

SUPREME COURT OF NIGERIA
10TH MARCH, 2000. SC.72/1994
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC

WEMA BANK NIG. LTD. & 2 ORS. APPELLANTS
AND
S.O. ODULAJA & 4 ORS. RESPONDENTS

***APPEALS** - Hearing - Notice of Hearing - Hearing of an appeal on a date fixed for interlocutory motion - When the parties had not been notified of the hearing - Is erroneous.*

***APPEALS** - Hearing of an appeal - When no process was served - Showing that the appeal had been fixed for hearing on that day - Renders the proceeding a nullity.*

***PRACTICE & PROCEDURE** - Appeal - Notice of proceedings - Failure to give notice of proceedings to an opposing party - In a case where service of process is required - Is a fundamental omission which renders such proceedings void.*

FACTS

The 1st and 2nd Plaintiffs/Respondents filed an action in the Lagos High Court challenging the sale of the property in dispute by the 1st Defendant/Appellant to the 2nd and 3rd Defendants/Appellants. The 1st Appellant granted a loan to the 2nd Respondent and as security for the loan, the 1st Respondent executed a deed of legal mortgage over the property in dispute. The property belonged to the 1st Respondent. When the 1st and 2nd Respondents defaulted on the repayment of the loan, the 1st Appellant exercised its power of sale and sold the mortgaged property to the 2nd and 3rd Appellants. Hence the 1st and 2nd Respondents filed the action. Before the hearing of the action, the 1st and 2nd Respondents filed a motion and applied for an interlocutory injunction restraining the

2nd and 3rd appellants from taking over the premises. The learned trial judge refused to grant the application.

Dissatisfied with this ruling, the 1st and 2nd Respondents appealed to the Court of Appeal. In order to accelerate the hearing of the appeal, the 1st and 2nd Respondents filed a motion before the Court of Appeal and prayed for an order to set down a date for the hearing of the appeal. This motion was listed for hearing on 18th January, 1994 and this fact was notified to the parties by a hearing notice dated 23rd July, 1993. On 18th January, 1994 when the case was called, counsel to the 1st, 2nd and 3rd Appellants in this appeal was absent, while counsel for the 2nd and 3rd Respondents in this appeal was present in court. The Court of Appeal proceeded to hear the substantive appeal when the parties had not been notified that the appeal would be heard on that day, and after listening to the arguments and submissions of the counsel to the 1st and 2nd Respondents, it reserved judgment. On 27th January, 1994 the 1st, 2nd and 3rd Appellants in this appeal, filed a motion praying for an order setting aside the proceedings held on 18th January 1994. The Court of Appeal did not hear the motion but went ahead and delivered its judgment on 24th February, 1994. In its judgment, the appeal was allowed. The Appellants aggrieved, have now appealed to the Supreme Court raising two issues while the Respondents on their own part also raised two issues but the appeal was decided on a single issue

ISSUE FOR DETERMINATION

"1. Whether the Court of Appeal was right in law in delivering its judgment on 24th February, 1994 based on the hearing conducted on 18th January, 1994 without first hearing and determining the application the application dated 28th January, 1994 filed by the appellants herein.

HELD (Unanimously allowing the appeal per Lead Judgment of **MOHAMMED JSC**

Appeals - Hearing

1. In the motion the respondents prayed the Court of Appeal to "set down a date for hearing the appeal." The date of hearing the motion was fixed

for 18/1/94. It is crystal clear therefore that the only proceedings which the Court of Appeal could conduct in respect of this case was hearing the motion praying for a date for the hearing of the substantive appeal. The Court of Appeal was clearly in error to hear the appeal when the parties had not been notified, through the court processes, that the appeal would be heard on 18/1/94. (p. 703 E)

Appeals - Notice of proceedings

2. There is no dispute on the fact that the appellants were not served with any notice that the appeal would be heard on 18/1/94. Failure to give notice of proceedings to an opposing party in a case where service of process is required is a fundamental omission which renders such proceedings void because the court has no jurisdiction to entertain it. See OBIMONURE V. ERINOSHO (1966) 1 All N.L.R. 250. (p. 704 A)

