

SUPREME COURT OF NIGERIA
FRIDAY 4TH OCTOBER, 2002. SC. 156/1999
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, S. U. ONU,
A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC

1. JONASON TRIANGLES LTD
2. JONATHAN A. ANAGOR APPELLANTS
AND
CHARLESMOH & PARTNERS LTD RESPONDENT

COURTS - Action - Hearing - It is the duty of judge to facilitate the hearing - Of action pending before him (H1)

APPEALS - Court - Decision - Interference - Court of Appeal rightly refused to interfere with decision of trial judge - More so as appellants have not shown that the court was wrong (H2)

APPEALS - Concurrent findings - Where such findings are unimpeachable - Supreme Court will not interfere (H3)

FACTS

Plaintiff/respondent instituted this action against defendants/appellants at the High Court of Cross River State, Calabar wherein he claimed inter alia the sum of N5,000,000.00 as special and general damages. Thereafter, adjournments were secured in the matter to hear motion for accelerated hearing of the case. On a particular adjourned date, only respondent and his counsel were in court. Appellants and their counsel were absent. The court however went on with the matter after hearing witness for respondent.

The court eventually gave judgment holding that appellants were liable in respect of respondent's claim. Appellants who were dissatisfied filed appeals at the Court of Appeal, Calabar seeking to set aside the judgment and orders of the trial court. The appeals were dismissed by the court. Being aggrieved, appellants appealed to Supreme Court contending that they were not given fair hearing at the trial court and that the concurrent findings by the trial court and Court of Appeal occasioned a miscarriage of justice.

ISSUES FOR DETERMINATION

“(a) Issue No. 1

Whether the appellant’s right to a fair hearing of the substantive suit at the trial had been breached or substantially eroded and whether the concurrent decision to the contrary has occasioned serious miscarriage of justice in the circumstances.

(b) Issue No. 2

Whether the purported hearing and determination of the substantive suit was competent and whether the concurrent; decision affirming same has occasioned serious miscarriage of justice.

(c) Issue No. 3

Whether the lower court is justified in striking out Notice of Appeal filed on 26th November, 1995, and in failing to determine the issues Numbers 1A and 2A arising from the Amended Notice of Appeal filed on 9th September, 1997.”

HELD (Unanimously dismissing the appeal per

EJIWUNMI JSC)

Action - Hearing

1. As I have earlier already noted in this judgment the other facts that led to the determination of this action, it is not necessary to repeat them here. Having regard to those facts, the decision of this Court in *Solanke v. Ajibola* (supra) is of no avail the appellants. It must be remembered that it is part of the duty of a Judge to see that everything is done to facilitate the hearing of an action pending before him. In so doing, he has to exercise his discretionary power, which undoubtedly belongs to the trial Judge. The exercise of this discretionary power to facilitate the hearing of the action pending before him may however be challenged on appeal. (p. 3011 G)

Court - Decision - Interference

2. But it is settled principle that a Court of Appeal ought to be very slow indeed to interfere with the discretion of a trial Judge. In the instant appeal, the Court below, rightly in my view, refused to interfere with the decision of the trial Court. And, as this Court is satisfied that the appellants have not also shown

that the Court of Appeal was wrong to have upheld the judgment of the trial Court, this appeal must also fail that as it may. (p. 3012 A)

APPEALS - Concurrent findings

3. It must also be borne in mind that this appeal is against the concurrent findings of the High Court and the Court of appeal. It is however settled principle that where the concurrent findings of the two Courts are unimpeachable, and no special circumstances have been shown to the effect that the findings are impeachable, this court would not interfere with them. (p. 3012 B)

REPRESENTATION

Dr. J.O. Ibik, SAN, with M.C. Okonkwo, for the Appellants
F.O. Onyebueke, for the Respondents

