

SUPREME COURT OF NIGERIA

6TH APRIL, 2001. SC. 184/1995.

**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, S. U. ONU,
U. A. KALGO, S. O. UWAIFO, JJSC.**

FIRST BANK OF NIGERIA PLC APPELLANT
AND
MAY MEDICAL CLINICS &
DIAGNOSTIC CENTRE LIMITED RESPONDENTS

***APPEALS** - Evidence - Affidavits evidence - Contradictions - In the circumstances of this case - The court below was wrong to choose one side of the story - Without giving opportunity to resolve the contradictions (H 2)*

***APPEALS** - Judgment - As the judgment is lost - Due to fault of a trial court - The court of appeal was wrong - In making it impossible for the appeal to be heard - And must hear the appeal on all lawful grounds of appeal (H 3)*

***EVIDENCE** - Affidavit - Containing diametrically opposing material facts - Must be resolved by viva voce evidence - Not by picking and choosing which to believe (H 1)*

FACTS

This is an appeal against the judgment of the Court of Appeal in an interlocutory matter. The initial suit originated at the High Court of Kaduna State. In that suit the plaintiffs who are the present respondents sued the 1st Bank of Nigeria Plc for dishonouring two cheques issued by the 2nd plaintiff/respondent, the Managing Director of the 1st Plaintiff/Respondent. The cheques were for the sums of N1000.00 and N1200.00 respectively and they claimed against the appellant the sum of five hundred thousand Naira and interest at 25% per annum for dishonouring the cheques. The trial judge gave judgment in favour of the plaintiffs, but

dispute later arose as to the exact terms of the judgment, as the original handwritten scripts had been lost without any clear evidence as to whether the fault was that of the appellant's former counsel Dr. Oguntoye or the learned trial judge who had taken the scripts of the judgment away.

The appeal actually bordered not on the merits of the trial judge's judgment but on the fact that the judgment sought to be executed was different from the one delivered in court. The appellant's former counsel - Dr. Oguntoye had lodged an appeal to the Court of Appeal before the writ of execution was issued with his brief and record of appeal filed and prepared. It was in dispute whether the trial judge had returned the judgment and whether Dr. Oguntoye had access to it in order to prepare the record of appeal in which case he would be responsible for the loss. However in a motion to amend the Notice of appeal and brief of argument by appellant's new counsel in view of the missing documents, neither Dr. Ogunkoya nor the trial judge was called upon to react to the allegations against them by filling an affidavit and the appeal court ruled against the appellant without settling the contradictions by oral evidence and dismissed their motion. Thus this appeal to the Supreme Court with the following issues for determination.

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

Differences in Affidavit evidence

1. Where the only evidence before a court are affidavits of the parties – that is to say the applicant's affidavit and respondent's counter-affidavit, the court can rule and arrive at a conclusion insofar as the affidavits do not contain totally divergent depositions of facts. In cases where the affidavits, on material facts to be adjudicated upon are diametrically at variance, the court before which the proceeding is being conducted must not pick and choose or believe one and reject the other, it is only by resorting to viva voce evidence that the Court will resolve the conflict on the facts.

(p. 1032 E)

Affidavit - Contradictions therein

2. In a matter of this nature, affidavit from Dr. Oguntoye and one from trial judge would have been of great help and importance in resolving conflicts and court below ought to have either directed the trial judge and Dr. Oguntoye to react to the allegations against them or to call for oral evidence. As the affidavits stood at lower Court it was very impossible to arrive at any just conclusion on the evidence in them. Certainly the allegations are serious enough and to shut off these two personalities is surprising to deduce from what was before the lower court how Dr. Festus Oguntoye should be found culpable of what surely is a crime without his being heard.

It is therefore a great error by court below to hold, on contradictions in the affidavit evidence before it that “*Dr. Oguntoye was responsible due to his own selfish reasons for the loss or disappearance of the documents*” without his being heard and to hold his client, the appellant virtually vicariously liable for his crime. (p. 1033 E)

Judgments - Loss of

3. Where a judgment is lost due to inadvertence or negligence of the court officials, as in this case the appellant is not to blame, the fault lies squarely with trial court. If that is the case here the appellant may not be able to prosecute this appeal. The assertion that the documents were lost due to Dr. Oguntoye’s unlawful act could not legally be discerned from the affidavit in that he was not confronted with it to react. Similarly trial judge herself could hardly escape suspicion. But what is surely disturbing is that the court below by its ruling was vitiating the only way out for the appellant to have his appeal heard. As it is now it seems the appeal in the lower court could not be prosecuted on its merit because all necessary documents could not be available before it. It is in the interest of justice for Court of Appeal to make all necessary orders so that the case can be resurrected. If the manuscript is missing the lower court will be unable to fairly hear the appeal, the best it can do is to order hearing de novo. As the manuscript could not be found and affidavits and letters conflict on where the blame for the manuscript disappearance laid, the Court of Appeal must

hear the appeal on all lawful grounds of appeal. (p. 1034 C & H)

