

SUPREME COURT OF NIGERIA
FRIDAY 31ST JANUARY, 2003. SC. 97/1995
CORAM:- M. L. UWAIS CJN, I. L. KUTIGI,
M. E. OGUNDARE, U. MOHAMMED, N. TOBI JJSC

1. OSUJI OKORO OFORKIRE
2. ALHAJI OKORO OFORKIRE
(for themselves and on behalf of
Oforkire Family of Awo-Omamma) APPELLANTS
AND

1. JOHN MADUIKE
2. JEROME MADUIKE
3. CHIBUEZE OGBONNIA
4. ALPHONSUS OGBONNIA RESPONDENTS
5. BERNARD NWALUBI
6. NWUGO UKWUEGBU
(for themselves and on behalf of
Umuduruotiti Family of Awo-Omamma)

APPEALS - Objection - Preliminary objection - Manner of raising - Respondent must give three days notice before hearing - And when incorporated in brief - Leave must be sought to move the notice of objection (H1)

APPEALS - Objection - Preliminary objection - Failure to argue - As appellants' counsel did not make any submission on the notice of objection - The same is deemed abandoned (H2)

FACTS

Two separate suits were filed in the High Court of Imo State in the Oguta Judicial Division. The 1st suit No.HOG/2/79 was filed on 18/1/79 by the present appellants against respondents, and on 6/3/79 respondents filed their own suit No.HOG/10/79 over the same piece of land against appellants. In suit No.HOG/2/79, appellants' claim against respondents is for trespass and injunction and in suit No.HOG/10/79 respondents claimed against appellants for declaration of entitlement to customary right of occupancy, damages for trespass and perpetual injunction restraining appellants from the land.

The two suits were consolidated in the court.

At the end of the hearing the learned trial Judge entered judgment in favour of appellants. He granted them N10,000.00 as damages for trespass and also made an order of injunction against respondents. Dissatisfied, respondents filed appeal in the Court of Appeal Port Harcourt. On their part, appellants incorporated preliminary objection in their brief of argument, but failed to seek leave of the court to argue same. Consequently, the court did not rule on the objection. In a considered judgment, the court allowed the appeal. Aggrieved, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

“(a) Whether the Court of Appeal was right in ignoring the objection raised by the appellant as to the competence of grounds of appeal filed by the respondents.

(b) Whether the Court of Appeal was right in holding that the evidence of the traditional history of the appellants was at variance with their pleadings.

(c) Whether the Court of Appeal was right in holding that exhibit ‘G’ civil suit No. 47/48 constituted res judicata against the plaintiffs.

(d) Is it the law and practice that in two consolidated suits once the appeal of a party succeeds the other is entitled to judgment without considering the merits of his case?”

HELD (Unanimously dismissing the appeal per
MOHAMMED JSC)

Preliminary objection - Manner of raising

1. I agree with the learned counsel that a party in the Court of Appeal having a preliminary objection against any of the grounds of appeal must give the appellant three days notice before the objection is heard. The notice of preliminary objection can be given in the respondent’s brief, but a party filing it, in the brief, must ask the court for leave to move the notice of objection before the oral hearing of the appeal commences. Otherwise it will be deemed to have been waived and therefore abandoned. (p. 166 E)

Preliminary objection - Failure to argue

2. In the proceedings before the Court of Appeal which I reproduced above, Mr. Nsofor did not make any submission on the Notice of preliminary objection which he raised in the respondents' brief at the Court of Appeal. The Notice of preliminary objection is therefore deemed abandoned. The appellants have therefore failed to get this single issue resolved in their favour.

Since this is the only competent issue left for the prosecution of this appeal I have no hesitation in holding that the appellants have lost this appeal. (p. 167 H)

NOTABLE POINT OF INTEREST

MOHAMMED JSC

1. Determination of preliminary objection was not considered in Labiyi v. Anretiola

The case of Labiyi v. Arietiola (supra) which the appellants' learned counsel referred to, in his submission before the appeal, was not helpful to the appellants at all. In fact the ratio decidendi in that appeal concerns the formulation of issues from the grounds of appeal filed. As a matter of fact, the judgment which learned counsel referred to in Labiyi v. Anretiola (supra) is not the lead judgment. It is a concurring judgment written by Nnaemeka-Agu, JSC. The lead judgment was written by Karibi-Whyte, JSC and in it the learned justice did not consider any issue which concerned the determination of a preliminary objection against the hearing of an appeal. (p. 167 F)

