

SUPREME COURT OF NIGERIA
FRIDAY 12TH JULY, 2002. SC. 110/1998
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, S. U. ONU,
A. I. KATSINA-ALU, E. O. AYOOLA, JJSC

ABU IDAKWO APPELLANT
AND
1. LEO EJIGA RESPONDENTS
2. IGALA TRADITIONAL COUNCIL

APPEALS - Fair hearing - Proceedings - When issue of fairness of hearing arises - Appellate Court is to see whether the result of the case - Would have been the same even if breach of fair hearing did not occur (H1)

APPEALS - Proceedings - Fair hearing - Absence of - Proper order - When entire proceedings are tainted by unfairness - The proper thing to do is to set aside decision therein (H2)

APPEALS - Rehearing order - Purpose - Order that matter be heard de novo in civil case - Is made for benefit of both parties - So that the matter in dispute could be resolved on merit (H3)

COURTS - Criminal procedure - Retrial order - Principles - Abodunde v. R. - Court should consider the need to balance societal interest - With need to protect accused from oppressive trial (H4)

APPEALS - Hearing on merit - Meaning - Appeal is heard on merit once appellate court considered issues in controversy - And has taken a decision to confirm - Or to set aside decision of a lower court (H5)

FACTS

Plaintiff/appellant filed this action against defendant/respondent at the High Court of Kogi State. Appellant claims for a declaration that he was the rightful person to be appointed Gago of Ukwaka village. Appellant also filed an interlocutory application seeking for injunction to restrain respondent from doing a number of things. The court thereafter ruled in favour of appellant and made order

restraining respondents as per claims of appellants.

Respondents appealed to the Court of Appeal contending among other things, that there has been an unfair hearing occasioning a miscarriage of justice in that the trial judge had made pronouncements on the substantive issue in the case in the course of his determination of the application for interlocutory injunction. The Court of Appeal upheld that contention. Being aggrieved, appellant filed appeal at Supreme Court.

HELD (Unanimously dismissing the appeal per
AYOOLA JSC)

APPEALS - Fair hearing - Proceedings

1. The appellant, on this appeal, did not complain about the finding that a fair hearing was denied the respondents by the trial judge. The question of fairness of a proceeding is quite separate from the question of the merit of the trial court's decision. When a question of fairness of hearing arises in a case, the only purpose that could have been served by the appellate court considering, albeit in a restricted manner, issues of the merits of the case, in my opinion, is to see whether the result of the case would have been the same even if the breach of the principle of fair hearing had not occurred. Whether that exercise will serve any useful purpose will normally depend on the nature of the breach. In my opinion, where it will be a matter of speculation whether the same decision would have been arrived at had a hearing not tainted by unfairness taken place, an enquiry into the merits is a futile exercise, I would even go as far as saying that an unfair method cannot produce a fair result. (p. 2286 E)

Fair hearing - Absence of - Proper order

2. The second issue raises the question: What order should an appellate court make consequent upon its finding that there had been absence of fair hearing? A case in which the fairness of hearing had tainted the proceedings taken as a whole, must be distinguished from, a case in which a defect at one stage of

the proceedings which may have been capable of affecting the fairness of the proceedings is put right or compensated at a later stage. In the latter case, in reality, there would have been no unfairness in the totality of the proceedings. That is not the case here. However, when the proceedings are held not to be fair and the unfairness had tainted the entire proceedings there would have been a fundamental breach of the principle of procedural equality of the parties essential to our system of adjudication, such as to make the proceedings a sham. The normal thing to do in such a situation is to set aside the decision as the Court of Appeal had done in this case. (p. 2288 D)

APPEALS - Rehearing order - Purpose

3. Where proceedings of a tribunal are vitiated by unfairness, first duty of a court reviewing the decision of such tribunal is to set aside the decision. The order that the matter be heard de novo in a civil case is an order made for the benefit of both parties so that the matter in dispute could be gone into and resolved on the merit.

