

SUPREME COURT OF NIGERIA
FRIDAY 27TH SEPTEMBER, 2002. SC. 141/1998
CORAM:- E. O. OGWUEGBU, S. U. ONU, A. I. IGUH,
S. O. UWAIFO, E. O. AYOOLA, JJSC

1. NATHAN ONWUKA APPELLANTS
2. EMEKA ONWUKA
 AND
1. BEN MADUKA
2. CHIEF C. O. C. CHUKWUJEKWU
3. CHIEF OFOJUAAMIZU
4. CHIEF ALPHONSUS OKOLI RESPONDENTS
5. CHIEF EMMANUEL IZUNDU
(For themselves and as representing
the Nnewi Community except the
Appellants

COURTS - Judgments - Review - Instances - Court lacks jurisdiction to review its decision - Except when inter alia the decision is a nullity by breach of procedure - Or when judgment was given in default (H1)

ORDERS OF COURT - Joinder of party - Correctness of - A person made party by order of court is properly joined - Until such an order has been set aside by higher court (H2)

COURTS - Joinder of party - Application to strike out - Competence - Since court lacks jurisdiction to review its decision - Application to strike out name of party earlier added - Is incompetent (H3)

FACTS

Plaintiffs/appellants commenced this action against one Ben Maduka (“the original defendant”) at the High Court of Anambra State, wherein they claimed damages for trespass on a land in dispute between the parties and an order of injunction. On an application made pursuant to O.3 r.10 of the High Court Rules, the court per Ikeazor, J. added applicants as defendants/respondents in a representative capacity. These persons thus became 2nd and 5th defen-

dants/respondents. Thereafter, appellants brought an application pursuant to O.3 r.7 of the High Court Rules seeking for striking out of the names of the said respondents for being improperly joined in the first place. 2nd and 5th respondents raised preliminary objection to the application.

However, Ikeazor J was transferred before he could rule on the application. The matter was thus heard by Ononiba J, who upheld the objection. He thus struck out appellants' application on the ground that he had no power to review the order for joinder of parties earlier made by Ikeazor J. On appeal to the Court of Appeal, Enugu Division, the court held that the High Court cannot review an order it earlier made to add the parties to the suit. According to the court, discretion granted pursuant to O.3 r.7 is limited to persons joined by parties ab initio. The court thus dismissed the appeal. Dissatisfied, appellants filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

Whether Order 3 rule 7 is in respect of parties at the institution of the action or parties joined by the Courts suo motu or on the application of the parties after the institution of the action.

Whether in this application the judge is sitting on appeal over its former order or decision or is carrying out the mandatory provisions of statute.

HELD (Unanimously dismissing the appeal per
AYOOLA JSC)

Judgments - Review - Instances

1. The question in this appeal bears consideration from a general as well as a particular perspective. The general perspective calls for an application of the general principle of law that a court lacks jurisdiction to set aside its own decision except as permitted by common law such as, when the decision is a nullity by reason of a breach of procedure as has occasioned a miscarriage of justice, or as provided for by the rules, such as when judgment is given in default or the court is given the power to discharge an order it has made then. Except in cases where the rules permit a court to discharge or

review an order it had made, that interlocutory orders stand in the same position as final orders, and cannot be altered except by means of an appeal had been decided as long ago as 1912 in *Kelsey v. Doune* (1912) 1 K.B. 482. (p. 2959 A)

ORDERS OF COURT - Joinder of party - Correctness of

2. A person presumed to be made party by the order of court is "properly joined" until the order permitting him to be so made has been set aside. It is a higher court that can determine the merits of the order to set it aside if need be. To the extent that O.3, r.7 permits a court seised of a matter to strike out the name of a party "improperly joined", it is manifest that the provision was not intended to empower the High Court to strike out a party it had itself permitted to be added as a party. This is because by the application of general law, it is not the court that made the order to add parties, but a higher court, that can determine that such party had been improperly joined, for the High Court which made the order adding parties to exercise the power to determine that the addition was improper will be such a significant departure from general law prohibiting a court from renewing its own decision that such power cannot be read by implication into the provisions of O.3, r.7 which, themselves, are consistent with the authority of the court to supervise and correct addition of parties in the proceedings. (p. 2960 E)

