

SUPREME COURT OF NIGERIA

22ND JUNE, 2001. SC. 192/1997

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI,
U. MOHAMMED, A. I. KATSINA-ALU, O. ACHIKE, JJSC.**

A. A. OGUNKUNLE & ORS. DEFENDANTS/APPELLANTS
AND
ETERNAL SACRED ORDER PLAINTIFFS/RESPONDENTS
OF THE CHERUBIM & SERAPHIM & ANOR.
C. A. OGUNYEMI & ORS. DEFENDANTS/RESPONDENTS

***APPEALS** - Right of appeal - As the consent judgment of the trial court - Did not bind the appellants - And they were not parties thereto - Their appeal was incompetent and should be struck out (H 3)*

***APPEALS** - Right of appeal - Under s.222 (a) 1979 Constitution - Condition precedent - Person claiming such a right - Must show that the court's decision is against him or his interest (H 1)*

***PRACTICE & PROCEDURE** - Notice of discontinuance - Brings the action against the defendant to an end - And any judgment given against remaining defendants - Will not affect that defendant (H 2)*

FACTS

The 1st and 2nd respondents as plaintiffs brought an action at the Federal High Court Lagos against the 1st to 11th defendants for themselves and on behalf of other persons claiming to belong to the Eternal Sacred Order of the Cherubim and Seraphim of Ebute Metta Lagos State. The reliefs claimed included an injunction restraining the defendants from parading themselves as members or officers of the said order and injunction restraining the defendants from trespassing into their property at Ebute Metta in Lagos and other reliefs. At the trial the original defendants were split into two and 1st-15th respondents were joined on their own application. The two sets of original defendants filed separate Statements of defence and the present appellants counter claimed. The coun-

sel to the parties agreed to and filed terms of settlement before the court to which the present appellants dissented. The plaintiffs thereupon served a notice of discontinuance against the present appellants. The trial judge after hearing counsel on the record on the adjourned date on the notice of discontinuance as it affected the terms of settlement filed, entered judgment against the defendants as per the terms of settlement and specifically excluded the present appellants from the effect of the judgment.

The appellants' appeal to the Court of Appeal was dismissed and they have further appealed to the Supreme Court. The plaintiffs respondents and defendants respondents have also cross-appealed challenging the jurisdiction of the Court of Appeal to entertain the appeal.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal had jurisdiction in the circumstance to entertain the defendants/appellants' appeal?

2. Assuming without conceding that the Court of Appeal had jurisdiction to entertain the appeal;

(a) Whether the learned Justices of Appeal were right in considering the effect and validity of the Notice of Discontinuance, when there was no appeal on those Points before the court?

(b) Whether the learned Justices of Appeal had the jurisdiction to consider and determine any issue whatsoever relating to the Notice of Discontinuance when there was no appeal on the issue?"

HELD: (Unanimously dismissing the main appeal and allowing the cross appeal per lead judgment of **KATSINA-ALU JSC**)

Right to appeal - Condition precedent

1. One does not need a magnifying glass to see that the existence of a decision affecting a party is a condition precedent to the existence of a right of appeal and indeed the exercise of any such right of appeal by that party. The right of appeal conferred by the Constitution is a right against the decision of a court adversely affecting a party. It therefore goes without any argument that for a person to claim any right of appeal as envisaged, that person must show that the decision of the court is against him or against his interest. (p. 2122 E)

Notice of discontinuance

2. A discontinuance, in my view, brings the action or that part of the action as is discontinued to an end against the defendants or such of them against whom the action has been discontinued without further intervention from the court.

The judgment of the trial court was against the defendants except the 4th, 9th and 10th defendants. It was a consent judgment which specifically excluded the present appellants. This is so because the action against them had been earlier discontinued. (p. 2122 H)

Right of appeal - Consent judgment

3. The consequence of a consent judgment is that it cannot and does not bind a person who is not a party to it either directly or by representation. What is more as at the time judgment was given, the appellants had ceased to be parties to the suit. The effect of this is simple. The appellants had no right of appeal to the Court of Appeal. At that stage the Court of Appeal should have struck out the appellants' appeal to that court for want of jurisdiction. (p. 2123 B)

REPRESENTATION

A. A. M. Fashanu, Esq. for the Appellant.

Kola Awodein, S.A.N. with M.A. Apampa for the Respondents/Cross-appellants.

