

SUPREME COURT OF NIGERIA
FRIDAY 21ST JUNE, 2002. SC. 55/1996
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
U. MOHAMMED, S. O. UWAIFO, A. O. EJIWUNMI, JJSC

ALHAJA SARATU ADELEKE APPELLANT
AND
1. ALHAJA MORITNATU RAJI
2. RAIMI RAJI RESPONDENTS

APPEALS - Courts - Issues - Suo motu raising - Propriety - Ojusanya v. Olusanya - Where points are taken suo motu by appellate court - Parties must be given the opportunity to address the court - Before decision is taken on such points (H1)

APPEALS - Rehearing - As issue one did not satisfactorily determine the appeal - Course of justice is better served - If the appeal is sent to Court of Appeal - For hearing on merit (H2)

FACTS

Before the High Court of Oyo State, plaintiffs/respondents commenced this action against defendant/appellant wherein they claimed declaration of title to a parcel of land situate at Akuro, Molete-Ibadan, N10,000 special damages for trespass committed by appellant on the said land and an order of injunction restraining appellant and her agents from committing further acts of trespass on the land in dispute. Pleadings were duly filed and exchanged and at the trial both parties called evidence in support of their respective cases. In its judgment, the court found in favour of respondents. The court granted the claim for general damages. However, claim for special damages was dismissed for want of proof.

It should be noted however that respondents' counsel filed an application to amend his pleadings during the trial. The application was opposed by appellant's counsel for being too late in the day. The court dismissed the objection and granted the amendment as sought by respondents. Appellant was dissatisfied. She filed appeal at the Court of Appeal, Ibadan. The court determined the appeal solely on the propriety or otherwise of the trial court's grant of leave

to amend the pleadings. The court allowed the appeal and struck out respondents' claim. Both parties were dissatisfied with the judgment. Accordingly, appellant filed the main appeal at Supreme Court, while respondents cross-appealed.

ISSUES FOR DETERMINATION

“(i) Whether in view of the findings of the lower court and the appellants’ prayer before the court, the lower court has jurisdiction to strike out the case of the respondents as against the dismissal of the case.

(ii) Whether the lower court as an intermediate appellate court ought to have considered and given a decision on the other issues submitted for determination in the appeal before them and whether such consideration would not have assisted the lower court to correct the dismissal of this case.”

HELD (Unanimously allowing the appeal and the cross-

appeal per lead judgment of **EJIWUNMI JSC**)

Courts - Issues - Suo motu raising - Propriety

1. But though the appeal was allowed, the Court below made the further order of striking out the respondents’ claim. It is difficult to understand the rationale for this order as that was not the claim before the Court. Having allowed the appeal, the Court ought not to have made orders affecting the respondents’ interest without hearing from the parties. In this respect, I wish to refer to the principle that was so clearly enunciated in the case of *Ojusanya v. Olusanya* (1983) 14 NSCC 97 at p. 102 where this Court said thus:

“This Court has said on a number of occasions that although an appeal court is entitled, in its discretion, to take points suo motu if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only: where the points are so taken the parties must be given the opportunity to address the appeal court before decision on the points is made by the appeal court. See *Kuti & Anor v. Jibowu & Anor.* (1972) 1 All NLR (pt. II) p. 180 at p. 192...”
(p. 1712 D)

APPEALS - Rehearing

2. Now, it is also patent that the appeal was considered in respect of the 1st issue raised in the appeal, which was allowed. It cannot, in my view be satisfactory to determine the appeal on that issue alone. I think that in the circumstances, the course of justice would be better served if the appeal is sent back to the Court below for the hearing of the appeal on its merits. (p. 1712 H)

NOTABLE POINT OF INTEREST

EJIWUNMI JSC***1. Issues for determination must be distilled from valid grounds of appeal***

Though, I have looked at the points raised by the respondents, yet I must decline to consider them, as there are no grounds of appeal to justify the intervention of an appellate court in respect of those matters. It is well settled that where a party seeks to have an appellate court resolve a question decided by the Court below, that party must have filed grounds of appeal germane to the question and issues properly raised thereon to justify the consideration of the question by an appellate court. (p. 1711 D)

