

SUPREME COURT OF NIGERIA
FRIDAY 10TH MAY, 2002. SC. 147/1997
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
U. MOHAMMED, S. O. UWAIFO, A. O. EJIWUNMI, JJSC

ALHAJI ABDUL-RAUF

OLUMEGBON

... PLAINTIFF/RESPONDENT

(Substituted the following
deceased persons by Order of Court
dated 11/10/99

1. CHIEF LAMIDI YESUF KALEFO

THE OLUMEGBON OF LAGOS

2. CHIEF S. S. OLA ABEREOLE

(For themselves and on behalf of
ODUGBESE and ABEREOLE and
OLUMEGBON Chieftaincy Families)

AND

1. AMIDA ADEDEJI KAREEM

(Substituted CHIEF TIJANI

OJUPON (DECEASED) THE

BAALE OF AJAH by Order of

Court dated 6/12/88)

2. OLATUNJI APELEHIN

OJUPON

..... DEFENDANTS/RESPONDENTS

3. ALHAJI SULE OGUNSEMO

4. REV. OLATUNDE

AYOTUNDE

..... PARTY INTERESTED/APPELLANT

ALASE

APPEALS - Extension of time - Delay in application - Effect - As
appellant did not show seriousness in seeking leave to appeal - Such
inordinate delay may be a ground of refusing leave (H1)

COURTS - Discretion - Exercise of - Basis - Party applying to the
court to exercise its discretionary power in his favour - Must put up
convincing argument - To show he is entitled to decision applied for
(H2)

APPEALS - Courts - Exercise of discretion - Except where lower court did not exercise discretion in good faith - Or has acted arbitrarily - Supreme Court shall not substitute its own discretion (H3)

FACTS

Plaintiff commenced this action at the High Court of Lagos State against defendants wherein it claimed for N10,000 as damages for trespass on a parcel of land known as “Ojegin” and injunction restraining defendants from continuing in occupation of the said land. After the testimony of one witness for plaintiff, the court adjourned the matter for further hearing. However, hearing could not go on because the parties agreed to a term of settlement which the court would enroll as a consent judgment. The consent judgment was thus enrolled on the 4th of March, 1991.

Subsequently in June 1993, defendants filed a motion seeking an order setting aside the consent judgment, an order for rectification of the said judgment and a stay of execution of the judgment. The learned trial judge refused to set aside the consent judgment and also declined to grant an order for stay of execution of the said judgment. After four months of the ruling of the court, appellant i.e. Rev. Olatunde Ayotunde Alase filed a motion at the Court of Appeal, Lagos for an order of extension of time within which to appeal as a person interested in the subject of the suit and an order for leave to appeal against the consent judgment and an order of extension of time to file Notice of Appeal. The court found no merit in the application and dismissed same. Being dissatisfied, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

“Is the Court of Appeal right in its interpretation of Section 222(a) of the Constitution of the Federal Republic of Nigeria. Now Section 243(a) of the Constitution of the Federal Republic of Nigeria 1999.

Is the Court of Appeal right by holding that a ground of appeal which raises issues of Jurisdiction of the Court of First instance is not a ground of appeal which prima-facie shows good cause why the appeal should be heard.”

HELD (Unanimously dismissing the appeal per **MO-HAMMED**)

APPEALS - Extension of time - Delay in application - Effect

1. The appellant did not show that he was serious about this application because even after the learned trial judge had delivered her ruling on 16/12/94, the appellant took almost four months before he filed a motion seeking for extension of time to seek leave to appeal as an interested party against the consent judgment. Inordinate delay in seeking leave to appeal may be a ground of refusing leave. (p. 1367 F)

COURTS - Discretion - Exercise of - Basis

2. A party applying to the court to exercise its discretionary power in his favour must put up a convincing argument showing that in fact and in law he is entitled to a decision which he has applied for. In the case in hand the Court of Appeal looked into the affidavits sworn by the appellant and the grounds of appeal attached to the application and was convinced that he had not shown good cause why he should be permitted to appeal “as an interested party” against the Consent Judgment which was delivered on 4th March, 1991. (p. 1368 B)

