

SUPREME COURT OF NIGERIA
2ND MARCH, 2001. SC. 100/1997
CORAM:- U. MOHAMMED, A. I. IGUH, O. ACHIKE,
S. O. UWAIFO, E. O. AYoola, JJSC.

1. THE GOVERNOR OF KOGI STATE
2. THE DEPUTY GOVERNOR KOGI STATE APPELLANTS/
3. THE ATTORNEY-GEN. OF KOGI STATE CROSS-
4. THE COMMISSIONER OF POLICE KOGI RESPONDENTS
STATE

AND

1. COL. HASSAN YAKUBU (RTD.) 1ST RESPONDENT
THE EJEH OF ANKPA CROSS-APPELLANT
2. ALHAJI AHMADU YAKUBU 2ND CROSS RESPONDENT

APPEALS - Jurisdiction - Once the appeal is determined - Based on a preliminary issue formulated by the court or the parties - Any other discourse on other issues or on merits of the appeal - Is without jurisdiction and incompetent.

CONSTITUTIONAL LAW - Fundamental Rights - Enforcement of under 1979 Rules - Chieftaincy disputes cannot be enforced under this Rule - As properly held by the lower courts.

PRACTICE & PROCEDURE - Appeals - Orders - Where an action is improperly constituted - The proper order to make is striking out - Not dismissal - And such order totally determines the case.

FACTS

The cross appellant/1st respondent was the EjeH of Ankpa a first class traditional ruler and a member of Kogi State Council of Chiefs.

He was deposed by the Kogi State government in 1992 and detained and his movement restrained to a guest house where only his family members had access to him. The cross appellant/1st respondent commenced an action for leave to enforce his fundamental rights. The leave was granted and he sought relief under the Fundamental Rights (Enforcement Procedure) Rules, 1979 for an order releasing him from detention, a declaration that his detention was illegal unconstitutional null and void, a declaration that his deposition as Ejeh of Ankpa was unconstitutional null and void, Ten million Naira damages amongst other reliefs. During the hearing of the appeal, the appellants' counsel raised the issue of the competence of the suit as its substratum was based on his deposition as chief as revealed by the affidavit. He submitted that such actions cannot be properly brought under the Fundamental Right (Enforcement Procedure) Rules.

The trial judge in his ruling agreed with this submission and dismissed the action. He further considered the issue of fair hearing as having been granted to the cross appellant as canvassed by the appellants and made an inconsequential order in the light of his earlier dismissal of the case. On appeal by the cross-appellant the Court of Appeal agreed with him that the proper order was a striking out of the action and not a dismissal and so set aside the earlier order of dismissal for a striking out order. It went ahead to consider the appeal against the inconsequential order of the High court. The cross-appellant has however further appealed to the Supreme Court while the appellants had withdrawn their appeal against the inconsequential decision of the Court of Appeal on the merits after striking out the case.

ISSUE FOR DETERMINATION

“1. Whether the Court of Appeal was right in striking out the entire claim of the appellant which goes beyond the stool of Ejeh of Ankpa having regard to order 2, Rules 1(1) and 2(1) of the Kogi State High Court (Civil Procedure) Rules, 1991 moreso that none of the 1st-4th respondents objected in limine to the procedure used in filing the case (This issue relates to grounds one and two).

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

Appeals - Jurisdiction

1. After this decision Salami JCA, held that the answer to the second issue (which he formulated) had put an end to the appeal before the Court of Appeal. Why then did the learned Justice embark on the consideration of the appeal on the merits? Clearly after the appeal had been determined on the issues he formulated the court had become *functus officio* and any decision on the merits is without jurisdiction. I agree that any discourse outside the issues formulated either by the parties or the court is incompetent – see Management Ent. V. Otusanya (1987) 2 NWLR (Pt. 55) 179 and Bankole v. Pelu (1991) 8 NWLR (Pt. 211) 523.