NOTABLE POINTS OF INTEREST

BELGORE JSC

B 1. *Immaterial conflicts in affidavits*

However where conflicts in the affidavits do not touch the material substance of the matter before the Court, decision may be based on the evidence in those affidavits and there will be no need to resort to oral evidence to resolve such immaterial facts (L.S.D.P.C. Vs Adold/Stamm International (Nig) Ltd. (1994) 7 NWLR (Pt. 358) 545, 550; Okupe Vs F.I.B.R. (1994) All NLR (Reprint) 284; Garba Vs University of Maiduguri (1986) 1 NWLR (Pt. 18) 550; Falobi Vs Falobi (1976) 9 – 10 SC, 1). It is also right that the Court can consider facts in affidavit by disregarding flimsy facts deposited therein and there will be not necessity to call oral evidence (L.S.D.P.C. Vs. Adold/Stamm International Nigeria Limited (supra). (p. 1032 G)

E 2. *One cannot claim for speculative damages in an action for defamation*

The case concerned two dishonoured cheques amounting to a total of about N3,000.00. The case was for damages amounting to N500,000.00 only. It is like a case in defamation to be remedied in damages; in such a case it is not heard in law that a person claims interest on speculative damages from when the action was filed. (p. 1035 A)

REPRESENTATION

G J.B. Daudu Esq., SAN with him M.M. Oyeleke Esq. and D.D. Dimlong Esq. for the Appellant.
Basil C. Nwogu Esq. for the Respondents.

CASES REFERRED TO

H Garba v. University of Maiduguri (1986) 1 NWLR (pt.18) 550
L.S.D.P.C. v. Adold/Stamm International (Nig.) Ltd. (1994) 7 NWLR (pt.358) 545, 550
Okupe v. F.I.B.R. (1994) ALL N.L.R. (Reprint) 284

Engineering Enterprises Ltd. v. Attorney-General of Kaduna State (1987)
2 NWLR (pt.57)

Pharmatek Industrial project Ltd v. Bayo Ojo (1996) 1 NWLR (pt.424)
334 at 338

Okpala v. Ibeme (1989) 2 NWLR (pt.102) 208

B

Adalaju v. Alade (1994) 7 NWLR (pt.358) 537

Duru v. Nwosu (1989) 4 NWLR (pt.113) 24 at 43

Okoduwa v. State (1988) 2 NWLR (pt.76) 333, 355

Abodundu v. The Queen (1959) 4 F.S.C.70

C

LEAD JUDGMENT BY BELGORE JSC

This is an appeal against the judgment of Court of Appeal in an interlocutory matter, in the suit originating at High Court of Kaduna State presided over by Donli, J. The plaintiffs May Medical Clinics and Diagnostic Centre Ltd. and its Managing Director, Kevin Chukwudi Nwachukwu sued the defendant, First Bank of Nigeria Plc for dishonouring two cheques issued by 2nd plaintiff (now 2nd respondent) for the sums of N1,000.00 and N1,200.00 respectively. He was claiming against the appellant “the sum of five hundred thousand naira and interest at the rate of 25% per annum for the dishonouring of the cheque”. The particulars of the claim were set out by the plaintiffs as

“1. Amount wrongfully withdrawn by the Defendant account = N3,780.80

2. The amount surcharged the plaintiff by the defendant for the dishonoured cheque – N1,000.00

3. Amount spent by the Plaintiffs in their defence at the prosecution of the second plaintiff by the landlord at Tundun Wada Area Court 1 at Kaduna for the recovery of the N1,000.00 contained in the dishonoured cheque = N500.00

4. The sum of N1,000.00 wrongfully debited the plaintiffs on the 30th January 1985 while the cheque for that amount was negligently dishonoured = N1,000.00 Total N5,281.00”.

