

SUPREME COURT OF NIGERIA
17TH DECEMBER, 1999. SC. 225/1993
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
A. I. KATSINA-ALU, O. ACHIKE, U. A. KALGO, JJSC.

ALHAJI AWESU ATANDA ADEYEMI & ANOR. PLAINTIFFS/
(Executors of the Estate of Alhaji Fasasi Adisa APPELLANTS
Adeshina)

AND

CHIEF SIMON MORONFOLU DEFENDANTS/
OLAKUNRI & 10 ORS. RESPONDENTS

***ACTIONS** - Appeals - Striking out - Where the trial court struck out the application for interlocutory injunction - And not the main suit - As there were no appeal against refusing to strike out the main suit - Court of Appeal has no power to delve into that issue.*

***ACTIONS** - Striking out - Of the application for interlocutory injunction - And the main action - Trial court was right in treating each application - According to available evidence.*

***LOCUS STANDI** - Appeals - Issue of locus in respect of the main action - Was wrongly decided - As it never arose before the Court of Appeal.*

FACTS

Before the trial High Court, plaintiffs/appellants filed an action against the defendants/respondents seeking to establish that as executors of the estate in issue they are entitled to a statutory certificate of occupancy. They claimed N10,000.00 as damages for trespass and perpetual injunction. The plaintiffs secured an interim injunction against the defendants pending the determination of the motion on notice for interlocutory injunction. The defendants filed counter affidavits and what they called "Notice of objection in law." The application and the objection were heard together.

In its ruling, the trial court found that the plaintiffs have not established that they have capacity to bring the application. The application was struck out without striking out the action. The plaintiffs appealed to the Court of Appeal which upheld the striking out order but extended it to the action itself. Being dissatisfied, plaintiffs have further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal can competently exercise power to set aside a writ of summons and strike out a suit in the absence of an appeal against the High Court's refusal to do so".

HELD (Unanimously allowing the appeal per lead judgment of **KALGO JSC**)

Actions - Appeals - Striking out

1. With due respect to the learned justice of the Court of Appeal, while the first paragraph of this quotation was correct, the second paragraph could not at all be correct. From the ruling of the learned trial judge from which I quoted extensively earlier in this judgment, it is abundantly clear that only the application for interlocutory injunction was struck out and not the main suit. The main suit was not held to be incompetent as the learned trial judge said that since the defendants/appellants have not filed pleadings, and joined issues with the plaintiffs/respondents, it was premature to strike out the suit at that stage. There was no appeal against this finding by either party to the action in the Court of Appeal. The Court Appeal would therefore have no power to delve into that issue. (p. 2915 F)

Striking out - Of the application for interlocutory injunction

2. I however do not agree with the Court of Appeal when it said that the finding made by the learned trial judge that the application to strike out the action was premature, was in any way contradictory to his conclusion to strike out the application for interlocutory injunction. My reason was that he was treating each application according to the evidence produced before him and I am satisfied that he acted properly on the evi-

dence disclosed in the affidavits before him as far as the application for interlocutory injunction was concerned. (p. 2916 B)

Issue of locus in respect of the main action

3. But on going through the whole judgment of the Court of Appeal one would find that the concept of the locus standi in respect of the main action permeated the whole judgment, whereas, that issue was never appealed against even though it rose at the trial court. Therefore the Court of Appeal was wrong in striking out the action filed by the appellants at the trial court as being incompetent. It is abundantly clear in this appeal that while the trial court and the appellants were dealing with the issue of locus standi in respect of filing an application for interlocutory injunction, the Court of Appeal was dealing with the issue of locus standi in respect of the main action or suit without any appeal to it on that issue. The Court of Appeal was obviously and glaringly wrong in that respect and for this reason I do not think that it is necessary to examine issues (i) and (ii) raised by the appellants in this appeal, as it would serve no useful purpose. See SANUSI V AMEYEGUN (1992) 4 NWLR (PT.237) 527 (p. 2917 A)

