

COURT OF APPEAL  
ENUGU DIVISION  
6TH JULY, 1999. CA/E/33/97  
CORAM: N. TOBI, J. A. FABIYI, M. D. MUHAMMAD, JJCA

CO-OPERATIVE & COMMERCE BANK ..... APPELLANT  
AND  
BARN ONYEKWELU ..... RESPONDENT

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**CONTRACTS** - *Frustration - How it occurs in law - The principle assumes that the frustrating event - Was not caused by the fault of either party.*

**CONTRACTS** - *Frustration - Mere deposition in pleadings without evidence - Is not enough.*

**JURISDICTION** - *Stare decisis - Federal High Court - Damages for wrongful dismissal under Company and Allied Matters Decree - Following the Yalaju-Amaye case - The Federal High Court has jurisdiction.*

**MASTER & SERVANT** - *Frustration of contract - Termination of a worker's appointment - Cannot result in frustration of the contract.*

**MASTER & SERVANT** - *Frustration - Wrongful termination of appointment - That the company finds it difficult to continue in business - Cannot ground the plea of frustration.*

**PLEADINGS** - *Admission - Public company - Admission that appellant is a public company in its statement of defence - Cannot be denied by counsel.*

**PRACTICE & PROCEDURE** - *Pleadings - Address of counsel - Facts that are not duly pleaded - Cannot be introduced during address.*

### **FACTS**

The plaintiff/respondent is a legal practitioner who was in 1974 appointed by the defendant/appellant as an Assistant Secretary. On 17th May, 1989, he was promoted to the rank of Deputy General Manager/ Company Secretary. On 28th June, 1991, the respondent's appointment was determined as he was retired from the service of the appellant. The respondent filed an action before the Federal High Court seeking reliefs for wrongful termination of his employment.

The trial judge found in favour of the respondent and held that he was entitled to payment of his salary and all other entitlements until the appointment was properly determined. Being aggrieved, appellant has now appealed to the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*"(1) Had the Federal High Court jurisdiction to hear and determine this suit for breach of contract of employment between a bank and its employee?"*

*(2) On 28th June 1991 was the respondent a secretary of a public company who must be given the prior notice prescribed by s. 296 of the Companies and Allied Matters Decree No. 1 of 1990?"*

*(3) Even if he was such a secretary did his retirement under the circumstance given in the letter of retirement and in evidence enjoin the procedure outlined in the said S. 296 (2) to be valid and lawful and intra vires?"*

**HELD** (Unanimously dismissing the appeal per lead judgment of **TOBI JCA**)

### ***Jurisdiction - Stare decisis***

1. The Court of Appeal held in the case that a claim for damages for wrongful dismissal as a Company Director is not within the jurisdiction of the Federal High Court. On appeal, the Supreme Court held that each of the claims of the plaintiff are matters within the provisions of the Companies Decree, 1968 and therefore within the jurisdiction of the Federal High Court. Like the instant case, the plaintiff in the Yalaju-Amaye case also claimed for damages, though in the alternative. In the light of the prin-

ciples of stare decisis, I am bound by the decision of the Supreme Court, the effect of which is that the Federal High Court had jurisdiction to entertain the action of the respondent. (p. 1256 H)

### ***Pleadings - Admission***

2. It is the law that what is admitted goes to no issue. It is also the law that parties are bound by their pleadings. See Chairman Gwaram Local Government v. Dantine (1993) 2 NWLR (Pt. 275) 370; Accordingly it does not lie in the mouth of counsel to contend in the light of the admission in paragraph 2 of the Amended Statement of Defence that the appellant was not a public company. (p. 1257 F)

### ***Pleadings - Address of Counsel***

3. It appears to me that the issue was raised by learned Senior Advocate during his address at the lower court. It is the law that address of counsel is based on pleaded facts. Therefore where facts are not duly pleaded counsel cannot introduce them in the course of address. After all, the facts belong to the party. What belongs to counsel is the law. It is the combination of facts and the law that makes litigation what it really is. The party supplies the facts and counsel supplies the law, and that makes a beautiful blend. (p. 1258 A)

