

SUPREME COURT OF NIGERIA
13TH JULY, 2001. SC. 123/1996
CORAM:- A. B. WALL, I. L. KUTIGI, S. U. ONU,
S. O. UWAIFO, E. O. AYOOLA, JJSC.

ADEBAYO OGUNDOYIN & 2 ORS DEFENDANTS/APPELLANTS

AND

DAVID ADEYEMI PLAINTIFF/RESPONDENT
(For himself and on behalf of Laojo Family)

***APPEALS** - Dismissal - Exercise of Discretion - The considerations on which the Court of Appeal exercised its discretion - Were not judicious or judicial or proper (H 1)*

***APPEALS** - Reversal - Fair hearing - Any judgment or ruling - Based on breach of constitutional provision of fair hearing - Will not be allowed to stand on appeal (H 3)*

***FAIR HEARING** - Hearing notice - Non appearance of party - The dismissal of the appellants' case - Was a breach of his right to fair hearing - As there was no proof of service of hearing notice on him (H 4)*

***LEGAL PRACTITIONERS** - Mistake of counsel - Court will not punish a litigant - For the mistake of his counsel (H 2)*

FACTS

The respondent as plaintiff instituted an action in a representative capacity in the High Court of Osogbo, Oyo State against the appellants. Respondent claimed a declaration that he was entitled to a statutory certificate of occupancy in respect of a disputed piece of land situate near Oyan town in Odo-Otin Local Government Area of Oyo State,

as well as for damages and injunction. He led traditional evidence and acts of ownership and possession while the appellants gave a contrary traditional evidence. The trial judge however at the end of trial granted the respondent's relief for a declaration while dismissing the other claims.

On appeal to the Court of Appeal the counsel to the appellants on 29th March 1993 withdrew his incompetent brief and obtained an adjournment to the 13th day of September 1993 to file a proper brief. Before the adjourned date a fresh hearing notice was issued refixing the date for hearing for the 19th of January 1994. The counsel for the appellants had however died before this new hearing notice was issued. The hearing notice also was not served on the appellants or their counsel who had no notice of the appeal fixed for the 19th day of January 1994.

On the date fixed for hearing, the Court of Appeal dismissed the appellants' appeal for want of diligent prosecution as all the parties and their counsel were absent from court. The appellant who was dissatisfied with the dismissal has appealed against the decision of the lower court to the Supreme Court.

ISSUES FOR DETERMINATION

1. *Whether the Court of Appeal had judicially, judiciously and properly exercised its discretion in dismissing the defendants' appeal having regard to all the circumstances of the case.*

2. *Whether the Appellants had been given fair hearing by the Court of Appeal having regard to the non-appearance of the Appellants and their counsel particularly when the record of the Court of Appeal did not show that the Appellants and their counsel had been served with the hearing notice of the appeal.*

HELD (Unanimously allowing the appeal per lead judgment of **ONU JSC**)
Appeals - Dismissal - Exercise of discretion

1. Be it noted that it was unknown to the Learned Justices of Court of Appeal that the counsel for the Appellants (E. A. Popoola Esq. of counsel) had died on 3/7/93, even before the hearing notice of 9/9/93 was issued. If the Learned Justices of Appeal had properly examined the record moreso, when there was no response to the hearing notice of 9/9/

93 by either party to the appeal, the misapprehension entertained by them could have been obviated. That that court recorded: “*Appellants’ brief was struck out on 29/9/93. Since that date appellants have not taken any steps indicative of an intention to pursue the appeal.*” Upon this consideration, the court proceeded to pronounce its Ruling: “*Appeal is dismissed for want of diligent prosecution*” rather than serve to end the matter with finality, left a yawning gap in the exercise by the court below of their discretion judicially, judiciously or properly. (p. 2698 F)

Mistake of counsel

2. The mistake and/or inability of Mr. Popoola in not getting through with a proper brief at once obviously led ultimately to the ruling of the court below to the effect that the Appellants have regrettably not taken any steps indicative of an intention to pursue the appeal.