REPRESENTATION

Tani Molajo Esq. for the Appellants

Segun Onakoya Esq. for the 1st Respondent

2nd - 11th Respondents were not represented

CASES REFERRED TO

Sanusi v. Ameyegun (1992) 4 NWLR (PT.237) 527

Okonji v. Njokanna (1991) 7 NWLR (pt. 202) 131

Anyaduba v. N.R.T.C. Ltd. (1992) 5 NWLR (PT. 243) 535

Lawrence Akinbi v. Mil. Governor of Ondo State (1990) 3 NWLR (Pt.140) 525

LEAD JUDGMENT BY KALGO JSC

In the trial court, the appellants who were the plaintiffs took out a writ of summons against the defendants now respondents seeking the following reliefs:-

- B (i) *A declaration that as executors of the estate of late Alhaji Fasasi Adisa Adeshina (the plaintiffs) are the persons entitled to a statutory certificate of occupancy on the piece or parcel of land conveyed by virtue of a deed of conveyance dated 12th day of September, 1972 and registered as No. 41 at page 41 Volume 1406 of the Lagos Lands Registry.*
- C (ii) *N10,000.00 damages for trespass against the defendants jointly and severally.*
- D (iii) *A perpetual injunction restraining the defendants their servants or agents from committing further trespass to the land. (Underlining mine)*

The writ was filed on the 19th of February 1991 and on the same day, the plaintiffs/appellants filed an ex parte motion for interim E injunction restraining the defendants/respondents their servants or agents from felling trees, demolishing structures, erecting new ones or selling or in any way alienating the land the subject matter of the suit pending the hearing and determination of the motion on notice for interlocutory in-

F junction of the same prayers. On the 20th of February 1991, the interim injunction was granted and defendants/respondents were served with the writ of summons, interim injunction and the motion on notice for interlocutory injunction. Thereafter the 1st respondent filed a counter-affidavit. The 2nd - 11th respondent also filed their joint counter-affidavit;

G they had earlier on filed what they called "NOTICE OF OBJECTION IN LAW" on the 5th of March 1991. The learned trial judge, with the consent of all the parties in the case, ordered that both the motion on notice for interlocutory injunction and the said notice of objection be heard together. The application and the objection were then heard together and in

H a considered ruling delivered on 20th June, 1991, the learned trial judge, Obadina J. ruled:-

"On the totality of the evidence, it is my view that the plaintiffs

have not established that they have capacity to bring the application. The application is therefore incompetent and is accordingly struck out."

Dissatisfied with this order, the appellants appealed to the Court of Appeal which dismissed the appeal and found that:-

"The striking out order made by the learned trial judge is accordingly upheld." B

In their appeal to this Court, the appellants filed 5 grounds of appeal against the decision of the Court of Appeal, but formulated only three issues for determination thus:-

"(i) Whether the court below was correct to insist upon strict proof of the appellant's capacity, standing and proprietary interest in the consideration of an application for interlocutory injunction." C

(ii) Whether the 2nd to 11th Respondents' 'challenge to the Appellants' locus standi was competent in the absence of a Statement of Defence raising the point for trial in limine as required by Order 22 rule 2 High Court of Lagos (Civil Procedure) Rules, 1972." D

(iii) Whether the Court of Appeal can competently exercise power to set aside a writ of summons and strike out a suit in the absence of an appeal against the High Court's refusal to do so". E

The 1st respondent in his brief raised 2 issues only which read:-

"1. Whether the issue of "capacity to sue" is still an issue before the Court of Appeal in the Appeal against the refusal of Learned Trial Judge Obadina J. to grant Interlocutory Injunction." F

2. Whether the Court of Appeal can exercise power to set aside a Writ of Summons as being incompetent when there is no appeal in respect of same before the Learned Justices."

