

SUPREME COURT OF NIGERIA
FRIDAY 12TH JULY, 2002 SC. 30/1995
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, S. U. ONU,
A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC

1. ALHAJA ABENI BAKO
 2. G. A. SUNMOLA (ALIAS BAKO) APPELLANTS
 3. ABAYOMI OWULADE
(Legal representative of the Estate of
Abina Mojeed Sunmola (alias Bako
Deceased)
 - AND
 1. JOSEPH BOLAJI LANIYAN
 2. ISIAH OGUNYADE RESPONDENTS
 3. R. O. LANIYAN
-

APPEALS - Error - Court of Appeal - Was clearly in grave error - In allowing an appeal which was never before it (H1)

FACTS

Plaintiffs/respondents sued defendants/appellants at the High Court of Lagos State, Ikeja claiming a declaration of right of occupancy in respect of a parcel of land, damages for trespass and injunction. In the course of the trial, respondents sought to tender a survey plan of the disputed land. Appellants objected on the ground that the witness through whom it was sought to be tendered was not the maker. The learned trial judge thus refused to admit the plan in evidence. Respondents thereupon informed the court of its intention to appeal against the ruling. Hence, the hearing was adjourned to enable respondents file their application for stay of proceedings. Respondent thereafter filed application for stay of proceedings pending the determination of their appeal at the Court of Appeal, Lagos. The learned trial judge refused the application for stay. Respondents then asked for an adjournment to enable them file similar application at the Court of Appeal. The application for adjournment was equally refused. Since respondents were not proceeding with their action, the learned trial judge dismissed their action in its entirety. Later on, respondents filed another Notice of Appeal at the same division of

Court of Appeal against the dismissal of their action. The court allowed the appeal as to the refusal of the trial court to admit the survey plan. However in doing so, the court proceeded to set aside the judgment of trial court dismissing respondents' case. Appellants were aggrieved with the judgment and thus appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether there was at any time before the Court of Appeal any competent appeal against the judgment of the trial court dismissing the plaintiffs' case on 1st June, 1990.

2. Whether the Court of Appeal was right in setting aside the said judgment."

HELD (Unanimously allowing the appeal per
KATSINA-ALU JSC)

APPEALS - Error - Court of Appeal

1. Evidently, there were two appeals against two different decisions on different days. There was no order for the consolidation of the two appeals. Rather learned counsel for the defendants informed the lower court that the second appeal filed on 17 August, 1990 was withdrawn. The plaintiffs did not deny nor dispute that statement. The defendants further pointed out that the plaintiffs' second issue which related to the second appeal did not arise in this appeal.

In the light of the foregoing the court of appeal was clearly in grave error in allowing an appeal which was never before it. (p. 2149 H)

REPRESENTATION

Kehinde Sofola SAN with O. B. A. Howells and I. F. Ajijola for the Appellants

P. N. Ikwueto with C. O. Ochoze for the Respondents

LEAD JUDGMENT BY KATSINA-ALU JSC

The plaintiffs sued the defendants before an Ikeja High Court claiming a declaration of right of occupancy in respect of a parcel of land, damages for trespass and injunction. In the course of the trial

the plaintiff sought to tender a survey plan of the disputed piece of land. Learned counsel for the defendants objected on - the ground that the witness through whom it was sought to be tendered was not the maker. The learned trial Judge in his ruling refused to admit the plan which was then marked "X" Rejected.

The plaintiffs appealed against this refusal by a Notice of appeal dated 31 May, 1990. The Court of Appeal allowed the appeal of the plaintiffs. But in doing so the lower court proceeded to set aside the judgment of the learned trial Judge delivered on 1 June, 1990 whereby the plaintiffs case was dismissed for refusing to proceed with the case when called upon repeatedly to do so by the learned trial Judge.

In order to appreciate the complaints in this appeal, it is necessary to relate the background facts. As I have already indicated, the learned trial Judge in the course of the trial rejected a survey plan sought to be tendered by the plaintiffs in a ruling dated 31 May, 1990. Mr. Lardner SAN for the plaintiffs intimated the court that he would appeal against the decision within two hours. The court then adjourned further hearing to 1st June, 1990 to enable Mr. Lardner to bring his application for a stay of proceedings. The plaintiffs filed their Notice of Appeal against the ruling of 31 May, 1990 on the same day i.e. 31 May, 1990 as indicated by Mr. Lardner. That Notice contains only one ground of appeal. It reads:-

"1. That decision of the learned trial Judge rejecting in evidence the plan sought to be put in evidence is wrong in law in that the plan is admitted in the Statement of Defence."

On 1 June, 1990 Mr. Lardner SAN sought an order to stay further proceedings pending the determination of the plaintiffs' appeal to the Court of Appeal. The application to stay further proceedings was refused by the learned trial Judge.

Mr. Lardner for his part asked for an adjournment to enable him to make a similar application for stay of proceedings before the Court of Appeal. The learned trial Judge refused to grant an adjournment. Rather he asked the learned counsel for the plaintiffs to proceed with his case. Learned counsel would not. He remained defiant. In consequence the learned trial Judge dismissed the plaintiffs' case in its entirety.