It is trite law that the court does not normally punish a litigant for the mistake of his counsel. In Iroegbu v. Okwordu (1990) 6 NWLR (Part 159) 649 at page 669 B – F Nnaemeka-Agu, JSC had this to say:

“I think it should be regarded as settled by a long line of decided cases that the courts do not normally punish a litigant for the mistakes of his counsel.” (p. 2699 B)

Appeals - Reversal - Fair hearing

3. The hearing must be fair and in accordance with the twin pillars of justice, namely audi alteram partem and nemo iudex in causa sua. See Mohammed & Anor. v. Olawunmi (1990) 2 NWLR 458 at 485 B – C. In Urhata v. Menta Ltd. (1968) NMLR 55 at 58, it was held that the principle of audi alteram partem is a fundamental principle of justice from which legislation alone can derogate. Any judgment or ruling based on breach of the Constitutional provision of fair hearing as provided in Section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 will not be allowed to stand on appeal. It is fatal to the judgment appealed against on that ground. See Ntukidem v. Oko (1986) 5 NWLR (Part 45) 909. Thus, in Sheldon v. Bromfield Justices (1964) 2 Q.B. 573 AT 578, IT WAS HELD THAT THE Court or tribunal shall give equal treatment,

opportunity and consideration to all concerned in a case. (p. 2700 H)

Fair hearing - Hearing notice - Non appearance of parties

4. The hearing notice issued on 9/9/96 was meant to re-fix the appeal for B and to supersede the 13/9/93 date. There was no proceeding in the appeal on 13/9/93 as it did not come up on that day. The learned Justices of the Court below owed it as their duty to examine the court record as to whether the Appellants were served with hearing notice but deliberately C absented themselves, including their counsel from court, and did not take the opportunity of being heard. In those circumstances, can it be said that the Appellants were given a fair hearing in the instant case here on appeal? I take the firm view that the Appellants were not given a fair hearing. In Alhaji Chief Yekini Otapo v. Chief R.O. Sunmonu & Ors. D (supra) Obaseki, JSC in answering a similar question said “ A hearing can only be fair when all the parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused a hearing or not given an opportunity to be heard, the hearing cannot qualify as fair E hearing.” When the Appellants were not heard before their appeal was dismissed they were not by any stretch of imagination given a hearing let alone fair hearing by the court below. It is indeed trite law that a party F who will be affected by the result of a judicial enquiry must be given opportunity of being heard, otherwise the action taken following the inquiry will be unconstitutional and illegal. See Chief Busari Akande v. The State (1988) 7 SCNJ 314. As Kayode Eso, JSC put it at page 322 of the Report: “audi alteram partem means please hear the other side.” G (p. 2702 F)

NOTABLE POINTS OF INTEREST

WALI JSC

1. Duty of counsel to inform court of death of another counsel

H Learned counsel owe the court a duty to inform it of the death of a counsel involved in a matter before it. In the present case either Mr. O. Abolade of respondent's counsel or Chief Bayo Olagunju the new counsel for the appellant ought to have put the Court of Appeal on notice of

Mr. Popoola's demise. (p. 2704 G)

AYOOLA JSC

2. Appeal for lack of fair hearing - Merit of the case is irrelevant

When an appeal is brought to set aside the decision of a lower court on the ground that a party has been deprived of the opportunity of being heard before the decision is taken, facts intended to show that the party's case was meritorious or not, or to show in what way the court below would have exercised his discretion are irrelevant. What the court below may have decided had the parties been heard is mere speculation. It is for these reasons that I consider as irrelevant the reasons why the appellants had not filed their brief in the court below at the time their appeal was dismissed. (p. 2707 B)

3. Setting aside does not imply diligence in prosecuting the appeal

It needs be emphasised, however, that the fact that the order dismissing the appeal of the appellants will be set aside is not tantamount to a decision by this court that the appellants have conducted their appeal in the court below with due diligence. That is a decision for the court below to take after giving an opportunity of a hearing to the parties who still have to go before the court below, put the relevant facts before it and, if so advised, make the necessary applications to the court. All this court can and should do on allowing this appeal is to set aside the order of the court below dismissing the appeal and remit this appeal to that court for it to be dealt with as may be appropriate, after giving both parties an opportunity of being heard. (p. 2707 G)

REPRESENTATION

Akin Oladimeji Esq. for the appellants.

Respondent absent. Not represented.

CASES REFERRED TO

Iroegbu v. Okwordu (1990) 6 NWLR (Part 159) 649 at page 669 B-F
Bowaje v. Adediwura (1976) 6 SC. 143 page 147

Akinyede v. The Appraiser (1971) 1 All NLR 162

Ahmadu v. Salawu (1974) 1 All NLR (Part 2) 318

Bello Akanbi & Ors. v. Mamudu Alao & Anor. (1989) 3 NWLR (Part 108) 118

B Ibodo v. Enarofia (1980) 4-7 SC. 42 at 52

Donatus Ndu v. The State (1990) 7 NWLR 550 at 578

Oyeyemi v. Commissioner for Local Government (1992) 2 NWLR (Part 226) 666

Urhata v. Menta Ltd. (1968) NMLR 55 at 58

C Ntukidem v. Oko (1986) 5 NWLR (Part 45) 909

Sheldon v. Bromfield Justices (1964) 2 Q.B. 573 at 578

Mohammed & Anor. v. Olawunmi (1990) 2 NWLR 458 at 485 B-C

Otapo v. Sunmonu (1987) 2 NWLR 605

D

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979 S.33(1)

