

COURT OF APPEAL
ENUGU DIVISION
16TH JUNE, 1993. CA/E/152/92
CORAM:- U. ABDULLAHI, O. AWOGU,
S. A. AKINTAN, JJCA

OKECHUKWU ADIMORA PLAINTIFF/
APPLICANT/RESPONDENT

AND

NNANYELUGO AJUFO & ORS. DEFENDANTS/
APPELLANTS

IN THE MATTER OF APPLICATION
TO SUBSTITUTE:

CHRISTOPHER ILORA AZIKIWE RESPONDENT/
APPELLANT

APPEALS - Issues - Relevance of - Parties - Application for Substitution on ground of death - Issue of exhibition of a Supreme Court order - Does not arise in this matter (H1)

COURTS - Evidence - Judicial notice - Supreme Court's order to the High Court - The Judge was entitled to take notice of it - Without its being exhibited (H2)

PRACTICE & PROCEDURE - Parties - Substitution of - Where the matter has reached the Supreme Court - Appellant's objection to his being substituted - For the deceased defendants - Was rightly overruled (H3)

ACTIONS - Representation - Substitution of parties - Not only sons should be substituted - For their dead fathers - But every member of the represented class (H4)

SUPREME COURT - Issue - Judgment of - Being final - Issue of whether appellant's refusal to be substituted for dead defendants - Is a challenge

to Supreme Court's judgment - Is a non-issue (H5)

FACTS

This appeal is against the ruling of Iguh, C.J. Anambra State (as he then was), substituting the appellant for the deceased defendants. The case had gone on appeal up to the Supreme Court. During this period of over 15 years the defendants who represented the Mazeli-Alamuzo-Ojidoko family of Onitsha died. In its judgment, the Supreme Court set aside the decision of the two lower courts and ordered that the plaintiff was entitled to damages. It also ordered that the High Court at Onitsha should assess the said damages due to the plaintiff.

When the case was mentioned before the High Court, Defendants' counsel announced his withdrawal as the defendants on record were all dead. This led to the present application to substitute the appellant, among others. Appellant who admitted being a member of the Mazeli-Alamuzo-Ojidoko family in his counter-affidavit objected to his being substituted. He averred inter alia, that he knew nothing about the suit, and never authorized the defendants on record to represent him. He mentioned the names of the sons that survived the various defendants and stated that since 1970 up to their deaths he was not in speaking terms with them. The trial court overruled the objection and substituted the appellant for the deceased defendants. Dissatisfied with the ruling the appellant appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

"1. Was the learned trial Judge right in referring to and on relying on the contents of the judgment and order of the Supreme Court which were not exhibited to the affidavit in support of the application or otherwise produced as Exhibit in his consideration and determination of the said application?"

2. Was the appellant's opposition to his being substituted for the deceased defendants a challenge to the judgment of the Supreme Court and was the said opposition belated?"

3. Was the issue that the deceased defendants have sons surviving them and their own personal properties immaterial in the determination

of the application?

4. *Was the appellant the proper person to be substituted for the deceased defendants in this case?*

HELD (Unanimously dismissing the appeal per lead judgment of **AWOGU JCA**)

Issues - Relevance of - Parties

1. The first issue for determination complains of the position taken by the learned Judge with respect to the order of the Supreme Court and that the applicants need not exhibit the order along with the application for substitution. This issue seems to me not to arise in the application for substitution since at that point, the enforcement of the order was not the issue. Learned counsel for the appellant, realizing this to be so, abandoned his ground of appeal on the issue of enforcement. (p. 1139 D)

COURTS - Evidence - Judicial notice

2. Even so, if there was a directive by the Supreme Court to the High Court Onitsha as alleged, was the learned Judge not entitled to take notice of the Order?

In my humble view he was entitled to do so, the more so as the directive was to that court to assess the damages due to the plaintiff. (p. 1139 E)

Parties - Substitution of

3. Thus, at the stage when the application was for substitution, the simple issue was whether or not the appellant should be substituted. He did not raise in his counter-affidavit that there was no subsisting suit against his family for which he should be substituted. Had he done so, the applicants would have been obliged to exhibit the order of the Supreme Court. All the appellant did was to object to his being substituted and, in my view, the learned Judge was right in substituting him. His reasons for doing so were cogent. As he stated (see p. 26 of the record):

“In the present case, there was no challenge of the defendants representation of the Mazeli-Alamuzo-Ojidoko Family by the respondents or any other person all through the pendency of this case and I am satis-

fied that it is now too late in the day for the respondent to claim that he did not authorize a named defendants' representation after the pendency of the suit for 14 years and a further two years after this final judgment by the Supreme Court." (p. 1139 H)

