

SUPREME COURT OF NIGERIA
FRIDAY 5TH APRIL, 2002. SC. 95/1998
**CORAM:- A. B. WALI, U. MOHAMMED, A. I. KATSINA-
ALU, S. O. UWAIFO, E. O. AYOOLA, JJSC**

1. AFRICAN CONTINENTAL BANK PLC
2. MRS. I. S. OKWY OMENYE APPELLANTS
AND
EMOSTRADE LIMITED RESPONDENT

PLEADINGS - Issues - Proof - Burden of - When issues are joined in pleadings - Evidence is needed to prove same - And duty is on person who raised the issues - To adduce satisfactory evidence (H1)

COURTS - Issues - Binding nature of - Resolution - Court must limit itself to issues at stake - And should refrain from indulging in extraneous matters (H2)

COMPANY LAW - Legal personality - Proof - Certificate of incorporation ought to have been produced by respondent - As that was the only way to prove its legal personality (H3)

APPEALS - Actions - Institution - Juristic personality - Failure to prove - Fate - Since respondent failed to prove juristic personality - The action should be struck out (H4)

FACTS

Plaintiff/respondent (a limited liability company) alleged that it maintained a current account with 1st defendant's/appellant's bank in Calabar. Respondent further stated that failure of appellants to furnish it with its statement of account quarterly has deprived it of opportunity of conducting its business prudently. Thus, respondent sued appellants at trial High Court claiming the sum of N5,000,000.00 as special and general damages for breach of contract. Respondent averred in its statement of claim that it is a registered limited liability company in Nigeria.

Appellants denied that respondent was one of its customers. At the hearing, respondent failed to adduce evidence of its juristic

personality. Respondent's certificate of incorporation was not produced. However, respondent tendered two exhibits to prove that it is a customer of the bank. The court held in favour of respondent and awarded the sum of N2,500,000.00 as damages to respondent. Appellants filed appeal at the Court of Appeal, Enugu Division. The appeal was dismissed which has necessitated the filing of another appeal by appellants at Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether upon the pleadings and the evidence their Lordships, the majority Justices at the Court of Appeal below were justified when they confirmed the judgment of the Court of first instance in favour of the Plaintiff whose legal existence as a juristic persona was challenged but never established.

(ii) Whether the majority Justices of the Court of Appeal below were justified when they sustained the decision of the Court of the first instance upon the question of legal existence of the Plaintiff by holding, per Honourable Justice J. T. AKPABIO, J.C.A. that the ‘name of the Respondent on the writ was a mere misnomer which did not and could not vitiate the proceedings.’

(iii) Whether the existence vel. non. of the Plaintiff as a juristic persona was ever admitted by the sole witness of the Defendants and if so whether the question of the Plaintiff's existence as a legal person is one that can be decided upon the purported admission made by the sole witness for the Defendants under cross-examination relating to matters not pleaded.

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

PLEADINGS - Issues - Proof - Burden of

1. It is a fundamental procedural requirement that when issues are joined on the pleadings, evidence is needed to prove them. It is the person upon whom the burden of establishing that issue lies that must adduce satisfactory evidence. When there is no such evidence, the issue must be resolved against him and the consequences of that are as decisive of the case presented as the materiality of that issue. The nature of the

evidence that will suffice, as to whether it is documentary or oral, may well depend on the issue and the requirement of the law. (p. 967 F)

COURTS - Issues - Binding nature of

2. With due respect to the learned Justice, he appears to have indulged in a verbal peregrination in which he made assumptions, asked irrelevant questions and reached erroneous legal and factual conclusions instead of resolving a simple matter on which issue was joined, namely, proof that the plaintiff is a juristic person incorporated as a limited liability company in Nigeria as it claims. Such a speculation, I must say with due respect, was an unfortunate frolic. It is a familiar admonition that a court should refrain from indulging in it. It is not part of judicial exercise but is mere curious guesswork. (p. 968 F)

