

COURT OF APPEAL (LAGOS DIVISION)
21ST APRIL, 2004 CA/L/225/2001 & CA/L/514/2001
CORAM:- P. O. ADEREMI, M. D. MUHAMMAD,
C. M. CHUKWUMA-ENEH, JJCA

GEORGINA AHAMEFULE APPELLANT
AND
1. IMPERIAL MEDICAL CENTER
2. DR. ALEX MOLOKWU RESPONDENTS

APPEALS - Right to appeal - Final decision - Constitutional law - Section 241(1) and 242(1) of the 1999 Constitution - Provide as to when appeal shall be as of right - And when leave of the court is required - The order made in this case - Is not a final decision (H1)

APPEALS - Leave to appeal - Consent judgment - Where a party consents to the order in question - Leave of the court should be obtained - Before he can appeal (H2)

PARTIES - Consent judgment - H.I.V. positiveness - Ascribed to a party - Where her counsel consents to court's order - To provide an expert witness on the H.I.V. issue - The party should not reprobate (H2)

APPEALS - Leave to appeal - Where necessary - But was not obtained - The appeal will be struck out (H3)

FACTS

Before the High Court of Lagos State, the plaintiff/appellant filed an action against the defendants/respondents. Appellant claimed some reliefs against the respondents for terminating her employment on ground of her H.I.V. positive status. Before hearing commenced, Counsel for the respondents had asked for assurances that counsel in the matter, the judge and other litigants in the court room would not be infected with H.I.V. if the appellant who is H.I.V. positive is allowed to come into the

court room to give evidence. He urged on the court to require the appellant to produce a medical expert who would testify on oath that other occupants of the court would not be infected with H.I.V.

The trial judge ordered as prayed. In reaction to the court's order, the trial judge recorded the appellant's counsel as saying that he is ready to bring an expert from the USA on the subject matter. It is against this ruling that the appellant has now appealed on two grounds of appeal. The respondents raised a preliminary objection urging the court to strike out the appeal for being incompetent, as leave of court was not obtained in filing the appeal.

HELD (Unanimously striking out the appeal per **ADEREMI JCA**)

Right to appeal - Final decision - Constitutional law

1. By virtue of section 241 (1) of the 1999 Constitution, an appeal lies from a decision of the Federal High Court or a High Court of the State to the Court of Appeal as of right if it is a final decision in any civil or criminal proceedings before that Federal or State High Court. Again by virtue of section 242(1) of the 1999 Constitution, apart from the grounds provided in section 241 of the Constitution an appeal on all other grounds shall be from a decision of the Federal High Court or State High Court with the leave of the relevant High Court or the Court of Appeal. Can the order made by the trial Judge on 5/2/2001 be said to be a final decision?

By no stretch of imagination or construction of the applicable rules and laws can it be said that it was. Indeed, the issue that raised itself up for determination arose in the course of wanting to start the hearing of the substantive case. All the main rights of the plaintiff are yet to be determined; they have not been disposed of see *U.T.B. & Ors. v. Odofin* (2001) 8 NWLR (Pt. 715) 296. (p. 1920 A)

Leave to appeal - Consent judgment - H.I.V. positiveness

2. The records of appeal show, as I have pointed out *supra*, that the plaintiff consented to the making of the order. "Consent" in legal parlance, involves an element of volition, a voluntary agreement is a deliberate and free act of the mind. Such is the controlling effect that '*Consent*' has on a judgment or

ruling that a party who has consented to a procedure by the trial Judge cannot subsequently challenge the procedure on the ground, that it worked injustice on him see *Olubode & Ors. v. Salami* (1985) 2 NWLR (Pt. 7) 282 and *Akhiwu v. The Principal Lotteries Officer Mid-Western State* (1972) 1 All NLR 299. Counsel for the plaintiff/appellant in this matter has, in an unequivocal manner, consented to bringing an expert from the U.S.A. on the issue of H.I.V. the positiveness of which was ascribed to her. This he expressed, in clear terms, after the ruling of the court below in that direction. In law, a party cannot both approbate and reprobate at the same time. That being a consent judgment, it is a constitutional requirement that a party who has so consented and who later decides to appeal against the consent judgment must first and foremost obtain the leave of court see *Afolabi & Ors. v. Adekunle & A.nor.* (1983) 2 SCNLR 141, (1983) 8 SC 98 and section 242 of the 1999 Constitution. (p. 1920 F)