Constitution of the Federal Republic of Nigeria 1999 S.36(1)

E

LEAD JUDGMENT BY ONU JSC

F This is an appeal against the judgment/order of the Court of Appeal holden at Ibadan in Suit No. CA/I/122/89 dated the 19th day of January, 1994. The Respondent therein as Plaintiff, had instituted the action in a representative capacity in the High Court of Osogbo Judicial Division of Oyo State against the Appellants who were Defendants, claiming the following reliefs:-

G “(a) *Declaration that the plaintiff is entitled to statutory certificate of occupancy in respect of a piece of land situate, lying and being at Aje farm land near Oyan town in Odo-Otin Local Government Area of Oyo State.*

H (b) *N500.00 special and general damages for trespass committed by the defendant on the land; and*

(c) *Injunction restraining the defendants from further acts of disturbance of the plaintiff and his family members on the land.”*

Pleadings having been duly ordered, filed and exchanged by the parties, the case went to trial before Sijuade, J. as he then was, at the Osogbo Judicial Division of the then Oyo State (now Osun State) High Court. After hearing, counsel on both sides addressed the Court. The learned trial Judge in a considered judgment dated 19th January, 1994 B granted only the declaration sought by the Respondent while dismissing the reliefs for damages for trespass and injunction.

The Appellants being dissatisfied with the said judgment, filed their Notice of Appeal to the Court of Appeal sitting at Ibadan premised C on four grounds.

FACTS OF THE CASE

The Plaintiff/Respondent's Case

The Respondent of Laojo Family of Oyan, brought this action in a representative capacity laying claim over the land in dispute between D the parties at Aje farm in Oyan more appropriately described and set out in Survey Plan No. OG.5/85 drawn by S. Akin Ogunbiyi, Licensed Surveyor: That it was granted to Ademota and Ajiboye, the ancestors of the plaintiff by their father Oba Olusunle over two hundred years ago. The E ancestors of the Plaintiff/Respondent took possession and started to cultivate it. The descendants of the ancestors thereafter inherited the land in dispute.

It was further demonstrated that the members of Laojo family F grew Kolanuts and other economic crops on the land, which is bounded by Gbebikan, Danakale, Ade and Ayika families as boundary neighbours. They (the Laojo family) then contended that Gbadamosi Aroyehun granted permission to Ogundoyin the father of the Defendants/Appellants to farm G on the land in dispute. That Ogundoyin who paid Ishakole for the land not only later stopped but laid claim of ownership to the land in dispute, having destroyed 21 palm trees and three Kolanut trees property of the Respondent.

The Defendants/Appellants' Case

For the Defendants/Appellants, the facts of the case were as follows:

Their claim was that the land in dispute and the land allegedly

granted to them (Appellants) was owned by them as clearly reflected or described in the Survey Plan No. GCS/278/OY 85 produced and drawn by Bode Adeaga, Licensed Surveyor. The land, they contended, was settled upon by one Olagbemisoye, their ancestor as virgin land about
 B 250 years ago. Tracing their genealogy, they asserted that Olagbemisoye begat Esorun, Adebisi and Ogundoyin their ancestor, adding that other members of their family farmed on the land; adding that when in 1974, Saliu Oriade made a demand for N12.80 for Ishakole from Ogundoyin
 C but Ogundoyin denied liability. Oriade thereupon instituted an action against Ogundoyin. Ogundoyin, it was explained, granted a portion of his land to the Respondent because they were in-laws.

Upon stream, it was argued is the natural boundary between the Respondent and the Appellants. It was the Appellants' contention that
 D the Respondent belonged to Obatire-joye family and not Laojo. The Appellants removed five palm trees which were their own on their farm.

FACTS RELEVANT TO THIS APPEAL

i. The counsel for the Appellants, it was shown, was one Mr. E. A. Popoola whereas the Appellants themselves were shown to be also Appellants in the lower court. Having perfected all the conditions of appeal from the High Court, Osogbo, the late Mr. E. A. Popoola learned counsel, it was stated, moved the lower court on 5/2/90, for the follow-
 F ing orders:

“(a) *For an order for an enlargement of time to file a written brief in this appeal.*

(b) *For leave to amend and file additional grounds of appeal which is attached to the affidavit in support of motion and marked Ex-*
 G *hibit A.*

(c) *An order deeming the additional grounds of appeal as property filed and served.”*

ii. By an order dated the same day (5/2/90) leave for extension
 H of time to file Appellants' brief and leave to file the additional grounds of appeal were granted and the Appellants' brief to be filed within three weeks of the said order.

iii. Grounds II, III, V and VI as additional grounds of appeal to

the lower court were filed on 23/2/90.

iv. The Respondent's brief dated 27th March, 1990 was filed on 30th March, 1990.

v. Next came the date for the hearing of the appeal before the Court below on 29th March, 1993 but which never took place as can be gleaned from the following proceedings recorded by the court with counsel for both sides present and participating vide page 90 of the Record:

"Court: The brief argued grounds of appeal. Do you concede that the appellants' brief is incompetent?"