CASES REFERRED TO

U.A.C. Nig. Ltd. v. Fasheyitan (1998) 7 SC (Pt. II) 35
Sanusi v. Ameyogun (1993) 4 NWLR (Pt. 237) 527
Chinwendu v. Mbamali (1980) 3-4 SC 31
Woluchem v. Gudi (1981) 5 SC 29
Solanke v. Ajibola (1968) All NLR 47
COP, Benue State v. Iheabe (1998) 11 NWLR (Pt. 525) 666
Oditia v. Okwudinma (1969) All NLR 250
Mbadinui v. Ezuka (1994) 8 NWLR (Pt. 364) 535
Solanke v. Aibola (1968) 1 All NLR 46

RULES REFERRED TO

High Court (Civil Procedure) Rules (Edict No. 7) Cross Rivers State
1987, O.37 r.10

LEAD JUDGMENT BY EJIWUNMI JSC

The present respondent was the plaintiff in the High Court of the Cross River State holden at Calabar wherein the respondent claimed jointly and severally against the appellants as the 1st and 2nd defendants respectively for the sum of N5,000,000.00 (Five Million Naira) as special and general damages. The particulars of special dam-

ages were stated in paragraph 12 (a), (b) & (c) of respondent's statement of claim which read thus:

"(a) The sum of N275,000.00 (Two Hundred and Seventy-Five Thousand Naira) given to the defendants by the plaintiff for a job not performed.

B (b) The sum of N180,000.00 (One Hundred and Eighty Thousand Naira) being the amount the plaintiff spent in hiring the pay loader for the contract.

C (c) The sum of N550, 000. 00 being the expected profit that the plaintiff would have made if there was no breach on the side of the defendants. Total of the special damages is the sum of N 1,005,000.00. General damages for inconveniences, loss of business and reputation in business is the sum of N3, 995, 000. 00. Total is the sum of N5,000,000.00."

D It would appear from the Printed Record that the writ of summons in the matter was dated the 7th day of April 1995. The Statement of Claim would appear to have also been filed with the Writ of Summons. It does not appear from the Records when those steps were in fact taken in the proceedings.

E However, it suffices to note that the respondents were served with the documents on a date prior to the 25th day of April, 1995. This is because the appellants, by a motion dated 25th April, 1995, before the High Court of Cross River State holden at Calabar prayed the Court for the transfer of this suit/matter from the High Court of *F* Cross River State to the High Court of Rivers State in the interest of justice. Attached to the said motion was a 16-paragraph affidavit sworn to by the 2nd appellant, who described himself as a businessman and a director of the 1st defendant. A conditional appearance for the *G* appellant was also made on their behalf by their learned counsel, C.U. Ikeji, Esq., on the same date as when the above motion was filed, namely, the 25th of April, 1975.

H Thereafter, an undated motion on notice, brought under the inherent jurisdiction of the Court, was filed for the respondent by his learned counsel, P.O. Onyebueke, Esq. By that motion, the appellants were notified that the Court will be moved on the 23rd of May 1995, that appellant or his counsel can be heard for the accelerated hearing of the case, and for any order/orders as the Court may deem fit to make in the circumstances. One Chief Charles Molokwu, who

described himself as the Managing Director of the respondent/company deposed to a paragraph affidavit in support of the motion. This motion for accelerated hearing would, from the depositions in the affidavit, apparently filed to cause the main suit to be heard as early as possible, and to prevent the matter from being transferred to the High Court of Rivers State, sequel to the application made to that effect by the appellants. B

It is clear that on the 23rd May, 1995, the matter came up before Ezoma, CJ., the former Chief Judge of Cross River State and he noted that the parties were present. He further noted that Mr. Onyebueke with Mr. Aniema Ephraim appeared for the respondent and that Mr. Ikeji, counsel for the appellant wrote a letter asking for an adjournment. His request was granted and the matter was adjourned to the 12th of June, 1995, for mention. C