(p. 912 B)

Fundamental Rights - Enforcement of

2. The High Court relied on the previous decisions of this Court that chieftaincy disputes cannot be enforced under the Fundamental Rights (Enforcement Procedure) Rules 1979 before it held that the action filed by the cross/appellant was not properly constituted. The Court of Appeal affirmed this decision. It is trite that this court held that view. – See cases of Olaniyi v. Aroyehun (supra) (p. 912 F)

Orders - Where an action is improperly constituted

3. After the Court of Appeal has substituted the order made by the trial court from the dismissal of the suit to that of striking it out that will be the end of the case before it and any further decision is incompetent and beyond its jurisdiction. It is quite clear from the authorities referred to by both the High Court and the Court of Appeal that when a court finds an action improperly constituted the proper order to make is to strike it out and not to dismiss it. The decision of the Court of Appeal therefore is right when it substituted the decision of the High Court of dismissing the action filed by the cross-appellant with an order striking out his claim. This decision brings to an end all hearing in respect of Suit No. AHC/96/92. Any further pronouncement on the merit of the action after it had been

struck out is incompetent and outside the jurisdiction of the Court of Appeal. (p. 913 A)

NOTABLE POINT OF INTEREST

B MOHAMMED JSC

1. When to withdraw appeal against an inconsequential decision

C During the hearing of this appeal the attention of the Attorney-General Kogi State was drawn to the fact that the decision of the Court of Appeal on the merits was inconsequential and not based on the issues the court formulated to warrant the filing of appeal against it. He wasted no time in applying to withdraw the appeal. The appeal was consequently dismissed. (p. 909 G)

D REPRESENTATION

A. A. Akubo, J.A Abrahams, with him, for the cross-appellant Abdullahi Haruna, A/G. Kogi State, J.S. Fagbemi and O. S. A. Obayomi, with him, for the 1st set of respondents.

E Kayode Olatunji, L.A. Yusuf, with him, for the 2nd respondent.

CASES REFERRED TO

Olaniyi v. Aroyelum (1991) 5 NWLR (pt. 194) 652 at 680
F Management Ent. v. Otusanya (1987) 2 NWLR (pt. 55) 179
Bankole v. Pelu (1991) 8 NWLR (pt. 211) 523
Umaru Abba Tukur v. Taraba State Government (1997) 6 SCNJ 81

STATUTE & RULES REFERRED TO

G Constitution of Nigeria, 1979, s. 42 (1)
Fundamental Rights (Enforcement Procedure) Rules, 1979

LEAD JUDGMENT BY MOHAMMED JSC

H Col. Hassan Yakubu (Rtd), was the Ejeh of Ankpa, a first class traditional ruler and a member of Kogi State Council of Chiefs. In December, 1992, Col. Hassan Yakubu (Rtd), hereinafter referred to as the 1st respondent/cross-appellant, was deposed as the Ejeh of Ankpa by the

Government of Kogi State. Following his deposition the 1st respondent/Cross-appellant was detained and his movement restricted in a guest house and only members of his family had access to him.

Aggrieved by his removal as the Ejeh of Ankpa the 1st respondent/cross-appellant commenced an action, vide nd application exparte, B for leave for the enforcement of his fundamental rights. The leave was granted. He therefore filed a formal application on notice within the provisions of the Fundamental Rights (Enforcement Procedure) Rules 1979, and sought for the following reliefs:

“(i) an order for the immediate production of the body of the applicant before the honourable court, and for the immediate release of the applicant from detention. C

(ii) A declaration that the continued detention (House Arrest) of the applicant by the respondents at the Government Guest House, Lokoja D since the 28th day of December, 1992 is unlawful, unconstitutional, illegal, null and void.

