

SUPREME COURT OF NIGERIA

17TH JULY, 1998. SC. 244/1990.

**CORAM : M. L. UWAIS CJN, S. M. A. BELGORE, A. B. WALI,
M. E. OGUNDARE, E. O. OGWUEGBU JJSC.**

U.A.C. OF NIGERIA LIMITED PLAINTIFF/APPELLANT
AND

1. M. O. FASHEYITAN

2. M. O. FASHEYITAN NIGERIA LTD. RESPONDENTS

***APPEALS** - Issues for determination - Must be related to the grounds of appeal - Issues are to be argued in the brief and not the grounds of appeal.*

***APPEALS** - Concurrent findings of fact - Based on admissible evidence - And that were not perverse - The Supreme Court will not interfere.*

***WORDS & PHRASES** - "Brief" - What it connotes.*

FACTS

The plaintiff/appellant sued the defendants/respondents claiming the sum of N42,250.00 being the value of goods entrusted by the appellant company to the respondents to be transported by them from Lagos to Kaduna. The goods were not delivered at Kaduna or anywhere and they were not returned to the appellant either. The appellant claimed he had difficulty in serving the writ on the respondents and applied ex parte for substituted service of the writ of summons and the Statement of Claim. The application was granted and a bailiff swore to an affidavit of service on the respondents. Then the appellant moved for judgment in default of appearance by the respondents. The respondents applied to the learned trial judge to have the purported substituted service set aside on the ground that they were never served with the processes. The appellant filed a counter-affidavit contradicting the facts deposed to in the affidavit in support of the respondents' application. The learned trial judge decided

to take oral evidence in order to resolve the conflict in the facts deposed to in the said affidavit and counter-affidavit. Both sides called witnesses.

The learned judge on hearing the oral evidence believed the service was not affected as ordered and set aside the purported service of writ of summons and statement of claim. Consequently he dismissed the motion for judgment in default of appearance. The appellant appealed to the Court of Appeal, which dismissed the appeal. Dissatisfied, the appellant has further appealed to the Supreme Court raising three issues but which hover around one major issue.

ISSUE FOR DETERMINATION

Whether or not on the totality of the evidence before the trial High Court the Court of Appeal was right in affirming the former Court's decision setting aside the service of the Appellant's writ of summons and statement of claim.

HELD (Unanimously dismissing the appeal per lead judgment of **BELGORE JSC**)

Issues for determination

1. It is clear that the brief is the argument for the appeal on the issues contained therein. The issues, set out for determination in the brief, must be related to the grounds of appeal, that is to say, must be relevant to the grounds of appeal. It therefore follows that once an appellant gain access to the Court of Appeal and the Supreme Court by virtue of Notice of Appeal containing the grounds of appeal, it is the issues formulated in the brief of argument based on the grounds of appeal that are argued, and no longer grounds of appeal. Any brief of argument that does not address the issues formulated therein but reverts to the grounds of appeal is not arguing the issues and will appear to abandon the issues. (Elf (Nigeria) Ltd. vs Sillo (1994) 6 NWLR (pt.350) 258; Carlen (Nigeria) Ltd. vs Unijos (1994) 1 NWLR (pt. 323) SC. (p. 1893 H)

Brief - What it connotes

2. In essence the brief is the concise but condensed argument on the grounds of appeal built round the issues formulated therein and it is far

beyond the grounds. Brief writing has been with us for sometime now and its structure and form ought to have been firmly ingrained in our appellate advocacy. It must therefore be re-emphasized that argument in the brief must be based on the issues formulated for determination and not on grounds of appeal. (p. 1894 D)

Concurrent findings of fact

3. As I earlier said, this appeal is based not on law but on concurrent findings of fact. The findings were based on admissible evidence and they were not perverse to cause this Court to interfere. (p. 1894 H)

NOTABLE POINT OF INTEREST

BELGORE JSC

1. Attitude of the Supreme Court to an inelegant brief

What has happened in the appellant's brief is that it addressed the grounds of appeal substantially but never departed from the points raised in the issues. It is more of an inelegant brief than an incurably defective brief I believe the brief could be better. The attitude to such briefs is to take them for what they are - inelegant - and nothing more to militate against hearing the appeal. (p. 1894 F)

REPRESENTATION

Appellant absent, counsel also absent.