In their joint brief filed by the 2nd - 11th respondents, they adopted the 3 issues formulated by the appellant for determination in the appeal. G

At the hearing the learned counsel for the appellants adopted and relied upon his brief of argument. In oral argument learned counsel drew the attention of the court to pages 105-113 of the record and submitted that since the trial court did not, in its ruling appealed against strike out the action, (it only struck out the application) the Court of Appeal was in H

error when it purported to affirm the order to strike out the action, which was non-existent.

Mr. Onakaya, learned counsel for the 1st respondent after adopting his brief for the 1st respondent conceded that the appeal is meritorious and should be allowed.

The 2nd - 11th respondents were not in court and no counsel represented them. Their brief of argument was therefore deemed argued in accordance with the rules of this court.

I shall take the appellants' issues (iii) first. The complaint under this issues was whether the Court of Appeal has the power to set aside a writ of summons and strike out a suit in the absence of an appeal against a refusal to do so.

Under this issue, the learned counsel for the appellants submitted that the Court of Appeal was under the mistaken impression that the appeal before it was in respect of the locus standi of the appellants to file the action. He pointed out that the appeal was only against the striking out of the appellants' application for interlocutory injunction by the trial court. It was therefore wrong, learned counsel submitted, for the Court of Appeal to proceed to strike out the whole action on the grounds that the appellants lacked the locus standi to sue. On that alone, he further submitted, this appeal must succeed.

It is common ground that the learned trial judge heard the appellants' motion for interlocutory injunction together with the 2nd - 11th respondents' "notice of objection in law" and delivered one considered ruling in respect of both on the 20th of June 1991. In that ruling on pages 49-50 of the record he made the following findings:-

"In this application, there is no evidence of a will or probate in respect of the Estate of the late Fasasi Adisa Adeshina. Therefore there is no evidence that the plaintiffs are in fact Executors of the late Fasasi Adisa Adeshina. In that regard, it is my view that the plaintiffs have no capacity or locus standi to bring the application. The application is therefore incompetent." (Underlining mine).

In the final analysis, the learned trial judge, ended his ruling by saying:-

"On the totality of the affidavit evidence it is my view that the plaintiffs have not established that they have capacity to bring the application. The application is therefore incompetent and is accordingly struck out." (Underlining mine)

There is no doubt that from the above extracts of the ruling, the learned B trial judge was dealing only with the application for interlocutory injunction and not the suit itself. In effect on page 50 of the record, he examined the position of the main action itself and said:-

"Since the defendants have not filed their Statement of defence C and joined issue with the plaintiffs, I think it will be premature at this stage of the proceedings to either dismiss or strike out the entire suit".

The Court of Appeal on the other hand started off with a misconception of the issues involved in the case before the trial court. In the review of what happened in the trial court, Sulu-Gambari JCA in his leading D judgment said on page 105 of the record that:-

"The learned trial judge, with the consent of the parties, heard the application for interlocutory injunction with the preliminary objection on notice asking the writ of summons to be set aside on the basis of E lack of plaintiffs' capacity to sue.

The learned trial judge upheld that the plaintiffs' have not established that they have capacity to bring the action, and declaring the action incompetent, he struck it out." (Underlining mine)

With due respect to the learned justice of the Court of Appeal, while the first paragraph of this quotation was correct, the second paragraph could not at all be correct. From the ruling of the learned trial judge from which I quoted extensively earlier in this judgment, it is abundantly clear that only the application for interlocutory injunction was struck out and not the main suit. The main suit was not held to be incompetent as the learned trial judge said that since the defendants/appellants have not filed pleadings, and joined issues with the plaintiffs/respondents, it was premature to strike out the suit at that stage. There was no appeal against this finding by either party to the action in the Court of Appeal. The Court Appeal would therefore have no power to delve into that is-

sue.