### ***Frustration - How it Occurs in law***

4. Frustration occurs whenever the law recognises that without default of either party contractual obligation has become incapable of being performed because of circumstances in which performance if called for would make it a thing radically different from what was undertaken by the contract. The principle of frustration assume that the frustrating event was not caused by the fault of either party to the contract. Therefore if a defendant sets up the defence of frustration and the plaintiff alleges that such frustration was due to the fault of the defendant, the onus is on the plaintiff to prove such fault. See Western Nigeria Finance Corporation v. West Coast Builders Ltd. and Another (1971) 1 U.I.L.R. 93. (p. 1258 D)

***Frustration - Mere deposition in pleadings***

5. It is not enough for a party to depose in his pleadings that a contract was frustrated; he must lead evidence as to the frustrating events. Where this is not done, the court is entitled to hold that the contract was not frustrated.

B (p. 1258 G)

***Frustration - Wrongful termination of appointment***

C 6. It is not my understanding of the law that where an employer terminates the appointment of workers, such labour practice results in frustration of the contract of service. That cannot be the law. The only evidence before the court was that there was retirement of some top employees of the bank as well as the junior staff. (p. 1258 H)

D ***Termination of appointment***

7. Again, it is not my understanding of the law that if a company finds it difficult to continue in business, it can successfully plead frustration. That cannot be the legal position. Difficulty to continue in business could be as E a result of the fault of the company. In such a situation, a plea of frustration cannot be sustained. I am in agreement with respondent that there is no evidence of frustrating event or events to justify the plea. If anything, DW 1 said under cross examination that the appellant still paid his salaries F as Administrative Secretary (Personnel).

There is no evidence that appellant could not employ or retain the services of a company secretary because of hardship experienced in the business. Respondent correctly pointed out that the appellant is under a statutory duty to employ the services of a secretary. And so I ask: where G lies the plea of frustration? None. (p. 1259 B)

**REPRESENTATION**

A. N. Anyamene SAN (with him, O. Ozugbi) - for the Appellant

H B. Onyekwelu in person

**CASES REFERRED TO**

Chairman Gwaram Local Government v. Dantine (1993) 2 NWLR (Pt. 275) 370

Ejiniyi v. Adio (1993) 7 NWLR (305) 320

Fakuade v. O.A.U.T.H. (1993) 5 NWLR (Pt. 291) 47

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Imah v. Okogbe (1993) 9 NWLR (316) 159

Kaugama v. NEC (1993) 3 NWLR (Pt. 284) 681

Western Nigeria Finance Corporation v. West Coast Builders Ltd (1971) 1 U.I.L.R. 93

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Ezeugo v. Ohaneyere (1978) 6 and 7 SC 171 at 184

Taiwo v. Kingsway Stores Ltd. (1950) 19 NLR 122

Chukwumah v. Shell BP (1993) 4 NWLR (Pt. 289) 512 at 549

Societe Generale Favouriser Development v. Societe General Bank (Nig) Ltd. (1997) 4 NWLR (Pt. 497) 8 at 28

D

**STATUTES REFERRED TO**

Company and Allied Matters Decree No. 91 of 1990 ss. 296, 36(5), 37, 624, 625 (1)

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Constitution (Suspension and Modification) Decree No. 107 of 1993 s. 230 (1) (e)

**LEAD JUDGMENT BY TOBI JCA**

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The respondent is a legal practitioner. In 1974, he was appointed by the appellant, a banker, as an Assistant Secretary. He assumed duty in that capacity on 1st April, 1974. His appointment was confirmed by a letter dated 19th July 1976. He received promotion from time to time. On 17th May, 1989, the respondent was promoted to the rank of Deputy General Manager/Company Secretary.