The balance of 494,720.00 was claimed as general damages. Judgment was given by learned trial judge after hearing the parties on 23rd

November 1992. The judgment was in favour of the plaintiff but a dispute arose as to the exact terms of the judgment. This has led to heated disagreement between the counsel to the plaintiffs and the previous counsel for appellant, one Dr. Festus Oguntoye who seems to have totally disappeared from the suit but who has been directly accused of dishonesty and misconduct which he denied. Similarly, learned trial judge was accused of keeping away not only the original handwritten scripts of the judgment she delivered in open Court but also the entire file containing the proceedings in the suit. This appeal, as I said earlier is interlocutory because the real issue is not the merit or demerit of the trial judge's judgment but that the judgment being attempted to be executed was different from the one delivered in open court. Further, the file containing the original handwritten proceedings, including the judgment, was taken away by learned trial judge to her house, ostensibly "*to be put into computer,*" but for several months all attempts to get it back to Kaduna High Court Registry were futile. But an appeal had been promptly lodged at the Court of Appeal. The trial judge, despite the appeal lodged, had immediately issued a writ for execution of the judgment. The appellant's original counsel, Dr. Oguntoye, lodged the appeal and filed a brief and prepared a record of appeal. But the trial judge, it was alleged never returned the file and finally it was alleged missing. The dispute was whether the file was returned by trial judge and whether Dr. Oguntoye had access to it to prepare the record of appeal. Curiously enough, in a motion to amend grounds of appeal and the brief of argument, with affidavits and counter affidavits by parties, neither trial judge nor Dr. Oguntoye was invited to react to the allegations as none of them filed any affidavit. The appellant had at the stage before motion in Court of Appeal to amend the Notice of Appeal and brief of argument, dispensed with services of Dr. Oguntoye and briefed another Counsel. Thus, what was before the Court of Appeal as interlocutory matter to the appeal was that the Record of Appeal, especially the judgment, was not the correct one as at court of trial.

To illustrate the issues it is expedient the affidavits and the ruling of Court of Appeal be set out. The appellant's new Counsel, before 28th September when the matter was to come up filed a motion praying for

the following orders:

“i. Leave to amend the appellant’s Notice of Appeal by substituting same with the annexed Exhibit “C” and deeming the said Exhibit “C” as being duly and properly filed and served.

ii. Leave to amend the appellants brief of argument by substituting same with the amended brief of argument marked herein as Exhibit “D” and deeming the said Exhibit “D” as being duly and properly filed and served.

iii. An Order of this Honourable Court vacating its order directing all the parties to this appeal to return to the Registrar of High court No. 4 for the purpose of settlement of the record of proceedings on the ground that based on the existing facts, it is impossible to comply with such an order.

iv. Abridging the time, within which the respondents may file a reply to the appellants brief.

v. Accelerated hearing of the appeal.”

The supporting affidavit, inter alia, asserts as follows:

(a) That both parties had challenged the existing printed records but the principal complaint came in the form of an affidavit filed by respondent’s counsel challenging its correctness.

(b) That only the handwritten original of the judgment of Hon. Donli J. would have put to rest, the doubts and allegations brought about by the Certified True Copy which is said to be at variance with the said manuscript.

(c) That the loss of the manuscript was attributed vide Exhibit “B” to the trial judge herself by the registrar of her court.

(d) That so long as the said judgment continues to be lost, the order of the Court of Appeal directing a settlement of the printed records cannot be complied with.

(e) That in the circumstances described above, it was necessary to seek the courts leave to amend both the notice of appeal and brief of argument so as to raise and argue the issue that the loss of such judgment had frustrated the appellants appeal and a retrial was the appropriate order to make.

The respondents' reaction is the counter-affidavit deposing inter alia as follows:

“(a) That the appellant’s counsel refused to co-operate in respect of the settlement of records.

B *(b) That at all material times the allegation has always been that Appellant’s counsel Dr. Oguntoye was responsible for the loss of the manuscript and exhibit. Exhibits ATT 4 and ATT 9 were referred to.*

(c) That it will bring hardship to the respondents were they to write a new brief at this stage.”

C Oral arguments followed in the Court on these affidavit evidence, which to my mind, ought to have contained affidavits by Dr. Oguntoye and the trial judge, and of course the clerks and registrars of the trial court who might have handled the original handwritten record of proceedings. After D the oral arguments, Court of Appeal ruled in this vein:

1. That on the affidavit evidence before the Court no cogent convincing reasons were advanced to justify granting the prayers to amend the grounds of appeal and the brief.