Appeals - Hearing of an appeal

3. In this case, the hearing of the appeal on 18/1/94 when no process was served on the appellants showing that the appeal had been fixed for hearing on that day is a fundamental error rendering the proceedings a nullity. (p. 704 B)

REPRESENTATION

Tayo Oyetibo, for the appellants

A.I. Idigbe, Raugh M. Uwechue, with him, for the respondents

CASES REFERRED TO

OLUBUSOLA STORES V. STANDARD BANK (1975) All N.L.R. 123 at 127

DOGAN V. BELLO (1993) 6 N.W.L.R. (Pt.299) 321 at 330

OKAFOR V. A. G. ANAMBRA STATE (1991) 5 LRCN 1497 (1991) 6 N.W.L.R (Pt.200) 659

OBIMONURE V. ERINOSHO (1966) 1 All N.L.R. 250

LEAD.JUDGMENT BY MOHAMMED JSC

This is an appeal from the decision of Lagos Division of the Court of Appeal. The material facts about this appeal may be stated briefly as follows:

B The 1st appellant granted a loan to the 2nd respondent and as security for the loan, the 1st respondent executed a deed of legal mortgage over the property in dispute. The property is situated at No.53, Coker Road, Ilupeju Layout, Lagos. The property belonged to the 1st
C respondent. When the 1st and 2nd respondent defaulted on the repayment of the loan, the 1st appellant exercised its power of sale and sold the mortgaged property to the 2nd and 3rd appellants.

The 1st and 2nd respondents then went to court and filed an action in the Lagos High Court challenging the sale of the property by the
D 1st appellant to the 2nd and 3rd appellant. Before the hearing of the action, the 1st and 2nd respondents filed a motion and applied for an interlocutory injunction restraining the 2nd and 3rd appellants from taking over the premises. The learned trial judge refused to grant the application. He however ordered that the 2nd and 3rd appellants could move
E into the property but subject to a condition that they should not alter any part of the building pending the determination of the substantive case. Secondly, the learned judge ordered that a tenant in the premises who
F secured his tenancy through the 1st and 2nd respondents should not have his tenancy renewed when it expired. The place would revert to the control of the 2nd and 3rd appellants.

Dissatisfied with this ruling, the 1st and 2nd respondents appealed to the Court of Appeal. In order to accelerate the hearing of the
G appeal, the 1st and 2nd respondents filed a motion before the Court of Appeal and prayed for an order to set down a date for the hearing of the appeal. This motion was listed for hearing on 18th January, 1994 and this fact was notified to the parties by a hearing notice dated 23rd July,
H 1993.

On 18th January, 1994 when the case was called, counsel to the 1st, 5th and 6th respondents who are, in this appeal, 1st, 2nd and 3rd appellants was absent. But counsel for the 1st and 2nd appellants who

are 2nd and 3rd respondents in this appeal was present in court. It is not clear from the record of this appeal what happened to the motion fixed for hearing on 18/1/94. What is clear is that the court below proceeded to hear the appeal and after listening to the arguments and submissions of the counsel to the 1st and 2nd respondents, it reserved judgment. B

On 27th January, 1994 the 1st, 2nd and 3rd appellants, in this appeal, as 1st, 5th and 6th respondents at the court below filed a motion praying for an order setting aside the proceedings held on 18th January, 1994. The court below did not hear that motion but went ahead and delivered its judgment on 24th February, 1994. In its judgment, the court below allowed the appeal, set aside the order of the High Court and granted the order of interlocutory injunction which was prayed for by the 1st and 2nd respondents. The Court of Appeal further ordered that the case be transferred to another judge for trial. C D

This appeal is from the decision of the Court of Appeal mentioned above. The issues which called for determination as raised by Mr. Oyetibo, learned counsel for the appellants read as follows:

"1. Whether the Court of Appeal was right in law in delivering its judgment on 24th February, 1994 based on the hearing conducted on 18th January, 1994 without first hearing and determining the application the application dated 28th January, 1994 filed by the appellants herein. E

2. Assuming but without conceding that the Court of Appeal was entitled to deliver its judgment as aforesaid, whether the court was right in setting aside the order made by the trial court and in granting an order for interlocutory injunction after holding that the appellants in the court below (1st and 2nd respondents herein) "had not provided the court with sufficient facts which were placed before the lower (trial) court." F G

Learned counsel for the respondents adopted the 1st issue formulated by the appellants and modified the second issue in the following terminology. H

"2. Was the Court of Appeal correct in delivering a judgment in this case in the light of the materials before it?"