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On 28th June, 1991, the appointment of the respondent was determined. He was retired from the service of the appellant. This sad news was conveyed to the respondent by a letter No.CCB/CO.4/Vol.3/145 of 28th June, 1991. The respondent felt bad, and naturally so. He sued. The trial Judge gave him judgment. His retirement was declared null and void and of no effect whatsoever. The judge held that the respondent was en-

titled to the payment of his salary and all other entitlements as secretary of the defendant from 28th June, 1991 until the appointment was properly determined, less the amount of the money paid by the appellant into the respondent's bank account as money had and received.

B The appellant did not like the judgment. An appeal was therefore filed. Briefs were duly filed and exchanged. Appellant formulated three issues in his brief:

C *"(1) Had the Federal High Court jurisdiction to hear and determine this suit for breach of contract of employment between a bank and its employee?"*

*(2) On 28th June 1991 was the respondent a secretary of a public company who must be given the prior notice prescribed by s. 296 of the Companies and Allied Matters Decree No. 1 of 1990?*

D *(3) Even if he was such a secretary did his retirement under the circumstance given in the letter of retirement and in evidence enjoin the procedure outlined in the said S. 296 (2) to be valid and lawful and vires?"*

The respondent formulated four issues for determination:

E *"(1) Has the Federal High Court jurisdiction to hear and determine the suit?"*

F *(2) Was the learned trial judge right in holding on the pleadings and law, that the Appellant was a public company by 28th June, 1991 when the Respondent was removed from office as the Appellant's Secretary?"*

*(3) Was the learned trial judge right in holding that the Respondent was the Secretary (of the Appellant) as envisaged by S. 296 of CAMD?"*

G *(4) Was the learned trial judge right in holding that in the circumstances it removed the respondent from office as its Secretary, the Appellant could not validly do so without complying with the provisions of S. 296 (2) & (3) OF CAMD, 1990"*

H On Issue No. 1, learned counsel for the appellant, Mr. A. N. Anyamene, submitted that section 230 (1) (e) of the Constitution (Suspension and Modification) Decree No. 107 of 1993 limited the jurisdiction of the Federal High Court to civil causes and matters arising from the opera-

tion of any Act or Decree relating to companies and allied matters and any other common law regulating the operation of companies. Counsel cited Skenconsult (Nigeria) Limited and Another v. Ukey (1981) 1 SC 6 at 31; Associated Registered Engineering Contractors Limited and others v. Engineer D. Y. Amaye (1986) NWLR (Pt. 31) 653 and submitted that the reliefs claimed by the respondent did not come near a cause or matter arising from the management of a company registered under Decree 107 of 1993. While learned Senior Advocate conceded that the issue of jurisdiction was not raised in court below, he submitted that the issue can be raised at any time, and even for the first time on appeal. Parties cannot by consent or acquiescence confer jurisdiction on a court it does not possess, learned counsel submitted.

On Issue No. 2, learned Senior Advocate submitted that section 296(2) of the Companies and Allied Matters Decree No. 1 of 1990 did not apply to the case of the respondent as that Decree came into force on 31st December, 1990. This is so, because the respondent was notified of his retirement on 28th June, 1991, learned counsel maintained. It was the submission of counsel that at the time the respondent was retired from the service of the appellant, it was not a public company within the provision of section 50 of the Companies and Allied Matters Decree, 1990. He submitted that since the respondent could not prove the public company status of the appellant at the time he was retired the action must fail; Counsel claimed later in his brief that the fact of the appellant being ever a public company was not an issue at the trial.

On Issue No. 3, learned Senior Advocate contended that if the appellant was a public company by the 28th June, 1991 the respondent was entitled to the notice prescribed by section 296(2) of the Companies and Allied Matters Decree. Counsel further contended that in the circumstances of the case the plea of frustration availed the appellant. He claimed that the case that approximates to that of the respondent is Olatunbosun v. Niser Counsel (1988) 6 SCNJ 38; (1988) 3 NWLR (Pt. 80) 25 at 55 and 56. He urged the court to allow the appeal.