Chief (Mrs.) C. J. Aremu, for the Respondent

CASES REFERRED TO

Elf (Nigeria) Ltd. vs Sillo (1994) 6 NWLR (pt. 350) 258

Carlen (Nigeria) Ltd. vs Unijos (1994) 1 NWLR (pt. 323) SC

Ayanboye vs Balogun 1990) 5 NWLR (pt. 137) 392

Onifade vs Olayiwola (1990) 7 NWLR (pt. 161) 130

Macaulay vs NAL Merchant Bank Ltd. (1990) 4 NWLR (pt. 144) 283

Egbunike vs A.C.B. Ltd. (1995) 2 NWLR (pt. 375) 34

A.C.B. Ltd. vs Losada (Nigeria) Ltd. (1995) 7 NWLR (pt. 405) 261

Abinabina v. Enyimadu. 12 WACA 171 at p. 173

Mogaji v Cadbury Ltd., (1995) 2 N.W.L.R. (pt. 4) 692

Chinwendu v. Mbamali (1980)3-4 S.C. 31 at 75

Woluchem v. Gudi (1981)5 S.C. 319 at 326-330

Kale v. Coker (1982)12 S.C. 252 at 271

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RULES REFERRED TO

Supreme Court Rules, Order 6 Rule 5(1) (a) (b)

C

LEAD JUDGMENT BY BELGORE JSC

The appellant Company entrusted goods to the defendants/respondents to be transported by them from Lagos to Kaduna where the appellant had a branch. The goods were not delivered at Kaduna or anywhere and they were not returned to the plaintiff/appellant either. Upon this the plaintiff claimed against the defendants the sum of N42,250.00 being value of the goods and interest at the rate of 5% from the date the writ was taken out until the final judgment. The plaintiff claimed he had difficulty in serving the writ on the defendants/respondents and prayed and got order substituted service on them whereby service would be effected on the respondents' premises.

On the bailiff making a return that the substituted service had been effected, the plaintiff then moved for judgment in default of appearance by the respondents. However, upon receipt of Motion papers for judgment in default, the respondents brought a motion to set aside the substituted service "on the ground that the defendants have not been served with any writ of summons." There was an affidavit as usual in support of this application to which the plaintiff filed a counter-affidavit. The learned trial judge then decided to have oral evidence to resolve the conflict in the affidavits. It must be pointed out that the first defendant who is the alter ego of the second defendant admitted his address was No. 93 Cemetery Street, Ebute Metta, on which the plaintiff claimed the bailiff served the defendants by substitution, the learned judge on hearing the evidence believed the service was not effected as ordered and set aside the purported service of writ of summons and statement of claim. Consequently he dismissed the motion for judgment in default of appear-

ance. It is upon this ruling that the appellant (plaintiff) appealed to the Court of Appeal which dismissed the appeal by upholding the decision of the trial Court. Thus this appeal before the Supreme Court.

The appellant set out the following issues for determination, which the respondents adopt regard as all hovering around one and only aspect, B that is to say the lower Court was right when it held that upon all facts before it the service of process was not effected on the defendants:

"01. Whether or not the lower court erred in law in declining to reverse the decision of the High Court when the findings of the learned C Judge cannot be supported by the evidence placed before him at the trial and therefore failed to draw the proper inference from the facts proved.

02. Was the Court of Appeal in error in refusing to reverse the decision of the learned Judge or interfere with his findings of fact when such findings are perverse and the learned Judge did not appear to have D taken proper advantage of his having seen and heard the witnesses.

03. On the totality of the evidence before the High Court, whether or not the Court of Appeal ought to have intervened to reverse the decision of the learned Judge especially as the evidence of the defence witnesses was full of contradictions on material points in issue which were E not resolved by the learned Judge."

It must be clearly explained in this judgment that the only means to gaining to this Court from the lower Court of Appeal. Thus it is the Notice and Grounds of appeal endorsed on the Notice that make the F entering of the appeal possible. However, once the appeal is entered, the procedure for the hearing of the appeal is another matter.

By Order 6 rule 5(1) (a) of the Supreme Court Rules, the appellant shall within ten of the receipt of Record of Appeal file and serve the G respondent a written brief, being a succinct statement of his argument in the appeal. Such brief shall contain what are, in the appellant's view, the issues arising in the appeal (Order 6 rule 5 (1) (b) of the Supreme Court Rules. The respondent may also file a brief in answer to the appellant's H brief within eight weeks of his receiving the latter's brief, such a brief will contain the issues relied upon by the respondent for opposing the appeal. **It is clear that the brief is the argument for the appeal on**