(iii) A declaration that the purported deposition of the applicant from the stool of Ejeh of Ankpa by the respondents is unlawful, unconstitutional, illegal, null and void. E

(iv) An order of injunction restraining the respondents, their agents, servants privies, assigns, representatives and whosoever from threatening or further threatening and harassing the applicant whatsoever. F

(v) An order of injunction restraining the respondents, their agents, servants, privies, assigns, representatives and whosever from imposing and or installing any other person(s) to the stool of the Ejeh of Ankpa. G

(vi) Ten Million Naira (N10,000,000.00) only being special and general damages against the respondents, jointly and severally for the flagrant abuse and infringement on the fundamental rights of the applicant by the unlawful detention, embarrassment and the purported deposition of the applicant without fair hearing.” H

The application was supported and opposed with irreconcilable affidavits. Annexed to the affidavits are a number of Exhibits. During

the hearing of the application learned counsel for the Governor, Deputy Governor, Attorney-General and Commissioner of Police, Kogi State, who are appellants, in this appeal, raised the issue of competency of the trial court to hear the suit filed by the 1st respondent/cross-appellant. Mr
 B Haruna who was then the Solicitor-General of Kogi State submitted that the substratum of all the affidavits in support of the application filed by the 1st respondent/cross appellant for the enforcement of his fundamental human right was based on deposition. Counsel argued that it was not a
 C fundamental right to be a chief. He referred to the case of Olaniyi v. Aroyehun (1991) 5 NWLR (Pt.194) 652 at 680 where this court, per Karibi-Whyte JSC, held as follows:

*“Chieftaincy is not a matter of fundamental rights and cannot be enforced under the provisions of section 31 of the Constitution. It
 D cannot be seriously argued that there is fundamental right to be a chief. It is a privilege claimed by human beings in an organised society to bring order into their mutual relationship. It is not such right which the law can enforce by virtue merely of the claimant being a human being.”*

E Learned counsel thereafter argued that the action being brought under the Fundamental Rights (Enforcement Procedure) Rules was improperly constituted. The learned trial judge, in his ruling, agreed with the submission of the counsel for the appellants that the action involving
 F the stool of Ejeh of Ankpa brought under the Fundamental Rights (Enforcement Procedure) Rules was not properly constituted. He therefore dismissed the action. The learned trial judge thereafter considered the alternative submission of counsel for the appellants that the 1st respondent/cross-appellant was given fair hearing before he was deposed. The
 G learned trial judge considered the evidence from conflicting affidavits and at the end held;

*“Taking every factor into consideration, if I had found in his
 H favour, I would have awarded him the sum of N100,000 (One hundred thousand Naira) only as damages.”*

Although it is clear from the conclusion of the learned trial judge, reproduced above, that the decision he made on the merits was in consequential and not a decision to respond to since he said *“if I had found in*

his favour I would have...” yet the 1st respondent/cross appellant filed an appeal against such vain decision. In addition, the 1st respondent appealed against the order of the learned trial judge dismissing his suit when the proper order to make is to strike it out.

The Court of Appeal agreed with the 1st respondent/cross-appellant that the trial High Court was in error to dismiss the action after finding that the suit was improperly constituted. The court below therefore set aside the order of dismissal and struck out the suit. It however went into similar error and considered the appeal against the inconsequential decision made on the merits, which the learned trial judge made. Salami JCA, concluded his judgment with the following words:

“The removal of appellant without hearing him is clearly in breach of provisions of chiefs (Appointment and Deposition) Edict (supra). It also did violence to the principles of fair hearing because there were breaches of the twin pillars of nemo iudex in causa sua and audi alteram partem. The answer to appellant’s second issue is negative, grounds 2 of appeal, therefore, succeeds. Notwithstanding, the answer to this issue the appeal succeeds partially. I allow the appeal to the extent of substituting the order of dismissal made by the trial court with an order striking out the appellant’s claim before the court below. The appellant is entitled to costs for his limited success. I make order of N1,000.00 costs against each set of respondents in favour of appellant”.

Dissatisfied with the judgment of the Court of Appeal, the Attorney-General of Kogi State, representing the appellants, in this appeal, came before this court appealing against the vain decision of the Court of Appeal after it had struck out the suit. On his part the 1st respondent filed a cross-appeal against the order striking out the action he filed before the High Court. He also appealed against the Court of Appeal’s failure to order that he be reinstated as the Ejeh of Ankpa.