On that day, the 1st appellant and his counsel were absent D and as counsel for the appellant wrote asking for an adjournment, the matter was accordingly adjourned to the 4th of July, 1995. On the adjourned date, the matter was adjourned with the consent of both counsel to the 3 1st of July, 1995, for motions. On that day, though parties were present with their respective counsel, the matter was, with consent of both counsel, adjourned to the 27th of September 1995 for 'Motion'. E

Now on the 27th September, 1995, the Court noted thus:-

"Parties present. Mr. Onyebueke for the plaintiff /Defendant says he met with his counsel who said he would be in court. He does not know why he is not here." F

Onyebueke says this is the 5th time that Mr. Ikeji has not come to court and have (sic) refused to move the court. He urges the motion to be struck out by this court. Court. The motion filed on the 25/4/95 by the defendants is hereby struck out without prejudice. The case is hereby adjourned to the 24th of October, 1995 for hearing of motion for accelerated hearing, and hearing of the substantive suit. I make no order as to costs." G

On the 24th of October, 1995, to which the matter was adjourned for hearing of the motion for accelerated hearing, and the hearing of the main suit, only the respondent and his learned counsel, F.O. Onyebueke, were present in Court. The appellants and their counsel were absent. It was then that counsel for the respondent, H

told the court that he would like to go on with the case. Apparently the court acceded to this request as the witness for the 1st appellant was called upon to testify. The witness who was the only witness for the respondent, thereafter gave evidence in support of the case for the respondent. At the conclusion of his evidence, the Court then reserved judgment to the 20th November, 1995. The judgment was duly delivered on the adjourned date. By virtue of the judgment, the appellants were adjudged liable jointly and severally in respect of the respondent's claims. The Court thereupon made the following orders:

"(a) The defendants shall pay the sum of N275,000.00 (Two Hundred and Seventy-Five Thousand Naira) given to the defendants by the plaintiff for a job not performed.

(b) The defendants shall pay to the plaintiff the sum of N180,000.00 (One Hundred and Eighty Thousand Naira) being the amount the plaintiff spent in hiring the pay loader for the contract (c) That even though the plaintiff claims the sum of N3,995,000.00 as general damages for inconvenience, loss of business, the plaintiff should content himself in the sum of N1,000,000.00 (One Million Naira).

(d) I assess costs at N3,000.00 (Three Thousand Naira) in favour of the plaintiff."

Thus the respondent succeeded in respect of its claims against appellants. The appellants, not satisfied with the judgment and orders of the trial Court, appealed to the Court of Appeal. The appellants who also failed to obtain an order setting aside the judgment of the trial Court, also appealed to the Court of Appeal respect of the refusal to obtain that order.

In determination of the two appeals, the Court of Appeal considered the merits of the appeal in accordance with the issues raised separately for each appeal. In view of the argument raised he appeal before this Court, I will set out the issues considered the lower court. They read thus:-

In respect of the judgment, the issues are

"(1) Whether the purported trial and proceedings of 24th October, 1995 are competent.

(2) If so, whether the judgment and proceedings of 20/11/95 violated the defendant's right to fair hearing."

And in respect of the appeal again

“1A Whether the Court below is correct in regarding the trial as a determination on the merit?”

2A If not, whether the Court below exercised its discretion judicially and judiciously in refusing to set aside its verdict in the circumstances manifest on the record?” B

And after due consideration of the arguments advanced before the lower Court by learned counsel for the parties, the appeals were dismissed in toto. Salami, JCA., who wrote the lead judgment, concluded his judgment thus:-

“Having resolved issues 1 and 2 in favour of the respondent, the remaining issues viz 1A and 2A do not call for determination. The grounds of appeal from which issues 1A and 2A are formulated are consequently struck out. The notice of appeal filed on 26th November, 1995, is equally struck out. The remaining grounds of appeal leading to formulation of issues 1 and 2 fail and are dismissed. The appeal also fails and it is dismissed with costs which is assessed at N3,500.00 in favour of the respondent.” C D