Arguing the appeal, the respondent, in person, submitted that by section 230 (1) (e) of the Constitution (Suspension and Modification) De-

cree No. 107 of 1993 the Federal High Court has exclusive jurisdiction in civil causes and matters arising from the operation of any Act or Decree relating to Companies and Allied Matters, any other common laws regulating the operation of companies. He submitted that the appellant breached the provision of section 296(2) and (3) of the Companies and Allied Matters Decree.

The respondent contended that it is a fundamental principle of law that it is the claim of the plaintiff which determines the jurisdiction of the court. He cited Attorney-General, Anambra State v. Attorney-General of the Federation (1993) 6 NWLR (Pt. 302) 692 at 742; Anyia v. Iyayi (1993) 7 NWLR (Pt. 302) 692 at 309; Enwezor v. Onyejekwe (1964) ALL NLR 14; Adejumo v. Military Governor, Lagos State (1972) 1 ALL NLR 159; Ndaeyo v. Ogunnaya (1977) 1 SC 11; Yalaju-Amaye v. Associated Registered Engineering Contractors Ltd (1990) 4 NWLR (Pt. 145) 422. He submitted that the provisions of section 230 (1) (e) of the Constitution (Suspension and Modification) Decree No. 107 of 1993 giving the Federal High Court exclusive jurisdiction in causes and matters arising from the operation of any Act or Decree relating to Companies and Allied Matters etc., is similar to the provisions of the Federal High Court Act 1973 except that operation of any Act or Decree relating to Companies and Allied Matters was substituted for the companies Decree 1968. He argued that paragraph 12 of the Amended Statement of defence does not contain any mention or reference, express or implied of the fact that appellant became a public company on 25/9/91. The issue for consideration in law is the effect of the appellant's unqualified admission of paragraph 2 of the respondent's Amended Statement of Claim, he contended.

On when a company is registered or deemed to be registered, respondent called the attention of the court to section 36(5) and 37 of the Companies and Allied Matters Decree, 1990. He submitted that by virtue of the above provisions, all existing companies are deemed to be registered under the Decree on the date stated in their Certificate of Incorporation as contained in section 37. He relied once again on the admission of paragraph 2 of the respondent's Amended Statement of Claim by the appellant in paragraph 1 of its Amended Statement of Defence.



Respondent submitted that the learned trial Judge was right when he held that the respondent was the secretary of a public company on 28/6/91. He relied on section 296(1) of the Companies and Allied Matters Decree, 1990. Calling the attention of the court to paragraph 4 of the Amended Statement of Claim, respondent submitted that the paragraph B was not denied by the appellant, nor was the evidence challenged by the appellant. He also called the attention of this court to paragraphs 5 and 6 of the Amended Statement of claim and argued that the learned trial Judge was right in his finding that the respondent was the secretary of the appellant as envisaged in section 296(2) of the Decree. The duty was on the C appellant to plead to the contrary, respondent contended. He relied on Emegokwue v. Okadigbo (1973) 4 SC 113 at 117; George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117; African Continental Seaways Ltd. v. Nigerian Dredging Road and General Works Ltd. (1977) 5 SC 225 at D 248 and NIPC Ltd v. Thompson Organisation (1969) 1 NWLR 99 at 104.

Respondent argued that since the appellant did not plead dual functions performed by him, it was too late in the day to raise the issue. He relied on Reynolds Construction Company v. RBB (1993) 6 NWLR (Pt. E 297) 122 at 128; N.N.S.L. v. Emenike (1987) 4 NWLR (Pt. 63) 77; Buraimoh v. Bamgbose (1989) 3 NWLR (Pt. 109) 352 at 365.

Respondent further argued that the cause of action arose in 1991 and the applicable law is not the Companies Decree 1968 but the Companies and Allied Matters Decree 1990, which repealed the Companies Decree, 1968. The plaintiff's legal right or claim is to be determined by reference to the law in force at the time the cause of action arose, respondent contended. He relied on Uti and Others v. Onoyivwe (1991) 1 NWLR (Pt. 166) 166 at 201; Uwaifo v. Attorney-General Bendel State (1982) 7 G SC 124 (1983) 4 NCLR 1.