COMPANY LAW - Legal personality - Proof

3. Even from the speculation made by the learned Justice, would it not have been a more positive approach to tender the certificate of incorporation at the trial although not lodged with the first appellant? I think so since the respondent pleaded that it was incorporated as a limited liability company and the appellants categorically denied this. The certificate should have been produced by the respondent rather than what looks like the pranks played about its status because it is only by that certificate of incorporation its legal personality can be proved in the circumstances. That is firmly established by the authorities of this court. In his dissenting judgment, Salami JCA made it quite clear that there was the need for the plaintiff to produce the certificate of incorporation if it was duly incorporated as a limited liability company and that nothing else would suffice. The learned Justice was absolutely right. (p. 969 C)

Actions - Institution - Juristic personality - Failure to proof

4. It follows that in the present case, the respondent has failed to prove that it has a juristic personality and that it can sue (and be sued). That is the same as saying that it does not exist in the eye of the law. The appellants upon this scenario have

said that the respondent is not their customer and that they have no record of it. I think they cannot be faulted on that stand. The two courts below were in error not to have so held. I therefore find merit in this appeal and allow it. I set aside the judgments of the two courts below together with the order for costs made by each of them. I hereby strike out the action as it was instituted by or on behalf of a person unknown to law. I award the appellants N10,000.00 cost. (p. 970 F)

REPRESENTATION

O. A. Obianwu, for the Appellants
Victor Ndoma-Egba, for the Respondent

CASES REFERRED TO

Fawehinmi v. N.B.A. (No. 2) (1989) 2 NWLR (Pt. 105) 558
Ivienagbor v Bazuaye (1999) 9 NWLR (Pt. 620) 552
Carlen (Nig) Ltd. v. University of Jos (1994) 1 NWLR (Pt. 323) 631
Shittu v. Ligali (1941) 16 NLR 23
Overseas Construction Co. Ltd. v. Creek enterprise Ltd (1985) 16 NSCC (Pt. 2) 1371
J. K. Rande v. Kwara Breweries Ltd. (1986) 6 SC 1
Regd. Trustees of Apostolic Church v. A-G Mid-Western State (1972) NSCC (vol. 7) 247

LEAD JUDGMENT BY UWAIFO JSC

The plaintiff sued the defendants for an amount of N5,000,000.00 special and general damages for an alleged breach of contract. It is said that the plaintiff, a limited liability company, maintained a current account No. 05474 with the first defendant's Calabar branch. The second defendant was at all material times the Branch Manager of that branch. The breach of contract was attributed to the defendants' failure to make available to the plaintiff its statements of account and copies of all cheques and other instruments drawn on the said account. The plaintiff contended that that failure was a breach of the defendants' statutory duty to furnish the plaintiff with statements of his account quarterly. It was claimed that this default made it impossible for the plaintiff "to monitor or operate his (sic) account and thus making him (sic) unable to conduct his (sic)

affairs and business prudently”.

In paragraph 1 of the amended statement of claim, it was averred that the plaintiff is a limited liability company incorporated under the laws of Nigeria. This averment was specifically and categorically denied and challenged in two paragraphs of the amended statement of defence. First, in paragraph 2, it was said: B

“Paragraph 1 of the plaintiff’s amended statement of claim is denied. The plaintiff is not a limited liability company and is not a body known to the law which can sue or be sued and will at the trial be put to the strictest proof of its status.” C

Second, in paragraph 17, it was said:

“The defendants herein will contend at the trial that the plaintiff is not a limited liability company and as such cannot maintain this action against the defendants.”

Furthermore, in two paragraphs of the amended statement D of defence, paras. 5 and 13, the defendants clearly averred that the plaintiff, Emostrade Limited, was not and had never been its customer.

At the hearing no evidence was led by the plaintiff to establish its status as a legal persona who can sue. The certificate of incorporation was not produced. On the contrary, among the seventeen exhibits tendered by the plaintiff were exhibits 16 and 17, which show that Emostrade, a registered trade name, is the customer with account No. 05474 with the first defendant. The trade name is solely under the ownership of Victor Ndoma-Egba. The account was opened on 18 May, 1987: see exhibits 16 and 17. E F

The learned trial judge (O. Ita, J) in his judgment given on 5th February, 1996 observed, on the question whether the plaintiff had been proved to be a liability company incorporated under the Laws, that: G

“It is in evidence that the defendant recognized the existence of the plaintiff on the basis of their pleading in amended statement of defence paragraphs 9, 10, 11 and 12. What is admitted need not be proved.” H

It is perhaps pertinent at this stage to recite the said paragraphs of the amended statement of defence, and add paragraphs 8 and 13 thereof, in order to appreciate the learned trial judge’s misconception that there was admission by the defendants that the plaintiff

was incorporated. The defendants were in those paragraphs denying certain paragraphs of the amended statement of claim – para. 6 and later paras. 7, 8, 9 and 10. The relevant paragraphs of the amended statement of defence read:

B “8. The 1st and 2nd Defendants deny paragraphs 7, 8, 9 and 10 of the plaintiff’s amended statement of claim.