As the appellants were dissatisfied with the judgment and orders of the Court below, an appeal predicated upon four grounds of appeal was filed in this Court. And with leave a fifth ground of appeal was also filed and served. It is upon these five grounds of appeal that the learned counsel for the appellants in the brief prepared for them by their learned counsel, Dr. J.O. Ibik (SAN), that the following three issues were identified for the determination of this appeal. They read thus:- E F

“(a) Issue No. 1 (original grounds 1,2 & 4)

Whether the appellant’s right to a fair hearing of the substantive suit at the trial had been breached or substantially eroded and whether the concurrent decision to the contrary has occasioned serious miscarriage of justice in the circumstances. G

(b) Issue No. 2 (original ground 3)

Whether the purported hearing and determination of the substantive suit was competent and whether the concurrent ; decision affirming same has occasioned serious miscarriage of justice. H

(c) Issue No. 3 (proposed additional ground 5)

Whether the lower court is justified in striking out Notice of Appeal filed on 26th November, 1995, and in failing to determine the issues

Numbers 1A and 2A arising from the Amended Notice of Appeal filed on 9th September, 1997.”

Before the above issues are considered, and though I have stated broadly the events that led to the hearing of the case by the trial Court, I would now state briefly the facts disclosed and which the trial Court upheld. The respondent to this appeal is an incorporated company with its head office at No. 9 Bedwell Street, Calabar. The 1st appellant is also an incorporated company with its head office at No. 1, Transamadi Layout, Port Harcourt. The 2nd appellant is its managing director.

From the Statement of Claim filed by the respondent and evidence given thereon, it would appear that on or about the 26th of October, 1994, the parties agreed that the appellant would convey teak wood on behalf of the respondent from Eboko for delivery to Calabar wharf. The agreement to this effect was entered into in Calabar. It was also a term of the agreement that the teak wood would be delivered in ten trips and at a cost of N275,000.00; the respondent claimed that he paid to the appellants the sum of N270,000.00 with a Union Bank cheque and also N5,000.00 to complete the cost of the transaction. The agreement was admitted in evidence as Exhibit 2. Also admitted in evidence is the LPO -Exhibit 3 which was given to the respondent, and which led to the formation of the agreement with the appellants. The respondent also stated that in order to effect due performance of the contract, he hired a pay loader to assist in the loading of the teak wood into the appellants' lorry. The pay loader was hired for 5 days at the cost of N 180,000.00. A receipt, Exhibit 4, was issued for that payment. Respondent claimed that it was agreed between the parties that the pay loader should be ready to load on the 2nd November, 1994. The pay loader duly arrived at Eboko, but the respondents' lorry to carry the teak wood was not there, and for five days for which the pay loader was hired, the transporter, namely the appellants' lorry, did not show up at Eboko to effect the transportation of the teak wood.

The respondent then claimed that the appellants failed to carry the teak wood as agreed. And in spite of the several demands made for the return of the money paid to the appellants, and the incidental expenses incurred by the respondent for the proper execution of the contract, the appellants have refused or neglected to pay back the