I agree with the Court of Appeal when it stated in its judgment that whenever a question of jurisdiction of any court is raised, that question must be dealt with immediately by the court concerned since it touches on the competence of the court to entertain the matter before it. See LAWRENCE AKINBI V MIL. GOVERNOR OF ONDO STATE & 1 or (1990) 3 NWLR (Pt.140) 525. **I however do not agree with the Court of Appeal when it said that the finding made by the learned trial judge that the application to strike out the action was premature, was in any way contradictory to his conclusion to strike out the application for interlocutory injunction. My reason was that he was treating each application according to the evidence produced before him and I am satisfied that he acted properly on the evidence disclosed in the affidavits before him as far as the application for interlocutory injunction was concerned.**

Towards the end of its judgment, the Court of Appeal identified the main issue for determination before it when it said:-

"However, the issue to be decided before us in this appeal is whether the (sic trial) court was correct to insist upon strict proof of the plaintiffs' capacity, standing and proprietary interest in the consideration of their application for interlocutory injunction".

And it answered the question this way:-

"The answer to the question posed above is that the plaintiffs must establish the sources of their rights to sue and if none is shown at the stage the challenge was launched against them, they have failed to discharge the duties reposed in them and the learned trial judge would be held to be right, and I so hold, in coming to the conclusion that the action is incompetent."

It appears clearly from the above that while the Court of appeal agreed with the finding of the learned trial judge in respect of the interlocutory application; it went ahead to conclude that the main action itself is incompetent. And when it proceeded to say that :-

"The striking out order made by the learned trial judge is accordingly upheld."

It clearly contradicted itself. **But on going through the whole judgment of the Court of Appeal one would find that the concept of the locus standi in respect of the main action permeated the whole judgment, whereas, that issue was never appealed against even though it rose at the trial court. Therefore the Court of Appeal was wrong in striking out the action filed by the appellants at the trial court as being incompetent.**

It is abundantly clear in this appeal that while the trial court and the appellants were dealing with the issue of locus standi in respect of filing an application for interlocutory injunction, the Court of Appeal was dealing with the issue of locus standi in respect of the main action or suit without any appeal to it on that issue. The Court of Appeal was obviously and glaringly wrong in that respect and for this reason I do not think that it is necessary to examine issues (i) and (ii) raised by the appellants in this appeal, as it would serve no useful purpose. See SANUSI V AMEYEGUN (1992) 4 NWLR (PT.237) 527; OKONJI V NJOKANNA (1991) 7 NWLR (pt. 202) 131; ANYADUBA V N.R.T.C. LTD (1992) 5 NWLR (PT. 243) 535.

Finally, I find that this appeal has merit. I accordingly allow it and set aside the decision of the Court of Appeal and affirm that of the trial court. I award N10,000.00 costs in favour of the appellants against the 2nd - 11th respondents.

BELGORE JSC

The Court of Appeal erroneously adverted to the substantive suit rather than the interlocutory application which the trial court found the applicants incompetent to bring. The substantive suit is yet to be heard at the trial court. I therefore agree with my learned brother. Kalgo, JSC., that because of the misconception of the real issue by the Court of Appeal, this appeal ought to be allowed. I also allow the appeal and set aside the decision of the Court of Appeal. I award N10,000.00 as costs to the appellants against the respondents.

OGWUEGBU JSC

I have read the draft of the judgment of my learned brother Kalgo, JSC just delivered. For the reasons given by him in the said judgment which I hereby adopt as mine, I too allow the appeal, set aside the judgment of the Court of Appeal and restore that of the learned trial judge. I award N10,000,00 cost of this appeal to the appellants against the respondents.

KATSINA-ALU JSC

I have had the advantage of reading the judgment just delivered by my learned brother Kalgo JSC. I agree with it and would allow the appeal for the appeal for the reasons which he has given. I abide by the D order as to costs.