C 9. In further denial of these paragraphs, the Defendants will at the trial contend that the averment therein contained bear no relevance to the plaintiff on record and will at the trial object to the tendering of any letter or documents, which are unrelated to the plaintiff on record. With particular reference to paragraph 9 of the statement of claim the 1st Defendant owes no obligation to furnish statement of account to the plaintiff for the mere asking and without any offer of the fee or cost therefor.

D 10. The Defendants vehemently deny paragraphs 12 and 13 of the Plaintiff’s Amended statement of claim. The Defendants owe no contractual duty to the plaintiff to avail him with statement of account and cheques/other instruments drawn on the plaintiff’s account if any once the said cheques/other instruments have been paid.

E At any rate even if such a duty exists the plaintiff did not make a demand timeously and is estopped from suing on it. At any rate no such duty can arise without a quid pro quo and the plaintiff did not pay for the services for which he had now filed this action.

F 11. Still in answer to the said paragraph 12, the 1st Defendant says that by a letter dated 14th April, 1993 the Defendants through their Solicitors J. Bassey Aniekan & Associates, wrote to the plaintiff requiring him to make funds available to enable the bank put together a task force to be able to meet his requirement but he failed to reply to the said letter or to make any funds available. This letter is hereby pleaded and the plaintiff is given notice to produce same at the trial of this case.

H 12. In further denial of the said paragraph the 1st Defendant says that it discharged its DUTY to the Plaintiff, if any and that all NECESSARY statements of account were sent to the plaintiff even without its request and also at its request, through his accountant one Oluwaseyi Febelurin.

13. Paragraph 14 of the Amended Statement of Claim is denied. In further denial of this paragraph the 1st Defendant says

that it will object to the tendering of any document which does not relate to plaintiff as the plaintiff has never been the 1st Defendant's Customer or at all." (Emphasis Mine)

It is clear from the above, particularly paragraphs 9 and 13, that the defendants maintained that the present plaintiff as stated on record had never been the first defendant's customer. The other paragraphs were simply a traverse of averments made by the plaintiff. On the whole I cannot see what amount to an admission by the defendants of the existence of the plaintiff as said by the learned trial judge. He even went further to observe:

"From evidence given, even by d.w.1 the plaintiff was known to them, the plaintiff was their customer, until the 2nd defendant melted out of the scene, an argument that purports to deny the existence of the plaintiff comes up and is proffered. (sic) What were defendants dealing with, was it with nobody all along? If, so, with respect, for what have they filed pleadings, and led evidence including pleadings and evidence of the plaintiff? The defence is far from a real defence in this case, and I so hold."

With due respect to the learned trial judge, this observation has failed to take account of the legal requirement of proof of the juristic personality of a party to a case when issue is joined on it.

Evidence was adduced by both sides on the claim itself. The relief sought by the plaintiff was simply put in the amended statement of claim thus: *"WHEREOF the plaintiff claims the sum of N5,000,000.00 (five million naira) being special and general damages for breach of contract."* All I can see about the manner the learned trial judge considered that relief and made an award is contained solely and entirely in the last two paragraphs of this judgment which he stated as follows:

"On Damages: The law on it is as stated in the Reply in this case and represents the true position and is adopted by this Court so as to shorten the length of this judgment. I hold that the case here calls for damages at large. For the reason given which are in evidence, a trading Account was blocked making it impossible for the Account holder to operate the Account is recognized as a breach of contract between the Customer and the Bank."