REPRESENTATION

O. Ojo Esq. for the appellant

I. O. Olorundare, Esq., and K. O. Fagbemi SAN for the respondents

CASES REFERRED TO

Ogunbadejo v. Onoyemi (1993) 1 NWLR (Pt. 271) 517

Oshatoba v. Olujitan (2000) 5 NWLR (Pt. 655) 159

Ajibade v. Pedro (1992) 5 NWLR (Pt. 241) 257

Arowolo v. Adimula (1991) 8 NWLR (Pt. 212) 753

Metal Construction (W.A.) LTD v. Migliore (1990) 1 NWLR (Pt. 126) 299

Kuti v. Jibowu (1972) 1 All NLR (Pt. II) 180

Ajao v. Ashiru (1973) 1 All NLR (Pt. 11) 51

Ekpenyong v. Nyong (1995) 2 SC 711

- Nyagba v. Mbaham (1996) 9 NWLR (Pt. 471) 201
 Akimbola v. Plison Fisho Nig. Ltd. (1991) 1 NWLR (Pt. 167) 270
 Ojusanya v. Olusanya (1983) 14 NSCC 97
 Omoregbe v. Lawani (1980) 12 NSSC 164
 Akapo v. Hakeem-Habeed (1992) 6 NWLR 266
 B Registered Trustees of Ifeloju v. Kuku (1991) 5 NWLR (Pt. 189) 65
 A.C.B. v. Crestline Service Ltd (1991) 6 NWLR (Pt. 195) 301

LEAD JUDGMENT BY EJIWUNMI JSC

- C Before the High Court of Oyo State in suit No. 1/57/84, this action was commenced by the plaintiffs against the defendants wherein they claimed thus:-

D “(1) *The plaintiffs claim against the defendants for a declaration of title to a statutory right of occupancy to that piece or parcel of land situate, lying and being at Akuro, Molete, Ibadan.*

(2) *The plaintiffs claim against the 1st defendant N10,000.00 (ten thousand Naira) being special damages for trespass committed by the 1st defendant on the said land sometime in August 1975 which trespass is still continuing.*

- E (3) *The plaintiffs also claim injunction restraining the defendants, their servants or agents from committing further acts of trespass on the land in dispute.”*

The particulars of damage pleaded also are as follows:-

- F “By 1st Plaintiff

Cost of rebuilding stone foundation destroyed
N2,000.00

Cost of kolanut and cocoa trees etc. destroyed
N1,000.00

- G *General damages* *N2,000.00*
N5,000.00

By the 2nd Plaintiff for himself and Mulikatu Rail Family

Cost of kolanut, cocoa trees etc. destroyed on 2 plots
N2,000.00

- H *General damages* *N3,000.00*
N5,000.00

Following the order that pleadings be filed and exchanged, the parties duly complied. At the trial, both parties called evidence in support of their respective case. The learned trial judge thereafter

delivered a considered judgment. By the said judgment, the learned trial judge found in favour of the plaintiff that they were in possession of the disputed land. He however dismissed their claim in respect of special damages as no evidence was led in support of that head of claim. But he held that the plaintiffs were entitled to general damages for the trespass committed on the disputed land. The 1st and 2nd plaintiffs were therefore awarded the sum of N500.00 each. B

However, in view of what will later be considered by the Court below when hearing the appeal, it is desirable to note that during the trial in the course of his closing address, learned counsel for the plaintiffs sought leave to amend his pleadings. The record of that part of the proceedings read thus:- C

“At this stage, Agbaje applies to amend the title of the action in relation to the 1st plaintiff by adding “for herself and on behalf of the Oyinade section of Raji Adewale family” Sarumi opposes the application, says it is too late in the day as there is no evidence to support the amendment. There is no evidence that action was brought on behalf of a particular section. D

Court: Although no evidence is shown to have been led by the plaintiffs in respect of the sections on behalf of whom the action is brought, I do not see any injustice to the defence case in granting the amendment sought, if it is possible that without such amendments alone the plaintiffs’ case could be defective. All amendments permissible are those aimed at assisting trial court in determining the real questions in controversy without at the same time working injustice on the other party. I shall grant the amendment sought as prayed with N40 as costs in favour of the defendants.” E F

Being dissatisfied with the judgment and orders of the trial Court, they appealed to the Court below. In that Court, parties in accordance with the rules of that Court then filed and exchanged their respective briefs of arguments. It is significant to note that in the briefs so filed by the parties, the question as to whether the amendment of the pleadings of the plaintiffs was properly granted by the learned trial judge was raised in the briefs filed by the parties before the Court below. The appellant in that Court and in this Court raised the question thus: G H

“3.1 Whether the learned trial judge was right in granting the amendment sought by the plaintiffs after the defendants had

addressed the Court.”