During the hearing of this appeal the attention of the Attorney-General Kogi State was drawn to the fact that the decision of the Court of Appeal on the merits was inconsequential and not based on the issues the court formulated to warrant the filing of appeal against it. He wasted no time in applying to withdraw the appeal. The appeal was consequently

dismissed.

I now turn to the cross-appeal. Learned counsel for the cross-appellant identified the following issues for the determination of the cross-appeal:

B “1. Whether the Court of Appeal was right in striking out the entire claim of the appellant which goes beyond the stool of Ejeh of Ankpa having regard to order 2, Rules 1(1) and 2(1) of the Kogi State High Court (Civil Procedure) Rules, 1991 *moreso* that none of the 1st-4th respondents objected in limine to the procedure used in filing the case (This issue relates to grounds one and two).

C 2. Whether the procedure adopted in initiating the action inter alia involving the Ejeh stool was not proper or improper so as to prevent the Court of Appeal from making appropriate consequential order reinforcing the appellant to the said stool in the exercise of its powers under section 16 of the Court of Appeal Act, 1976 (This issue relates to additional grounds five, six and seven).

D 3. Whether the Court of Appeal was right in formulating only two issues for determination without regard to the entire grounds of appeal inter alia attacking the inconsistent Ruling of Fabiyi J. which was said to be complementary and not contradictory of the Ruling of Ajanah J. granting leave to the appellant (This issue relates to grounds three and four)”.
F

It seems to me that an affirmative determination of issue 1 will decide the fate of this appeal. The respondents to this cross-appeal are, (1) the Governor of Kogi State, (2) the Deputy Governor of Kogi State, (3) the Attorney-General of Kogi State and (4) the Commissioner of Police, G Kogi State. I will refer to them as the first set of respondents in this judgment. The other respondent is Alhaji Ahmadu Yakubu, the present Ejeh of Ankpa, who will be the 2nd respondent to the cross-appeal. The issues raised by the first set of respondents are the same as the issues identified H by the cross-appellant. The 2nd respondent, through his counsel, Kayode Olatunji, formulated the following issues for the determination of cross-appeal.

“1. Whether or not the lower court was right in striking out the

1st respondent's claim as being improperly constituted more so when there was no appeal to it by the 1st respondent against the decision of the trial court on same.

2. *Whether or not the issues formulated by the court below adequately covered the 1st respondent's complaints at the lower court".* B

In view of my observation above I shall consider issue 1 first. The learned counsel for the cross-appellant in his brief submitted that reliefs (i), (ii) and (iv) of the cross-appellant's case are based on distinct and independent rights which are enforceable under the Fundamental Rights Procedure. They are themselves causes of action enforceable in the court, pursuant to section 42(1) of the Constitution of the Federal Republic of Nigeria, 1979. it seems to me that the submissions of the cross-appellant on issue one is not focused on the main observation of the Court of Appeal on the competency of the court to decide the case on the merits after it had dismissed the action. Salami JCA, in his judgment identified only two issues for the determination of the appeal filed by the cross-appellant at the Court of Appeal. He made far reaching statement on those two issues in the following words: C D E

"The issues arising for determination from the grounds set out elsewhere in the judgment are:

(ii) Whether after finding that the action is improperly constituted ought the learned trial judge not have struck out rather than dismissing the suit? F

(iii) Whether it was competent of the learned trial judge, Fabiyi, J., to decline jurisdiction after Ajana J, had granted the appellant leave to enforce his fundamental human right under the provisions of Fundamental Rights (Enforcement Procedure) Rules, 1979. G

These issues are co-terminus with appellant's issues 3 and 5. the determination of this appeal primarily turns upon these issues if the answer to the second issue, which is an oblique attack on the decline of jurisdiction by the learned trial judge is negative there would be need to consider other issues. In other words, it may not be necessary for me to go into the merit of this appeal if the finding of the learned trial judge subsists. It would be an exercise in futility to proceed any further". H

