

SUPREME COURT OF NIGERIA
FRIDAY 12TH APRIL, 2002. SC. 112/1997
CORAM:- A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE,
A. I. KATSINA-ALU, U. A. KALGO, JJSC

ALHAJI BALARABE M. ABUBAKAR APPELLANT
AND
UNIPETROL NIGERIA PLC RESPONDENT
AND
IN THE MATTER OF AN APPLICATION BY:
UNIPETROL NIGERIA PLC APPLICANT
AND
1. ALHAJI BALARABE M. ABUBAKAR
2. ALHAJI K. T. TURAKI
3. MALLAM YAKUBU MOHAMMED RESPONDENTS
(Deputy Chief Sheriff High Court of
Justice, Kano)
4. ALHAJI SADI MOHAMMED MATO
(Chief Registrar, High Court of Justice, Kano)

APPEALS - Orders of court - Mischief - Remedy - Respondent need not appeal to remedy the mischief - Since mandatory injunction can be used - To reverse step taken by appellant (H1)

COURT PROCESSES - Abuse of - Appellant's use of ex parte order to obtain release of judgment debt - While an application is pending at Court of Appeal against same - Was intended to render appellate court helpless (H2)

COURTS - Appeals - Actions - Subject matter - Need to preserve - Court must see that the res is preserved - Especially where execution of successful appeal will be impossible (H3)

FACTS

1st respondent/appellant obtained judgment against applicant/respondent at the Kano State High Court in the sum of N1,275,259.20. Respondent filed an appeal against the judgment. In the meantime, respondent deposited the judgment debt with the

Chief registrar of the High Court (4th respondent). Respondent then filed an application for stay of execution. The court granted the application in part to the effect that appellant should provide a person of means to guarantee that he would pay the judgment debt should respondent's appeal succeed.

Respondent again dissatisfied with the ruling of the court, filed a motion on notice at the Court of Appeal, Kaduna for an order for variation of the High Court's order. The parties were fully aware of the pending motion at the Court of Appeal. Nevertheless, appellant and 2nd respondent brought an ex parte motion before the trial High Court to release the judgment debt i.e. subject matter of the pending application at Court of Appeal to them. The trial High Court granted the ex parte application. Thereafter, the Court of Appeal ruled in favour of respondent, set aside the ex parte order of the High Court and gave a mandatory injunction to appellant and 2nd respondent to pay back the judgment sum to 4th respondent within 30 days of the ruling. Appellant was dissatisfied. Hence he appealed to Supreme Court.

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

APPEALS - Orders of court - Mischief - Remedy

1. Clearly, the action of the Appellant in obtaining the ex-parte order and thereby having the judgment debt released to him while the Respondent's motion to vary the order of the High Court was still pending in the Court of Appeal, was intended and calculated to obstruct whatever order the Court of Appeal was likely to make in the application before it. This is therefore not strictly a case in which one would have expected the Respondent to have appealed first before the mischief can be remedied. And that much was made clear by the Court of Appeal when it said in its lead Ruling (per Ogebe JCA) on page 101 of the record as follows: "It is now a firmly established principle that a mandatory injunction will lie to reverse a step already taken by a party to litigation in an interlocutory application, if the step taken by the other party is to steal a

match on the applicant.”.

The Ruling continued on page 104 thus:

“The fact that the applicant did not appeal against the order of the trial court releasing the judgment sum to the 1st and 2nd Respondents does not affect the merit of this application. The applicant has been able to satisfy this Court on the two things required in an application of this nature (1) that the act complained of was performed while an application was pending before this Court and the other party had notice of it; (2) that such act was capable of obstructing whatever order this court might wish to make on this application.” (p. 956 D)

COURT PROCESSES - Abuse of

2. I believe the Court of Appeal was right. The action of the Appellant in using an ex-parte order to obtain the release of the judgment debt to him while the application to vary the High Court order in respect of the same judgment debt was still pending in the Court of Appeal was only intended to effectively render the Court of Appeal helpless and present it with a fait accompli. This must not be allowed to happen.
(p. 957 B)

Appeals - Actions - Subject matter - Need to preserve

3. I have to add in passing that every court of law has the duty to see that the res, the subject matter of litigation, is preserved especially in this case where it was shown that the Appellant cannot be in a position to repay the Respondent the sum awarded if the appeal succeeds. The Court of Appeal was therefore right in setting aside the ex-parte order of the High Court and ordering as it did. (p. 957 D)

REPRESENTATION

No appearance by or for the appellant
A. O. Ojeh for the respondent

CASES REFERRED TO

Vaswani Trading Com. v. Savalakh & Co. (1972) 12 SC 77
Mohammed v. Olawunmi (1993) 4 N.W.L.R (Pt. 10) 806

Kilgo (Nig) Ltd. v. Holman Bros (1980) 5-7 SC 60)

Ojukwu v. Mil Gov Lagos State & Anor (1985) 2 NWLR (Pt. 10) 806

Ivory Merchant Bank Ltd v. Partnership Investment Ltd & Anor (1996) 5 NWLR (Pt. 448) 363)

B

LEAD JUDGMENT BY KUTIGI JSC

This is an interlocutory appeal against the decision of the Court of Appeal, Kaduna contained in its Ruling delivered on 8th July, 1997.