REPRESENTATION

Rhodes Nsofor, Esq., for the Appellants

K. C. O. Njemanze, Esq. with A. B. Osogu, for the Respondents

CASES REFERRED TO

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

Ariori v. Elemo (1983) 1 SCNLR 13

Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 285

Labiyi v. Anretiola (1992) 8 NWLR (pt. 258) 139

- Ibodo v. Enarofia (1980) 5-7 SC 42
 Ania v. Obabiolorun-Kosi (1986) 2 NWLR (Pt. 22) 316
 Olusesi v. Oyelusi (1986) 3 NWLR (Pt. 31) 634
 John v. Blakk (1988) 1 NWLR (Pt. 72) 648
 Govt of Imo State v. Greeco Construction & Eng. Asso. Ltd. (1985)
 B 3 NWLR (Pt. 11) 71
 Dambam v. Lele (2000) 11 NWLR (Pt. 678) 413
 Akwiwu Motors Ltd. & Anor. v. B. O. Songonuga (1984) 5 SC 184
 Abisi v. Ekwealor (1993) 6 NWLR (Pt. 302) 643
 C Bereyin v. Gbobo (1989) 1 NWLR (Pt. 97) 372

RULES REFERRED TO

Court of Appeal Rules, O.3 r. 15(1)(3)

LEAD JUDGMENT BY MOHAMMED JSC

D This is an appeal from the judgment of the Court of Appeal, Port Harcourt Division. Two separate suits were filed in Imo State High Court in the Oguta Judicial Division. The 1st suit No. HOG/2/79 was filed on 18/1/79 by the present appellants against the respondents, and on 6/3/79 the respondents filed their own suit No. HOG/10/79 over the same piece of land against the appellants. In suit No. HOG/2/79 the appellants' claim against the respondents is for trespass and injunction and in suit No. HOG/10/79 the respondents claimed against the appellants for:

F “(a) Declaration that the plaintiff is entitled to the customary right of occupancy of the land in dispute verged pink in the filed plan No. PO/IMO. 23/79 as herein pleaded.

G (b) N200.00 (two hundred Naira) general damages for trespass to the said land in dispute as pleaded.

(c) Perpetual injunction restraining the defendants, their servants, agents, workers and all claiming through or under them from entering the said land again and from causing any waste thereon.”

H The two suits concern the same piece of land. Ukattah, J. (as he then was) sitting at Oguta consolidated the two suits and heard them together. In the consolidated suit, Osuji Okoro Aforkire and Anor. were made the plaintiffs and John Maduike and others were made defendants. At the end of the hearing the learned trial Judge entered judgment in favour of the plaintiffs. He granted them

N10,000.00 as damages for trespass and also made an order of injunction against the defendants. Dissatisfied with that decision, the defendants, who hereinafter shall be called the respondents, appealed to the Court of Appeal. In a considered judgment of the Court of Appeal, written by Katsina-Alu, JCA (as he then was) and concurred with by Onalaja and Muntaka-Coomassie, JJCA, the appeal was allowed. The court below granted the following orders in favour of the respondents:

“(a) That defendants are entitled to the customary right of occupancy of land in dispute verged pink in Plan No. PO/IMO.23/79.

(b) N200.00 (two hundred Naira) general damages for trespass to the said land.

(c) A perpetual injunction restraining the plaintiffs, their servants, agents, workers and all claiming through or under them from further trespass to the said land.

It is against the said judgment that Osuji Okoro Oforkire and Alhaji Okoro Oforkire, who are the appellants, in this appeal came before this court. Learned counsel for the appellants, E. T.

Nsofor identified the following four issues for the determination of the appeal:

“(a) Whether the Court of Appeal was right in ignoring the objection raised by the appellant as to the competence of grounds of appeal filed by the respondents.

(b) Whether the Court of Appeal was right in holding that the evidence of the traditional history of the appellants was at variance with their pleadings.

(c) Whether the Court of Appeal was right in holding that exhibit G civil suit No. 47/48 constituted res judicata against plaintiffs.

(d) Is it the law and practice that in two consolidated suits once the appeal of a party succeeds the other is entitled to judgment without considering the merits of his case?

Seven issues were formulated for the respondents in the respondents' brief. They read as follows:

“1. Whether the grounds of appeal filed by the appellants against the judgment of the Court of Appeal involve questions of fact or mixed law and fact to require leave of the Court of Appeal or the Supreme Court.