E *2. That the respondents’ affidavit (counter affidavit) Annexes disclosed the former counsel to the appellant, Dr. Oguntoye, was responsible for the loss of the original court’s manuscripts and exhibits as there was no challenge to the said averment.*

F *3. That the application was mala fide and that a man should not be allowed to benefit from his wrongdoing because the appellant’s “conduct was selfish” and was solely to circumvent the real issue.*

G *4. That the appellant was giving the impression that the manuscript of the trial court’s judgment was irretrievably lost as well as the exhibits but how was it able to file Notice of Appeal now proposed. That is to say how did it obtain the materials for the proposed grounds of appeal?*

H The Court of Appeal finally held that to grant the prayers to amend the Notice of Appeal and brief of argument based on the materials before the court would be *“useless, inconsequential and inconsistent”*. The motion was therefore dismissed. Thus the appeal lodged to this Court.

The following issues were formulated by appellant for determina-

tion:

“1. Whether in refusing the Appellants application, particularly the prayer that sought to amend the notice of appeal and brief of argument, the Court of Appeal was justified in relying on the existing affidavit evidence to hold that Dr. Oguntoye former appellant’s counsel had unlawfully removed the hand written judgment of Donli J. and 29 exhibits as a result of which the appeal before it was unarguable and by reason of such a conduct, the appellant bank was estopped from relying on the wrong doing of their counsel to improve its case?”

2. Assuming but not conceding that the Court of Appeal was correct, when it found that Dr. Oguntoye, Appellant’s former counsel was responsible due to his own selfish reason for the loss or disappearance of the documents, could the appellant be vicariously liable for the said conduct, which is criminal in nature?”

3. Whether the Court of Appeal adverted to the correct legal principles when it refused the application to amend the Notice of Appeal, and Brief of Argument and other prayers in the application and it is answered in the negative, what are the correct legal principles applicable to an application to amend a notice of appeal and brief of argument before an appellate court?”

As against this, the respondents formulated the issues as follows:

“1. Based on the materials before the Court of Appeal, whether there was sufficient evidence before the Court to support the culpability of Dr. Festus Oguntoye, Counsel to the Appellant, in the loss of the vital documents to be used in deciding the appeal?”

2. Whether the Court of Appeal, Kaduna was justified in refusing the Appellant’s application because of the culpability of it’s Counsel in the loss of the TRIAL COURT’S ORIGINAL JUDGMENT MANUSCRIPT and the 29 EXHIBITS tendered by both parties at the trial?”

3. Whether in exercising it’s discretion to refuse the Appellant’s application for the amendment of the Notice of Appeal, Grounds of appeal and Brief of Argument. The Court of Appeal applied the correct principles of law in deciding applications for leave to amend the Notice of Appeal, Grounds of Appeal and Brief of Argument?”

It must be pointed out that the respondents raised preliminary objection to the grounds of appeal on which ruling will be given first. The first ground of appeal has raised issue of wrong exercise of discretion by the Court of Appeal. The allegation was that Dr. Festus Oguntoye, former counsel to the appellants, unlawfully removed manuscript of the judgment of trial court to frustrate the appeal. This is a substantial question of law and the ground is competent.

On second ground of appeal involving error in law in that to ask to be allowed to file additional grounds of appeal or to amend ground of appeal is a constitutional right insofar as the ground is competent as in this case.

The respondent's counter affidavit to the appellant's affidavit in court below was not unchallenged in view of all facts before that court in that Exhibit 4 emanating from trial court shows clearly that the missing manuscript of trial court's judgment and exhibits could be attributed to any other person other than Dr. Oguntoye. The "*unlawfully removed*" manuscript imputes a crime and Court of Appeal in that instance ought to be adverting to the burden of proof required. The net result is that all the grounds, even though not elegantly well framed, are grounds of law and are therefore competent. The preliminary objection is therefore dismissed.

Where the only evidence before a court are affidavits of the parties – that is to say the applicant's affidavit and respondent's counter-affidavit, the court can rule and arrive at a conclusion insofar as the affidavits do not contain totally divergent depositions of facts. In cases where the affidavits on material facts to be adjudicated upon are diametrically at variance, the court before which the proceeding is being conducted must not pick and choose or believe one and reject the other, it is only by resorting to viva voce evidence that the Court will resolve the conflict on the facts. However where conflicts in the affidavits do not touch the material substance of the matter before the Court, decision may be based on the evidence in those affidavits and there will be no need to resort to oral evidence to resolve such immaterial facts (L.S.D.P.C. Vs Adold/Stamm International (Nig) Ltd. (1994) 7 NWLR (Pt. 358) 545, 550; Okupe Vs F.I.B.R. (1994) All NLR (Reprint) 284; Garba Vs University of Maiduguri (1986) 1 NWLR (Pt. 18) 550; Falobi Vs Falobi (1976)