C The Applicant/Respondent in the court below had applied vide summons to show cause, for and obtained the following orders against the 1st and 2nd Respondents:-

D “(1) *The order of the lower court on an ex-parte motion releasing the judgment sum to the 1st Respondent dated the 6th June, 1996 is hereby set aside as an abuse of the process of this Court and a nullity.*

E “(2) *The 1st and 2nd Respondents are issued with a mandatory injunction to pay to the Deputy Chief Registrar of this court the sum of N1,275,259.20 (one million two hundred and seventy-five thousand two hundred and fifty-nine Naira and twenty Kobo), which was wrongly collected from the 4th respondent in the court below within 30 days from the date of this Ruling.*

F “(3) *The Deputy Chief Registrar of this Court on receipt of this money shall pay it to AFRIBANK NIGERIA PLC. Kaduna in an interest yielding account pending the determination of the applicant’s motion dated the 6th day of May 1996 or the appeal filed in this Court, whichever comes first.”*

G Costs of N1,000.00 were awarded against the 1st and 2nd Respondents in addition. Dissatisfied with the Ruling of the Court of Appeal the 1st Respondent / Appellant has now appealed to this court. Three Grounds of Appeal were filed from which the following two issues have been distilled for our determination:-

H “1. *Whether the decision of the court below in unilaterally setting aside the ex-parte orders of the trial Kano High Court was beyond its jurisdiction and a flagrant violation of Section 33 of the 1979 Constitution (As Amended).*

2. *Whether the orders by the court below were legally made.”*

Before delving into the issues, the brief, simple and undisputed fact of the case must first of all be stated. The 1st Respondent/Appel-

lant had obtained judgment against the Applicant/Respondent at the Kano High Court on 11th March 1996 in the sum of N1,275,259.20. The Respondent appealed against the judgment on 3rd April 1996. In the meantime the Respondent deposited the judgment debt with the Chief Registrar of the High Court (the 4th Respondent). He then filed an application for stay of execution and also to set aside the writ of execution filed by the Appellant. On 6th May 1996, the High Court granted the application in part to the effect that the Appellant should provide a person of means to guarantee that he would pay the judgment debt should the Respondent's appeal succeed.

The Respondent again dissatisfied with the Ruling of the High Court then filed a motion in the Court of Appeal, for an order for variation of the order of the High Court. The application was filed on 7th May 1996. All the Respondents including the Appellant herein, were aware of this motion at least by the 18th of May 1996.

In spite of the fact that the application to vary the order of the trial High Court was pending before the Court of Appeal, and that all the parties were aware of the application, the 1st and 2nd Respondents brought an ex-parte motion on 6th June 1996 before the trial High Court to release the money, judgment debt, which was the subject matter of the application in the Court of Appeal to them. The trial judge granted the motion and personally instructed the 4th Respondent and ensured that the money was released to the 1st and 2nd Respondents. At the hearing of the motion in the Court of Appeal the record shows that learned counsel for the 1st and 2nd Respondents conceded having received notice of Respondent's motion for variation on 18th May 1996. The learned Director of Civil Litigation, Kano State, who appeared for the 3rd and 4th Respondents also said that the 3rd and 4th Respondents although aware of the application, had no choice in the matter, because they were faced with the ex-parte order (Exhibit C) of the trial judge to release the money to the 1st Respondent. This in short were the facts and circumstances under which the Court of Appeal made the orders complained of above.

At the hearing of this appeal on 14th January 2002, both the Appellant and the Respondent were absent and not represented by anyone. But since the parties had filed their briefs of argument, the appeal was treated as having been argued as provided for under

Order 6 Rule 8(6) Rules of the Supreme Court. The Appellant in his brief argued the two issues set out above together. The pivot of his complaint is simply that there was no appeal against the ex-parte order of the Kano High Court which the Court of Appeal set aside in its Ruling, consequently, the Court of Appeal lacked the jurisdiction to have set it aside since the parties were not heard there been no appeal. I must say at once that on a review of the facts of the case above, the Appellant would seem to have misconceived and completely failed to appreciate the real issue before the Court of Appeal. The issue was simply that:-

In spite of the fact that the Appellant was aware of the motion pending in the Court of Appeal for variation of the order of the Kano High Court, he (the appellant) brought an ex-parte motion before the same Kano High Court to release the judgment debt in respect of which an application was pending in the Court of Appeal and which ex-parte application was granted.