I hasten to add that it is not being suggested that the guidelines in Abodunde's case are not useful in civil cases. The caution that is here emphasized is that it is always useful to bear in mind the objective of the rules in that case and the difference in emphasis in a civil case. The length of time it will take for a retrial to be concluded is not a relevant consideration in the decision whether or not to order a hearing de novo in a civil case when a decision had been set aside for lack of fairness of the proceedings. (p. 2289 C/F)

Criminal procedure - Retrial order - Principles

4. Although the case of Abodunde v. R. (1959) FSC 70, cited by counsel for the respondents in the respondents' brief, set out principles that should guide the court in ordering a retrial in a criminal case, I am of the opinion that while the emphasis in a civil case is to ensure determination of the rights of the parties, in a criminal case the prevailing consideration is the need to balance the interest of society in the due administration of criminal justice with need to protect the accused per-

son from a possible oppressive trial after he may have gone through the rigours of an abortive trial. (p. 2289 D)

APPEALS - Hearing on merit - Meaning

5. Learned counsel for the appellant invited this court to order that the appeal before the Court of Appeal be remitted to that court for hearing on the merit. That invitation must have overlooked the fact that there is no appeal before us from the finding that the proceedings in the High Court were vitiated by unfairness. The decision of the Court of Appeal was arrived at after that court had considered the first issue raised in the appeal. That was a hearing of the appeal on the merit. It goes without saying that an appeal is heard on the merits once the appellate court has considered the issue or issues in controversy in the appeal and has taken a decision either to confirm or set aside the decision of a lower court. Not having set aside the decision of the Court of Appeal and having confirmed it, this court lacks jurisdiction to order that an appeal which that court had disposed of on the merit be reheard by the Court of Appeal. The submission of the learned counsel for the appellant is thus misconceived. (p. 2289 H)

REPRESENTATION

F Chief B. C. Oyibo with J. O. Sanni for the appellant
Respondent and their counsel, A. B. Akogu, Esq. who settled their brief were absent

CASES REFERRED TO

G Ikomi v. The State (1986) 1 NSCC 730
Abodunde v. R. (1959) FSC 70

BOOKS REFERRED TO

H Halsbury's Laws of England (4th ed.) para 100
Judicial Review of Administrative Action (2nd ed.) p. 227

LEAD JUDGMENT BY AYoola JSC

By a writ of summons issued on 25th October 1989 the appellant, plaintiff in the High Court of Kogi State, claimed, among several

other declarations, a declaration that he was the rightful person to be appointed the 'Gago of Ukwaka Village'. On 17th July 1995 the High Court (Ochimana, J.,) entered judgment in his favour and declared him the Gago of Ukwaka. The defendants, Leo Ejiga and Igala Traditional Council, respondents in this appeal, appealed to the Court of Appeal which, on 3rd December, 1997, allowed their appeal, set aside the judgment of the High Court and ordered that the case be heard de novo by another judge of the High Court of Kogi State. B

Of the six issues for determination raised before the Court of Appeal, that court disposed of the appeal on the first of the issues which was as follows: C

"Whether the learned trial judge decided the issues in the substantive suit when ruling on respondent's application for interim injunction on 15/3/90 and if so, whether this did not occasion a miscarriage of justice to the appellants." D

It did not consider the other issues for determination which touched on the merits of the case.

The facts which gave rise to the only issue can be briefly stated and, in doing so, I draw largely from the judgment of Ejigunmi, JCA, (as he then was) who delivered the leading judgment, of the Court of Appeal. Before pleadings were filed in the suit in The High Court, the appellant filed a motion on notice whereby he prayed orders of interim/interlocutory injunction against the defendants to restrain them from doing a number of things. There were two affidavits and a counter-affidavit filed in the application. The trial judge having heard redresses by counsel for the parties ruled in favour of the appellant and made orders restraining the defendants in terms of the orders sought. Pleadings having been filed by the parties, the suit proceeded to trial on the merits, the parties calling witnesses in support of their respective cases. At the conclusion of the trial the trial judge gave judgment for the appellant. The respondents herein appealed to the Court of Appeal contending, among other things, that there has been a miscarriage of justice in that the trial judge had made pronouncements on the substantive issue in the case in the course of his determination of the application for interlocutory injunction. The Court of Appeal upheld that contention. It held that: H

"...the trial judge was wrong to have made pronouncement on matters which would be the subject of controversy in the substan-

five suit.”Ejiwunmi, JCA, (as he then was) said:

“it is manifest from what had transpired in this case that... trial cannot be said to have given the appellants a fair hearing in respect of the substantive suit. The learned judge fell into error when he made specific findings upon the issues that fell for consideration in the same case before him.”