9 – 10 SC, 1). It is also right that the Court can consider facts in affidavit by disregarding flimsy facts deposited therein and there will be not necessity to call oral evidence (L.S.D.P.C. Vs. Adold/Stamm International Nigeria Limited (supra). The affidavit before the court touch directly at the issue to be considered in the main appeal. It is always of paramount importance to have all the records in an appeal before the appellate court. The proceedings including the exhibits and judgment are the materials necessary for the appellate Court to decide whether the trial court's judgment was right or wrong. No court can do justice in any case when all the relevant facts available are not placed before it. The learned trial judge and the registrar's and clerks of the court handling the manuscript ought to be involved in at least swearing to affidavits where records are either incomplete or are alleged to be at variance with what happened in open court. The affidavit of the appellant in court below was to the effect that the exhibits and manuscript of the judgment were missing and could not be before Court of Appeal. The respondents also agreed the manuscript were missing and that even counsel for respondents called both at the office and residence of trial judge to retrieve the documents. Thus it could not by any shred of imagination be said that the fault entirely lied with Dr. Oguntoye. **In a matter of this nature, affidavit from Dr. Oguntoye and one from trial judge would have been of great help and importance in resolving conflicts and court below ought to have either directed the trial judge and Dr. Oguntoye to react to the allegations against them or to call for oral evidence. As the affidavits stood at lower Court it was very impossible to arrive at any just conclusion on the evidence in them. Certainly the allegations are serious enough and to shut off these two personalities is surprising to deduce from what was before the lower court how Dr. Festus Oguntoye should be found culpable of what surely is a crime without his being heard.**

It is therefore a great error by court below to hold, on contradictions in the affidavit evidence before it that *“Dr. Oguntoye was responsible due to his own selfish reasons for the loss or disappearance of the documents”* without his being heard and to hold his client, the appellant virtually vicariously liable for his crime.

Court below earlier ordered the parties to settle record of trial court. The appellant's application issue in this appeal, clearly stated it was an impossible order to obey as the manuscript had disappeared from the trial court. Thus the application to amend the Notice and grounds of appeal and the appellant's brief of argument was perfectly before that court. That was the only way all facts would easily have been before that court. There was no direct and cogent evidence of where the documents were; only that they were allegedly admitted to have been taken by trial judge to her residence for about seven months. In Engineering Enterprises Ltd. Vs. Attorney-General of Kaduna State (1987) 2 NWLR (Pt.57), this Court held that every appellant has right to appeal once his grounds of appeal are competent. **Where a judgment is lost due to inadvertence or negligence of the court officials, as in this case the appellant is not to blame, the fault lies squarely with trial court. If that is the case here the appellant may not be able to prosecute this appeal. The assertion that the documents were lost due to Dr. Oguntoye's unlawful act could not legally be discerned from the affidavit in that he was not confronted with it to react. Similarly trial judge herself could hardly escape suspicion. But what is surely disturbing is that the court below by its ruling was vitiating the only way out for the appellant to have his appeal heard. As it is now it seems the appeal in the lower court could not be prosecuted on its merit because all necessary documents could not be available before it. It is in the interest of justice for Court of Appeal to make all necessary orders so that the case can be resurrected. If the manuscript is missing the lower court will be unable to fairly hear the appeal, the best it can do is to order hearing de novo.** In the instant case, it is not only the appellant that submits the manuscript was missing the respondent also agrees. What is certain in the case is the amount claimed. The amount claimed was N500,000.00, it seems the judgment to be executed ran into N2,886,769.60. **As the manuscript could not be found and affidavits and letters conflict on where the blame for the manuscript disappearance laid, the Court of Appeal must hear the appeal on all lawful grounds of appeal.**

Finally the Court of Appeal ought to have been on its guard by the nature of the action, the amount claimed and the amount purported to have been awarded by trial court. The case concerned two dishonoured cheques amounting to a total of about N3,000.00. The case was for damages amounting to N500,000.00 only. It is like a case in defamation B to be remedied in damages; in such a case it is not heard in law that a person claims interest on speculative damages from when the action was filed. The writ in this matter was clearly for damages for dishonoured cheques for N500,000.00, though also including claim for interest on this specu- C lated damages it is surprising how this immodest claim metamorphosed into over N2,000.000.00 judgment.