COURTS - Joinder of party - Application to strike out - Competence

3. It follows, in my judgment, that (i) since under the general law the High Court had no jurisdiction to review its own decision; and, (ii) since for it to determine whether a person who it had by its own order presumed to be a party, it must review its own decision, an application made to the High Court to strike out the name of a party it had added on the ground that it should not have been added in the first place, is incompetent. It will amount to the High Court reviewing its own decision. It does not really matter whether the application was made to the judge who made the order to add parties in the first place or to another judge of the same High Court. The

denial of jurisdiction is of the High Court which includes the Judge who made the order permitting parties to be added.
(p. 2961 A)

NOTABLE POINT OF INTEREST

AYOOLA JSC

1. Parties “joined” and “added” – Distinction

Salami, JCA., held that parties introduced into the proceedings through the provisions of O.3, r. 10 are “added” to the suit and not “joined”.

- C Attractive and convincing as the distinction may appear to be, some may consider it a mere resort to semantics. It is, in my opinion, convenient but not compelling to draw a distinction between “joined” and “added”. A person “added” as a party by order of the court may well be described as “joined” as a party to the suit by such “addition”
- D by order of court. In my view, a valid and convincing distinction is that when a person had been made party without the intervention of the High Court, the court seised of the matter may determine whether he had been properly or improperly joined. That exercise does not involve a review of any order or judicial decision. Where, however,
- E a person had been made a party by order of court, court which made the order remind itself, describe its effect as an improper joinder without reviewing its decision and, in doing so, contravening the principle against self-review. (p. 2960 B)

REPRESENTATION

E. O. Onyema Esq., for the Appellants
O. R. Ulasi Esq, for the Respondents

CASES REFERRED TO

- Akporue v. Okei (1973) NSCC 649
Epere v. Aforije (1972) 3 SC 113
Skenconsult Nig. Ltd. v. Ukey (1981) 1 SC 6
Kelsey v. Doune (1912) 1 K.B. 482
- H Orewere v. Abiegbe (1973) 9 & 10 SC 1
Uku v. Okumagba (1974) 3 SC 35

RULES REFERRED TO

Anambra State High Court (Civil Procedure) Rules 1988, O. 3 rr. 7, 10

LEAD JUDGMENT BY AYoola JSC

The short question which arises in this appeal is whether where a person has been added as party in a suit by order of the High Court pursuant to O.3, r.10 of the High Court Rules (Civil Procedure) 1988 of Anambra State, the court which made that order can, acting under O.3, r.7, itself strike out from the suit the name of the party so added on the ground that he had been improperly joined. O.3, r.10 provides that:

“If it shall appear to the court, at or before the hearing of a suit, that all the persons who may be entitled to or who claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the court may, on the application by such persons or by a party to the suit, permit such persons to be added as plaintiffs or defendants in the suit, as the case may be.”

O.3, r.7 provides that:

“The Court may, at any stage of the proceedings, and on such terms as appear to be just, order that the name or names of any party or parties, whether as plaintiffs or defendants, improperly joined be struck out.”

The appellants in this appeal, who were the plaintiffs in the High Court of Anambra State commenced an action against one Ben Maduka (“the original defendant”) whereby they claimed damages for trespass and injunction. On an application made pursuant to O.3, r.10 of the High Court Rules the High Court (Ikeazor, J.) on 7th June, 1994, added the applicants in the application, Chiefs Chukwujekwu, Amizu, Okoli and Izundu, as defendants in a representative capacity, “for themselves and as representing the Nnewi Community except the plaintiff. These persons thus became the 2nd and 5th defendants in the suit. The appellants on 21st July, 1994, applied under O.3, r.7 to the High Court for an order

“That the 2nd to 5th defendants improperly joined be struck out from this suit.”