It appears to me that the 1st issue touches on the jurisdiction of

the court below to hear the substantive appeal when only a motion had been fixed for hearing on that day. Mr. Oyetibo submitted, in the appellant's brief, that the court below was wrong in law to hear the appeal on a date fixed for the hearing of a motion pending in the matter without any previous notification to the parties that the appeal would be heard on that date. Learned counsel quite helpful in support of his submission referred to the case of OLUBUSOLA STORES V. STANDARD BANK (1975) All N.L.R. 123 at 127. In that case the plaintiffs/respondents commenced proceedings in the Lagos High Court claiming against the defendants/appellants a refund of a loan. The writ was filed for the "Undefended List," but somehow the writ was not served on the defendants for some-time and the plaintiffs obtained a court order for substituted service of the writ. The case was then fixed for a named date for mention. On the fixed date, it was shown from the record that the order for substituted service was carried out some five days before the return date. On appeal to this court on ground that the judgment was irregularly obtained it was held:

"In the present case, as we pointed out before, the action was meant for the Undefended List and indeed the writ was so marked. On the 9th July 1973, which was the return date on the order for service by substitution, the report to the court about service was to the effect that "the pasting was effected on the 4th July, 1973." If the writ was served on the 4th July, 1973, it was not possible in any case for the defendants to comply with Rule 11 on or before the 9th July 1973, since manifestly the period of the five days before the day fixed for hearing was not available to them. On those facts the provisions of Rule 13 will not apply and it is difficult to see how the learned trial judge could justifiably have entered judgment for the plaintiffs as for an action on the Undefended List. Besides this however, is the fact that the order made on the ex-parte application on the 11th day of June, 1973, had fixed the case only for mention on the 9th day of July, 1973. If, as indeed it was the case, the suit was only to be mentioned on that day, the learned trial judge clearly wrongly treated that date as a date fixed for the hearing of the action and erred in law as the entry of judgment on that day was in

breach of the provisions of Rule 13."

Learned counsel for the respondent on his part submitted that the appellants did not file a counter affidavit to the motion filed for hearing on 18/1/94. The appellants also did not file a respondents brief for the hearing of the appeal before the Court of Appeal. Counsel argued that with the foregoing state of facts, the Court of Appeal was entitled to deal with the appeal as uncontested and accordingly take arguments thereon immediately. The Court of Appeal would then decide the appeal on the consideration of the Appellants' Brief only. Counsel referred to the case of DOGANA V. BELLO (1993) 6 N.W.L.R. (Pt.299) 321 at 330.

I think learned counsel is trying to defend a serious lapse from the court below. The Hearing Notice for the motion fixed for hearing on 18/1/94 reads in part as follows:

" TAKE NOTICE THAT ABOVE MENTIONED MOTION will be listed for hearing before the Court of Appeal sitting at No. 1B Bourdillon Road, Ikoyi, Lagos on Tuesday the 18th day of January, 1994 at Nine O'clock in the forenoon."

In the motion the respondents prayed the Court of Appeal to "set down a date for hearing the appeal." The date of hearing the motion was fixed for 18/1/94. It is crystal clear therefore that the only proceedings which the Court of Appeal could conduct in respect of this case was hearing the motion praying for a date for the hearing of the substantive appeal. The Court of Appeal was clearly in error to hear the appeal when the parties had not been notified, through the court processes, that the appeal would be heard on 18/1/94.

In OKAFOR & ORS V. A. G. ANAMBRA STATE & ORS. (1991) 5 LRCN 1497 (1991) 6 N.W.L.R (Pt.200) 659 the Court of Appeal, Enugu Division fixed the appeal for hearing on 14th June, 1988 but mistakenly the court heard the appeal on 11th April, 1988 without the knowledge or oral arguments of the parties. A motion by the appellants prayed the court to set aside its judgment because it had no jurisdiction to give judgment at the time it did. The Court of Appeal agreed with the prayer and said that its judgment was a nullity and set it aside. On appeal

to the Supreme Court, the decision of the Court of Appeal was affirmed.