It is therefore an error on the part of Court of Appeal to refuse the application to file additional grounds of appeal. The appeal therefore succeeds. The appellant's application to file additional grounds of appeal D ought to have been granted. It is hereby granted. The appeal is hereby remitted to Court of Appeal Kaduna Division to be heard by an entirely different panel apart from that that heard it. N10,000.00 costs to the appellant against the respondent. E

OGWUEGBU JSC

I have had the opportunity of reading in draft, the judgment just F delivered by my learned brother, Belgore, JSC. I agree with his reasons and conclusion.

Having regard to the suspicious circumstances surrounding the disappearance of the manuscript of the judgment delivered by the learned trial judge as well as the exhibits tendered at the trial, the defendant/ G appellant's application at the court below for leave to amend its Notice of Appeal as set out in Exhibit "C" annexed to the affidavit in support of the application and to amend the brief of argument marked Exhibit "D", the need to grant the application by the court below was compelling. If the H prayers were not granted and there was no right of further appeal, the appellant would have been permanently disabled from questioning the propriety of the judgment of the trial judge or that of the Court of Appeal

refusing leave to amend the Notice of Appeal.

The approach of the court below in its consideration of the appellant's application is grossly erroneous. There is a complaint of a fundamental defect in the proceedings of the court of trial. Suspicions are cast
B as to who was responsible for the loss or disappearance of the hand written judgment of the learned trial judge: the learned trial judge (Donli, J), Dr. Oguntoye former counsel of the appellant or the staff of the Registry of the High Court. The court below appeared to have swept the complaint under
C the carpet and without any attempt to resolve the conflicting affidavit evidence held the appellant vicariously liable for the disappearance of the manuscript of the judgment. The application of the appellant was brought in utmost good faith and not intended to overreach and the grant of it by the court below appears to be the only avenue for determining the question
D in controversy between the parties or correcting any defect or error in the proceedings. Leave to amend notice of appeal is provided in the Court of Appeal Rules and special circumstances are not needed to justify the amendment. The discretion of the court to grant it is unhampered provided it is
E exercised judicially and judiciously. See *Re Stockton etc. C.O. (1879) 10 Ch. D.335*. The powers of the court below to order amendments and generally to make orders as are necessary to produce a just result extend to amendment of notice of appeal and brief of argument.

It is my view that the court below should have granted the application and having failed to exercise its discretion judicially, this court will do so. For the above reasons and the fuller reasons contained in the judgment of my learned brother Belgore, JSC, I allow the appeal. Accordingly,
F the amendments sought by the appellant in the court below are hereby
G granted. It is ordered that the appeal be heard by another panel of Justices of the Court of Appeal, Kaduna Division other than that which heard the application. The appellant is entitled to the costs of this appeal which is fixed at N10,000.00.

H I should add that our courts should not allow the embarrassing circumstances surrounding this appeal to repeat itself. It is capable of eroding the confidence of the citizenry in our judicial system.

ONU JSC

I had a preview before now the judgment of my learned brother Belgore, JSC just delivered. I am in entire agreement therewith that the appeal is meritorious and must perform succeed.

Accordingly, I allow the appeal and make similar consequential orders inclusive of costs as therein contained.

KALGO JSC

I have read in advance the judgment just delivered by my learned brother Belgore, J.S.C. in this appeal. I agree entirely with him that there is merit in the appeal and it ought to be allowed.

Accordingly, I allow the appeal, set aside the decision of the Court of Appeal and abide by the consequential orders made in the leading judgment including the orders as to costs.

UWAIFO JSC

I read before now the judgment of my learned brother Belgore JSC. I agree that there is merit in the appeal. I shall add a few words for emphasis particularly having regard to the unfortunate circumstances of this case.

The plaintiffs claim to be customers of the defendant bank having a current account at the Hospital Road, Kaduna Branch of the bank. On 30 January, 1985 they issued a cheque for N1,000.00 drawn on the bank to settle rent bill. The cheque was presented but was returned, marked “Refer to Drawer.” Another cheque dated 28 June, 1985 for N1,200.00 issued in favour of one Dr. Oji U. Oji, an employee of the plaintiffs, was said to have been dishonoured. It was alleged that the sum of N1.00 was wrongfully surcharged against the plaintiffs for the dishonoured cheque and that the sum of N3,760.00 was unilaterally withdrawn by the bank from the plaintiffs’ account. They said their landlord sued them for the recovery of the N1,000.00 and it cost them N500.00 to defend the suit.

The plaintiffs therefore sought special damages of N5,281.00 and general damages for negligence/breach of contract in the sum of N494,720.00, making a total of N500,000.00. They also asked for 25% interest.