On 17 August, 1990 the plaintiffs filed another Notice of Ap-

peal dated 16 August, 1990 against the dismissal of his claim. That Notice does not contain any grounds of appeal. Paragraph 2 thereof reads:-

2. PART OF DECISION OF THE LOWER COURT

The decisions -

- B (i) *refusing a stay of proceedings pending the determination of the appeal lodged against the Ruling rejecting in evidence the plaintiffs' composite plan showing*
- (a) *the plaintiffs' land*
- C (b) *the land claimed by the defendants; and*
- (c) *the area of overlap which is the subject matter of the case.*
- (ii) *dismissing the suit when the plaintiffs announced their inability to proceed further with the trial, the posture of the case then being that their action was bound to fail if they proceeded, as a judgment of the court respecting must be tied to a plan before the court and the plan of the land in suit had been rejected in evidence by the learned trial judge."*

Paragraph 3 states:

- E *"Further grounds of appeal will be filed and leave to argue them will be sought."*

The plaintiffs/appellants' brief of argument before the Court of Appeal was dated 7th December, 1992. Paragraph 1 thereof reads:

- F *"1(1) This is an appeal against the judgment of the High Court of Lagos State, Ikeja Judicial Division, delivered on the 31st May 1990 in suit No. IID/765/89."*

The plaintiffs raised two issues for determination in their brief of argument. They read as follows:

- G *"3(1) Was the learned trial Judge not wrong in law in failing to observe that from paragraphs 6 & 7 of the Statement of Claim to which the defendant pleaded by denying para. 6 and put in evidence the said plan, the objection of the defendant going to weight only and the denial of paragraph 6 is meaningless in law since it is the prerogative of a plaintiff to nominate the subject of his litigation and it is that subject matter that the defendant must defend (if he is to stand a chance of successfully resisting the claim against him).*

3(2) Is that act of the learned Judge in dismissing the plaintiffs claim in the circumstances not an abuse of judicial power, and are the cases cited by him not irrelevant?"

It will be seen clearly that although the plaintiffs' appeal is against the ruling of 31 May, 1990 their Issue No.2 is in respect of the judgment of the trial court given on 1 June, 1990 against which a Notice of Appeal was filed on 17 August, 1990.

The defendants, both in their brief of argument in the court below and in their counsel's oral submissions at the hearing of the appeal, contended that the plaintiffs' second issue did not arise in this appeal. In addition, counsel for the defendants indicated at the hearing that the plaintiffs had withdrawn their appeal against the dismissal of their action.

In allowing the appeal the Court of Appeal in its judgment said:

"As the court below erred in wrongfully rejecting the admission of the plaintiffs' survey plan, and therefore proceeded to dismiss the case, that final decision rests on a wrong premises. Accordingly the appeal succeeds and the judgment of the lower court is hereby set aside for retrial. I make no order as to costs."

The defendants' appeal to this court against that decision has raised two issues for determination. They read thus:

"1. Whether there was at any time before the Court of Appeal any competent appeal against the judgment of the trial court dismissing the plaintiffs' case on 1st June, 1990.

2. Whether the Court of Appeal was right in setting aside the said judgment."

This appeal is against the decision of the lower court as it relates to the decision of 1 June, 1990. As I have already pointed out the trial court's judgment dismissing the plaintiffs' case was not delivered until 1 June, 1990, a day after the ruling the subject matter of the plaintiffs' complaint. I also pointed out that part of the decision of the trial court the plaintiffs complained of was "The entire ruling of the learned trial judge rejecting in evidence the plaintiffs' composite plan No. CD/25/89 and marking same rejected." It is therefore evident that the trial court's decision on 1 June, 1990 dismissing the plaintiffs' case did not form part of the plaintiffs' complaint in the Notice of Appeal dated 31 May, 1990.

Evidently, there were two appeals against two different decisions on different days. There was no order for the consolidation of the two appeals. Rather learned counsel for the

defendants informed the lower court that the second appeal filed on 17 August, 1990 was withdrawn. The plaintiffs did not deny nor dispute that statement. The defendants further pointed out that the plaintiffs' second issue which related to the second appeal did not arise in this appeal.

B ***In the light of the foregoing the court of appeal was clearly in grave error in allowing an appeal which was never before it.*** In the result this appeal succeeds and I allow it. I set aside the decision of the Court of Appeal only as it relates to the decision of the trial court delivered on 1 June, 1990 dismissing the case of the plaintiffs. The defendants are entitled to costs which I assess at C N10,000.00 against the plaintiffs.

D ***KUTIGI JSC***

I read in advance the judgment just delivered by my learned brother Katsina-Alu, JSC. I agree with him that the Court of Appeal was right for holding that the trial High Court erred in rejecting for admission in evidence of the plaintiffs' Survey Plan. The case was E therefore properly remitted to the trial court for a retrial. But the Court of Appeal was wrong when it proceeded to set aside the judgment of the High Court on which there was no appeal before it. The latter decision must therefore be set aside and it is hereby set aside. F The Appellants are awarded costs assessed at N10,000.00 only.

ONU JSC

G I have been privileged to read in draft the judgment of my learned brother Katsina-Alu JSC just delivered. I agree with his reasoning and conclusion that the appeal succeeds and it is allowed by me. I make similar consequential orders inclusive of N10,000.00 costs to the Defendants.

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BELGORE JSC

The appeal in lower court never existed because the court dealt with an appeal not before it. For reasons succinctly set out in judgment of my learned brother, Katsina-Alu, JSC I also allow this appeal

with N10,000.00 against the plaintiffs/respondents.

EJIWUNMI JSC

Being privileged to have read in advance the judgment just delivered by my learned brother Katsina-Alu JSC, I agree for the reasons given in the said judgment that this appeal has merit. I will therefore also allow the appeal and award costs in the sum of N10,000.00 to the defendants.

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