CASES REFERRED TO

Popoola v. P. A. G. D. (1972) 11 SC 49 at 64

Nnaji for v. Ukonu (1985) 2 NWLR (Pt. 9) 686

STATUTE REFERRED TO

Constitution of Nigeria 1979 s. 220, 221 and 222(a)

LEAD JUDGMENT BY KATSINA-ALU JSC

The plaintiffs (1st and 2nd respondents in this appeal) brought an action in the Federal High Court Lagos originally against the 1st to

11th defendants for themselves and on behalf of other persons falsely claiming to belong to the "Eternal Sacred Order of the Cherubim and Seraphim of No. 75, Ibadan Street, Ebute Metta, Lagos, Lagos State jointly and severally for:

B "1. *INJUNCTION* restraining the defendants, their followers, agents servants and any other of their associates from parading themselves as members, officers and/or agents of *ETERNAL SACRED ORDER OF THE CHERUBIM AND SERAPHIM*, and from using or answering to the name of *ETERNAL SACRED ORDER OF THE CHERUBIM AND SERAPHIM*.

D "2. *INJUNCTION* restraining the defendants jointly and severally whether by themselves or by their servants, licencees, followers, officers, or any of their associates whomsoever from continuing to trespass on the property of the *Eternal Sacred Order of the Cherubim and Seraphim* situate at and known as No. 75 Ibadan Street, East, also at Ebute-Metta, Lagos and at No. 75 Odunfa Street, East, also at Ebute-Metta aforesaid and any other properties belonging to the plaintiffs wherever E situate upon which they are now trespassing, or from making any other properties belonging to the plaintiffs wherever situate upon which they are now trespassing, or making use of the said premises without the consent and authority of the plaintiffs.

F "3. *SURRENDER* and return to the plaintiffs of all monies, documents and properties of the plaintiffs in their possession or custody by virtue of their trespass on the plaintiff's property"

G Pleadings were exchanged with the 1st and 2nd respondents, as plaintiffs, filing their Statement of Defence on the one hand and the 4th, 8th-11th defendants (the appellants) filing their own Statement of Defence on the other with a counter-claim.

H Subsequently the 1st - 15th respondents joined in the suit as co-defendants by their own application whereby they obtained leave of the Federal High Court "to defend this action for themselves and on behalf of other persons who worship at the *Eternal Sacred Order of the Cherubim and Seraphim* of No. 75 Ibadan Street (East) Ebute-Metta, Lagos, Lagos State."

As I have already indicated, the original set of defendants were split into two represented by separate counsel. But later they were represented by Mr. Kehinde Sofola, SAN, leading Chief B. A. Adeeko continued to represent those defendants, but the separate statements of defence which they had filed remained on record. Mr. Adejuyigbe appeared for the second set of defendants. B

On the 1st August 1990 the plaintiffs filed terms of settlement. The record shows that on the 3rd August, 1990, Mr. Akesode, counsel for the plaintiffs/respondents reported to the court that the case had been amicably settled and terms of settlement signed by all the surviving defendants except four of them, three of whom are present appellants. Both Chief Adeeko and Mr. Adejuyigbe respectively confirmed the report and agreed on behalf of their respective clients that consent judgment be entered as per the terms of settlement filed. The learned trial judge adjourned the matter to 25th October 1990 to enable the appellants consider the matter. C D

On 24th of October 1990 the appellants brought an application for an order to set aside the order made on the 4th of July 1990 joining the second set of defendants. On the same day the plaintiffs/respondents filed a Notice of Discontinuance against the present appellants. It would appear that Mr. Agbebi the fourth of the dissenting defendants had, by that time, died. E

When the matter came on again on 25th October 1990, Chief Adeeko intimated the court that he was "going to make an application" to withdraw his appearance for the present appellants but that he would still have to make a formal application. Later, he was more direct in his intention to withdraw his appearance. Mr. Fashanu then announced his appearance for the appellants. Both Mr. Awodein and Mr. Adesode objected to the appearance of Mr. Fashanu. The learned trial judge then ruled that Mr. Fashanu had no "locus" at that stage of proceedings. He proceeded to hear counsel then on record as appearing for the parties on the notice of discontinuance as it affected the terms of settlement filed. F G H

After hearing counsel for the parties, the judge entered judgment against the *"Defendants as per the terms of settlement dated 24th day of*

July, 1990 and filed on the 1st August 1990, except the 4th, 9th and 10th Defendants."