Answer: I concede that the appellants' brief is incompetent. I filed the appellants' brief on 23rd day of December, 1990

Mr. Popoola applies to withdraw the appellant's brief so that I may prepare a proper brief. I also ask for adjournment.

Abolade: If the court is disposed to grant an adjournment I will be asking for costs.

Court: The Appellants' brief filed on 23rd day of February, 1990 is struck out as being incompetent. The appeal is adjourned to 13th day of September, 1993 with N300.00 costs to the respondent."

vi A fresh hearing notice dated 9/9/93 was issued before 13/9/93 to which date the appeal was adjourned in court while counsel were present. The hearing notice of 9/9/93 refixed the appeal for 19/1/94. Unfortunately, the appeal did not come up on 13/9/93 and there was no record of proceedings of the appeal for 13/9/93. The hearing notice of 9/9/93 refixing the appeal for 19/1/94 was not served on the appellants nor on the counsel for the appellants and the appellants had no notice that the appeal was to come up on 19/1/94.

vii The counsel for the Appellants Mr. E. A Popoola was hospitalised and he died at Oshogbo State Hospital on Saturday 3rd July, 1993, ever before the hearing notice for 19/1/94 was issued.

viii On 19/1/94 the court below presided over by G.A. Oguntade, H.J.C.A. dismissed the Appellants' appeal for want of diligent prosecution although no proof of service was available to the court in the appeal filed and all the parties and their counsel were absent from court.

ix The Appellants were dissatisfied with the Ruling of the court below and took steps to appeal against the ruling.

x Before the Appellants knew that their appeal was dismissed, however, time had run out against them. Albeit, the Appellants on 1/6/95 obtained orders from the Supreme Court for:

- i. Extension of time within which to apply for leave to appeal.
- ii. Leave to appeal and
- iii. Extension of time within which to appeal.

The Appellants thereafter filed their Notice of Appeal dated 12th July, 1995, upon the said ruling while in the meantime, fulfilling the conditions of appeal within time.

GROUND OF APPEAL

The two Grounds of Appeal filed by the Appellants in this appeal are as follows:

1. The learned Justices of the Court of Appeal misdirected themselves in law when they proceeded to make an order of dismissal in the circumstances of the appeal instead of adjourning it or striking it out.

PARTICULARS OF MISDIRECTION

(a) Both parties and their counsel were absent from court on 19th January, 1994, the day for which the appeal was re-fixed for hearing.

(b) No hearing notice was served on the Appellants or their counsel

(c) The order of dismissal made by the Learned Justices of Court of Appeal was a wrong exercise of their judicial discretion.

(d) The grant of adjournment or the striking out of the appeal could be compensated by award of costs.

(e) By dismissing the appeal the Appellants were not given opportunity of being heard before they were shut out of the court without legal redress.

(2) The Learned Justices of the Court of Appeal erred in law in dismissing the appeal for want of diligent prosecution.

PARTICULARS OF ERROR

(a) Upon the observation of the Court on 29/3/93 the counsel

for Appellants conceded that the Appellants' brief was incompetent; he applied to withdraw the brief.

(b) The counsel for the Appellants indicated his willingness to file a proper brief.

(c) The said counsel was not seen to give him a hearing before the appeal was dismissed. B

(d) The dismissal order was based on assumed consideration, unknown to the Learned Justices of the Court of Appeal that the counsel was dead.

(e) The order of dismissal was not applied for by the Respondent who himself, with his counsel, was not in court to apply for such order." C

ISSUES FOR DETERMINATION

While the Appellants formulated two issues for the determination of this Court, the Respondent submitted an only issue as arising for determination. D

APPELLANTS' TWO ISSUES

FIRST ISSUE E

Whether the Court of Appeal had judicially, judiciously and properly exercised its discretion in dismissing the defendants' appeal having regard to all the circumstances of the case.