There is no dispute on the fact that the appellants were not served with any notice that the appeal would be heard on 18/1/94. Failure to give notice of proceedings to an opposing party in a case where service of process is required is a fundamental omission which renders such proceedings void because the court has no jurisdiction to entertain it. See OBIMONURE V. ERINOSHO (1966) 1 All N.L.R. 250. In this case, the hearing of the appeal on 18/1/94 when no process was served on the appellants showing that the appeal had been fixed for hearing on that day is a fundamental error rendering the proceedings a nullity. The answer to the question posed in issue 1 by learned counsel for the appellants is therefore in the negative. Having declared the proceedings conducted by the Court of Appeal on 18th January, 1994 a nullity I need not consider the second issue raised for the determination of this appeal.

This appeal therefore succeeds and it is allowed. The proceedings conducted by the Court of Appeal on 18th January, 1994 and the judgment delivered on 24th February, 1994 are hereby set aside. I remit the case back to the Lagos Division of the Court of Appeal for rehearing the appeal before another panel of that court. I award N10,000.00 costs in favour of the appellants against the 1st and 2nd respondents only.

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BELGORE JSC

The main business of the Court of Appeal on 18th day of January, 1994 was to hear a motion to set aside a previous hearing in this matter not to hear the substantive appeal. But it nonetheless went ahead to hear and determine the substantive appeal and delivered its judgment. There was no Hearing Notice for delivery of judgment on 18th day of January, 1994. The Court below was therefore in error, an error that occasioned miscarriage of justice. I am therefore of the same mind with my learned brother, Mohammed, JSC., that this appeal has merit and must therefore be allowed. I also allow the appeal and make an order for rehearing before another panel of the Court of Appeal, Lagos Division. I

award the appellants N10,000.00 as costs of this appeal against the respondents.

OGUNDARE JSC

I agree with the judgment of my learned brother, Mohammed, JSC., just delivered. I have nothing more to add. I, too, allow the appeal, set aside the proceedings and judgment of the Court below delivered on 24th February, 1994 which proceedings and judgment I hereby declare a nullity. I order that the appeal to the Court of Appeal be heard expeditiously before another panel of that Court. I, too, award N10,000.00 costs of this appeal to the Defendant/Appellant against the 1st and 2nd Plaintiffs/Respondents.

ONU JSC

I had the privilege of a preview of the draft judgment of my learned brother, Mohammed, JSC., just delivered. I am in full agreement therewith that the appeal is meritorious and should perforce succeed.

I adopt the same as mine and have nothing further to add thereto

IGUH JSC

I have had the opportunity of reading in draft the judgment just delivered by my learned brother, Mohammed, J.S.C. and I am in full agreement that there is merit in this appeal.

The main issue for consideration is whether the court below was right in law to have conducted the hearing of the substantive appeal on the 18th January, 1994, a date on which the proceeding was only fixed for the hearing of a motion without any previous notification to the parties that the appeal would be heard on that date.

In Olubusola Stores v. Standard Bank (1975) 1 All N.L.R. (part 1) 125 at 129 - 130, this court in circumstances not entirely dissimilar with those of the present case pronounced as follows:-

"..... Besides this, however, is the fact that the order made on

the ex-parte application on the 11th day of June, 1973 had fixed the case only for mention on the 9th day of July, 1973. If, as indeed it was the case, the suit was only to be mentioned on that day, the learned trial Judge clearly wrongly treated that date as a date fixed for the hearing of the action and erred in law as the entry of judgment on that day was in breach of the provisions of Rule 13".

It is thus clear that the court below, with respect, was in definite error to have heard the appeal in the present proceedings on a date specifically fixed for the hearing of a motion pending in the cause without any previous notification to the parties that the appeal would be taken on that date. In my view, the judgment of that court which was delivered upon the hearing of the substantive appeal without due notice to the parties and on a date the cause was only fixed specifically for the hearing of a motion therein filed is a violation of the fundamental right of the parties to fair hearing as entrenched in the Constitution.

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother that I, too, allow this appeal and set aside the judgment and orders of the Court of Appeal dated the 24th day of February, 1994. I abide by the consequential orders made in the

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