I hasten to explain that the ‘specific findings’ referred to were those made in the course of the application for interlocutory injunction. In this appeal from the decision of the Court of Appeal the appellant’s case, as put by his counsel in the first issue in the appellant’s brief of argument, is that the court below should not have limited itself to a consideration of the only issue on which it disposed of the appeal, but should have considered the other issues raised in the appeal and, particularly, the appellant’s argument on them, it was argued that a miscarriage of justice had been occasioned by failure of the Court of Appeal to consider those other issues. Learned counsel for the appellant raised and argued a second issue, namely: that the order that the case be heard de novo was not appropriate. It was argued that it would cause a delay of justice. He further argued that the respondents “have not shown any particular kind of injury they have suffered from the unfair hearing meted to them by the trial High Court’s prejudging its substantive judgment to warrant the making of the order in the first place.”

The appellant, on this appeal, did not complain about the finding that a fair hearing was denied the respondents by the trial judge. The question of fairness of a proceeding is quite separate from the question of the merit of the trial court’s decision. When a question of fairness of hearing arises in a case, the only purpose that could have been served by the appellate court considering, albeit in a restricted manner, issues of the merits of the case, in my opinion, is to see whether the result of the case would have been the same even if the breach of the principle of fair hearing had not occurred. Whether that exercise will serve any useful purpose will normally depend on the nature of the breach. In my opinion, where it will be a matter of speculation whether the same decision would have been arrived at had a hearing not tainted by unfairness taken place, an enquiry into the merits is a futile ex-

ercise, I would even go as far as saying that an unfair method cannot produce a fair result.

In *Ikomi v. The State* [1986] 1 NSCC 730, this court held that although there was a breach of the rule of natural justice by an adjudicator, such breach was a technical breach which did not vitiate the proceedings. In that case Nnamani JSC at 749 said:

“Normally a finding that rules of natural justice have been breached would vitiate any order made... Chief Williams has contended that the question of miscarriage of justice such as the Court of Appeal found absent here is really irrelevant. But where an order is set aside following a breach of natural justice it is to my mind to obviate a miscarriage of justice. I think having regard to my conclusion on the nature of breach which has occurred here, it is relevant to consider whether a miscarriage of justice has been occasioned. I am inclined to agree with the Court of Appeal that none has been.”

Ikomi case was not one in which the breach of the rules of natural justice led to any speculation but that the result would have been the same had the breach not occurred. It was merely a breach of the principle of natural justice at the stage of grant of consent to prefer a criminal information. That is different from the present case where the adjudicator had pronounced on substantive issues in the case before trial.

In my opinion, the view that should guide the court in cases such as the present one in which the judge had manifestly prejudged the issues in the case before the trial, is expressed in Vol. 1(1) Halsbury's Laws of England (4th ed.) para 100 as follows:

“It has been held that there is no such thing as a technical breach of natural justice, that is, non-compliance with the rule is immaterial if the party claiming to be aggrieved has not suffered any significant detriment. But a mere risk that there has been actual prejudice will usually suffice, and the courts will not readily conclude that a fair hearing would have made no difference to the outcome.”

In similar vein is the opinion by Professor de Smith in his work, *Judicial Review of Administrative Action* (2nd ed.) p 227 as follows:

“One can find judicial support for the view that even where breach of the rule is established, a court ought not to afford redress if satisfied that the decision would have been the same had the rule been observed. But the general rule is that it is immaterial to ask

whether substantial justice was in fact done. Rather than speculate on what the decision might have been had the proper hearing taken place, the courts will normally prefer to set aside the decision made in order to reaffirm the paramountcy of fundamental principle.”

It was to show that the breach of the rule of hearing committed by the trial judge was fundamental and beyond what can be termed “technical” that the Court of Appeal took pains to examine the proceedings in the High Court and considered the issues raised in the interlocutory and substantive proceedings before coming to the conclusion that the trial judge had prejudged the issues before the substantive trial. In these circumstances, I am satisfied that the Court of Appeal, having found that there was no fair hearing, took the proper course by limiting itself to the issue which touched on the fairness of the proceedings.

The second issue raises the question: What order should an appellate court make consequent upon its finding that there had been absence of fair hearing? A case in which the fairness of hearing had tainted the proceedings taken as a whole, must be distinguished from, a case in which a defect at one stage of the proceedings which may have been capable of affecting the fairness of the proceedings is put right or compensated at a later stage. In the latter case, in reality, there would have been no unfairness in the totality of the proceedings. That is not the case here. However, when the proceedings are held not to be fair and the unfairness had tainted the entire proceedings there would have been a fundamental breach of the principle of procedural equality of the parties essential to our system of adjudication, such as to make the proceedings a sham. The normal thing to do in such a situation is to set aside the decision as the Court of Appeal had done in this case.