On the basis of the claim, the pleadings, Exhibits and the relevant law on all the aspects of the case to which the attention of

this court was duly drawn, I am satisfied that the Defendants are liable to the plaintiff and I have come to consider the sum of N2,500,000 as adequate compensation for the Plaintiff in the circumstances of this case and for the pain caused the plaintiff by the unlawful action of the Defendants.”

B In the appeal to the Court of Appeal (Enugu Division) against the judgment, issues for determination were raised about the juristic personality of the plaintiff, privity of contract and also the award of damages of N2,500,000.00. On December 1, 1997 the court in a split decision (Akpabio and Ubaezonu JJCA, Salami JCA dissenting) C dismissed the appeal.

The defendants (as appellants) have further appealed to this court and will henceforth be referred to as the appellants while the plaintiff will be referred to as the respondent. The appellants have D raised five issues for determination, namely:

“*(i) Whether upon the pleadings and the evidence their Lordships, the majority Justices at the Court of Appeal below were justified when they confirmed the judgment of the Court of first instance in favour of the Plaintiff whose legal existence as a juristic persona E was challenged but never established.*

(ii) Whether the majority Justices of the Court of Appeal below were justified when they sustained the decision of the Court of first instance upon the question of legal existence of the Plaintiff by holding, per Honourable Justice J. T. AKPABIO, J.C.A. that the ‘name F of the Respondent on the writ was a mere misnomer which did not and could not vitiate the proceedings.’

(iii) Whether the existence vel. non of the Plaintiff as a juristic persona was ever admitted by the sole witness of the Defendants and G if so whether the question of the Plaintiff’s existence as a legal person is one that can be decided upon the purported admission made by the sole witness for the Defendants under cross-examination relating to matters not pleaded.

(iv) Whether upon the pleadings and the evidence, it was H open to their Lordships, the majority Justices at the Court of Appeal below to infer as they did that the account evidenced by Exhibits 16 and 17 was ever converted into a Limited Liability Company account in the name of the Plaintiff as holder.

(v) Whether on the face of the pleadings and Exhibits 1 to

17, particularly 16 and 17, the plaintiff made out any cause of action against the Defendant to warrant judgment being entered in his favour by the Court of first instance and the Court of Appeal below.”

The respondent considers the sole issue which arises for determination to be –

“whether on the state of the pleadings and the evidence the existence of the plaintiff as the defendant’s customer was not established.” B

I do not think this correctly represents an issue arising from the ground of appeal, and indeed the contention of the appellants. The real contention is properly reflected in issue (i) raised by the appellants. I shall consider issues (i), (ii) and (iii) by the appellants together. C

It must be recalled that the respondent specifically pleaded that it was a Limited Liability Company incorporated in Nigeria. The appellants pleaded in categorical denial and asked for proof. In popular legal parlance, issue was joined by the parties on that. The plaintiff also pleaded that it was the first appellant’s customer at its Calabar branch. Once more, the appellants denied this unambiguously. First they pleaded: ‘The plaintiff is not known to the 1st defendant as its customer at its Calabar Branch. Emostrate Limited is not its customer.’ Later in their pleading they said: ‘...the 1st defendant says that it will object to the tendering of any document which does not relate to the plaintiff as the plaintiff has never been the 1st defendant’s customer or at all.’ Again, the parties joined issue in effect as to whether Emostrate and Emostrate Limited are one and the same in order to determine which of them is a customer of the first appellant. D E F

It is a fundamental procedural requirement that when issues are joined in the pleadings, evidence is needed to prove them. It is the person upon whom the burden of establishing that issue lies that must adduce satisfactory evidence. When there is no such evidence, the issue must be resolved against him and the consequences of that are as decisive of the case presented as the materiality of that issue. The nature of the evidence that will suffice, as to whether it is documentary or oral, may well depend on the issue and the requirement of the law. G H

What was needed to be proved as to the juristic personality

of the plaintiff was whether there was evidence that it was duly incorporated. The trial court frontally evaded answering this. It merely said that the first appellant was aware that the plaintiff was its customer and that the defence that the plaintiff was neither an incorporated body nor its customer was “*far from a real defence in this case.*”

B The court below did not fare better. It said per Akpabio JCA:

“I have carefully considered the two arguments canvassed above and must say that regardless of whether the respondent was duly incorporated as a limited liability company or not there can be no question of his (sic) being a legal or a juristic person in this case. This is because respondent’s name on the writ of summons ‘EMOSTRADE LIMITED’ is prima facie a limited liability company, and therefore a juristic person.”