The application came before Ikeazor, J., who before he could

rule on a preliminary objection raised by counsel to the 2nd - 5th defendants was transferred. The matter then came before Ononiba, J., who after hearing fresh arguments on the preliminary objection to the application upheld the objection on 13th December, 1995.

The facts on which the plaintiffs relied in the High Court for their application to strike out the names of the added defendants, as can be found in the main affidavit sworn in support by Nathan Onwuka, the 1st plaintiff, were, put briefly, that: the 2nd defendant was aware of previous suit on the land and is from Umuenem Otolo Nnewi which is very far from Umudim; the 3rd defendant is from Akaboukwu village which had no connection with "Agbo-Edo," the land in dispute; the 4th defendant's people had no land around the land in dispute; the 2nd - 5th defendants do not represent the quarters they come from but were busy bodies who elected themselves to bring the application to be joined as defendants as Nnewi Community did not meet to consider the case; paragraph 7 of the affidavit in support of the motion for joinder was false and Nnewi as a town had no communal land. It is evident that the whole purport of the affidavit was that the application to add the 2nd to 5th defendants should not have been granted because either the parties joined did not represent the persons or community they claimed they were representing or, the community itself had no interest in the subject-matter of the suit. There were facts and issues which could have been put before Ikeazor, J., before he made an order adding the 2nd - 5th defendant, but they were not so put, despite the opportunity which the appellants had of doing so, since they were present in court when the 2nd - 5th defendants application was heard and determined by Ikeazor, J. In the affidavit in support of the applications the appellants tried to proffer explanations for their counsel's neglect to put the facts before Ikeazor, J. However, such explanations were inconsequential, since what was material was that those facts were at all material times available but were not put before the trial court.

In striking out the appellants' application, Ononiba, J., held that he had no power to review the order made by Ikeazor, J. He reasoned that although O.3, r.7 gave the High Court wide discretion to strike out names of parties "improperly joined", parties "improperly joined" could not be parties added by the Court but parties joined by the plaintiff while filing the suit ab initio. He drew support

for that view from the decision of this court in Akporue & Ors v. Okei & Ors (1973) NSCC 649.

On the appeal to the Court of Appeal, the appellants argued that O.3, r.7 did not limit “parties improperly joined” to persons joined by the parties ab initio and that the High Court would not be sitting on appeal from its own decision were it to set aside an order it made joining the defendants. The Court of Appeal rejected both contentions and dismissed the appeal. Salami, JCA., who delivered the leading judgment of the court below, with which Akpabio, JCA., and Tobi, JCA., (as he then was), agreed, in a clear and well considered judgment, held that the provisions of O.3, r.7 granted the court “discretionary power to strike out name or names of any party or parties, whether as plaintiff or defendant, improperly joined at any stage of proceedings.” His conclusion was that the provisions of that Rule concerned:

“Party or parties joined by the plaintiff at the institution of the action and not to the parties who sought to be joined or were added after the institution of the action on an application made to the court by an existing party, be it a plaintiff or a defendant, or an intervener who claims some share or interest in the suit after satisfying the court that such a person is a necessary party, for the purpose of enabling the court effectually and completely adjudicate upon and settle all the issues in the suit”

Salami, JCA., held that there was a distinction between “a party joined” and “a party added” and that while O.3, r.7 empowered the High Court to strike out from the suit party or parties improperly “joined” it did not empower the court to do the same in respect of party or parties “added”. He relied on the decisions of this court in Chief Epere & Another v. Aforije (1972) 3 SC 113, 122, Akporue & Another v. Ischeri Okei & Ors (1973) 12 S.C. 137 and Skenconsult (Nigeria) Ltd. v. Ukey (1981) 1 SC 6, and held that as Ikeazor, J., was competent to make the order adding the 2nd - 5th defendants to the suit, “which order was a result of exercise of his discretion after examining affidavits and listening to argument” the appellants’ remedy lay on appeal and not in application to a judge of co-ordinate jurisdiction to have his order set aside.