SECOND ISSUE F

Whether the Appellants had been given fair hearing by the Court of Appeal having regard to the non-appearance of the Appellants and their counsel particularly when the record of the Court of Appeal did not show that the Appellants and their counsel had been served with the hearing notice of the appeal. G

RESPONDENT'S LONE ISSUE

Whether the Court of Appeal was right to have dismissed the case when no brief was filed and no application for extension of time to do so made. H

In my consideration of this appeal, it is my intention to adopt the two issues distilled by the Appellants to enable me to adequately dispose of the matters in contention. It was contended on the Respondent's

behalf that as from 29th March, 1993 when the court below struck out the Appellants' brief for incompetence and the case was thereafter adjourned to 13/9/93 at their counsel's instance to enable him to file a fresh brief, the fact that the Appellants did not utilise the 60 days available to them pursuant to Order 6 Rule 2 of the Court of Appeal (Amendment) Rules 1981 as amended by the Court of Appeal (Amendment) Rules, 1984 to do so, militated against them on the expiring of their time by 28th May, 1993. The Appellants' reply that as there was no court sitting on 13/9/93 to which the appeal was adjourned when the Appellants were expected to attend then, the hearing notice of 9/9/93 superseded that of 13/9/93, thus warranting circumstances –

(a) That the Appellants would come up with an application for extension of time within which they could comply with the order of court with good and substantial reasons under Order 3 Rule 4 of the Court of Appeal Rules, 1981, as amended.

(b) That the absence of the two parties and their counsel on 19/1/94 could arouse suspicion of an untoward event that if known, could be accepted as also being good and substantial reason.

(c) The fate of the fresh hearing notice which re-fixed date for the hearing also required thorough examination by the Learned Justices of the Court below.

Be it noted that it was unknown to the Learned Justices of Court of Appeal that the counsel for the Appellants (E. A. Popoola Esq. of counsel) had died on 3/7/93, even before the hearing notice of 9/9/93 was issued. If the Learned Justices of Appeal had properly examined the record moreso, when there was no response to the hearing notice of 9/9/93 by either party to the appeal, the misapprehension entertained by them could have been obviated. That that court recorded: "Appellants' brief was struck out on 29/9/93. Since that date appellants have not taken any steps indicative of an intention to pursue the appeal." Upon this consideration, the court proceeded to pronounce its Ruling: "Appeal is dismissed for want of diligent prosecution" rather than serve to end the matter with finality, left a yawning gap in the exercise by the court below of

their discretion judicially, judiciously or properly. From the record of court reproduced in paragraph (v) above, another factor considered by the court was the incompetent brief of argument filed by the late counsel for the appellants, Mr. E. A. Popoola, as transpired, indicated that he would file a proper brief within three weeks. He could not do so before he was hospitalised. **The mistake and/or inability of Mr. Popoola in not getting through with a proper brief at once obviously led ultimately to the ruling of the court below to the effect that the Appellants have regrettably not taken any steps indicative of an intention to pursue the appeal.**

It is trite law that the court does not normally punish a litigant for the mistake of his counsel. In *Iroegbu v. Okwordu* (1990) 6 NWLR (Part 159) 649 at page 669 B – F Nnaemeka-Agu, JSC had this to say:

“I think it should be regarded as settled by a long line of decided cases that the courts do not normally punish a litigant for the mistakes of his counsel.”

See also this Court’s earlier decisions in:

1. *Bowaje v. Adediwura* (1976) 6 SC.143 page 14
2. *Akinyede v. The Appraiser* (1971) 1 All NLR 162
3. *Ahmadu v. Salawu* (1974) 1 All NLR (Part 2) 318.

More recently in the case of *Bello Akanbi & 3 Ors. v. Mamudu Alao & Anor.* (1989) 3 NWLR (Part 108) 118, this Court commenting on matters when it will not punish a litigant for the mistake or inadvertence of counsel held at page 154 paragraphs F – G:

*“The Courts will generally not punish a litigant for the mistake or inadvertence of his counsel when the mistake or inadvertence in respect of procedural matters and in such a case the discretion of the court, although always required to be exercised judicially, would be exercised with a leaning towards accommodating the parties’ interest and determination of the case on the merits (*Ibodo v. Enarofia* (1980) 4 – 7 SC.42 at H 52 referred to and distinguished).*

Per Eso, JSC at page 142, paragraphs F – G:

“The Court of Appeal referred to our decision in Ukpe v. Ibodo

where we refused to visit the sins of the counsel upon the client for some procedural neglect. We took care in the case to limit our concern to “mere procedural irregularities” made by counsel. Of course, this was not saying anything novel as the concern of this Court has always been in pursuit of real, as opposed to cosmetic justice. This Court is a court of concrete justice and not one interested in “shadow boxing.”