Clearly, the action of the Appellant in obtaining the ex-parte order and thereby having the judgment debt released to him while the Respondent's motion to vary the order of the High Court was still pending in the Court of Appeal, was intended and calculated to obstruct whatever order the Court of Appeal was likely to make in the application before it. This is therefore not strictly a case in which one would have expected the Respondent to have appealed first before the mischief can be remedied. And that much was made clear by the Court of Appeal when it said in its lead Ruling (per Ogebe JCA) on page 101 of the record as follows:-

"It is now a firmly established principle that a mandatory injunction will lie to reverse a step already taken by a party to litigation in an interlocutory application, if the step taken by the other party is to steal a match on the applicant. See the case of OJUKWU v. MILITARY GOVERNOR OF LAGOS STATE & ANOR (1985) 2 NWLR (Pt. 10) 806 at 823-824."

The Ruling continued on page 104 thus:-

"The fact that the applicant did not appeal against the order of the trial court releasing the judgment sum to the 1st and 2nd Respondents does not affect the merit of this application. The applicant has been able to satisfy this Court on

the two things required in an application of this nature:-

(1) that the act complained of was performed while an application was pending before this Court and the other party had notice of it;

(2) that such act was capable of obstructing whatever order this court might wish to make on this application.” B

I believe the Court of Appeal was right. The action of the Appellant in using an ex-parte order to obtain the release of the judgment debt to him while the application to vary the High Court order in respect of the same judgment debt was still pending in the Court of Appeal was only intended to effectively render the Court of Appeal helpless and present it with a fait accompli. This must not be allowed to happen. In VASWANI TRADING COM. VS. SAVALAKH & CO. (1972) 12 S.C. 77 this court set aside a writ of possession executed during the pendency for disposal of an application for a stay of execution. ***I have to add in passing that every court of law has the duty to see that the res, the subject matter of litigation, is preserved especially in this case where it was shown that the Appellant cannot be in a position to repay the Respondent the sum awarded if the appeal succeeds.*** (see for example KIGO (NIG) LTD. VS HOLMAN BROS (1980) 5-7 S.C. 60). ***The Court of Appeal was therefore right in setting aside the ex-parte order of the High Court and ordering as it did.*** (See OJUKWU vs. LAGOS STATE (supra), MOHAMMED vs. OLAWUNMI (1993) 4 N.W.L.R (Pt 10) 806, IVORY MERCHANT BANK LTD. v. PARTNERSHIP INVESTMENT LTD. & ANOR (1996) 5 N.W.L.R (Pt. 448) 363). C D E F

I find no merit in the appeal. It is accordingly dismissed. The Ruling of the Court of Appeal, Kaduna dated 8th day of July 1997 is hereby affirmed. I make no order as to costs. G

WALI JSC

I have had the advantage of reading in advance the lead judgment of my learned brother Kutigi, JSC and I agree with it. For the same reasons stated in the lead judgment, I also dismiss the appeal for want of merit. I affirm the Ruling handed down by the Court of Appeal, Kaduna Division, with no order as to costs. H

OGUNDARE JSC

I have been privileged to read in advance the judgment of my learned brother Kutigi JSC just delivered. I agree with the said judgment. I have nothing more to add. I, too, make no order as to costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother KUTIGI JSC in this appeal. I entirely agree with his reasoning and conclusion. I also would dismiss the appeal with N10,000.00 costs to the Respondent.

KALGO JSC

This appeal is interlocutory in nature. The facts giving rise to the appeal have been clearly set out in the leading judgment of my learned brother Kutigi JSC with which I entirely agree. I do not intend to repeat the facts here except to emphasize the fact that at the time the appellant made the ex-parte application in the trial court for release of the judgment debt to him, i.e. on 6th May 1996, he was fully aware of the application for mandatory injunction to vary the order in relation to the same judgments debt pending before the Court of Appeal. The application of the appellant in the trial court if granted would most certainly over reach the respondent's application for mandatory injunction in the Court of Appeal and render it nugatory. In my view, it will also constitute an abuse of court process as it was in respect of the same matter and in different courts, more so as the one in the Court of Appeal was earlier in time. I therefore agree that the Court of Appeal was right in making the orders it made on respondent's application and setting aside the orders made by the trial court on 6th May 1996 on the ex-parte application.

In the result, I entirely agree with my learned brother Kutigi JSC that there is no merit in this appeal. I dismiss it and affirm the ruling of the Court of Appeal delivered on the 6th of July 1997. I make no order as to costs.