Leave to appeal - Where necessary

3. After a careful study of the grounds of appeal contained on the notice, they are, in my view, at the highest, those of mixed law and facts. In both cases that I have highlighted *supra*, an appeal by an aggrieved party the like of the plaintiff/appellant in this appeal, shall lie to this court (Court of Appeal) with the leave of this court. In *Ojemen & Ors. v. His Highness William O. Momodu II (The Ogirrua of Irrua) & Ors. -* (1983) 1 SCNLR 188, (1983) 3 SC 173, the word “Leave” in the context described *supra* means permission. I have perused the entire record of proceedings, no leave of this court was sought and none was granted. For these reasons, the appeal lodged in this case is very much incompetent. The notice of preliminary objection is very meritorious and it must be sustained and I so do. The appeal is therefore struck-out. (p. 1921 B)

NOTABLE POINT OF INTEREST

MUHAMMAD JCA

1. Appeals - Need to comply with statutory provisions

The right of appeal is the creation of statute and never exercised at large. The very 1999 Constitution which has created the appellant’s right of ap-

peal requires that in the particular circumstance of the appellant, since the appeal rests on the interlocutory decision of the lower court and also in respect of an order appellant had consented to, appellant must obtain the “permission” of either the lower court or this court before exercising her B right of appeal. That has not been done. The lapse has grounded the exercise of an otherwise legitimate right. See section 242 of the 1999 Constitution.

Of course the leave of either the court below or this court would have been dispensed with were the appellant’s appeal to be based on grounds C of law alone. I agree with his lordship’s analysis and conclusion thereto that the grounds are at best of mixed law and facts. The appellant remains disabled given this state of affairs. The appeal so initiated is incapable of being carried through. The appeal has to be aborted having been commenced without the necessary permission of either the High Court or the Court of D Appeal.

In *Ojong v. Duke* (2003) 14 NWLR (Pt 841) 581, it is opined that where a statute provides for the manner of doing a particular act, the act would be adjudged duly performed only if done in the manner specified by E the law. Appellant must be told that much too. (p. 1922 A)

REPRESENTATION

N. Bowei (Mrs.) for the Appellant
F Prof. S. A. Adesanya, SAN, with M. A. Oguntolu, Esq. for the respondents

CASES REFERRED TO

Afegbai v. A.-G. Edo State (2001) 14 NWLR (Pt.733) 425, (2001) FWLR (Pt. 69) 1373
G Lori v. Akukalia (1998) 12 NWLR (Pt.579) 592
Kaine v. Ojukwu (2000) 15 NWLR (Pt.691) 516, (2000) FWLR (Pt.28) 2241
U.T.B. & Ors. v. Odofin (2001) 8 NWLR (Pt. 715) 296
H Mohammed v. Olawunmi (1990) 2 NWLR (Pt. 133) 458
Olubode & Ors. v. Salami (1985) 2 NWLR (Pt. 7) 282
Akhiwu v. The Principal Lotteries Officer Mid-Western State (1972) 1 All NLR 299

Ahamefule v. Imperial Medical Center (2004) 7 KLR Aderemi JCA 1917

Afolabi & Ors. v. Adekunle & A.nor. (1983) 2 SCNLR 141, (1983) 8 SC 98
Ojemen & Ors. v. His Highness William O. Momodu II (The Ogirrua of
Irrua) & Ors. - (1983) 1 SCNLR 188, (1983) 3 SC 173
Ojong v. Duke (2003) 14 NWLR (Pt 841) 581

B

STATUTE REFERRED TO

Constitution of Nigeria 1999 ss. 241(1), 242(1)

LEAD JUDGMENT BY ADEREMI JCA

In the court below, High Court of Lagos State, the learned trial Judge had ordered the plaintiff, now the appellant before this court to produce an “expert opinion” on the risk of the plaintiff/appellant giving evidence in court on account of her Human Immune-Deficiency (HIV) positive status. Suffice it to say that the plaintiff/appellant had taken out a writ of summons against the respondents who were defendants before that court claiming some reliefs against them for the termination of her employment on grounds of her HIV - positive status. Before hearing in the case commenced in the court below counsel for the defendants/respondents had asked for assurances that counsel in the matter, the judge and other litigants in the court room would not be infected with HIV if the appellant, an HIV-positive, was allowed to come into the court room to give evidence. He urged on the court to require the plaintiff/appellant to produce a medical expert who would testify on oath that other occupants of the court would not be infected with HIV if the appellant was allowed in. Suffice it to say that a motion for accelerated hearing of the case had been brought by the plaintiff/appellant. The learned trial Judge immediately ordered that an expert opinion be heard on the subject-matter either from Nigeria or from abroad.

Dissatisfied with the ruling of the court, the appellant had appealed to this court upon a notice of appeal filed on 2/4/2001 which carries two grounds of appeal. The appellant filed her brief of argument on the 23rd of April, 2002. Sequel to the filing of the appellant’s brief of argument, the respondents filed a notice of preliminary objection on 4th April, 2003 urging this court to strike out the appeal for reason of being

incompetent. The grounds upon which the notice is predicated are:

1. the appeal being against an interlocutory ruling of the court below on an order which the appellant had indicated an intention to comply with, the appellant, under the law, must seek and obtain the leave of court before filing the notice of appeal, and none was sought nor obtained.
2. that the reliefs sought are those normally sought and obtainable at the court of first instance and not at the appellate court.