The defendant in its statement of defence pleaded conspiracy and fraud involving the 2nd plaintiff and one Chukwuka Okpoko an employee of the said bank. The said fraud led to the crediting of the 2nd plaintiff's account with the sum of N3,780.00. Further details of how other manipulations allegedly took place were pleaded. At the time the cheque for N1,200.00 was presented for payment, the 1st plaintiff's account was overdrawn to the tune of N344.85. The case went to trial before Donli, J., sitting at the High Court, Kaduna. On 23 November, 1993, the learned trial judge gave judgment for the plaintiffs in the sum of N500,000.00. From the judgment on the printed record, no interest was awarded.

The defendant filed notice of appeal and filed an application for stay of execution. But somehow a writ of execution for an amount of N2,886,769.60 was signed by the judge. It was later that the Court of Appeal ordered a stay of execution. There is an allegation on behalf of the appellant that the exhibits tendered in the case were taken by the learned trial judge to her residence and that up till now she has been unable to produce them. The record of proceedings was alleged to have been kept by her for nearly seven months before she released it. She was said to have taken away the manuscript of her judgment with the reason that she intended to feed the judgment into her computer. The respondents, on the other hand, allege that one Dr. Oguntoye who was appellant's counsel at all material times took the exhibits and the hand-written judgment of Donli, J. This was denied by Dr. Oguntoye. At no time was Donli, J. asked by the lower court for her own version. The defendant in its numerous grounds of appeal is complaining against the judgment and in particular the award of N500,000.00 which has, as shown in the writ of execution, risen to N2,886,769.60 as at 2 February, 1993.,

At a stage in the Court of Appeal the defendant applied to amend the notice and grounds of appeal and consequently amend its appellant's brief of argument. The proposed amendment was to contend that the entire proceedings by Donli, J., leading to the controversial award of N500,000.00

and the signed writ of execution for N2,886,769.60, were a nullity. The relief sought was that the case be heard de novo before another judge. The Court of Appeal on 28 November, 1995 refused the amendment sought.

This appeal is against that interlocutory decision. The defendant (now appellant) has set down three issues for determination as follows:

“1. Whether in refusing the Appellants application, particularly the prayer that sought to amend the notice of appeal and brief of argument, the Court of Appeal was justified in relying on the existing affidavit evidence to hold that Dr. Oguntoye former appellant’s counsel had unlawfully removed the hand written judgment of Donli J and 29 exhibits as a result of which the appeal before it was unarguable and by reason of such a conduct, the appellant bank was estopped from relying on the wrong doing of their counsel to improve its case?”

2. Assuming but not conceding that the Court of Appeal was correct, when it found that Dr. Oguntoye, Appellant’s former counsel was responsible due to his own selfish reasons for the loss of disappearance of the documents, could the appellant be vicariously liable for the said conduct, which is criminal in nature?

3. Whether the Court of Appeal adverted to the correct legal principles when it refused the application to amend the Notice of Appeal, and Brief of Argument and other prayers in the application if it is answered in the negative, what are the correct legal principles applicable to an application to amend a notice of appeal and brief of argument before an appellate court?”

The lower court, per I.T. Muhammad JCA considered the application and observed:

“I am not convinced by the affidavit evidence of argument placed before this Court by learned counsel for the applicant to warrant me exercise my discretion in allowing the amendment. I am not prejudging the main appeal, but I do not think that there is any injustice more grave than allowing an appellant/applicant who during the process of compilation of Record of Appeal which is to be used during the main appeal losing some vital portions of the record such as exhibits tendered at the

trial court. The law can be lenient to applicants who unwittingly through acts of commission or omission though innocently, commit procedural irregularity in filing or prosecuting cases but certainly the law does not favour those who for selfish reasons, circumvent the real issue, in order to draw benefit from their own misdeeds. An impression is given by the applicant that the manuscript of the said judgment is irretrievably lost (paragraph 2(vii) of the Affidavit in Support) and that so long as the judgment and exhibits continue to be missing or lost, the order of the Appeal Court that both parties settle the records cannot be complied with, then one would ask: how does the applicant or from where did the applicant get the materials from which he set out his proposed amended Notice of Appeal and appellants brief?"

The learned Justice further added:

"It is trite (sic) that leave to amend will not be granted if the amendment will not cure the defect in the proceeding... Again, as briefs were already filed and exchanged by the parties... it will work injustice on the respondents as they will have to make consequential amendment to the brief already filed and served or even prepare a new one. That is capable of causing undue delay to the hearing of the appeal.