While the respondent in that Court and also in this Court put the question thus:-

“(i) *Whether or not the learned trial judge’s exercise of discretion to amend the capacity in which 1st respondent sued and to grant declaration of title to the respondents was a proper exercise of judicial discretion on the evidence before him.*”

It became inevitable therefore, that this question would have to be addressed by the Court below during the consideration of the appeal. And after due consideration of the effect of the amendment granted by the trial Court, the Court below allowed the appeal and ordered that the respondents’ claim be struck out. And it was so ordered with N500.00 costs. Both parties were in the circumstances dissatisfied with the judgment and orders of the Court below. Accordingly, the appellant who succeeded in the Court below has further appealed to this Court. And the respondents who were unsuccessful filed a cross-appeal, and in accordance with rules of this Court, briefs were filed and exchanged. The appellant filed an appellant’s brief and a reply brief in response to the respondents’ cross-appeal.

The brief of the respondents included the response to the appellants’ brief and the argument in support of the cross-appeal. At the hearing, learned counsel for the parties adopted their respective briefs and placed reliance on them. Learned counsel also addressed the Court orally to expatiate upon their arguments in their said briefs.

In the appellants’ brief, the two issues identified for the determination of the appeal read thus:-

“(i) *Whether in view of the findings of the lower court and the appellants’ prayer before the court, the lower court has jurisdiction to strike out the case of the respondents as against the dismissal of the case.*

(ii) *Whether the lower court as an intermediate appellate court ought to have considered and given a decision on the other issues submitted for determination in the appeal before them and whether such consideration would not have assisted the lower Court to correct the dismissal of this case.*”

The respondents appeared to have adopted the issues, identified in the appellants’ brief as they did not raise issues of their own in

that part of their brief. But they duly set out two issues in respect of the four grounds of appeal they filed with the leave of this Court in support of their cross-appeal.

They are:-

“(1) Whether or not the learned Justices of the Court were wrong to have interfered with the proper exercise of judicial discretion by the learned trial judge and thereby came to a wrong decision in setting aside the judgment and striking out the appellants’ claim.” ^B

“(2) Whether the learned justices of the Court of Appeal exceeded the limits of their jurisdiction in proceeding to consider matters not covered by the grounds of appeal nor raised in the appellants’ brief nor argued before them.” ^C

Now to be outdone, the appellant in his reply brief decided also to set out two issues in that brief. They read:-

“(i) Whether the learned Justices of the Court of Appeal were not right in setting aside the declaration made in favour of the respondents having regard to the facts and evidence which clearly makes the reliefs granted inconsistent and a fraud in disguise.”

“(ii) Whether the learned Justices of the Court of Appeal were not right in setting aside the amendment granted by the trial Court in this case?” ^E

These issues were set down in the appellant’s reply brief, according to the learned counsel for the appellant for the purposes of answering the argument of the respondents in their brief should the court accept them as constituting argument in their cross-appeal. ^F Earlier on in this judgment, I had stated that though the respondents did not identify separate issues for the determination of the appeal, they, however, set down issues for the determination of the appeal based on the grounds of appeal filed in support of their cross-appeal. ^G I do not therefore think that there is any merit in the contention made in the appellants’ brief that the respondents did nothing with regard to their cross-appeal.