He then excused Chief Adeeko from further appearing for the appellants. He thereafter proceeded to strike out the appellants' motion of 24th October, 1990.

The appellants' appeal to the Court of Appeal was dismissed. They have further appealed to this Court.

The plaintiffs-respondents and the defendants-respondents were also dissatisfied. They have filed a cross-appeal challenging the jurisdiction of the Court of Appeal to entertain the appeal.

In view of the nature of the cross-appeal I think it is desirable to consider it first. This is because if the cross-appeal succeeds, then the main appeal without more fails for want of jurisdiction in this court.

The cross-appellants have submitted the following issues for determination in this appeal:

"1. Whether the Court of Appeal had jurisdiction in the circumstance to entertain the defendants/appellants' appeal?

2. Assuming without conceding that the Court of Appeal had jurisdiction to entertain the appeal;

(a) Whether the learned Justices of Appeal were right in considering the effect and validity of the Notice of Discontinuance, when there was no appeal on those Points before the court?

(b) Whether the learned Justices of Appeal had the jurisdiction to consider and determine any issue whatsoever relating to the Notice of Discontinuance when there was no appeal on the issue?"

For their part, the appellants-cross-respondents have adopted the two issues raised by the cross-appellants.

ISSUE NO. 1

This issue questions the competence of the Appellants to appeal from a consent judgment which had specifically excluded them from the effect of the judgment. It further questions the jurisdiction of the Court of Appeal to entertain the Appellants' appeal to the court.

For the cross-appellants it was pointed out that the lower court, suo motu, invited all the parties to address it on the question:

"Whether the appellants are competent to appeal from the consent judgment which had specifically excluded them from the effect of the judgment."

After the address of learned counsel for the parties, the court below in the course of its judgment answered the question in this way: B

"At the end of the day the conclusions which reasonably follow in all the circumstances of the case are that, the appellants effectively ceased to be parties to the action at the time the consent judgment was entered in the case; the consent judgment was not blinding on them by reasons of the fact and also because they were specifically excluded from its operation. The position being thus, it is doubtful if the appellants were competent to bring this appeal." C

Without making any consequential order on the above finding and pronouncement the lower court proceeded nonetheless to consider the appeal on its merits and subsequently dismissed the same. It was submitted that the lower court was obliged as a matter of law to conclude that it had no jurisdiction to entertain the appeal. The appeal being incompetent, should have been struck out. D E

For the appellants-cross-respondents it was submitted that the issue posed suo motu by the lower court as to the competence of the appellants to appeal against the trial court's decision did not arise out of the Ground of Appeal filed before the lower court and so did not arise in the appeal at all as it was not raised by any of the parties to the appeal. It was argued that since the point was not raised by the respondents the lower court should not have dabbled into it. For this contention, learned counsel for the appellants-cross-respondents relied on the case of Popoola v. P.A.G.D. (1972) 11 SC. 49 at 64. It was further argued that what the court below said i.e. *"it is doubtful if the appellants were competent to bring this appeal"* is not an unequivocal finding against them as to their competence to bring the appeal as it is ex-facie an expression of doubt and the appellants could not be expected to appeal against such a non-finding or none-decision. F G H

Lastly it was submitted that whatever be the effect of the lower court's view, having found that there was a breach of fair hearing, it was

incumbent on the lower court to get on with the appeal notwithstanding any technical road blocks. For this submission the appellants-cross-respondents relied on the case of Nnajofofor v. Ukonu (1985) 2 NWLR (Pt.9) 686.

B The question to be resolved in this appeal is: Who has the right of appeal from the decision of the High Court? Sections 220, 221 and 222 (a) of the 1979 Constitution as amended deal with the issue of the right of appeal from judgments of the Federal High Court. Whereas
C sections 220 and 221 deal with the nature and type of decisions that are appealable as of right or with leave, section 222 (a) deals with what categories of persons can actually exercise that right of appeal as guaranteed by sections 220 and 221.