APPEALS - Courts - Exercise of discretion

3. It is settled law that the Supreme Court shall not substitute its own discretion for that of the lower court unless if the court did not act in good faith or had been swayed by irrelevant considerations or had acted arbitrarily or capriciously. None of such issues has been shown by the appellant in the consideration of his application. I am satisfied that the Court of Appeal was therefore right in refusing to grant the prayers of the appellant for the extension of time to seek leave to appeal against the consent judgment. (p. 1368 C)

REPRESENTATION

Chief G. O. Sotayo-Aro for the Appellant
M. A. Alaba Okupe the Respondent

CASES REFERRED TO

- Re-Adewunmi (1983) 3 NWLR (Pt. 83) 483
 CCB (Nig.) Ltd. v. Ogwuru (1993) 3 NWLR (Pt. 284) 630
 University of Lagos v. Aigoro (1984) NSCC (Vol. 15) 745
 B Mbadugha v. Nwosu (1993) 9 NWLR (Pt. 315) 110
 Mobil Oil Nig. Ltd. v. Fed. Board of Inland Revenue (1977) 3 SC 97
 Sharp v. Wakefield (1891) AC 173

STATUTE REFERRED TO

- C Constitution of the Federal Republic of Nigeria 1979, s. 222(a)

LEAD JUDGMENT BY MOHAMMED JSC

- This is an appeal from the decision of the Court of Appeal,
 D Lagos Division. The plaintiffs, on 6th December, 1988, took out a
 Writ of Summons in the Lagos High Court with a claim against the
 defendants for the following reliefs:

- “(1) The plaintiffs claims against the defendants jointly and or
 severally are for (1) N10,000.00 aggravated damages for trespass on
 E all that piece or parcel of land known as “Ojuegun” situate lying and
 being at Ajah Ile Town in Eti-Osa Local Government Area which said
 land is customarily used for ancestral burials and festival purposes.*

PARTICULARS

- Destruction of ancestral graves and/humiliation and mental
 F anguish and stress resulting from same... N10,000.00*

- (2) Injunction restraining the defendants by themselves their
 privies and or their servants or agents or the use from remaining on
 or going to carrying on building operations or continuing in occupa-
 G tion of piece or parcel of lands.*

- (3) Further or other relief”.*

- The case was filed before Mrs. Akinboye J, and after all the
 preliminaries which include settling and amendment of pleadings the
 trial commenced on 22nd November, 1989. A witness, Solace Salawu
 H Olatunde Abereojé, gave evidence for the plaintiffs. At the conclu-
 sion of his testimony the court adjourned to 2nd March, 1990 for
 further hearing. The hearing did not go on because the parties agreed
 to a term of settlement which the court would enrol as a consent
 judgment. The consent judgment was enrolled on the 4th of March,*

In June 1993 the defendants filed a motion seeking for the following orders:

“(1) An order setting aside the consent judgment entered by this court on 4th March, 1991.

(2) An Order for rectification of the said judgment as per the terms of the settlement dated 12th February, 1991.

(3) A stay of execution of the judgment of this court entered on 4th March, 1991 pending the ruling.”

The learned trial judge, on 16th December, 1994, delivered a ruling in which she refused to set aside the consent judgment and also declined to grant an order for stay of execution of the said judgment. Now, the appellant, Rev. Olatunde Ayotunde Alase, emerged. He went to the Court of Appeal on 6th March, 1995 and filed the following motion:

“TAKE NOTICE that this Honourable Court will be moved on... day of... 1995 at about 9 o'clock in the forenoon or so soon thereafter as Counsel may be heard for and on behalf of the Applicant for the following orders:

(i) An order for extension of time within which to apply for leave to appeal as a person having an interest in the subject of this Suit.

(ii) An order for leave to appeal against the consent judgment delivered on the 4th day of March 1991.

(iii) An order for extension of time to file Notice of Appeal.

(iv) Such further or other orders as this Honourable Court may deem fit in the circumstances.

Dated this 6th day of March 1995.”

The Court of Appeal, in a considered ruling found no merit in the application and dismissed it with costs. Being dissatisfied with the Ruling Rev. Olatunde Ayotunde Alase armed with five grounds of appeal came to this court contesting the decision of the Court of Appeal. Chief Sotayo-Aro, learned counsel for the appellant, identified four issues for the determination of the appeal. The issues are:

“4.00 Whether the Court of Appeal was right in refusing to grant the Appellant's application for leave to appeal and for extension of time within which to appeal against the decision of the High Court.