Be that as it may, it is in my view manifest that the main question canvassed in the 1st issue identified by the appellant and also in the cross-appeal of the respondent is whether the Court below was right to have struck out the respondents’ case. On this issue, both parties took the same position as they both contend that the order striking out respondents’ claim should not be allowed to stand. But ^H

they parted ways thereafter. For the appellant, it is argued that in the light of the lower Court's well founded and well reasoned judgment, the Court below had no jurisdiction left upon which it could resort to an order striking out the respondents' claims. It is therefore contended that the only order the Court below could have made in the circumstances is an order of dismissal of the respondents' claims. This is because, argued learned counsel for the appellants, the findings of the Court below are not preliminary matters as to the institution of the action, nor was it on whether the trial Court had jurisdiction to try the case, nor that the respondents have no locus standi, nor for want of compliance with any condition precedent. It was argued that if the Court below perceived that as the respondents instituted the action in their personal capacity, they cannot if the action was re-instituted purge themselves of being "*a veritable engine of fraud.*" In support of all the contentions made for the appellant, he cited In Registered Trustees of Ifeloju v. Kuku (1991) 5 N.W.L.R. (Pt. 189) 65 at 78, where it was held "*a matter is struck out from the cause list if it has either not been heard on the merits or not heard at all.*"

The other argument advanced for the appellant by his learned counsel is that, as the order for striking out was not asked for by the appellant, the Court has no jurisdiction to strike out the respondents' claim. As support for that proposition, he cited the following cases: Akapo v. Hakeem-Habeed (1992) 6 N.W.L.R. 266; Ekpenyong v. Nyong (1995) 2 S.C. 71, 86; Nyagba v. Mbaham (1996) 9 N.W.L.R. (Pt. 471) 201; Akimbola v. Plison Fisko (Nig.) Ltd. (1991) 1 N.W.L.R. (Pt. 167) 270.

Next, it was argued for the appellant that when the Court below felt that an order other than the order for dismissal which the appellant asked for, then the parties should have been invited to address the Court before making the order striking out the respondents' claim. He then cited A.C.B. v. Crestline Service Ltd (1991) 6 N.W.L.R. (Pt. 195) 301 at 314.

I have earlier in this judgment stated that the respondents also contended that the Court below should not have made the order striking out their claim. Like the appellant, it was also argued for them that if the Court below had that as its intention, and having raised it suo motu, then the Court should have invited the parties to address

the Court on it, before making the order. In support of that contention, the case of *Omoregbe v. Lawani* (1980) 12 N.S.S.C. 164 at 170 was cited.

The respondents however do not share the view of the appellant that the Court below should have dismissed the respondents' claim. Rather, it is contended for them that the Court below should not have interfered with the judicial discretion of the learned trial judge, who, it is claimed, had adverted his mind to the issues raised by both parties before arriving at his decision. There being nothing outstanding which was shown to have been an error in that decision of the trial Court, the Court of Appeal should have upheld the decision of the trial Court. The learned counsel then went on to identify several areas of the judgment of the Court below where he claimed that the Court below fell into error in its summation of the facts and the evidence led thereon before arriving at its decision. Though, I have looked at the points raised by the respondents, yet I must decline to consider them, as there are no grounds of appeal to justify the intervention of an appellate court in respect of those matters. It is well settled that where a party seeks to have an appellate court resolve a question decided by the Court below, that party must have filed grounds of appeal germane to the question and issues properly raised thereon to justify the consideration of the question by an appellate court. See *Ogunbadejo v. Onoyemi* (1993) 1 N.W.L.R. (Pt. 271) 517; *Oshatoba v. Olujitan* (2000) 5 N.W.L.R. (Pt. 655) 159; *Ajibade v. Pedro* (1992) 5 N.W.L.R. (Pt. 241) 257 at 262; *Arowolo v. Adimula* (1991) 8 N.W.L.R. (Pt.212) 753; *Metal Construction (W.A.) Ltd. v. Migliore* (1990) 1 N.W.L.R. (Pt. 126) 299.

Now, it is manifest from all that I have said above, that both parties took the view that the Court below had fully considered the merits of the appeal before deciding to strike out the respondents' claim. I therefore need to consider whether that contention is valid. To resolve that question, the judgment of the Court below has to be critically considered in the circumstances. After a careful perusal of the judgment, it is in my view manifest that in the leading judgment delivered by Salami JCA, (and with which Mukhtar and Azaki JJCA concurred) the Court was mainly concerned with the effect of the judgment of the trial Court having regard to the amendment of the plaintiffs' claim during the closing address of their counsel. It is my

view that the concern of the learned Justice of the Court of Appeal was that by the amendment, and with the plaintiffs' claim remaining unamended, the interests of others were unfairly affected. Hence, after reviewing the parties affected by the amendment, the Court below made the following observation:-