912 Gov. Kogi State v. Yakubu (2001) 3 KLR Mohammed JSC
(Underlining mine)

The Court of Appeal resolved issue 1 in favour of the cross-appellant and set aside the order made by the trial High Court dismissing the action and struck out the suit. On issue II it found that Ajana J, granted the cross-appellant leave to enforce his fundamental rights and no more. B Fabiyi J, was held by the Court below to have acted rightly when he declined jurisdiction after finding that the action before him was improperly constituted. After this decision Salami JCA, held that the answer to the second issue (which he formulated) had put an end to C the appeal before the Court of Appeal. Why then did the learned Justice embark on the consideration of the appeal on the merits? Clearly after the appeal had been determined on the issues he formulated the court had become functus officio and any decision on D the merits is without jurisdiction. I agree that any discourse outside the issues formulated either by the parties or the court is incompetent – see Management Ent. V. Otusanya (1987) 2 NWLR (Pt. 55) 179 and Bankole v. Pelu (1991) 8 NWLR (Pt. 211) 523.

E The main issue in this appeal is complaining against the decision of the Court of Appeal to strike out the entire claim of the cross-appellant. But this was the relief sought by the cross-appellant at the Court of Appeal against the dismissal of his suit by the trial court instead of striking it out. F How is it that the cross-appellant is now complaining against an order which he asked for and was granted?

The High Court relied on the previous decisions of this Court that chieftaincy disputes cannot be enforced under the Fundamental Rights (Enforcement Procedure) Rules 1979 before it held that the G action filed by the cross/appellant was not properly constituted. The Court of Appeal affirmed this decision. It is trite that this court held that view. – See cases of Olaniyi v. Aroyehun (supra) and Umaru Abba Tukur v. Taraba State Government (1997) 6 SCNJ 81.

H In Umaru Abba Tukur v. Taraba State Government (supra) this court held:

“...the primary complaint of the appellant in the whole case was his deposition as the Emir of Muri, the alleged breaches of his Funda-

Gov. Kogi State v. Yakubu (2001) 3 KLR Mohammed JSC 913
mental Rights to fair hearing, liberty and freedom of movement were merely accessory to his primary complaint. The proceedings by way of the Fundamental Right (Enforcement Procedure) Rules are inappropriate in the circumstance."

After the Court of Appeal has substituted the order made by the trial court from the dismissal of the suit to that of striking it out that will be the end of the case before it and any further decision is incompetent and beyond its jurisdiction. It is quite clear from the authorities referred to by both the High Court and the Court of Appeal that when a court finds an action improperly constituted the proper order to make is to strike it out and not to dismiss it. The decision of the Court of Appeal therefore is right when it substituted the decision of the High Court dismissing the action filed by the cross-appellant with an order striking out his claim. This decision brings to an end all hearing in respect of Suit No. AHC/96/92. Any further pronouncement on the merit of the action after it had been struck out is incompetent and outside the jurisdiction of the Court of Appeal.

On the facts of this case and the law the cross-appeal is hereby dismissed. I award N10,000.00 costs to each set of cross-respondents.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Mohammed, JSC and I am in full agreement with the reasoning and conclusions therein. I do not think there is any thing more that I can usefully add.

Accordingly, I, too, dismiss the cross-appeal with N10,000.00 costs to each set of cross-respondents.

ACHIKE JSC

I have before now had the privilege and opportunity of reading the judgment delivered by my learned brother, Mohammed, JSC I agree

with the conclusions reached by him. Accordingly, I too would dismiss the cross-appeal and award N10,000.00 costs to each set of cross-respondents.

B

UWAIFO JSC

I read in advance the judgment of my learned brother Mohammed JSC I agree with him that the cross-appeal lacks merit.