Later, the learned Justice said:

D *“In any case, regardless of whether the respondent was or was not a limited liability company, on the appellants’ own admission, the respondent was a partnership. It was a Registered Business Name. It was also accepted by the appellants themselves that the Account No. 05474 was their own and was held by Chief Victor*
 E *Ndoma Egba (p.w.1) who was the sole signatory to the account. So what were the appellants quarrelling about? That respondent did not incorporate his business under the Company and Allied Matters Act 1990. And how did that prejudice them? And in what way did the appellants suffer any loss? None. To put it briefly, this was a case of*
 F *misnomer of plaintiff which with leave of the court could be cured by amendment.”*

With due respect to the learned Justice, he appears to have indulged in a verbal peregrination in which he made assumptions, asked irrelevant questions and reached erroneous legal and factual conclusions instead of resolving a simple matter on which issue was joined, namely, proof that the plaintiff is a juristic person incorporated as a limited liability company in Nigeria as it claims. The learned Justice even went further
 G
 H to say and speculate thus:

“The writ of summons could have been amended by showing the plaintiff to be ‘Chief Victor Ndoma-Egba (Trading under the Name and Style of “EMOSTRADE”)’. This is if truly the plaintiff had not been incorporated. But, if, on the other hand the respondent

had actually been incorporated, but failed for one reason or the other to lodge his certificate of incorporation with the Bank, that should not be any business of the appellants, as long as the same man was still the signatory to the Account.”

Such a speculation, I must say with due respect, was an unfortunate frolic. It is a familiar admonition that a court should refrain from indulging in it. It is not part of judicial exercise but is mere curious guesswork: see *Overseas Construction Co. Ltd. v Creek Enterprises Ltd.* (1985) 16 NSCC (pt. 2) 1371 at 1375; *Ivienagbor v Bazuaye* (1999) 9 NWLR (pt 620) 552 at 561.

Even from the speculation made by the learned Justice, would it not have been a more positive approach to tender the certificate of incorporation at the trial although not lodged with the first appellant? I think so since the respondent pleaded that it was incorporated as a limited liability company and the appellants categorically denied this. The certificate should have been produced by the respondent rather than what looks like the pranks played about its status because it is only by that certificate of incorporation its legal personality can be proved in the circumstances. That is firmly established by the authorities of this court. In his dissenting judgment, Salami JCA made it quite clear that there was the need for the plaintiff to produce the certificate of incorporation if it was duly incorporated as a limited liability company and that nothing else would suffice. The learned Justice was absolutely right.

In the *Registered Trustees of Apostolic Church v. Attorney-General Mid-Western State* (1972) NSCC (vol. 7) 247, the plaintiffs averred in their statement of claim that the Apostolic Church was incorporated under the Land (Perpetual Succession) Act. The defendants in their statement of defence denied this and put them to strict proof. This court per Sowemimo Ag. JSC said at page 250:

“Although evidence was led as to named persons being made Trustees, the Certificate of Incorporation was never produced with section 6 of the Act under consideration they have no power to sue or be liable to being sued.”

There was some evidence of admission about the status of the Apostolic Church. But at page 252, this court observed further:

“We are in agreement with the learned trial Judge, that what-

ever may be the admission of the 3rd respondent of the status of the appellant, there is no evidence before the court that the appellant [i.e. the Apostolic Church] was ever a corporate body. This could only be established as a matter of law by the production in evidence of the Certificate of Incorporation, admission inter partes notwithstanding.” [parenthesis mine]

Similarly in *J. K. Rande v. Kwara Breweries Ltd.* (1986) 6 SC 1, the plaintiff averred that the defendant company was incorporated under the Companies Act 1968, which averment was denied by the company. The plaintiff at the trial court served a notice on the defendant to produce the certificate of incorporation but the defendant did not produce it. The plaintiff himself did not lead secondary evidence of the certificate (a public document) in order to prove the incorporation. Without such proof, the juristic personality of the defendant was not established. It was unanimously held by this court that the failure to produce the certificate of incorporation of the defendant was fatal to the plaintiff’s case. At page 7, Uwais JSC (now CJN) pointedly observed as follows:

“The appellant sued the respondent as a company incorporated under the Companies Act, 1968. He failed to prove the incorporation by the production of the certificate of incorporation. As the averment in the statement of claim that the defendant was so incorporated was categorically denied by the respondent in its statement of defence the failure to prove the incorporation was fatal to the appellant’s case.”