2. Whether the evidence of traditional history given by the

appellants is inconsistent with their pleadings.

3. *Whether exhibit ‘G’ which was the judgment of the native court in civil suit No. 47/48 constitutes estoppels per rem judicatam between the parties.*

B 4. *Whether exhibits ‘G’, ‘H’ and ‘K’ constitute acts of possession by the respondents on the land in dispute.*

5. *Whether the appeal filed by the respondents at the Court of Appeal was competent.*

C 6. *Whether the purported notice of preliminary objection incorporated in the appellants’ brief at the Court of Appeal was competent*

7. *Whether the Court of Appeal was bound to consider all issues raised by the parties in the appeal.”*

Before the appellants’ counsel began the oral submission D learned counsel for the respondents, Mr. K. C. O. Njemanze, requested for the hearing of the matter raised in issue I in the respondents’ brief. The issue concerns a preliminary objection against all the grounds of appeal filed by the appellants. Arguments were advanced by both counsel on the issue. At the end of the submissions E we resolved that only ground of appeal was competent. It was a ground of law.

The rest of the grounds, B, C and D were grounds of mixed law and fact and since no leave of this court or the court below had F been obtained before filing them they were incompetent. We accordingly struck them out. The only ground of appeal left is ground A which reads as follows:

“Error in Law:

G *The learned Justices of the Court of Appeal erred in law when they failed to decide on the competence of the grounds of appeal filed by the respondents.*

Particulars of Error:

H *The appellants had in their brief of argument and in oral argument urged the court to hold that the notice and grounds of appeal contained in the notice of appeal dated the 7th day of January, 1998 per pages 231-41 of the records are incurably defective and urged the court to strike out same. In particular the only valid grounds of appeal are 1 & 1. The rest should have been struck out by the Court of Appeal. If they had been struck out the other two could not have*

sustained this appeal.”

In his submission in support of issue 1 in the appellants’ brief, learned counsel for the appellants, argued that the appellants had raised a preliminary objection at the Court of Appeal against the grounds of appeal filed by the respondents (who were appellants in that court). The learned counsel pointed out that only grounds I and III were grounds of law. The rest were grounds of fact and since no leave to file them had been obtained the grounds were incompetent and ought to have been struck out by the Court of Appeal. He referred to cases of *Akwiwu Motors Ltd. and Anor. v. B. O. Songonuga* (1984) 5 SC 184 at 85-9; *Abisi v. Ekwealor* (1993) 6 NWLR (Pt. 302) 643 at 661 and *Bereyin v. Gbobo* (1989) 1 NWLR (Pt. 97) 372 in support of his submission. Learned counsel submitted that the Court of Appeal erred in law in failing to consider the objections raised against those grounds of appeal. Counsel further argued that the action of the Court of Appeal amounted to a miscarriage of justice. In conclusion, Mr. Nsofor pointed out that if the incompetent grounds were struck out the remaining two could not have sustained the appeal. This cannot be correct because even if the preliminary objection of the appellants at the Court of Appeal had been sustained by that court, grounds I and III which were said to be competent would lead to the reversal of the decision of the High Court. This is because those grounds were based on the relevance of exhibit ‘G’ to the present case. Exhibit G is the judgment of the Native Court of Eastern Orlu in case No. 47/48. The case involved the land which the present parties are disputing over its ownership. The fathers of the present parties fought over the disputed piece of land in 1948 and the decision was against the appellants. The father of the present appellants was made to pay 4 pounds damages to the father of the present respondents. G

The Court of Appeal concluded its finding on exhibit ‘G’ as follows:

“The result is this. The parties in the present suit are the privies of the parties in the earlier suit. In effect the parties in both actions are the same. The cause of action in the latter proceedings is the same as in the earlier proceedings. And lastly the res (subject matter) in contention in both proceedings is the same. The effect of this in law is that the plaintiffs in the present action are stopped from re-litigating the same cause of action. See Aro v. Fabolude (supra); Ogbogu v.

Ndiribe (supra) and Akibu v. Oduna (supra).”

However, I must go back to the preliminary objection raised by the respondents’ counsel which established that only issue (a) which has been formulated from ground A is competent for the determination of this appeal. Therefore, in a reply to the submission of the appellants’ counsel, learned counsel for the respondents referred to the procedure laid down in the Court of Appeal Rules on what a respondent must do if he wants to raise a preliminary objection to an appeal. Order 3 rule 5(1) provides as follows.

