GEORGE DEMIDE DEFENDANT

COURTS - Coercive power - May be invoked in a proper case by a court
- To resist any deliberate and unwarranted attempt - To delay its proceedings.

COURTS - Adjournment - Where reasons given by the trial judge for
refusing adjournment - Is not borne out by the records - Adjournment
should not have been refused.

COURTS - Adjournment - Where refusal is based on a wrongful exercise
of discretion - And it also occasioned grave injustice - Appellate court
has a duty to intervene.

PRACTICE AND PROCEDURE - Adjournment - Ought to be granted -
Whenever its effect is to ensure the determination of the issues between
the parties on the merits - And the application is not made for the purpose
of mere delay.

FACTS

In an action before the Sapele High Court, the Appellant claimed
inter alia for a declaration of title to the piece or parcel of land in dispute.
Pleadings were ordered, filed, amended and duly delivered. The case
came up for mention on the 30th of October, 1975 when it was ad-

journed to the 8th and 9th December 1975 for hearing. On the 8th of December, 1975, the case was adjourned for reasons not stated to the 5th of January, 1976. On the 5th of January, 1976, the case was further adjourned for reason not stated to the 10th and 11th of February 1976 for hearing. On that date the appellant applied for an adjournment because his Surveyor who was to be his first witness was sick.

The trial judge refused the adjournment on the grounds that the case has been in the court for three days, that there is no medical certificate from the Surveyor that he is unfit; and that the area in dispute is only a small piece of land not more than ten feet long. Counsel for the appellant refused to proceed and the case was dismissed with costs by the court. Against this order of dismissal of the suit the plaintiff has appealed to the Court of Appeal, Benin Division.

ISSUE FOR DETERMINATION

Whether having regard to the circumstances of this case the learned trial judge was right in refusing the plaintiff's application for an adjournment and proceeding to dismiss the plaintiff's claim.

HELD (Unanimously allowing the appeal per judgment delivered by **NNAEMEKA-AGU JCA**)

Courts - Coercive power

1. In a proper case a court may and ought to invoke its coercive power to resist any deliberate and unwarranted attempt to delay its proceedings without sufficient cause. (p. 811 G)

Adjournment - Ought to be granted

2. A Judge ought to adjourn a case whenever the postponement is likely to have the effect of better ensuring the determination of the issues between the parties on the merits and the application for adjournment is not made for purposes of mere delay. (p. 812 D)

Where reasons for refusing adjournment is not borne out by the records.

3. Also, one of the reasons given by the learned Judge for refusing adjournment to wit: that the case had been in court for three days is neither

borne out by the records nor shown to be as a result of the default of the plaintiff. The other reason, namely "that the area in dispute is only a small piece of land not more than ten feet long" is rather surprising as no evidence had been heard by him in the case. As for the third reason - that there was no note or medical certificate from the Surveyor to show that he was unfit to come to court - we note that that point never arose in the proceedings as such a certificate was never called for. (p. 813 E)

Adjournment - Refusal based on a wrongful exercise of discretion

4. From all these we have come to the conclusion that the learned Judge's refusal of the plaintiff's application for adjournment was clearly a wrongful exercise of his discretion. The refusal and consequent order of dismissal of the case, in our view, were not only arbitrary but also occasioned grave injustice; and, as it is so, this court has a duty to intervene: (p. 813 G)

REPRESENTATION

J.Y. Odebala for the appellant

J. A. Ororho for the Respondent

CASES REFERRED TO

Nwachukwu v. Eze 15 W.A.C.A 36

Maxwell v. Keun (1928) 1 K.B. 645 p. 658

Abeki v. Amboro (1961) 1 ALL N.L.R. 368

Evans v. Bartlam (1937) A.C. 473

Odusote v. Odusote (1971) N.M.L.R. 228 p. 232

JUDGMENT DELIVERED BY P. NNAEMEKA-AGU JCA

This is an appeal against the judgment of Ogbobine J., sitting in Sapele High Court on the 10th day of February, 1976. The claim before the Court was for a declaration of title to a piece or parcel of land known as No. 10 Commercial Avenue Sapele said to have been conveyed to the plaintiff under a registered deed of conveyance dated the 12th day of November, 1968, N600 damages for trespass, and injunction. Pleadings

were ordered, filed amended and duly delivered. The case came up for mention on the 30th of October, 1975 when it was adjourned to the 8th and 9th December, 1975 for hearing.