SECOND ISSUE

The grouse in this issue is centered on the principle of fair hearing as enshrined in Section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 (now Section 36(1) of the 1999 Constitution of Nigeria) which provides as follows:

“In the determination of his civil rights and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”

Each party to a dispute before a court of law or any other tribunal must be given fair hearing not only to allow each to state his own case in court or before a tribunal but also to give each party notice of the date of hearing and place of hearing which is the principle of audi alteram partem. This principle arises from the rule of natural justice. Fair hearing is also a rule of natural justice. Thus, in Donatus Ndu v. The State (1990) 7 NWLR 550 at 578 Nnaemeka-Agu, JSC stated the law succinctly thus:

“The very essence of fair hearing under Section 33 of the Constitution is a hearing which is fair to both parties to the Suit be they plaintiffs or defendants or prosecution and defence. The Section does not contemplate a standard of justice, which is biased in favour of one party and to the prejudice of the other. Rather it imposes an ambidextrous standard of justice in which the court must be fair to both sides of the conflict.”

See Oyeyemi v. Commissioner for Local Government (1992) 2 NWLR (Part 226) 666. **The hearing must be fair and in accordance with the twin pillars of justice, namely audi alteram partem and**

nemo iudex in causa sua. See *Mohammed & Anor. v. Olawunmi* (1990) 2 NWLR 458 at 485 B – C. In *Urhata v. Menta Ltd.* (1968) NMLR 55 at 58, it was held that the principle of audi alteram partem is a fundamental principle of justice from which legislation alone can derogate. Any judgment or ruling based on breach of the Constitutional provision of fair hearing as provided in Section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 will not be allowed to stand on appeal. It is fatal to the judgment appealed against on that ground. See *Ntukidem v. Oko* (1986) 5 NWLR (Part 45) 909. Thus, in *Sheldon v. Bromfield Justices* (1964) 2 Q.B. 573 AT 578, IT WAS HELD THAT THE Court or tribunal shall give equal treatment, opportunity and consideration to all concerned in a case.

It is little wonder that this Court has firmly held that when a represented party is not heard or given the opportunity of being heard in a case, the principles of natural justice are abandoned vide *Otapo v. Sunmonu* (1987) 2 NWLR 605 and *Olatunbosun v. NISER* (1988) 3 NWLR (Part 80) 25. Put in another way, it was the decision of this Court in *Paul Unongo v. Aper Aku & 3 Ors.* (1983) 115 – 129 at 151 – 152 that neither a court established by the Constitution nor the National Assembly should curtail the power of the Court to ensure a fair hearing to a party within a reasonable time as enshrined in Section 236 and 33(1) of 1979 Constitution (in the latter now Section 236(1) of the 1999 Constitution). This right of fair hearing, it has been held in *Ramoni Ariori & Ors. v. Muraino Elemo & Ors.* (1983) 1 SC.13 AT 15 is that, “the principle of fair hearing not only demands but also dictates that the parties to a case must be heard on the case formulated by them”. See *Nwokoro v. Onuma* (1990) 3 NWLR (Part 136) 22 at 33 per Karibi-Whyte, JSC. For, as Nnaemeka-Agu, JSC plainly put it in *Kotoye v. C.B.N.* (1989) 1 NWLR (Part 98) 419 at 448:

“For the rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given an opportunity of hearing. Once an Appellate Court comes to the conclusion that the party entitled to be

heard before a decision was reached but was not given the opportunity of a hearing the order/judgment thus entered is bound to be set aside.”

See also EX PARTE OBINYAN (1973) 12 SC.23 where this Court held that fairness is a determining factor for the applicability of the rules of natural justice that an inquiry should be given the same type of hearing. See the cases of Adigun v. Attorney-General of Oyo State (1987) 1 NWLR (Part 53) 678 at 718; Alade-toyinbo v. Adewumi (1990) 6 NWLR (Part 154) 98 at 108. See also Ceekay Traders Ltd. v. General Motors Co. Ltd. (1988) 3 NWLR (Part 82) 347 and Amadi v. Thomas Aplin Co. (1972) All NLR 41 at 42.

In the appeal herein, the court below dismissed the Appellants’ appeal on 19/1/94 for lack of diligent prosecution. At page 91 of the records, it is revealed that the appearance of parties is “nil”. In other words, none of the parties and their counsel appeared in court. It was not demonstrated whether or not the parties were served with hearing notices. The Appellants made a categorical statement of no service of hearing notice on them or their counsel who died on 3/7/93 before the hearing notice was issued on 9/9/93. As the practice of court is to serve counsel with hearing notice from the date of filing in court papers with address for service of such counsel, the inference is that no service of the hearing notice was ever effected on the dead counsel and consequently, the Appellants were not informed of the hearing date of the appeal.