Respondent submitted that the argument of the appellant that the respondent was employed under the general conditions of service for appellant's senior administrative staff and therefore section 296(2) and (3) H of the Decree do not avail him, is not tenable. He argued that since section 624 of the Decree makes sections 1 to 651 applicable to all existing companies which the appellant was one, as at 28th June, 1991, the respondent,

as secretary of the appellant, enjoyed the protection afforded by section 296(2) and (3) and was safe of the mischief aimed at in section 296(2). He relied on Societe Generale Favouriser Development v. Societe General Bank (Nig) Ltd. (1997)4 NWLR (Pt. 497) 8 at 28. Even if the general conditions of service of the appellant's administrative staff applied and were pleaded and tendered but conflicted with the provisions of section 296(2) and (3) of the Decree, such conditions will be void as against the respondent by virtue of section 625(1) of the Decree, respondent argued.

Respondent also attacked the appellant's argument that the Companies Decree, 1968 did not make provisions for Secretary of a Company. Submitting that the argument was wrong, respondent called the attention of the court to section 169 of the Decree.

Respondent also submitted that the learned trial Judge was right in holding that the appellant could be validly remove the respondent from office without complying with the provisions of section 296(2) and (3) of the Companies and Allied matters Decree, 1990. Dealing with motive, respondent referred to Ezeugo v. Ohaneyere (1978) 6 and 7 SC 171 at 184; Taiwo v. Kingsway Stores Ltd. (1950) 19 NLR 122; Chukwumah v. Shell BP (1993)4 NWLR (Pt. 289) 512 at 549. He urged the court to dismiss the appeal.

Both parties relied on section 230 (1) (e) of the Constitution (Suspension and Modification) Decree No. 107 of 1993 on the issue of jurisdiction of the Federal High Court to hear the matter. By the subsection, the Federal High Court has exclusive jurisdiction in civil causes and matters arising from the operation of any Act or Decree relating to Companies and Allied Matters Decree and any other common laws regulating the operation of companies. While learned Senior Advocate relied on the Court of Appeal decision in Associated Registered Engineering Contractors Limited and Others v. Engineer Amaye (supra), the respondent relied on the Supreme Court decision in Yalaju-Amaye v. Associated Registered Engineering Contractors Ltd., supra.

**The Court of Appeal held in the case that a claim for damages for wrongful dismissal as a Company Director is not within the jurisdiction of the Federal High Court. On appeal, the Supreme Court**

held that each of the claims of the plaintiff are matters within the provisions of the Companies Decree, 1968 and therefore within the jurisdiction of the Federal High Court. Like the instant case, the plaintiff in the Yalaju-Amaye case also claimed for damages, though in the alternative. In the light of the principles of stare decisis, I am bound by the decision of the Supreme Court, the effect of which is that the Federal High Court had jurisdiction to entertain the action of the respondent.

Let me take the issue whether the respondent was a Secretary of a public Company on 28th June, 1991 when he was retired. The contention of learned Senior Advocate that the appellant was not a public company at the time the respondent was retired cannot be taken seriously in the light of the state of pleadings. In paragraph 2 of the Amended Statement of claim, the respondent deposed:

*"The Defendant is a public limited company duly registered or deemed to be registered under the Companies and Allied Matters Decree 1990, and have its head office at No. 28, Okpara Avenue Enugu, within jurisdiction. The Defendant carried on banking business in Enugu and in various parts of Nigeria."*

In paragraph 1 of the Amended Statement of Defence, the appellant admitted the above:

*"The defendant admits paragraphs 1 and 2 of the amended statement of claim."*

**It is the law that what is admitted goes to no issue. It is also the law that parties are bound by their pleadings. See Chairman Gwaram Local Government v. Dantine (1993) 2 NWLR (Pt. 275) 370; Ejiniyi v. Adio (1993) 7 NWLR (305) 320; Fakuade v. O.A.U.T.H. (1993) 5 NWLR (Pt. 291) 47; Imah v. Okogbe (1993) 9 NWLR (316) 159; Kaugama v. NEC (1993) 3 NWLR (Pt. 284) 681. Accordingly it does not lie in the mouth of counsel to contend in the light of the admission in paragraph 2 of the Amended Statement of Defence that the appellant was not a public company.**

Learned Senior Advocate contended at paragraph 16 of his brief that the "appellant pleaded that on the said date it had not been registered

as a public company." I have gone through the 15 - paragraph Amended Statement of Defence but cannot see any averment as claimed by learned Senior Advocate. While I concede that such an averment could have availed the appellant, I cannot hold in favour of the appellant, in a vacuum.

**B It appears to me that the issue was raised by learned Senior Advocate during his address at the lower court. It is the law that address of counsel is based on pleaded facts. Therefore where facts are not duly pleaded counsel cannot introduce them in the course of address. After all, the facts belong to the party. What belongs to counsel is the law. It is the combination of facts and the law that makes litigation what it really is. The party supplies the facts and counsel supplies the law, and that makes a beautiful blend.**

**D The next issue for consideration is whether the respondent was entitled to the notice prescribed by section 296(2) of the Companies and Allied Matters Decree, 1990. Learned Senior Advocate related the above to the plea of frustration of the contract. Frustration occurs whenever the law recognises that without default of either party contractual obligation has become incapable of being performed because of circumstances in which performance if called for would make it a thing radically difference from what was undertaken by the contract. The principle of frustration assume that the frustrating event was not caused by the fault of either party to the contract. Therefore if a defendant sets up the defence of frustration and the plaintiff alleges that such frustration was due to the fault of the defendant, the onus is on the plaintiff to prove such fault. See Western Nigeria Finance Corporation v. West Coast Builders Ltd and Another (1971) 1 U.I.L.R. 93.**

**H It is not enough for a party to depose in his pleadings that a contract was frustrated; he must lead evidence as to the frustrating events. Where this is not done, the court is entitled to hold that the contract was not frustrated.**

**It is not my understanding of the law that where an employer terminates the appointment of workers, such labour practice results in frustration of the contract of service. That cannot be the law. The**

only evidence before the court was that there was retirement of some top employees of the bank as well as the junior staff. DW 1 specifically said in evidence:

*"The plaintiff was affected by the exercise. There were 10 Management staff (including the Plaintiff) affected by the retirement. Apart from this there are 754 members of the staff (Senior and Junior) affected by the exercise. The bank found it difficult to continue in business, as a result, the bank was advised by NDIC to cut down the number of staff."* Again, it is not my understanding of the law that if a company finds it difficult to continue in business, it can successfully plead frustration. That cannot be the legal position. Difficulty to continue in business could be as a result of the fault of the company. In such a situation, a plea of frustration cannot be sustained. I am in agreement with respondent that there is no evidence of frustrating event or events to justify the plea. If anything, DW 1 said under cross examination that the appellant still paid his salaries as Administrative Secretary (Personnel).

There is no evidence that appellant could not employ or retain the services of a company secretary because of hardship experienced in the business. Respondent correctly pointed out that the appellant is under a statutory duty to employ the services of a secretary. And so I ask: where lies the plea of frustration? None.

On the whole, this appeal fails and it is dismissed. The judgment of the learned trial Judge is upheld. I award N3,000 costs in favour of the respondent.

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### FABIYI JCA

I had a preview of the lead judgment just delivered by my learned brother, Tobi, JCA. I completely agree with his reasoning and conclusion which I adopt as mine. The appeal lacks merit. I also dismiss it and abide by the order relating to costs in the stated judgment.

**MUHAMMAD JCA**

I had a preview of the judgment read by my learned brother Niki Tobi JCA. I adopt same as mine. I make the same consequential orders as made by his lordship.

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