ACHIKE JSC

The plaintiffs/appellants had taken out a writ of summons against the defendants/respondents and sought the following reliefs:

"(1) A declaration that as executors of the estate of late Alhaji Fasasi Adisa Adeshina (the plaintiffs) are the persons entitled to a statutory certificate of occupancy on the piece or parcel of land conveyed by virtue of a deed of conveyance dated 12th day of September, 1972 and registered as No.41 Volume 1406 of the Lagos Lands Registry.

(ii) N10,000.00 damages for trespass against the defendants jointly and severally.

(iii) A perpetual injunction restraining the defendants their servants or agents from committing further trespass to the land."

On the same day that the writ was filed they also filed an ex-parte application for interim injunction restraining the defendants/respondents, their servants etc. from felling trees, demolishing structures etc..... on the land, the subject matter of the suit pending the determination of the motion on notice for interlocutory injunction. The 1st respondent filed a counter-affidavit to the motion on notice, while 2nd to the 11th respon-

dents filed a joint counter-affidavit in addition to what they termed NOTICE OF OBJECTION IN LAW, which no doubt, was a preliminary objection to the motion on notice. The motion on notice was taken together with the notice of objection, as agreed by the parties and consented to by the court. After due consideration of same, the learned trial judge ruled as follows:

"On the totality of the evidence, it is my view that the plaintiffs have not established that they have capacity to bring the application. The application is therefore incompetent and is accordingly struck out."

The reason given by the trial court for striking out the motion on notice was that the plaintiffs had no capacity or locus standi to bring the application because there was no evidence of a will or probate in respect of the Estate of the late Fasasi Adisa Adeshina for whom the plaintiffs were acting as the deceased executors. Adverting to the main action in passing, the trial judge, Obiter, stated that it would be premature at that stage of the proceedings to dismiss or strike out the entire action, the defendants not having filed their Statement of Defence to join issue with the plaintiffs.

On appeal to the Court of Appeal, that court not only upheld the order striking out the application but it went further to strike out the action. It is against the striking out of the action but the court below that the appellants herein have appealed.

The parties have offered arguments in their briefs as well as in oral arguments before us, but no oral argument was made on behalf of 2nd - 11th respondents whose counsel as well as themselves were absent. Learned counsel for the 1st respondent, conceded, rightly in my view, that the appeal was incontestable as it had great merit.

Having pursued the arguments in the parties' briefs as well as having heard appellants' counsel in oral submission, I am satisfied that the appeal has merit. Clearly, the only ground of appeal before the lower court upon which it could pronounce was the order striking out the motion for interlocutory injunction. Its judgment was unquestionably correct and I say no more about it. But to the extent that the leading judgment of Sulu-Gambari, JCA proceeded to strike out the entire action,

there is no doubt that his pronouncement in respect thereof was obiter dictum. The subject matter in respect of his dictum was not properly before him as it was not predicated on any ground of appeal formulated by the appellants. It was incompetent. That pronouncement as it relates
B to the main action, as might reasonably be expected, would be a matter that would surely exercise the trial court in due course but undoubtedly, as stated earlier by the trial court, though obiter, but rightly in my view, was premature. No court has jurisdiction to decide a point not subsumed
C as a ground of appeal, for in no sense is a court a knight errant. Our system of jurisprudence not being inquisitorial but adversary, does not give undue latitude to the presiding judge(s) to decide, at will, without due attention to procedural imperatives under the law. Sulu-Gambari, JCA, was, as it were, jumping the gun in his decision when he held that
D the entire action, rather than the application before the court on appeal, be struck out or dismissed. That order was a grave judgmental error which cannot be allowed to stand.

It is for the above reasons and the more detailed reasons contained in the leading judgment of my learned brother, Kalgo, JSC, with
E which I completely agree, that I, too, hold that the appeal is meritorious and the same should be allowed. Accordingly, I set aside the judgment of the Court of Appeal as it relates to the main action and restore that of the
F trial court.

I award N10,000.00 costs in favour of the appellants against the second set respondents, i.e. 2nd - 11th respondents.

G

H