The hearing notice issued on 9/9/96 was meant to re-fix the appeal for and to supersede the 13/9/93 date. There was no proceeding in the appeal on 13/9/93 as it did not come up on that day. The learned Justices of the Court below owed it as their duty to examine the court record as to whether the Appellants were served with hearing notice but deliberately absented themselves, including their counsel from court, and did not take the opportunity of being heard. In those circumstances, can it be said that the Appellants were given a fair hearing in the instant case here on appeal? I take the firm view that the Appellants were not given a fair hearing. In Alhaji Chief Yekini Otapo v. Chief R.O. Sunmonu & Ors.

(supra) Obaseki, JSC in answering a similar question said “A hearing can only be fair when all the parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused a hearing or not given an opportunity to be heard, the hearing cannot qualify as fair hearing.” When the Appellants were not heard before their appeal was dismissed they were not by any stretch of imagination given a hearing let alone fair hearing by the court below. It is indeed trite law that a party who will be affected by the result of a judicial enquiry must be given opportunity of being heard, otherwise the action taken following the inquiry will be unconstitutional and illegal. See Chief Busari Akande v. The State (1988) 7 SCNJ 314. As Kayode Eso, JSC put it at page 322 of the Report: “audi alteram partem means please hear the other side.”

Accordingly, I will answer the two issues considered together by me above in the negative.

The end result of all I have said above is that I will allow the appeal, set aside the decision of the court below and order that the appeal be reinstated for re-hearing by the Court of Appeal differently constituted and sitting in Ibadan. I make no order as to costs.

WALI JSC

I am privileged to have a preview of the lead judgment of my learned brother Onu, JSC, and I agree with his reasoning and conclusion for allowing the appeal.

The main issue involved in this appeal is whether, having regard to the facts involved in this appeal, the Court of Appeal was right in dismissing the appeal for want of prosecution.

On page 90 of the printed record of proceedings, learned counsel for the appellant Mr. Popoola, now of blessed memory on 29/3/93 stated as follows:-

"I concede that the appellants' brief is incompetent. I filed the appellants brief on 23rd day of December, 1990."

As a result of this concession, learned counsel withdrew the

incompetent brief as a result of which the Court of Appeal ordered that-
"The Appellants' brief filed on 23rd day of Febuary, 1990 is struck out as being incompetent."

After this order, the appeal was adjourned to 13th September, 1993 with an award of N300 costs to the respondent who was on that day represented by O. Abolade, of learned counsel.

The record of proceedings did not show that any thing happened on 13/9/93.

On 19/1/94 the Court of Appeal sat and when the appeal was called, there were no appearances by the parties or the learned counsel representing them. The Court of Appeal then proceeded as follows:-

"Appellant's brief was struck out on 29th day of March, 1993. Since that date appellants have not taken any step indicative of an intention to pursue the appeal.

The appeal is dismissed for want of prosecution"

There is no evidence that any hearing notice was issued for 19/1/94 or even if issued same was served on the parties or their respective counsel. There is also nothing in the record to show why the court did not sit on 13/9/93. More over there seems to be an admission by learned counsel on both sides in their briefs that Mr. Popoola, learned counsel for the appellant died on 3/7/93. This fact was not brought to the notice of the Court of Appeal up to the time it dismissed the appeal on 19/1/94.

The absence of notice of the death of Mr. Popoola to the Court by either the respondent or his counsel or the appellants themselves or their new counsel in the person of Chief Bayo Olagunju, misled the court in making the order of dismissing the appeal for want of diligent prosecution.

Learned counsel owe the court a duty to inform it of the death of a counsel involved in a matter before it. In the present case either Mr. O. Abolade of respondent's counsel or Chief Bayo Olagunju the new counsel for the appellant ought to have put the Court of Appeal on notice of Mr. Popoola's demise.

As the Court of Appeal was not aware of the death of the appellants' counsel and apparent absence of service of hearing Notices on the

parties as against 19/1/94 it would not be fair, in my view, to sustain the order of dismissal of the appeal made by the Court of Appeal, as the fault that led to the dismissal of the appeal could be partly attributed to the negligence of learned counsel in the matter, and partly attributable to the Court of Appeal for proceeding to dismiss the appeal without ascertaining that hearing notices for 19/1/94 were issued and served on the parties in which case the principal of fair hearing was breached. See *IROEGBU V. OKWORDU* (1990) 6 NWLR (Pt. 159) 649. *BOWAJI V. ADEDIWURA* (1976) 6 SC 143. *OTAPO V. SUNMONU* (1987) 2 NWLR 605 and *KOTOYE V. C.B.N.* (1989) 1 NWLR (Pt. 98) 419.