C

The appeal filed in this case was withdrawn at the hearing on 4 December, 2000 and was accordingly dismissed. What remains for a decision is the cross-appeal. The cross-appellant was the Ejeh of Ankpa, a first class traditional ruler and a member of Kogi State Council of Chiefs before he was deposed sometime in December, 1992. he was immediately detained in a Government Guest House. He therefore brought an action under the Fundamental Rights (Procedure) Rules for a number of reliefs including a declaration as to his unlawful detention, a declaration about his illegal and unconstitutional deposition, injunction and damages.

D

E

The learned trial judge came to a conclusion that the action was incompetent since the principal claim was in regard to the deposition and that the action was not appropriate as one of fundamental rights. He however considered the merit of the case and dismissed the action. The Court of Appeal, Abuja Division, allowed the appeal on the issue that having held that the action was incompetent, the proper order was that of striking out. The Court of Appeal made that order, but even so, it also itself considered some issues raised by the cross-appellant. It was an exercise which was by and large unnecessary and therefore futile. But it arrived at a crucial conclusion as to the failure of the cross-appellant to appeal against the decision of the trial court on the issue that the action was incompetent. It observed, per Salami JCA who read the leading judgment:

F

G

“It follows, therefore, that the pivot of the trial court’s decision has not been directly impugned. The decision of the trial court to the effect that the suit or action was wrongly or improperly constituted subsists until it is otherwise set aside even if it were to be wrong.”

H

I have no doubt in my mind that the learned Justice was right.

All the eighteen grounds of appeal and the six issues framed by the learned counsel for the cross-appellant (as appellant before the lower court) avoided the crux of the decision reached by the learned trial judge (Fabiya, J). as Salami JCA put it:

“The primary concern of learned counsel for appellant, in this connection, is whether or not the learned trial judge could safely have determined the action on the merit having found that the suit was not properly constituted. Furthermore, he is challenging the propriety or otherwise of Fabiya, J., declining jurisdiction to entertain the suit after Ajana, J., a judge of coordinate jurisdiction has granted leave to appellant to enforce his fundamental human right.”

There was therefore no complaint against the decision that the suit was incompetent. In other words, the cross-appellant did not feel aggrieved about it. Once that is so, the further appeal to this court by way of a cross-appeal amounts to nothing more than shadow-boxing. The issues formulated for determination cannot arise. They read thus:

“1. Whether the Court of Appeal was right in striking out the entire claim of the Appellant which goes beyond the stool of Ejeh of Ankpa having regard to order 2, Rules 1(1) and 2(1) of the Kogi State High Court (Civil Procedure) Rules, 1991 more so that non of the 1st-4th Respondents objected in limine to the procedure used in filing the case (This issue relates to grounds one and two)

2. Whether the procedure adopted in initiating the action inter alia involving the Ejeh stool was not proper or improper so as to prevent the Court of Appeal from making appropriate consequential order reinstating the Appellant to the said stool in the exercise of its powers under section 16 of the Court of Appeal Act, 1976 (This issue relates to additional grounds five, six and seven).

3. Whether the Court of Appeal was right in formulating only two issues for determination without regard to the entire grounds of appeal inter alia attacking the inconsistent Ruling of Fabiya J. which was said to be complementary and not contradictory of the Ruling of Ajana J. granting leave to the Appellant (This issue relates to grounds three and four).”

It will serve no purpose to proceed to determine these issues in any detail because the foundation upon which any such issues could have been based is that the learned trial judge was wrong in declining jurisdiction in this matter. That would have had to be canvassed before the Court of Appeal but it was not. Whatever the Court of Appeal did on the basis that that was not canvassed is hardly necessary to be questioned now other than to say it simply should have struck out the appeal and stopped there. I therefore strike out the issues for the reasons stated and accordingly dismiss the cross-appeal. I award N10,000.00 costs each to the appellants/1st cross-respondents and the 2nd cross-respondent.

AYOOLA JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother Mohammed, JSC. The appellants have withdrawn their appeal. I entirely agree with him that the cross appeal, should be dismissed and with the reasons he gives for that conclusion. I too dismiss the cross-appeal with N10,000 costs to the appellants.

F

G

H