B *"It is therefore my firm view that the amendment hurriedly made was not only mala fides it has resulted in injustice to the defendants particularly Tijani Adewale and some other members of Raji Family such as Omoboade section and Falilatu Raji whose section seems bifurcated."*

C The rest of the judgment was an elaboration of this point taken by the Court below with regard to the injurious effect of the amendment on the judgment that would, if allowed to stand, deny others whose interests were not properly protected in the action as constituted. It is also clear that the Court below then duly considered the effect of dismissing the action. In the end, the Court below allowed the appeal. ***But though the appeal was allowed, the Court below made the further order of striking out the respondents' claim. It is difficult to understand the rationale for this order as that***
D ***was not the claim before the Court. Having allowed the appeal, the Court ought not to have made orders affecting the respondents' interest without hearing from the parties. In this respect, I wish to refer to the principle that was so clearly enunciated in the case of Ojusanya v. Olusanya (1983) 14 NSCC 97 at p. 102 where this Court said thus:***
E ***"This Court has said on a number of occasions that although an appeal court is entitled, in its discretion, to take points suo motu if it sees fit to do so, yet that discretion must***
F ***be exercised sparingly and in exceptional circumstances only: where the points are so taken the parties must be given the opportunity to address the appeal court before decision on the points is made by the appeal court. See Kuti & Anor v. Jibowu & Anor. (1972) 1 All NLR (pt. II) p. 180 at p. 192; Salawu Ajao v. Karimu Ashiru & Ors (1973) 1 All NLR (Pt.II) p. 51 at p. 63; Atanda and Anor v. Lakanmi (1974) 1 All NLR (Pt.I) p.168 at p.178 and Kuti v. Balogun (1978) 1 LRN 353 at 357."***

G ***"This Court has said on a number of occasions that although an appeal court is entitled, in its discretion, to take points suo motu if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only: where the points are so taken the parties must be given the opportunity to address the appeal court before decision on the points is made by the appeal court. See Kuti & Anor v. Jibowu & Anor. (1972) 1 All NLR (pt. II) p. 180 at p. 192; Salawu Ajao v. Karimu Ashiru & Ors (1973) 1 All NLR (Pt.II) p. 51 at p. 63; Atanda and Anor v. Lakanmi (1974) 1 All NLR (Pt.I) p.168 at p.178 and Kuti v. Balogun (1978) 1 LRN 353 at 357."***

H ***Now, it is also patent that the appeal was considered in respect of the 1st issue raised in the appeal, which was***

allowed. It cannot, in my view be satisfactory to determine the appeal one that issue alone. I think that in the circumstances, the course of justice would be better served if the appeal is sent back to the Court below for the hearing of the appeal on its merits.

In the result, the appeal is allowed, and the cross-appeal succeeds. The appeal is therefore ordered to be sent back to the Court below for re-hearing before another panel. Each party to bear its costs.

BELGORE JSC

I agree that this appeal has merit and ought to be allowed. The cross-appeal also has great merit. Where a court, finds some substance in entering order of non-suit or strike out or retrial, it is important to hear the parties to address the court on the desirability of making such an order. To make any of the orders when not asked for by any of the parties, and the parties were not asked to address the court on such an order, injustice may result therefrom. It is for this reason and further reasons in the judgment of Ejiwunmi, JSC, that I also allow the appeal and the cross-appeal. I order a rehearing of the appeal before another panel. Each party to hear its costs.

OGWUEGBU JSC

I have had the privilege of a preview in draft of the judgment of my learned brother Ejiwunmi, J.S.C. and I agree that the appeal be allowed and the cross-appeal succeeds. I also endorse the order for a rehearing by another panel of justices of the court below.

MOHAMMED JSC

I have had the preview of the judgment of my learned brother, Ejiwunmi, J.S.C., in draft, and I agree with him that both the appeal and the cross-appeal have merit. My learned brother has considered all the salient issues raised in this appeal and I have nothing more to add to his opinion. The appeal is allowed and the cross-appeal succeeds. I also order the appeal back to the Court of Appeal to be

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re-heard before another panel. Parties to bear own costs.

UWAIFO JSC

I read in advance the judgment of my learned brother Ejiwunmi
B JSC. I agree with the conclusions and abide by the orders made in
the judgment.

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