It is for these and the fuller reasons in the lead judgment of my learned brother Onu, JSC that I also hereby allow this appeal, set aside the order of dismissal of appeal by the Court of Appeal for want of diligent prosecution and substitute the same with the order that the appeal be relisted.

I make no order to costs.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother Onu, J.S.C. I agree with his reasoning and conclusion. I will also allow the appeal, set aside the order of the court below and order that the appeal be heard by a new panel after the parties must have filed and exchanged briefs of argument to be ordered by the court below. I abide by the order for costs.

UWAIFO JSC

I read in advance the judgment of my learned brother Onu JSC. I am in agreement with it that the appeal succeeds. The circumstances of the case were such that the appellants could not be said to have been given an opportunity to be heard before their appeal was dismissed. That was a fatal error and accordingly the order of dismissal must be set aside: see *Otapo v Sunmonu* (1987) 5 SC 228; *Kotoye v Central Bank of Nige-*

2706 Ogundoyin v. Adeyemi (2001) 7 KLR Uwaifo JSC
ria (1989) 1 NWLR (Pt.98) 419.

Accordingly, I too allow this appeal, set aside the decision of the court below and order the reinstatement of the appeal. I make no order for costs.

B _____

AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother, Onu, JSC. I agree with him that this appeal be allowed.

The only question in this appeal is whether the court below should have made an order dismissing the appellant's appeal for want of diligent prosecution without giving them an opportunity of being heard before the order was made.

The facts have been narrated in the judgment just delivered by my learned brother, Onu, J.S.C. Those of the facts that are relevant to my short contribution are that at the time when the court below on 9th April, 1994 dismissed the appellant's appeal, the appellant had no brief of argument in the appeal, because their counsel had on 29th March, 1993 withdrawn an incompetent brief which he filed.

On 19th April, 1994 when the appeal was dismissed for want of diligent prosecution the parties and their counsel were absent, apparently because counsel and their parties were not served with notice of the hearing on that day. The appellants on their appeal from the dismissal of their appeal now contend that the court below should have adjourned the appeal or struck it out. They complained that the court below should not have dismissed the appeal for want of diligent prosecution because "unknown to the learned Justices of the Court of Appeal" the counsel for the appellants have died.

The fact is now placed before us, but was not placed before the court below, that the appellants' counsel Mr. E. A. Popoola had died on 3rd July, 1993 even before a hearing notice was issued on 9th September 1993. Also, on this appeal the appellants tried to explain why they had not filed their brief. They tried to invoke the principle that a party should

not be penalised for the mistake of his counsel. These, evidently, are irrelevant considerations in this appeal. This court is not concerned with the question whether or not there were good grounds for dismissing the appeal in the court below.

When an appeal is brought to set aside the decision of a lower court on the ground that a party has been deprived of the opportunity of being heard before the decision is taken, facts intended to show that the party's case was meritorious or not, or to show in what way the court below would have exercised his discretion are irrelevant. What the court below may have decided had the parties been heard is mere speculation. It is for these reasons that I consider as irrelevant the reasons why the appellants had not filed their brief in the court below at the time their appeal was dismissed.

The material, and I would say the only material, fact in this appeal is that the appellants were not heard before their appeal was dismissed. They had no notice of the sitting of the court below on that day. That a party should be given an opportunity of being heard before a decision is made against him is a fundamental principal of justice that pre-dated our Constitution. A person given such an opportunity cannot complain if he did not avail himself of such opportunity. In the same vein, a person denied of such opportunity and who has complained cannot be confronted with a response that he would have had nothing worth while to say had he been given an opportunity of a hearing.

This is an appeal that should be disposed of shortly. The appellants having been denied of an opportunity of being heard before their appeal was dismissed by the court below, the order of dismissal made by the court below should not stand.

It needs be emphasised, however, that the fact that the order dismissing the appeal of the appellants will be set aside is not tantamount to a decision by this court that the appellants have conducted their appeal in the court below with due diligence. That is a decision for the court below to take after giving an opportunity of a hearing to the parties who still have to go before the court below, put the relevant facts before it and, if so advised, make the necessary applications to the court. All this

court can and should do on allowing this appeal is to set aside the order of the court below dismissing the appeal and remit this appeal to that court for it to be dealt with as may be appropriate, after giving both parties an opportunity of being heard.

B For these reasons I too would allow the appeal. I set aside the order of the court below made on 19th January, 1994 dismissing the appellants' appeal. I order that the appeal be remitted to the court below to be dealt with as may be appropriate in the circumstances of the case.

C I make no orders as to costs.

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