I think the lower court, with due respect, was completely oblivious of the enormity of the issues involved in the scenario which was about playing out itself. I do not think it considered the scandalous circumstances alleged in this matter particularly in regard to the argument as to what was indeed awarded in the judgment. The judgment of Donli, J., as compiled in the printed record of proceedings prepared by the appellant's solicitors, shows that the award was N500,000.00 with no order made for interest. This is one of the points the appellant eventually intends to contend in an appeal for a retrial. It is of utmost importance, and crucial to the consideration of what the real judgment was, to look at the judgment which commences at page 182 of the said record of proceedings and ends at page 202 and then relate it to page 429 of the said record where the alleged signature of Donli, J. is appended, thereby appearing to confirm that the judgment was for N500,000.00 and no more, i.e. without payment of any interest being made part of it. Nothing was done to get Donli, J., to deny

that that was her judgment together with that signature. Nothing has been done to explain how a writ of execution of the said judgment for an amount of N2,886,769.60 came to be signed by her. It is understood the interest is now put at 30% p.a. going by a certain affidavit evidence, which also says that by now the amount would have risen above B N7,000,000.00. If, as alleged, the manuscript of the judgment is irretrievably lost, how does the Court of Appeal expect the parties to settle any other record than the one as compiled by the appellant? This is one of the reasons the appellant is seeking to amend its notice and grounds of C appeal.

With due respect, I am unable to agree with the reason given by the lower court for refusing the amendment sought. Those reasons are besides the issue of the need to amend the said notice and grounds of appeal. Furthermore, the fact that when leave is granted to amend that would D necessitate the respondents amending their own brief of argument is a normal and usual consequence. That cannot as such cause injustice to the respondents since they may have to be compensated with costs. In fact, I think it is the appellant who is likely to suffer a monumental injustice if it E is not given a chance to present a case urging the court to set aside what it regards as obvious manipulation to make it liable to an extent so alarming that it calls justice into question.

As already said, the appellant is trying to present a case for re- F trial. But first it wants to amend its notice and grounds of appeal and the brief of argument. In *Duru v Nwosu* (1989) 4 NWLR (pt.113) 24 at 43 per Nnamani JSC, it was observed:

“in Okoduwa v. State (1988) 2 NWLR (Pt. 76) 333, 355 this court G accepted one of the tests postulated in Abodundu v. The Queen (1959) 4 F.S.C. 70 which is that a Court of Appeal ought to order a retrial where there has been such an error in law or an irregularity in procedure which neither renders the trial a nullity nor makes it possible for the appeal H court to say there has been no miscarriage of justice.”

This is a principle which is intended, in my opinion, to deal with situations where there have been some grotesque occurrences in the determination of a case that cannot be explained. In such a situation there may not be

sufficient legal reasons to regard the trial a nullity but the court is unable to say that there has been no miscarriage of justice. Hence, in the *Abodundu's* case at page 166, Abbott F.J. who delivered the judgment of the court said:

B “in formulating these principles we do not regard ourselves as deciding any question of law or as doing more than to lay down the lines on which we propose to exercise a discretionary power. It is impossible to foresee all combinations of circumstances in which the question of ordering a retrial may arise...”

C Once there is a valid notice of appeal, it can be amended: see *Okpala v. Ibeme* (1989) 2 NWLR (Pt.102) 208; *Adalaju v. Alade* (1994) 7 NWLR (pt.358) 537. The purpose of such an amendment must be to ensure that the complaints of the appellant against the proceedings in question are laid and ventilated before the court. The fact that briefs of argument have been filed and exchanged and an appeal is virtually ready for hearing will not prevent the court from exercising its undoubted discretion to allow an amendment both to the notice and grounds of appeal and the brief of argument so long as the amendment would serve the ends of justice and fairness, and the other party can be compensated by costs: see *Pharmatek Industrial Projects Ltd v. Bayo Ojo* (1996) 1 NWLR (pt. 424) 332 at 338.

F For the above reasons and those given by my learned brother Belgore JSC in his judgment, I find merit in this appeal and allow it. The amendments sought to the notice and grounds of appeal, and also to the appellant’s brief of argument, are granted. The appeal is to be determined with reasonable dispatch in order to put the unpleasantness so far generated by these proceedings behind us. It is ordered that the hearing be before another panel of the Court of Appeal differently constituted as the former panel made findings and pronouncements which are likely to be prejudicial to the appellant. I award costs of N10,000.00 to the appellant.

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