Counsel for the appellant has argued that the respondents had suffered no particular injury. I do hold that a finding that there is no fair hearing implies in itself a prejudice to the party who lost tantamount to a finding of a contravention of his right to fair hearing guaranteed by the Constitution. He does not need to have suffered any particular injury for him to be entitled to have a decision against him, obtained unfairly, set aside.

A further question raised by counsel on behalf of the appellant

is, whether when a miscarriage of justice has been occasioned, a consideration of length of time it would take to resolve the dispute between the parties is relevant to a decision to order a rehearing de novo. Learned counsel the appellant argued and submitted that:

“The de novo trial order may very likely inflict the injustice of ‘justice delayed is justice denied’ on the appellant since by its effect the Appellant’s suit which commenced in October, 1989 about ten years ago may probably last another ten years namely by the year 2009 if reopened again now.”

He urged this court to substitute for the order of rehearing made by the Court of Appeal an order that the Court of Appeal should itself rehear the appeal on its merit.

Where proceedings of a tribunal are vitiated by unfairness, first duty of a court reviewing the decision of such tribunal is to set aside the decision. The order that the matter be heard de novo in a civil case is an order made for the benefit of both parties so that the matter in dispute could be gone into and resolved on the merit. Although the case of Abodunde v. R. (1959) FSC 70, cited by counsel for the respondents in the respondents’ brief, set out principles that should guide the court in ordering a retrial in a criminal case, I am of the opinion that while the emphasis in a civil case is to ensure determination of the rights of the parties, in a criminal case the prevailing consideration is the need to balance the interest of society in the due administration of criminal justice with need to protect the accused person from a possible oppressive trial after he may have gone through the rigours of an abortive trial. I hasten to add that it is not being suggested that the guidelines in Abodunde’s case are not useful in civil cases. The caution that is here emphasized is that it is always useful to bear in mind the objective of the rules in that case and the difference in emphasis in a civil case. The length of time it will take for a retrial to be concluded is not a relevant consideration in the decision whether or not to order a hearing de novo in a civil case when a decision had been set aside for lack of fairness of the proceedings.

Learned counsel for the appellant invited this court to order that the appeal before the Court of Appeal be remitted

to that court for hearing on the merit. That invitation must have overlooked the fact that there is no appeal before us from the finding that the proceedings in the High Court were vitiated by unfairness. The decision of the Court of Appeal was arrived at after that court had considered the first issue raised in the appeal. That was a hearing of the appeal on the merit. It goes without saying that an appeal is heard on the merits once the appellate court has considered the issue or issues in controversy in the appeal and has taken a decision either to confirm or set aside the decision of a lower court. Not having set aside the decision of the Court of Appeal and having confirmed it, this court lacks jurisdiction to order that an appeal which that court had disposed of on the merit be reheard by the Court of Appeal. The submission of the learned counsel for the appellant is thus misconceived.

Before I part with this appeal, I make some comments on how counsel had themselves contributed to the delay in resolving the dispute between the parties. Counsel for the respondents who well knew before the trial started that the judge should have disqualified himself did not raise the question until judgment was entered against the respondents. Counsel should have brought to the notice of the judge the likelihood of an absence of fair hearing. Counsel for the appellant who now expresses fear of delay of justice appears ill-advised to have encouraged his client to appeal from the decision of the Court of Appeal. Had the order of retrial made by that court in 1997 not been appealed from, the retrial may have been commenced and completed by now.

Be that as it may, for the reasons which I have given, it is clear that this appeal is devoid of merit. It is therefore dismissed with N10,000.00 costs to the respondents.

BELGORE JSC

I agree with my learned brother, Ayoola J.S.C., that this appeal has no merit. For the reasons the judgment written by him I also dismiss the appeal with N10,000.00 costs to respondents.

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother, Ayoola, J.S.C. I agree with his reasoning and conclusions. I also find no merit in the appeal. It is accordingly dismissed. The judgment of the Court of Appeal is confirmed. I endorse the order for costs.

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ONU JSC

Having read before now the judgment of my learned brother, Ayoola, J.S.C., just delivered, I am in entire agreement with it that the appeal is devoid of substance and must therefore fail. Accordingly, I dismiss the appeal and affirm the decision of the court below with N10,000.00 costs to the Respondents.

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KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother, Ayoola, JSC. I entirely agree with it, and for the reasons which he has given, I too dismiss the appeal with N10,000.00 costs to the respondents.

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