The appellants, plaintiffs in the High Court, have now appealed from the decision of the Court of Appeal. The respondents were the

original defendant and the four other defendants added by order of the High Court, who in this appeal have been represented by the same counsel and have filed a joint respondents' brief.

The issues for determination formulated by the appellant are as follows:-

B *"ISSUE NO. 1*

Whether Order 3 rule 7 is in respect of parties at the institution of the action or parties joined by the Courts suo motu or on the application of the parties after the institution of the action.

C *ISSUE NO. 2*

Whether in this application the judge is sitting on appeal over its former order or decision or is carrying out the mandatory provisions of statute.

"ISSUE NO. 3

D *Whether this appeal should not succeed since the 10 Court of Appeal failed to consider the issue of audi alteram partem raised by the Appellants."*

The respondents objected to the third issue on the ground that the 15 issue of fair hearing based on the audi alteram partem rule which it raised was not raised in the court below. The ground of appeal from which the third issue was formulated reads:

"ERROR IN LAW:- the learned judges of the Court x of Appeal erred in law by failing to consider the Appellants contention that the trial Court was in breach of a fundamental principle of the rule of law by not giving them any hearing before granting the application."

It is evident that a valid objection to ground 3 and the third issue formulated thereon cannot be that it raised a fresh point not raised in the court below, but that it is unrelated to anything that happened in the court below. The substance of the complaint in ground 3 was that the court below failed to consider an issue raised before it namely: the fairness of the hearing in the High Court which they contended was in breach of the audi alteram partem rule. The complaint in this court being about the proceedings in the court below, is not a fresh point requiring the leave of court before it can be raised, There is, however, a valid objection to the third issue. None of the two issues raised in the court below could be said to raise any question as to the fairness of the proceedings in the High Court calling for any time calls for any consideration by the court below.

Ground 3 and issue 3 formulated upon it having been based on what did not occur in the court below, a fiction, must therefore, be discountenanced in his appeal.

The question in this appeal bears consideration from a general as well as a particular perspective. The general perspective calls for an application of the general principle of law that a court lacks jurisdiction to set aside its own decision except as permitted by common law such as, when the decision is a nullity by reason of a breach of procedure as has occasioned a miscarriage of justice, or as provided for by the rules, such as when judgment is given in default or the court is given the power to discharge an order it has made then. Except in cases where the rules permit a court to discharge or review an order it had made, that interlocutory orders stand in the same position as final orders, and cannot be altered except by means of an appeal had been decided as long ago as 1912 in *Kelsey v. Doune* (1912) 1 K.B. 482. See 1999 Supreme Court Practice (White Book) 20/11/9. Were the parties to be at liberty, without exceptional circumstances and rules of court so permitting them, to bring before the High Court facts which were not put before it, before it came to a decision and to ask for a review of a prior decision on the basis of those facts, finality of decision would become uncertain. The power of a court, where such exists, to review its decision is guarded and regulated by express rules. So also is the power of an appellate court to act on fresh evidence. In *Akporue & Anor v. Isicheri Okei & Ors* 8 NSCC 649, (1973) 12 S.C. 137 at p. 146 Ibekwe, JSC., said.

“In the context of our legal system, judicial review is primarily the function of the appellate court.”

Similar principles were applied in the earlier case of *Orewere & Or. v. Abiegbe & Ors* (1973) 9 & 10 S.C. I (1973) 8 NSCC 479 and the later case of *Uku & Ors v. Okumagba & Ors* (1974) 3 S.C. 35; (1974) 9 NSCC 198. Once the application to strike out the name of a party involves a review of a previous decision the principle applies, and it does not matter that the order prayed for was couched merely as one to strike out the name of a party. In the particular perspective, the question is whether O.3, r.7 constituted an exception to the general rule that a court lacks jurisdiction to review its own

decision. The argument presented by counsel on behalf of the appellant is that joinder of parties may be effected by the plaintiff while instituting an action or by addition of a party by order of the court. He argued, in reaction to the approach whereby the Court of Appeal had compared the wording in O.3, r.7 with the wording in O.3, r. 10, that there is no distinction between the word “joined” and “added”.