“15(1) *A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with seven copies thereof with the Registrar within the same time.*”

In reference to the above Rule learned counsel submitted that the appellants did not follow this mandatory procedure. The notice of preliminary objection incorporated in the brief of argument is mere expression of intent by the appellants. Counsel further submitted that since appellants’ counsel did not apply to raise the said preliminary objection, did not insist same to be heard and did not seek leave to argue it first, or at all, the appellants are deemed to have abandoned it. He referred to *Ajibade v. Pedro* (1992) 5 NWLR (Pt. 241) 257 at 270 and *Ariori v. Elemo* (1983) 1 SCNLR 13. **I agree with the learned counsel that a party in the Court of Appeal having a preliminary objection against any of the grounds of appeal must give the appellant three days notice before the objection is heard. The notice of preliminary objection can be given in the respondent’s brief, but a party filing it, in the brief, must ask the court for leave to move the notice of objection before the oral hearing of the appeal commences. Otherwise it will be deemed to have been waived and therefore abandoned.** In *Nsirim v. Nsirim* (1990) 3 NWLR (Pt. 138) 285 at 296-297 this court, per Obaseki, JSC, stated as follows:

“*The respondent in the instant appeal has contended that although the objection was stated in the brief the court was not moved at the oral hearing of the appeal to strike out the grounds for failure of particulars of errors. He therefore submitted that the appellant herein should be taken to have abandoned the objection more so as*

it was not an issue for determination in the appeal before the Court of Appeal.

In my opinion, there is substantial merit in the contention of the respondent. Being a preliminary objection, the objection should have been by motion or notice before the hearing of the appeal so that arguments on it can be heard by the court. While notice of objection may be given in the brief, it does not dispense with the need for the respondent to move the court at the oral hearing for the relief prayed for.

This preliminary objection not having been raised and argued at the oral hearing the Court of Appeal cannot be condemned as having erred in allowing the then appellant (now respondent) to argue his appeals."

Be that as it may, I will now go back to the oral hearing of this case when it was heard by the Court of Appeal. The proceedings took place on 27/1/94. The entire proceedings have been recorded thus:

"Chief D.C.O. Njemanze (with him K.C.O. Njemanze) for appellants Prince E. T. Nsofor for the respondents. Chief Njemanze: Our brief of argument was filed on 10/2/89 and deemed duly filed all 28/2/89. We are relying on all the submissions in our brief.

We pray the court to allow the appeal Prince Nsofor: I rely on the respondents' brief dated 12/4/89 and filed on 13/4/89. I adopt the said brief. In respect of the notice and grounds of appeal see Labiyi v. Anretiola (1992) 8 NWLR (pt. 258) p. 139 paras. A-B.

I urge that the appeal be dismissed as lacking in merit. Court: Judgment for 29/3/94."

The case of Labiyi v. Arietiola (supra) which the appellants' learned counsel referred to, in his submission before the appeal, was not helpful to the appellants at all. In fact the ratio decidendi in that appeal concerns the formulation of issues from the grounds of appeal filed. As a matter of fact, the judgment which learned counsel referred to in Labiyi v. Anretiola (supra) is not the lead judgment. It is a concurring judgment written by Nnaemeka-Agu, JSC. The lead judgment was written by Karibi-Whyte, JSC and in it the learned justice did not consider any issue which concerned the determination of a preliminary objection against the hearing of an appeal.

In the proceedings before the Court of Appeal which I

reproduced above, Mr. Nsofor did not make any submission on the Notice of preliminary objection which he raised in the respondents' brief at the Court of Appeal. The Notice of preliminary objection is therefore deemed abandoned. See *Nsirim v. Nsirim* (supra). **The appellants have therefore failed to get this single issue resolved in their favour.**

Since this is the only competent issue left for the prosecution of this appeal I have no hesitation in holding that the appellants have lost this appeal.

Consequently, this appeal is dismissed. The judgment of the Court of Appeal is hereby affirmed. The respondents are entitled to the costs of this appeal which I assess at N10,000.00.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother, Mohammed, JSC. I entirely agree that the appeal is devoid of merit and that it should be dismissed. I accordingly hereby dismiss the appeal with N10,000.00 costs to the respondents.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Mohammed, JSC. I agree with him that the appeal has no merit. It is accordingly dismissed with N10,000.00 costs to the respondents.

OGUNDARE JSC

I agree with my learned brother, Mohammed, JSC that the only ground of appeal (Ground A) available to the appellants in this appeal is lacking in merit.