It follows that in the present case, the respondent has failed to prove that it has a juristic personality and that it can sue (and be sued). That is the same as saying that it does not exist in the eye of the law. The appellants upon this scenario have said that the respondent is not their customer and that they have no record of it. I think they cannot be faulted on that stand. The two courts below were in error not to have so held. I therefore find merit in this appeal and allow it. I set aside the judgments of the two courts below together with the order for costs made by each of them. I hereby strike out the action as it was instituted by or on behalf of a person unknown to law. I award the appellants N10,000.00 cost.

KALGO JSC

I have read in draft the judgment just delivered by my learned brother Uwaifo JSC in this appeal and I agree with him that there is merit in the appeal. I adopt the reasoning and conclusions reached therein as mine and I accordingly allow the appeal. B

The respondent who was the plaintiff in the trial court and who portrayed itself in the writ of summons as a limited liability company, claimed damages against the appellant for breach of contract. The appellants challenged its legal capacity or competence to sue, but it failed to establish that it is a legal entity entitled to sue and be sued. The respondent pleaded in paragraph 1 of its Amended Statement of Claim that:- C

“The plaintiff is a limited liability company under the laws of Nigeria with its registered office at No. 101 Marian Road Calabar to engage among other objects trading and engineering construction in Nigeria and elsewhere.”

In the joint Amended Statement of Defence, paragraph 2, the appellants expressly denied this and put the respondent on strict proof thereof. Paragraph 2 says:- E

“Paragraph 1 of the plaintiffs Amended Statement of Claim is denied. The plaintiff is not a Limited Liability Company and is not a body known to the law who can sue or be sued and will at the trial be put to strictest proof of its status...” F

According to the record of appeal, the respondent failed to prove that it had the legal status to sue or be sued. It also did not plead misnomer. It was therefore wrong for the Court of Appeal to introduce gratuitously the issue of misnomer on behalf of the respondent and rely on it in arriving at the majority decision of that Court. It is also not enough to assume that because company uses the name “*Limited*” on the writ of summons as plaintiff that company must be a limited liability company entitled to sue. The company status must be proved especially in this case where it was denied to be a limited liability company at the time of the transaction. This was not proved in this case and cannot be presumed either. H

The respondent as plaintiff, is therefore not a legal entity or juristic person entitled to sue and be sued in law. See *Carlen (Nig.) Ltd. v. University of Jos* (1994) 1 NWLR (pt 323) 631; *Shittu v. Ligali*

(1941) 16 NLR 23; Fawehinmi v. N.B.A. (No. 2) (1989) 2 NWLR (pt. 105) 558. The respondent is also not one of the bodies or associations which even though not incorporated, have been expressly or impliedly conferred with a right to sue or to be sued by statutes. It is an incompetent party and cannot sue as it did in this case. The whole action in the trial court is incompetent and I so hold. The majority decision of the Court of Appeal confirming that of the trial court was therefore wrong in law. In the result, I hereby find merit in this appeal. I allow it, and set aside the decision of the Court of Appeal (majority decision) and strike out the action of the respondent in the trial court. I abide by the order of costs made in the leading judgment.

D **AYOOLA JSC**

I have had the privilege of reading in advance the judgment delivered by my learned brother Uwaifo, JSC. For the reasons he gives with which I am in agreement I too would allow the appeal and abide by the orders he makes.

E **KATSINA- ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother UWAIFO JSC in this appeal. I agree with it. For the reasons he has given, I too would allow the appeal and strike out the plaintiff's claim. I abide by the order for costs.

G **MOHAMMED JSC**

I have had a preview of the judgment of my learned brother, Uwaifo, JSC, in draft and I agree with him that this appeal has merit and ought to be allowed. I therefore allow the appeal and set aside the decisions of both the trial High Court and the Court of Appeal. I also award N10,000.00 costs to the appellants.