D The material portion of section 222(a) of the 1979 Constitution as amended provides as follows:

"(a) Any right of appeal to the Federal Court of Appeal from decisions of a High Court conferred by this Constitution -

*(1) Shall be exercisable in the case of civil proceedings at the
E instance of a party thereto, or with the leave of the High Court or Federal Court of Appeal at the instance of any other person having an interest in the matter ..."* (Underlining for Emphasis).

One does not need a magnifying glass to see that the existence of a decision affecting a party is a condition precedent to the existence
F **of a right of appeal and indeed the exercise of any such right of appeal by that party. The right of appeal conferred by the Constitution is a right against the decision of a court adversely effecting a party. It therefore goes without any argument that for a person to**
G **claim any right of appeal as envisaged, that person must show that the decision of the court is against him or against his interest.**

In the present case, the plaintiffs-cross-appellants filed a Notice of Discontinuance against the present appellants on 24th October 1990.
H The material part of that Notice reads:

"TAKE NOTICE that the Plaintiffs in this suit hereby wholly discontinue this action against the 4th, 9th and 10th Defendants."

A discontinuance, in my view, brings the action or that part of the

action as is discontinued to an end against the defendants or such of them against whom the action has been discontinued without further intervention from the court.

The judgment of the trial court was against the defendants except the 4th, 9th and 10th defendants. It was a consent judgment which specifically excluded the present appellants. This is so because the action against them had been earlier discontinued. The consequence of a consent judgment is that it cannot and does not bind a person who is not a party to it either directly or by representation. What is more as at the time judgment was given, the appellants had ceased to be parties to the suit. The lower court was right when it held:

".... the appellants effectively ceased to be parties to the action at the time consent judgment was entered in the case; the consent judgment was not binding on them by reasons of the fact and also because they were not parties thereto; and, they were specifically excluded from its operation." (Underlining mine).

The effect of this is simple. The appellants had no right of appeal to the Court of Appeal. At that stage the Court of Appeal should have struck out the appellants' appeal to that court for want of jurisdiction.

In the result, the cross-appeal succeeds and I allow it. Accordingly, I strike out the appeal of the appellants to the Court of Appeal. The appeal of the appellants to this court is thereby rendered incompetent. It is also accordingly struck out. I award N10,000.00 costs to the cross-appellants against the appellants.

KARIBI-WHYTE JSC

I have read the leading judgment of my brother A. I. Katsina-Alu, JSC in this appeal. I agree with him that the appeal fails and the cross appeal succeeds.

I abide by the costs awarded in the leading judgment.

KUTIGIJSC

I read in advance the judgment just delivered by my learned brother Katsina-Alu, J.S.C. I agree with him that the Appellants having effectively ceased to be parties to the action at the time the consent judgment was entered in the case in the Federal High Court which judgment expressly excluded them from its operation, they had no right of appeal against that judgment to the Court of Appeal. The proper order which the Court of Appeal would have made was an order striking out the appeal for want of judgment. I will therefore strike out the appellants' appeal to the Court of Appeal and consequently strike out their further appeal to this court. You cannot put something on nothing. They are hereby struck out. I endorse the order for costs.

D MOHAMMED JSC

I entirely agree with my learned brother Katsina-Alu, JSC, that the appellants had no right of appeal to the Court of Appeal from the decision of the High Court because that court did not make any decision against them. The case against the appellants had earlier been discontinued and the consent judgment did not concern them. The cross-appeal therefore succeeds and it is allowed. Since the decision of the Court of Appeal is a nullity the appellants' appeal before this court is of no consequence. I strike it out. I abide by the order made in the lead judgment on costs.

OKAYACHIKE JSC

I have had the privilege of reading, before now, the judgment just delivered by my learned brother, Katsina-Alu, JSC. I do not think that I have anything to add. The result is that I, also agree that the cross-appeal deserves to succeed and it is also allowed by me. The appellants' appeal to the Court of Appeal is struck out while the appeal of the appellants to this Court is rendered incompetent and is accordingly struck out. The cross-appellants are awarded N10, 000.00 costs against the appellant.