The notice of preliminary objection is supported by an affidavit of 3 paragraphs and a further affidavit of 4 paragraphs. To counter the objection, the appellant has filed a 7-paragraph counter-affidavit. When this matter came before us on the 12th of February, 2004, Professor Adesanya, learned counsel for the respondents in his argument in support of the said notice of preliminary objection advanced three reasons why the appeal should be struck-out and they are according to him: -

1. The judgment appealed against is a competent ruling - the certified true copy of which was attached as exhibit AK1 and being a consent ruling; leave of the court below was required by virtue of section 241(2)(c) of the 1999 Constitution for a valid appeal to be entered.
2. The reliefs sought in the notice of appeal to the Court of Appeal (this court) are not in conformity with the principle that a Court of Appeal does not declare, rather it affirms or dismisses.
3. The ruling of the court below is an interlocutory one and unless it is on a point of law, leave of the court must be sought and obtained before an appeal is lodged. The grounds of appeals are at best of mixed law and facts.

He urged that the appeal be struck-out.

Mrs. Bowei in opposing the preliminary objection submitted after relying on the counter-affidavit filed on 20th June, 2003 that:

1. That the ruling sought to be appealed against is not an interlocutory one delivered with the consent of the parties. It is not a consent ruling.
2. The grounds of appeal are not of mixed law and fact, grounds 1 and 2 are of pure law.
3. Reliefs 3 and 4 cannot be granted by court below as the appellant

was complaining of his constitutional right of access to court.

While submitting that the appellant requires no leave of appeal she relied on (1) *Afegbai v. A.-G., Edo State* (2001) 14 NWLR (Pt.733) 425, (2001) FWLR (Pt. 69) 1373; *Lori v. Akukalia* (1998) 12 NWLR (Pt.579) 592 and *Kaine v. Ojukwu* (2000) 15 NWLR (Pt.691) 516, (2000) FWLR B (Pt.28) 2241. She finally urged that the notice of preliminary objection be dismissed. I shall like to preface this judgment with the facts leading to the ruling that led to the filing of a notice of appeal. Going through the records of appeal, on 5th February, 2001, the court below struck out the C summons for direction dated 31/7/2000 same having been abandoned; instead an application dated 15th January, 2000 for an order of accelerated hearing of the case was moved. Before an order granting the application was made, the learned counsel for the defendant/respondent, Prof. Adesanya D urged the trial Judge before making the order to direct that a medical report be produced that the plaintiff/appellant/respondent who was confirmed H.I.V. positive patient would not pass the infection to counsel, the members of the public and the presiding Honourable Judge. In response, the learned counsel for the plaintiff/appellant said it was his client's right to give evidence in E court because there was no other way to take her evidence; that it was not infectious and that he might call an expert advice in writing. The learned senior counsel for the defendants reacted by saying that an expert was necessary to give evidence on oath in order to be cross-examined. I shall F hereunder reproduce the short ruling of the learned trial Judge; it reads:

"Having listened to the arguments of both counsel on the issue of the risk of an H.I.V. patient-plaintiff giving evidence in court ... I am of the opinion that the view of the learned counsel for the defendants should be G respected in law in view of the fact that life has no duplicate and must be guaranteed (sic, guarded) jealously.

It is hereby ordered that an expert opinion be heard on the subject-matter either from an expert in Nigeria or from any other part of the world where research had been fully carried out" H

In a reaction to this order the learned trial Judge recorded the plaintiff/appellant's counsel as saying:

"Counsel for the plaintiff says he is ready to bring expert from U.S.A.

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on the subject-matter”

Having obtained that undertaking, the learned trial Judge thereafter adjourned the hearing to 26/3/2001 at 11 a.m. or 11.30 am after call over for that day. As I have said it is against that ruling that the plaintiff has appealed.

B I start the consideration of this objection by saying that **by virtue**
of section 241 (1) of the 1999 Constitution, an appeal lies from a
decision of the Federal High Court or a High Court of the State to the
Court of Appeal as of right if it is a final decision in any civil or criminal proceedings before that Federal or State High Court. Again by
C virtue of section 242(1) of the 1999 Constitution, apart from the grounds provided in section 241 of the Constitution an appeal on all other grounds shall be from a decision of the Federal High Court or State High Court with the leave of the relevant High Court or the
D Court of Appeal. Can the order made by the trial Judge on 5/2/2001 be said to be a final decision?