the issues contained therein. The issues, set out for determination in the brief, must be related to the grounds of appeal, that is to say, must be relevant to the grounds of appeal. It therefore follows that once an appellant gains access to the Court of Appeal and the Supreme Court by virtue of Notice of Appeal containing the grounds of appeal, it is the issues formulated in the brief of argument based on the grounds of appeal that are argued, and no longer grounds of appeal. Any brief of argument that does not address the issues formulated therein but reverts to the grounds of appeal is not arguing the issues and will appear to abandon the issues. (Elf (Nigeria) Ltd. vs Sillo (1994)6 NWLR (pt.350) 258; Carlen (Nigeria) Ltd., vs Unijos (1994) 1 NWLR (pt. 323) SC.) A party must advance his argument in brief on the issues formulated therein and not on the grounds of appeal. In essence the brief is the concise but condensed argument on the grounds of appeal built round the issues formulated therein and it is far beyond the grounds. Brief writing has been with us for sometime now and its structure and form ought to have been firmly ingrained in our appellate advocacy. It must therefore be re-emphasized that argument in the brief must be based on the issues formulated for determination and not on grounds of appeal. (Ayanboye vs Balogun 1990) 5 NWLR (pt. 137) 392; Onifade vs Olayiwola (1990) 7 NWLR (pt.161) 130; Macaulay vs NAL Merchant Bank Ltd. (1990) 4 NWLR (pt.144) 283; Egbunike vs A.C.B. Ltd. . (1995) 2 NWLR (pt. 375) 34; A.C.B. Ltd. vs Losada (Nigeria) Ltd. (1995) 7 NWLR (pt.405) 261.

What has happened in the appellant's brief is that it addressed the grounds of appeal substantially but never departed from the points raised in the issues. It is more of an inelegant brief than an incurably defective brief. I believe the brief could be better. The attitude to such briefs is to take them for what they are - inelegant - and nothing more to militate against hearing the appeal.

As I earlier said, this appeal is based not on law but on concurrent findings of fact. The findings were based on admissible evidence and they were not perverse to cause this Court to inter-

fere. I therefore find no merit in this appeal and I dismiss it with N10,000.00 costs to respondents.

UWAIS CJN

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I have had the opportunity of reading in draft the judgment read by my learned brother Belgore, JSC. I agree that this appeal is devoid of merit.

At the trial court, the Appellant, as plaintiff, applied ex parte for substituted service of the writ of summons and the Statement of Claim. The application was granted and a bailiff swore to an affidavit of service on the Respondents, defendants. The Appellant next applied for default judgment against the Respondents. The latter then applied to the learned trial judge to have the purported substituted service set-aside on the ground that they were never served with the processes. The Appellant filed a counter-affidavit contradicting the facts deposed to in the affidavit in support of the Respondent's application.

The learned trial judge rightly decided to take oral evidence in order to resolve the conflict in the facts deposed to in the said affidavit and counter-affidavit. Both sides called witnesses, At the end of hearing their testimonies he made the following observations and findings:-

"Having considered the evidence before me I feel very much inclined to accept the evidence of the witnesses for the defendants that the writ of summons, Statement of Claim as well as the court's order were never at any time posted as alleged by the plaintiff's only witness, the bailiff of the court I find all these allegations to be false. In the result, therefore, I hold that the writ of summons, Statement of claim and other processes were never served personally on the defendants nor were they posted on the premises as alleged by the plaintiff. The plaintiffs application for judgment in default is hereby dismissed and the alleged service by substitution as evidenced by the two affidavits sworn to by the bailiff are accordingly set aside."

The appeal to the lower court by the plaintiff, against this decision was unsuccessful because the lower court held that the findings

made by the learned trial judge were correct and that it could not interfere with the findings. In effect this amounts to concurrent findings of fact by the two courts.

B The plaintiff then appealed to this court on the same grounds as it appealed to the lower court. It has since been trite that this Court will not interfere with the concurrent findings of fact made by the courts below- Abinabina v. Enyimadu. 12 WACA 171 at p. 173; Mogaji v Cadbury Ltd. (1995) 2 N.W.L.R. (pt. 4) 692. There is, therefore, no merit in this appeal. It is for this and the reasons contained in the lead judgment of my learned brother Belgore, J.S.C. that I too hereby dismiss the appeal with C N10,000.00 costs to the Respondents jointly.

D **WALI JSC**

I have read before now the lead judgment of my learned brother Belgore, JSC and I agree with his reasoning and conclusion that the appeal has no merit.

E For the same reasons given in the lead judgment I also dismiss the appeal and adopt the consequential orders made therein.

F **OGUNDARE JSC**

I have had advantage of a preview of the judgment of my learned brother Belgore JSC. I agree with him that the appeal is lacking in merit and should be dismissed.

G The main issue arising in this appeal is as rightly put by the Respondents in their, and that is whether or not on the totality of the evidence before the trial High Court the Court of Appeal was right in affirming the former Court's decision setting aside the service of the Appellant's writ of summons and statement of claim.

H My learned brother has set out the facts leading to this appeal. The defendants had moved the High Court to set aside the purported service on them of the writ of summons and statement of claim. Their motion before the High Court was supported by an affidavit to which the

plaintiff replied by way of counter-affidavit. In resolving the conflict in the two affidavits, the learned trial Judge, and quite rightly, called for evidence. At the conclusion of evidence led by both sides the learned trial Judge in his ruling observed:

"Having considered the evidence before me I feel very much B inclined to accept the evidence of the witnesses for the defendants that the writ of summons, statement of claim, as well as the court's order were never at any time posted on the premises as alleged by the plaintiff's only witness, the bailiff of this court. I am satisfied that the defendants are C still on the premises in question where the plaintiff's motion for judgment was served on them.