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Representation - Substitution of parties

4. It is not the law that only sons whose fathers represented the family should be substituted on their death. This would have been so had the defendants been sued in their personal capacities. In a representative action every member of the class is represented by the named plaintiff or defendant and is equally a party to the action though unnamed (see Otapo v. Sunmonu (1987) 2 NWLR, pt. 58, 587; Moon v. Atherten (1972) 2 Q.B. 435). The family or any member of the family, who does not obtain exclusion from the representation is estopped from denying it. (p. 1140 C)

SUPREME COURT - Issue - Judgment of

5. Another issue raised for determination is whether or not by refusing to be so substituted, the appellant was thereby challenging the judgment of the Supreme Court. This is also a non-issue. The judgment of the Supreme Court is final and there can be no further appeal against it. It is not therefore an issue for determination, even if the effrontery of the appellant created that impression. As the appellant well knows, no process in a representative action can be validly adjudicated upon when the named plaintiffs or defendants are dead and there is no substitution (see Okonji v. Njokanma (1989) 4 NWLR, pt. 114, 161 at 170). On the whole the appeal lacks merit. It is hereby dismissed with N500.00 costs in favour of the respondent. (p. 1140 F)

REPRESENTATION

H G.R.I. Egonu, SAN, for appellant
G.E. Ezeuko for respondent

CASES REFERRED TO

Otapo v. Sunmonu (1987) 2 NWLR, pt. 58, 587

Moon v. Atherten (1972) 2 Q.B. 435

Okonji v. Njokanma (1989) 4 NWLR, pt. 114, 161 at 170)

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RULES REFERRED TO

Supreme Court Rules of 1985, Order 8 Rule 17

LEAD JUDGMENT BY AWOGU JCA

This appeal is against the Ruling of Iguh, C. J. Anambra State (as he then was), substituting the appellant for the deceased defendants in Suit No. 0/70/74. The case had gone on appeal from the High Court Onitsha to the Court of Appeal, Enugu, and finally, to the Supreme Court, Lagos. During this period of over 15 years the defendants who represented the Mazaeli-Alamuzo-Ojidoko family of Onitsha died. In the judgment, the Supreme Court set aside the decision of the two lower courts. In their place, the Supreme Court ordered that the plaintiff was entitled to damages which was fixed at the difference between the current price of 11 plots of land in the area and neighbourhood of Iyiukwu land in dispute and the price paid by the plaintiff to the defendants. The Supreme Court also ordered that the High Court at Onitsha should assess the said damages due to the plaintiff.

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When the case was mentioned at the High Court Onitsha on 11th November, 1989 Dr. Ikpeazu, who was appearing for the defendants, announced his withdrawal as the defendants on record were all dead. This led to the present application to substitute the appellant, among others. On being served with the motion for substitution, the appellant swore to a counter-affidavit. He admitted, however, that he was a member of the Mazaeli-Alamuzo-Ojidoko Family, but added:

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“9. That I knew nothing about the above suit and I never authorized the defendants on record in the said suit to represent me therein.

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10. That Nnanyelugo Ajufu, the 1st defendant in the above case, is survived by his two sons namely Kevin Okwudili Ajufu, and Arinze Ajufu.

11. That Chief Osita Anthony Abadom, the 2nd defendant in the above case, is survived by eight of his sons namely, Onyekwe Abadom, Nnabuenyi Ikem Abadom, Alexander Abadom, Okechukwu Abadom, Onuora Abadom, Egbunike Abadom, Albert Azubuike Abadom and B Chiejina Abadom.

12. That Nnabuenyi Peter Abadom, the 3rd defendant in the above case, is survived by his three sons namely, Emmanuel Sunday Abadom, Peter Olisaeloka Abadom and Ernest Chike Abadom.

C 13. That by Native Law and Custom of Onitsha the sons of a deceased Onitsha man are responsible for his liabilities.

17. That since 1970 and up to the deaths of the defendants on record in the above case I was neither in speaking terms nor in good terms with the said defendants.

D 18. That I and three other members of the Mazeli-Alamuzo-Ojidoko Family joined the members of the Omogo-Alamuzo Ojidoko Family and the Oramali Alamuzo-Ojidoko Family to constitute Suit No.0/10/78 at the High Court, Onitsha, against Nnanyelugo John Ajufo E (Nnanyelugo Ajufo) Chief Anthony Abadom, Chief Nnanyelugo Ilodibe and Michael C. Ilodibe for various reliefs for the purported conveyance of part of Iyiukwu land by the 1st, 2nd and 3rd defendants in Suit No. 0/10/78 to the 4th and 5th Defendants in the said Suit No. 0/10/78 which is F now on appeal to the court of Appeal.