On the 8th of December, 1975, the case was adjourned for reasons not stated to the 5th of January, 1976. On the 5th of January, 1976, the case was further adjourned for reasons not stated to the 10th and 11th of February, 1976, for hearing.

On the 10th of February, 1976, the following notes appeared on the records:

ODEBALA: *We are not in a position to go on with the case today. The Surveyor is sick. He said he was not in a position to travel. We cannot go on with the case today, although it is a definite fixture for hearing."*

ORORHO: *This is an old matter and the area in dispute in this case is only about five feet.*

COURT: *This application for an adjournment is hereby refused. There is no note on medical certificate from the surveyor that he is unfit to come to court. Secondly, this case has been in the court for three days and realising that the area in dispute is only a small piece of land not more than ten feet long as disclosed in the survey plan filed in the case, I consider an adjournment a waste of time. The application is therefore refused and the plaintiff is hereby called upon to commence evidence in his case.*

ODEBALA: *We cannot go on without the Surveyor.*

ORORHO: *We are applying that the case be struck out or dismissed.*

COURT: *On the 5th of January 1976, when this case was mentioned it was made clear to the parties that hearing of the case would proceed today. The plaintiff has now come to Court for an adjournment and when it was refused, his counsel stated that he could not proceed with it.*

I am clearly of the opinion that this is not a case which should remain any longer on the list. It was a definite fixture and plaintiff not being ready to go on, it will be and is hereby dismissed with costs."

Against this order of dismissal of the suit the plaintiff has appealed to this court and filed the following grounds of appeal which were argued together thus:

"(i) *The learned Judge of the Sapele High Court erred in law in dismissing the plaintiff's claim when the plaintiff's application for an adjournment was the first ever made by the plaintiff.*" B

(ii) *The learned Judge of the Sapele High Court erred in law in not granting the plaintiff's application for an adjournment.*

(iii) *The learned Judge of the Sapele High Court erred in law in dismissing the plaintiff's claim in the circumstances in which he did so."* C

The learned counsel for the appellant drew our attention to the fact that the reason for the application was that the Surveyor who had been duly subpoenaed by the plaintiff to give evidence was sick. The plaintiff saw the need to call the Surveyor as his first witness, that although the case D was fixed for hearing for two days the application for adjournment was for only the first day; that the Judge did not call for medical certificate to satisfy himself as to whether or not the surveyor was infact sick and that the learned Judge was wrong to hold that the case had been in court for E three days.

Finally the learned counsel submitted that the reasons given by the learned Judge for refusing adjournment were not only wrong on the facts but were also not sufficient in view of the provisions of Order 26 F rule 5 of the High Court rules to sustain his decision in refusing adjournment. The learned counsel for the respondent on the other hand contended that adjournment of a case is always at the discretion of the court and that under Order 26 R. 5 it was open to the learned trial Judge to G refuse or to grant it.

We will begin our consideration of this appeal by stating that **in a proper case a court may and ought to invoke its coercive power to resist any deliberate and unwarranted attempt to delay its proceedings without sufficient cause.** In Nwobu Nwachukwu and others v. H David Eze and others 15 W.A.C.A 36 where the High Court refused leave for the plaintiffs to discontinue their action after it has been fixed for hearing and called upon them to call evidence but plaintiff's counsel re-

fused to do so, the learned trial Judge dismissed plaintiff's action. The West African Court of Appeal held that the Judge was right to have dismissed the action in the circumstances of the case.

But in the circumstances of this case we do not think that the learned trial Judge was justified in refusing adjournment and proceeding to dismiss the plaintiff's case. Order 26 Rule 5, (1) and (2) of the High Court rules provide as follows:

"5. (1) The Court may postpone the hearing of any case on being satisfied that the postponement is likely to have the effect of better ensuring the hearing and determination of the question between the parties on the merits, and is not made for the purpose of mere delay. The postponement may be made on such terms as to the court seem just.