4.01 *Whether the Court of Appeal should not have based its ruling on Affidavit and Counter Affidavit evidence before it.*

4.02 *Is the Court of Appeal right in its interpretation of Section 222(a) of the Constitution of the Federal Republic of Nigeria. Now Section 243(a) of the Constitution of the Federal Republic of Nigeria*
 B 1999.

4.03 *Is the Court of Appeal right by holding that a ground of appeal which raises issues of Jurisdiction of the Court of First instance is not a ground of appeal which prima-facie show good cause why the appeal should be heard."*
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During the hearing of the appeal Chief Sotayo-Aro abandoned issues 4.00 and 4.01. Learned Counsel for the respondents, on his part, submitted that only one issue is relevant for the determination of this appeal, and that is, whether this court should interfere with
 D the refusal of the lower court to exercise its discretion in favour of the Party Interested, who is the appellant, in this appeal. Mr. Alaba Okupe at the initial stage raised an objection to the competency of grounds 2 and 3 of the appellant's grounds of appeal. However, during the hearing of the appeal when the learned counsel was confronted on
 E his objection to the two grounds he reconsidered his position and agreed that the grounds were grounds of law.

Chief Sotayo-Aro opened his submission on issue 4.02 and argued that the Court of Appeal was not right to say that a person
 F seeking leave to appeal "*as a person having interest in the matter*" pursuant to Section 222 (a) 1979 Constitution was required to show that the appeal was not frivolous and vexatious. The subsection did not include frivolity and vexatiousness. I think the learned counsel is
 G misconstruing the finding of the learned justice of the Court of Appeal in this submission. Ayoola JCA (as he then was) who wrote the ruling which is the subject of this appeal, opined, quite rightly, that whenever leave of the court is a condition precedent for a right, the discretion of the court is implied. It is very clear that this appeal is
 H from the refusal of the Court of Appeal to exercise its discretion and grant the appellant leave to appeal. That being so the Court of Appeal is duty bound to look into the application of the "*person having interest in the matter*" in order to confirm whether the appeal sought to be filed is frivolous and or vexatious.

Mr. Okupe submitted that from the affidavits and counter-affi-

davit and exhibits before the Court of Appeal the appellant could not satisfy the court below by showing good and substantial reasons why he failed to appeal within time, either in his own individual capacity, or as an attorney to the Ogunsemo Family. His grounds of appeal must also show that he had good cause why his appeal should be heard. In support of his submission Mr. Okupe referred to the cases of Re-Adewunmi (1983) 3 NWLR (Part 83) PP 483-486 and CCB (Nig.) Ltd. v. Ogwuru (1993) 3 NWLR (Part 284) PP 630. B

It is quite plain that the appellant had not acted timeously in the pursuit of getting the consent judgment set aside. The terms of Settlement were enrolled in a consent judgment, as I disclosed earlier in this judgment, on the 4th of March, 1991. The appellant said that he did not know about it until June 1993. If he was serious about getting the Terms of Settlement set aside what stopped him from going to court, within a reasonable time, to seek for a redress or even join the defendants when they filed an application before the learned trial judge seeking for the setting aside of the consent judgment? C D

Chief Sotayo-Aro gave an unconvincing reason for the appellant's failure to appeal on time. That the appellant was out of jurisdiction and when he knew about the decision the case-file of the case was before the learned judge. This made the appellant to wait until the learned trial judge had delivered her decision on the matter. This argument is untenable. Learned counsel for the appellant was well aware that the appellant could file a motion seeking for leave to join the defendants in their application for setting aside the consent judgment. ***The appellant did not show that he was serious about this application because even after the learned trial judge had delivered her ruling on 16/12/94, the appellant took almost four months before he filed a motion seeking for extension of time to seek leave to appeal as an interested party against the consent judgment. Inordinate delay in seeking leave to appeal may be a ground of refusing leave.*** To make the matter worse for the appellant, it is on record that his own branch of the family, the Ogunsemo families, subscribed to the Terms of the Settlement and were well represented when the Terms were pronounced in open court and enrolled as a consent judgment. E F G H

The consideration of the application filed by the appellant before the Court of Appeal is an exercise of judicial discretion. In 1891

Lord Halsbury described the meaning of judicial discretion when he dealt with the case of licensing justices and said that judicial discretion would mean that they were to act “*according to the rules of reason and justice, not according to private opinion and according to law and not humour*”. See *Sharp v. Wakefield* (1891) A.C. 173 at 179.