said money. Hence he commenced this action, and claimed as pleaded in the Statement of Claim. And as I have already stated above, the claims of the respondent were upheld by the trial Court and affirmed by the Court below. I now turn to consider the argument advanced for the appellants in respect of issue 1. From the argument set out in the appellant's brief, it is manifest that the thrust of the contention made for the appellants is that they were denied the right to cross-examine the respondent's witness. It is the contention of learned Senior Advocate, that non-attendance of the appellants and their counsel on 24th October, 1995, did not preclude their legal right to a Hearing Notice being timeously served to acquaint them of the subsequent adjournment to 20th November, 1995. It is also argued for the appellants that Order 37 Rule 10 of the High Court (Civil Procedure) Rules, (Edict No. 7) of 1987 of the Cross Rivers State is intended to enjoin the trial Court to exercise its discretion to adjourn or postpone trial in the interests of justice. It is then submitted for the appellants that the trial Court did not even advert to the duty cast upon it to maintain fair play in balancing the interest of both parties in the peculiar circumstances of the trial. In the view of learned Senior Advocate, by adjourning the case for judgment immediately after P.W.I testified in chief and the plaintiff closed its case, little was left to imagination that the trial Co unintended, (consciously or otherwise), to shut out the defence. Hence the learned trial Court did not order Hearing Notice to be served on the absent party. In support of the several arguments advanced for the appellants for the contention that the Court below was erroneous to have dismissed the appeal on ground of lack of fair hearing, reference was made to, the following cases: Commissioner for Police, Benue State v. Sunday Iheabe (1998) 11 NWLR (Pt. 525) 666 at 679; Oditia v. Okwudinma & Ors. (1969) All NLR 250 at 252-253; Mbadinuju v. Ezuka (1994) 8 NWLR (Pt. 364) 535 and Solanke v. Aiiibola (1968) 1 All NLR 46 at 54. The respondent also filed a respondent's brief prepared by its learned counsel, P.O. Onyebueke, Esq. In the said brief, respondent adopted the three issues identified for the appellants in their brief. It is however the submission for the respondent that there is no merit in the contention made for the appellant. Both in the respondent's brief and the oral argument of learned counsel before this Court, we were urged to dismiss the appeal.

Beginning with first issue, learned counsel for the respondent submits that the right of fair hearing of the appellants in the substantive suit was not breached. It is also the contention of the respondents that the action was duly initiated against the respondents and had been properly served with the processes relevant to the action.

B Learned counsel for the respondent, in his brief, invited the Court to note that the appellants filed a conditional memorandum of appearance and later filed a Motion for transfer of the suit to Port Harcourt on the premise that the Calabar High Court had no jurisdiction.

C Now, it is in my respectful view that the argument set out by appellants' learned Senior Advocate in their brief and in the course of his submissions before this Court amount clearly to the argument urged before the Court below when this appeal was considered by that Court. Their Lordships of the Court below, considered carefully D before them the arguments so advanced for the appellants, before dismissing the appeal. In the course of Ms Judgment, Salami, viewed the contention of the appellants thus:-

"The appellants by their conduct have voluntarily opted out of the trial because they had adequate information of the hearing date, E the venue of trial and had adequate time to react to the order granting adjournment but they chose to keep mute. Surely there can be no better notification to parties than the one communicated to them personally in the open court as it is the case in the present appeal.

The parties to the suit were aware of the subject of the action F as they had been duly served the statement of claim as well as the writ of summons for almost seven months before the suit was eventually fixed for hearing. It is not appellant's case that they were not aware of the respondent's case. They did not deny service of G respondent's writ of summons and statement of claim on them prior to the date fixed for hearing. There is no better evidence or notice of the case the respondent intended to make at the trial than his statement of claim - See Obmiami Bricks & Stones (NJ9) Ltd if. African Continental Bank Limited (1992) 3 NWLR. (Pt.229) 260 at 293."

H I have, earlier in this judgment, set out the various steps taken by the appellants from when the respondent initiated this action against the appellants, until the trial Court (action gave Judgment in favour of the respondent. It is also clear that before the matter was heard by the 15 trial Court, the appellants and their counsel were

in Court on the 17th of September, 1995, when the matter was adjourned with the motion for accelerated hearing to 24th October, 1995. Now, learned Senior Advocate, while conceding it that the motion for accelerated hearing was adjourned together with the main suit for hearing on the same date, i.e. 24th October, 1995, but sought to fault the Court for hearing the action on the adjourned date, determining the motion for accelerated hearing. He also linked that contention with his other contention that the appellants should have been served a hearing notice before the case was heard and determined. I have already observed how properly this contention with regard to the failure of the Court to issue a hearing notice to the appellants. As I agree with the views of the lower Court on this contention, it is therefore unnecessary to dwell further on this point. Except that it is necessary to observe that the case of *Solanke v. Ajibola* (1968) All NLR 47, which was referred to us by the learned counsel for the appellants is clearly distinguishable from the instant case. This Court, in that case, held that the fact that the defendant's counsel merely asked for an adjournment due to the sickness of the defendant on the 9th November, 1965, and then wrote asking for an adjournment owing to his own sickness on the 14th December, 1965, did not warrant the assertion of the trial Judge that the defendant was not willing to defend the action. In the instant case, it is manifest from the record that the appellant entered a memorandum of appearance in the Court after they were served with the respondent's writ of summons and Statement of Claim. Rather than filing their own Statement of Defence or take such steps as would disclose their defence, they choose to file a motion to transfer the action to the Port Harcourt High Court.