In my view, I do not think that the bailiff made any effort whatsoever to serve the defendants personally with the processes or to post D them pursuant to the order obtained. However, I should observe that in an affidavit sworn to by the said bailiff on the 8th February, 1983 in support the plaintiff's application for an order for substituted service, the bailiff alleged, among other things, that he was informed that the E defendants no longer carried on business in the premises and that they left no forwarding address. He further alleged that he was informed that the premises were being used as the defendants' family house. In the light of the evidence adduced, I find all these allegations to be false. In the result therefore, I hold that the writ of summons, statement of claim and F other processes were never served personally on the defendants nor were they posted on the premises as alleged by the plaintiff. That being the case I find as a fact that the said writ of summons, statement of claim etc. Have not been served on the defendants in accordance with the rules G of this court. The plaintiff's application for judgment in default is hereby dismissed and the alleged service by substitution as evidenced by the two affidavits sworn to by the bailiff are accordingly set aside."

He made findings that were based on the evidence accepted by him.

On Plaintiff's appeal to the Court of Appeal, that Court, per H Awogu JCA, after consideration of arguments raised before it by the Appellant observed:

"A Court of Appeal can only intervene in a situation such as the

above where the findings of the learned Judge cannot be supported from the evidence placed before him at the trial. True, there may well have been contradictions, but the totality of the evidence is what the learned Judge weighed against that of the bailiff- and only witness for the plaintiffs - who claimed to have done the pasting personally. On such contradiction, Kayode Eso, JSC, has observed that it is not every contradiction that mattered and,

"a contradiction that would make a court disbelieve a witness has to be on a material, point in the case. And what is materials, however, depends on the facts of each case. It must be such a contradiction that one of the witnesses contradicting the other on a material point is discredited and could as result not be believed as a witness of truth either generally or on the material point in issue."

Indeed, there was nothing more to support the evidence of the bailiff save his own ipse dixit. Also the learned Judge was faced with the credibility of witnesses and, quite rightly, made a choice, with his better advantage over a court of appeal."

The Court of Appeal dismissed the appeal.

The same arguments advanced in the court below are being canvassed in this Court. I have considered all the arguments advanced in the briefs of the parties. I am not persuaded that the findings made by the trial High Court are in any way perverse or not supported by the evidence. That court took proper advantage of having seen and heard the witnesses and correctly reviewed the evidence before it. I think the Court of Appeal was right in affirming the findings of the trial court, Being concurrent findings of facts of the two courts below and not having been shown to be perverse, I have no reason whatsoever to disturb those findings and as the findings support the conclusions reached by the two courts below I have no hesitation whatsoever in affirming those conclusions too. Consequently I too dismiss this appeal and award N10,000.00 costs to the Respondents.

OGWUEGBU JSC

I have had the privilege of reading the judgment of my learned brother Belgore, JSC. in this appeal and I entirely agree with him that the appeal should be dismissed.

This appeal is against the concurrent findings of fact by two lower courts. The appellant who requires this court to reverse the decisions of the two lower courts based on such findings undertakes a task of great difficulty. The learned trial judge found as follows:

"Having considered the evidence before me, I feel very much inclined to accept the evidence of the witnesses for the Defendants that the writ of summons, the Statement of Claim, as well the court's order were never at any time pasted on the premises as alleged by the plaintiff's only witness, the Bailiff of this court. I find as a fact that the said writ of summons, Statement of Claim etc. have not been served on the Defendants in accordance with the rules of this court."

In affirming the findings of the trial judge, the Court of Appeal stated:

"True, there may well have been contradictions, but the totality of the evidence is what the learned Judge weighed against that of the Bailiff and only witness for the plaintiffs. Indeed, there was nothing more to support the evidence of the Bailiff save his own ipse dixit. Also the learned Judge was faced with the credibility of witnesses and, quite rightly, made a choice, with his better advantage over a court of appeal."

This court will not depart from the rule it has laid down that it will not overrule the decisions of the court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression. See Chinwendu v. Mbamali & Ors. (1980)3-4 S.C 31 at 75, Woluchem & Ors. v. Gudi & Ors (1981)5 S.C. 319 at 326-330, Kale v. Coker & Ors (1982)12 S.C. H 252 at 271 and Powell & Wife v. Streatham Manor Nursery Home (1935) A.C.243 at 255.

I find no merit in this appeal which I too dismiss with N10,000.00 costs to the respondents.

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