A party applying to the court to exercise its discretionary power in his favour must put up a convincing argument showing that in fact and in law he is entitled to a decision which he has applied for. In the case in hand the Court of Appeal looked into the affidavits sworn by the appellant and the grounds of appeal attached to the application and was convinced that he had not shown good cause why he should be permitted to appeal “as an interested party” against the Consent Judgment which was delivered on 4th March, 1991. It is settled law that the Supreme Court shall not substitute its own discretion for that of the lower court unless if the court did not act in good faith or had been swayed by irrelevant considerations or had acted arbitrarily or capriciously. None of such issues has been shown by the appellant in the consideration of his application. I am satisfied that the Court of Appeal was therefore right in refusing to grant the prayers of the appellant for the extension of time to seek leave to appeal against the consent judgment.

Consequently, I see no merit in this appeal and it is dismissed. The decision of the Court of Appeal is hereby affirmed. I award N10,000.00 costs in favour of the plaintiff/respondent.

BELGORE JSC

I find no merit in this appeal and for the reasons adumbrated in the judgment of my learned brother, Mohammed, J.S.C. I also dismiss it with N10,000.00 costs to the respondent.

OGWUEGBU JSC

I have had a preview in draft of the judgment just delivered by my learned brother Mohammed, J.S.C., and I agree with him that for the reasons stated in the said judgment, which I hereby adopt,

this appeal should be, and is hereby dismissed, with costs to the respondents which I fix at N10,000.00.

UWAIFO JSC

I have had the opportunity of reading in advance the judgment of my learned brother Mohammed JSC. I agree with it for the reasons therein contained. B

The appeal was against the refusal of the Court of Appeal, Lagos Division to give leave to the appellant to appeal from a consent judgment entered by the Lagos High Court on 4th March, 1991 in suit No. LD/21/87. It was an exercise of an undoubted discretion of the Court of Appeal. After a careful consideration of the affidavit evidence and the proposed grounds of appeal, that court held that no good and substantial reasons for failure to appeal (as an interested party) within the prescribed period had been shown. As regards the proposed grounds of appeal, the finding was that they did not *prima facie* show an arguable appeal. C D

I have no doubt in my mind that the court below gave adequate consideration to all the materials brought to its attention in the application it had to consider. I do not find any cause to interfere with the discretion so exercised in refusing the application once it seems to me it was properly exercised: see *University of Lagos v. Aigoro* (1984) NSCC (Vol. 15) 745; *Mbadugha v. Nwosu* (1993) 9 NWLR (Pt 315) 110. This remains so even if I would have considered exercising the discretion differently, which I must say I would not in the present case: see *Mobil oil (Nig.) Ltd. v. Federal Board of Inland Revenue* (1977) 3 SC 97. E F

Under Order 3, r. 4(2) of the Court of Appeal Rules 1981 (as amended), an applicant for leave to appeal out of time must disclose (1) good and substantial reasons for the delay in appealing and (2) grounds of appeal which *prima facie* show good cause why the appeal should be heard i.e. arguable appeal. The principle is well-established that the two conditions must co-exist: see *In re: Adewunmi* (1988) 3 NWLR (pt.83) 483; *Co-operative and Commerce Bank (Nig.) Ltd. v. Ogwuru* (1993) 3 NWLR (Pt. 284) 630. G H

I too find no merit in this appeal and dismiss it with N10,000.00 costs to the respondent.

EJIWUNMI JSC

Having read before now the judgment just delivered by my learned brother, Mohammed JSC in its draft form, I agree for the reasons given in the said judgment that this appeal lacks merit.

B I will also dismiss the appeal for the reasons so given. In the result, I affirm the judgment of the Court below. I award costs in favour of the plaintiff/respondents in the cost of N10,000.00.

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