By no stretch of imagination or construction of the applicable rules and laws can it be said that it was. Indeed, the issue that raised itself
E up for determination arose in the course of wanting to start the hearing of the substantive case. All the main rights of the plaintiff are yet to be determined; they have not been disposed of see *U.T.B. & Ors. v. Odojin* (2001) 8 NWLR (Pt. 715) 296 and *Mohammed v. Olawunmi* (1990)
F 2 NWLR (Pt. 133) 458. I have had a very careful assessment of the grounds of appeal; they are in my view, at best, of mixed law and facts. What more, the records of appeal show, as I have pointed out *supra*, that the plaintiff consented to the making of the order. “Consent” in legal parlance, involves an element of volition, a voluntary agreement is a
G deliberate and free act of the mind. Such is the controlling effect that ‘Consent’ has on a judgment or ruling that a party who has consented to a procedure by the trial Judge cannot subsequently challenge the procedure on the ground, that it worked injustice on him see *Olubode*
H & Ors. v. *Salami* (1985) 2 NWLR (Pt. 7) 282 and *Akhiwu v. The Principal Lotteries Officer Mid-Western State* (1972) 1 All NLR 299. Counsel for the plaintiff/appellant in this matter has, in an unequivocal manner, consented to bringing an expert from the U.S.A. on the issue of

H.I.V. the positiveness of which was ascribed to her. This he expressed, in clear terms, after the ruling of the court below in that direction. In law, a party cannot both approbate and reprobate at the same time. That being a consent judgment, it is a constitutional requirement that a party who has so consented and who later decides to appeal against the consent judgment must first and foremost obtain the leave of court see *Afolabi & Ors. v. Adekunle & A.nor.* (1983) 2 SCNLR 141, (1983) 8 SC 98 and section 242 of the 1999 Constitution. I pause to say that after a careful study of the grounds of appeal contained on the notice, they are, in my view, at the highest, those of mixed law and facts. In both cases that I have highlighted *supra*, an appeal by an aggrieved party the like of the plaintiff/appellant in this appeal, shall lie to this court (Court of Appeal) with the leave of this court. In *Ojemen & Ors. v. His Highness William O. Momodu II (The Ogirrua of Irrua) & Ors.* - (1983) 1 SCNLR 188, (1983) 3 SC 173, the word “Leave” in the context described *supra* means permission. I have perused the entire record of proceedings, no leave of this court was sought and none was granted. For these reasons, the appeal lodged in this case is very much incompetent. The notice of preliminary objection is very meritorious and it must be sustained and I so do. The appeal is therefore struck-out. There shall be no order as to cost.

MUHAMMAD JCA

I read in draft the lead judgement just delivered by my learned brother, Aderemi, JCA. I agree with him that the objection raised by the respondents as to the competence of the appeal has merit and same is hereby upheld.

My few comments are purely for the purposes of emphasis otherwise his lordship in his usual approach has comprehensively treated the relevant issues raised in the preliminarily objection leaving hardly any room for further elucidation.

The ruling of the lower court sought to be appealed against is an interlocutory one. Having not disposed the rights of the parties, it is not a final decision of that court. See *Mohammed v. Olawunmi* (1990) 2 NWLR

1922 Ahamefule v. Imperial Medical Center (2004) 7 KLR Muhammad JCA
(Pt.133) 458. What is more, the appellant had consented to the very order
she sought to challenge on appeal.

B The right of appeal is the creation of statute and never exercised at
large. The very 1999 Constitution which has created the appellant's right of
appeal requires that in the particular circumstance of the appellant, since
the appeal rests on the interlocutory decision of the lower court and also in
respect of an order appellant had consented to, appellant must obtain the
"permission" of either the lower court or this court before exercising her
right of appeal. That has not been done. The lapse has grounded the exercise
C of an otherwise legitimate right. See section 242 of the 1999 Constitution.

Of course the leave of either the court below or this court would
have been dispensed with were the appellant's appeal to be based on grounds
of law alone. I agree with his lordship's analysis and conclusion thereto
D that the grounds are at best of mixed law and facts. The appellant remains
disabled given this state of affairs. The appeal so initiated is incapable of
being carried through. The appeal has to be aborted having been commenced
without the necessary permission of either the High Court or the Court of
E Appeal.

In *Ojong v. Duke* (2003) 14 NWLR (Pt 841) 581, it is opined that
where a statute provides for the manner of doing a particular act, the act
would be adjudged duly performed only if done in the manner specified by
the law. Appellant must be told that much too. The preliminary objection is
F hereby sustained for the foregoing and the detailed reasons articulated in the
lead judgement. I strike out the appeal. I also make no order as to costs.

G **CHUKWUMA-ENEH JCA**

I have read in advance the lead judgment of my learned brother,
Aderemi, JCA in this matter. And I agree entirely with his reasoning and
conclusions to the effect that the appeal lacks merit and should be dis-
H missed. I abide by the orders contained therein.