As I have earlier already noted in this judgment the other facts that led to the determination of this action, it is not necessary to repeat them here. Having regard to those facts, the decision of this Court in *Solanke v. Ajibola* (supra) is of no avail the appellants. It must be remembered that it is part of the duty of a Judge to see that everything is done to facilitate the hearing of an action pending before him. In so doing, he has to exercise his discretionary power, which undoubtedly belongs to the trial Judge. The exercise of this discretionary power to facilitate the hearing of the action pending before

him may however be challenged on appeal. But it is settled principle that a Court of Appeal ought to be very slow indeed to interfere with the discretion of a trial Judge. In the instant appeal, the Court below, rightly in my view, refused to interfere with the decision of the trial Court. And, as this Court is

B satisfied that the appellants have not also shown that the Court of Appeal was wrong to have upheld the judgment of the trial Court, this appeal must also fail that as it may. It must also be borne in mind that this appeal is against the concurrent findings of the High Court and the Court of appeal. It is however

C settled principle that where the concurrent findings of the two Courts are unimpeachable, and no special circumstances have been shown to the effect that the findings are impeachable, this court would not interfere with them. See U.A.C. Nig. Ltd. V. Fasheyitan (1998) 7 S.C. (Pt. II) 35, 11 NWLR (Pt. 573) 179; Sanusi v. Ameyogun (1993) 4 NWLR (Pt. 237) 527; Chinwendu v. Mbamali (1980) 3-4 S.C. 31; Woluchem v. Gudi (1981) 5 S.C 29 In the instant case, the concurrent findings of fact which have been reviewed above with regard to the circumstances leading to the trial of the action and the findings of the trial Court including the orders made thereon have not been impeached. As issues (I) and (2) have been shown to lack any merit, this appeal deserves to be dismissed for the reasons given in the course of this judgment. I do not think that issue

E 3 deserves to be considered in the circumstances, this appeal is hereby

F dismissed by me. However, I need to observe that the grounds of appeal, which formed the basis of issue 3, which were struck out by the Court below, ought to have been dismissed by that Court. Those grounds of appeal are therefore dismissed accordingly.

G In the result, for all the reasons given above, this appeal is hereby dismissed in its entirety. The respondent, being entitled to costs, is awarded same in the sum of N10,000.00.

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BELGORE JSC

On the facts before the trial court and its decision which Court of Appeal upheld, I find no merit in this appeal. The effort to seek procedural refuge to upturn the concurrent findings of two lower courts has totally failed. In substance this appeal has been another

ploy to delay justice. I also, for reasons set out by Ejiwunmi, JSC., dismiss this appeal with N 10,000.00 costs to respondent.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Ejiwunmi, JSC. I agree with him that the appeal lacks merit and ought to be dismissed. The appeal is accordingly dismissed with N10,000.00 costs in favour of the Plaintiff/Respondent.

ONU JSC

I have had the privilege of reading in draft before now the judgment just delivered by my learned brother, Ejiwunmi, JSC. I am in agreement with him that the appeal is devoid of any merit and I too dismiss it and make similar consequential orders inclusive of costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother, Ejiwunmi, JSC. I agree with it and for the reasons he gives I would dismiss the appeal with costs of N 10,000.00 to the Respondent.

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