Salami, JCA., held that parties introduced into the proceedings through the provisions of O.3, r. 10 are “added” to the suit and not “joined”. Attractive and convincing as the distinction may appear to be, some may consider it a mere resort to semantics. It is, in my opinion, convenient but not compelling to draw a distinction between “joined” and “added”. A person “added” as a party by order of the court may well be described as “joined” as a party to the suit by such “addition” by order of court. In my view, a valid and convincing distinction is that when a person had been made party without the intervention of the High Court, the court seised of the matter may determine whether he had been properly or improperly joined. That exercise does not involve a review of any order or judicial decision. Where, however, a person had been made a party by order of court, court which made the order remind itself, describe its effect as an improper joinder without reviewing its decision and, in doing so, contravening the principle against self-review. **A person presumed to be made party by the order of court is “properly joined” until the order permitting him to be so made has been set aside. It is a higher court that can determine the merits of the order to set it aside if need be. To the extent that O3, r.7 permits a court seised of a matter to strike out the name of a party “improperly joined”, it is manifest that the provision was not intended to empower the High Court to strike out a party it had itself permitted to be added as a party. This is because by the application of general law, it is not the court that made the order to add parties, but a higher court, that can determine that such party had been improperly joined, for the High Court which made the order adding parties to exercise the power to determine that the addition was improper will be such a significant departure from general law prohibiting a court from renewing its own decision that such power cannot be read by implication into the provisions of O.3, r.7 which, themselves,**

are consistent with the authority of the court to supervise and correct addition of parties in the proceedings.

It follows, in my judgment, that (i) since under the general law the High Court had no jurisdiction to review its own decision; and, (ii) since for it to determine whether a person who it had by its own order presumed to be a party, it must review its own decision, an application made to the High Court to strike out the name of a party it had added on the ground that it should not have been added in the first place, is incompetent. It will amount to the High Court reviewing its own decision. It does not really matter whether the application was made to the judge who made the order to add parties in the first place or to another judge of the same High Court. The denial of jurisdiction is of the High Court which includes the Judge who made the order permitting parties to be added.

For the reasons that I have stated. I come to the conclusion that the decision of the Court of Appeal is correct and that this appeal lacks merit. I therefore dismiss the appeal with N10,000 costs to the respondents.

OGWUEGBU JSC

(Editors Note - The Judgment of Hon. Justice E. O. Ogwuegbu, JSC., was not available as at the time of going to press. His Lordship's judgment will be published in a subsequent edition.)

ONU JSC

I am in entire agreement with the judgment of my learned brother, Ayoola, JSC., just read that the appeal herein lacks merit. Accordingly, I too dismiss it and make similar consequential orders inclusive of those as to costs.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ayoola, JSC., and I entirely agree that this appeal is without substance and ought to be dismissed.

For the same reasons as are contained in the said judgment, I too, dismiss this appeal with costs as assessed in the leading judgment.

B

UWAIFO JSC

I read in advance the judgment of my learned brother, Ayoola, JSC., and for the reasons he gives, I am in full agreement with the conclusions.

C

It is plain to me that where a person has by order of a judge been made a party to a proceeding/ that order cannot be reviewed by that judge or any other judge of co-ordinate jurisdiction. It is only an appellate court that may do so: see *Orewere v. Abiegbe* (1973) 9 & 10 S.C. 1; *Akporue v. Okei* (1973) 19 S.C. 13 7; *Uku v. Okumagba* D (1974) 3 S.C. 35. This principle applies to all orders which a judge may be entitled to make. But when such an order is shown to be incompetent and therefore a nullity, the judge who made it or any other judge of coordinate jurisdiction who had the necessary competence, may set aside that order{ See *Skenconsult (Nig) Ltd, v. Ukey* E (1981) 1 S.C. 6.

F

I am satisfied that Salami JCA., who gave the leading judgment in the court below in this case, accurately understood and stated the principle involved, and came to the correct conclusion. This appeal clearly lacks merit and I too dismiss it with N 10,000. 00 costs to the respondents.

G

H