(2) Where such application is made on the ground of the absence of a witness, the court shall require to be satisfied that his evidence is material, and that he is likely to be present and give evidence within a reasonable time."

It is clear from these that **a Judge ought to adjourn a case whenever the postponement is likely to have the effect of better ensuring the determination of the issues between the parties on the merits and the application for adjournment is not made for purposes of mere delay.** As the application for adjournment before the court was being made in order to enable the plaintiff call the Surveyor who had been duly subpoenaed to give evidence, the learned trial Judge ought to have adverted his mind to the provisions of Order 26 Rule 5 (2) set out above. There can be no gain-saying the fact that having regard to the claim and issues before the court a licensed Surveyor who prepared the plaintiff's plan which was duly pleaded was a most material witness: and the plaintiffs had a right to decide on the order in which he would call his witnesses.

We entirely agree with the learned counsel for the respondent that the question whether or not to grant an adjournment is a matter within the discretion of the trial Judge. This point has been made abundantly clear in a number of decided cases. It is also settled law that a Court of Appeal will not interfere with an exercise of discretion by a

court of trial unless it is satisfied that it was not exercised judicially: for this see Maxwell v. Keun (1928) 1 K.B. 645, p. 658; Abeki v. Amboro (1961) 1 ALL N.L.R. 368; Evans v. Bartlam (1937) A.C. 473. This court will always interfere with an exercise of discretion by the court below if it is satisfied that the result of such an exercise was to occasion injustice. B

But the question that has arisen in this case is whether the learned Judge was right in exercising his discretion against the appellants and refusing their application for adjournment. We note that the learned Judge did not find that the application was made for purposes of mere delay: in fact it appears to us from the fact that the application was just on the first day when the case had been fixed for two days that the Judge could have insisted on continuing the next day: it could not be the case that the application was made for purposes of mere delay. Moreover, the witness in question, the licensed surveyor, who was, no doubt, a most material witness had been subpoenaed by the plaintiff. We are satisfied that if the learned Judge had adverted his mind to the provisions of Order 26 R. 5 (1) and (2) set out above and applied them to the facts of this case he could not have refused the appellant's application to adjourn the case, much more dismiss the case. **Also, one of the reasons given by the learned Judge for refusing adjournment to wit: that the case had been in court for three days is neither borne out by the records nor shown to be as a result of the default of the plaintiff. The other reason, namely "that the area in dispute is only a small piece of land not more than ten feet long" is rather surprising as no evidence had been heard by him in the case. As for the third reason - that there was no note or medical certificate from the Surveyor to show that he was unfit to come to court - we note that that point never arose in the proceedings as such a certificate was never called for. From all these we have come to the conclusion that the learned Judge's refusal of the plaintiff's application for adjournment was clearly a wrongful exercise of his discretion. The refusal and consequent order of dismissal of the case, in our view, were not only arbitrary but also occasioned grave injustice; and, as it is so, this court has a duty to intervene: See Abiodun Odusote v. Olaitan** C D E F G H

814 Iruvbe v. Demide (1998) 4 KLR Nnaemeka-Agu JCA
Oduote (1971) N.M.L.R. 228, p. 232 where the Supreme Court, per
Udoma, J.S.C., said:

*"With respect, we are satisfied that in the circumstances of the
present case the Court of Appeal was in error in refusing the application
B for adjournment and dismissing the appeal, especially as the appellant
was herself not present in court and there was no evidence that she knew
the appeal was fixed for hearing that day. It cannot be denied that the
dismissal of the appeal in the circumstances has occasioned a miscar-
riage of justice; and it will be wrong for us to hold that the court was
C justified in dismissing the appeal or that it was exercising its discretion
properly and judicially in so acting."*

See also the judgment of Kaduna Division of this Court in FCA/15/17/77:
Fanz Holdings Ltd. v. Mrs. Patricia Lamotte (unreported) of the 24th of
D June, 1977.

For all we have said this appeal succeeds and is allowed. The
order of the learned Judge of dismissal with costs made in Sapele High
Court on the 10th day of February, 1976, in suit No. S/16/73 is hereby
E set aside and the case is hereby remitted to the High Court for retrial by
another Judge.

The appellants shall have the costs of this appeal which we as-
sess at N182.10.

F

G

H