Consequently I, too, dismiss the appeal and abide by the order for costs made in the lead judgment of my learned brother, Mohammed JSC.

TOBI JSC

I have read the judgment of my learned brother, Mohammed, JSC and I agree with him that this appeal should be dismissed. The only ground of appeal which is left in this appeal after striking out grounds B, C and D, is ground A which reads:

“The learned Justices of the Court of Appeal erred in law when they failed to decide on the competence of the grounds of appeal filed by the respondents.”

The only issue germane or relevant to the above ground of appeal in the appellants’ brief is Issue (a). It is formulated thus:

“(a) Whether the Court of Appeal was right in ignoring the objection raised by the appellant as to the competence of grounds of appeal filed by the respondents.”

It appears to me that of the seven issues for determination in the respondents’ brief, Issue No.1 is relevant and it reads:

“1. Whether the grounds of appeal filed by the appellants against the judgment of Court of Appeal involve questions of fact or mixed law and fact to require leave of Court of Appeal or Supreme Court.”

As rightly pointed out by my learned brother in his judgment, the appellants failed to give three days notice to the respondents before the date fixed for the hearing of the objection. This, in my humble view, is prejudicial to the case of the appellants.

It is elementary law that rules of court must be obeyed or complied with, as they are not made for fun. In *Solanke v. Somefun* (1974) 1 SC 141, *Sowemimo, JSC* (as he then was) opined:

“Rules of court are meant to be complied with... Rules of court are made to be followed. They regulate matters in court and help parties to present their case for purpose of a fair and quick trial. It is the strict compliance with these rules of court that make for quicker administration of justice.” See *Ibodo v. Enarofia* (1980) 5-7 SC 42; *Ania v. Obabiorun-Kosi* (1986) 2 NWLR (Pt. 22) 316; *Olusesi v. Oyelusi* (1986) 3 NWLR (Pt. 31) 634; *John v. Blakk* (1988) 1 NWLR (Pt. 72) 648; *Govt of Imo State v. Greco Construction & Eng. Asso. Ltd.* (1985) 3 NWLR (Pt. 11) 71; *Dambam v. Lele* (2000) 11 NWLR H (Pt. 678) 413.

Where notice is not given within the provision of Order 3 Rule 15(1) of the Court of Appeal Rules (as amended), the objection will be refused. Thus in *Okolo v. Union Bank of Nigeria Limited* (1998) 2

NWLR (Pt. 539) 618 where no such notice of preliminary objection was given, the Court of Appeal refused the objection. Achike, JCA (then was), after stating the provision of O. 3 r. 15(1), said at p. 644:

"It is quite clear to me that no such notice of preliminary objection as prescribed under Order 3, rule 15(1) was filed by the respondent herein nor was any served on the appellants ... The respondent having failed to comply with the relevant provisions of Rules of Court for objection to the hearing of the appeal. The purported aforesaid objection is hereby refused."

In *Arewa Textiles Plc v. Abdullahi and Brothers Musawa Ltd.* (1998) 6 NWLR (Pt. 554) 508, Ogebe, JCA said at page 512:

"During the oral hearing of this appeal the learned counsel for the respondent conceded that he did not give formal notice of preliminary objection in accordance with Order 3, rule 15(1) of the Court of Appeal Rules."

By Order 3 rule 15(3) of Court of Appeal Rules, if the respondent failed to comply with this rule, the court may refuse to entertain the objection. Rules of Court are meant to be obeyed and not in our statute books for fancy. Accordingly, in accordance with Order 3 rule 15(3) I refuse to entertain respondent's preliminary objection."

In my view, the above two cases correctly state the position of the law. Accordingly, by Order 3 rule 15(3), the preliminary objection of the appellants did not avail them.

The above apart, filing a process in court is different from arguing it in court. This is merely saying the obvious but the obvious is relevant to the live issue. If a notice of preliminary objection is filed, counsel has a duty to move it to enable the court rule on it one way or the other. A court process which is not moved in court is as good as not filed, unless the process is not opposed by the respondent.

In that respect, the court will deem the motion as moved. It should therefore be said in the alternative that in this appeal, there was no submission on the notice of preliminary objection. I entirely agree with my learned brother that the preliminary objection is deemed abandoned. The state of the law is that a party cannot, without leave, raise an issue not raised in the lower courts. In sum, the appeal fails and it is dismissed. The respondents are awarded N10,000.00 costs. Appeal dismissed.