19. That Iyiukwu land was and is owned in common by the Omogo-Alamuzo-Ojidoko Family, the Mazeli-Alamuzo-Ojidoko Family and the Oramali-Alamuzo-Ojidoko Family and the defendants in the above Suit No. 0/50/74 had no right or power to dispose of any part of G Iyiukwu land.”

The learned Judge over-ruled the objection and substituted the appellant for the deceased defendants. Dissatisfied with the ruling, the appellant appealed to this Court.

H Following the exchange of briefs, the appellant set down the following issues for determination.

“1. Was the learned trial Judge right in referring to and on relying on the contents of the judgment and order of the Supreme Court which

were not exhibited to the affidavit in support of the application or otherwise produced as Exhibit in his consideration and determination of the said application?

2. Was the appellant's opposition to his being substituted for the deceased defendants a challenge to the judgment of the Supreme Court B and was the said opposition belated?

3. Was the issue that the deceased defendants have sons surviving them and their own personal properties immaterial in the determination of the application? C

4. Was the appellant the proper person to be substituted for the deceased defendants in this case? D

The respondent adopted the above issues. Neither counsel added much, by way of oral argument, to the briefs.

The first issue for determination complains of the position D taken by the learned Judge with respect to the order of the Supreme Court and that the applicants need not exhibit the order along with the application for substitution. This issue seems to me not to arise in the application for substitution since at that point, E the enforcement of the order was not the issue. Learned counsel for the appellant, realizing this to be so, abandoned his ground of appeal on the issue of enforcement. Even so, if there was a directive by the Supreme Court to the High Court Onitsha as alleged, F was the learned Judge not entitled to take notice of the Order?

In my humble view he was entitled to do so, the more so as the directive was to that court to assess the damages due to the plaintiff. Order 8 Rule 17 of the Supreme Court Rules of 1985 provided G that:

"Any judgment given by the court may be enforced by the court or by the court below or by any other court which has been seized of the matter as the court may direct."

Thus, at the stage when the application was for substitution, the H simple issue was whether or not the appellant should be substituted. He did not raise in his counter-affidavit that there was no subsisting suit against his family for which he should be substi-

tuted. Had he done so, the applicants would have been obliged to exhibit the order of the Supreme Court. All the appellant did was to object to his being substituted and, in my view, the learned Judge was right in substituting him. His reasons for doing so were cogent.

B As he stated (see p. 26 of the record):

“In the present case, there was no challenge of the defendants representation of the Mazeli-Alamuzo-Ojidoko Family by the respondents or any other person all through the pendency of this case and I am satisfied that it is now too late in the day for the respondent to claim that he did not authorize a named defendants’ representation after the pendency of the suit for 14 years and a further two years after this final judgment by the Supreme Court.”

D It is not the law that only sons whose fathers represented the family should be substituted on their death. This would have been so had the defendants been sued in their personal capacities. In a representative action every member of the class is represented by the named plaintiff or defendant and is equally a party to the action E though unnamed (see Otapo v. Sunmonu (1987) 2 NWLR, pt. 58, 587; Moon v. Atherten (1972) 2 Q.B. 435). The family or any member of the family, who does not obtain exclusion from the representation is estopped from denying it.

F Another issue raised for determination is whether or not by refusing to be so substituted, the appellant was thereby challenging the judgment of the Supreme Court. This is also a non-issue. The judgment of the Supreme Court is final and there can be no further appeal against it. It is not therefore an issue for determination, even if the effrontery of the appellant created that impression. As the appellant well knows, no process in a representative action can be validly adjudicated upon when the named plaintiffs or defendants are dead and there is no substitution (see Okonji v. H Njokanma (1989) 4 NWLR, pt. 114, 161 at 170). On the whole the appeal lacks merit. It is hereby dismissed with N500.00 costs in favour of the respondent.

ABDULLAHI JCA

I agree that the appeal lacks merit and I dismiss it with N500.00 costs in favour of the respondent as reasoned and concluded in the lead judgment of Awogu, JCA, which I had the benefit of reading before hand.

AKINTAN JCA

I had the privilege of reading the draft of the judgment just delivered by my learned brother, Awogu, JCA. I agree with his reasoning and conclusion. I share his view that the appeal lacks merit. I too dismiss it with N500 costs in favour of the respondent.

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