

SUPREME COURT OF NIGERIA
30TH APRIL, 2004. SC. 15/2000
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, S. U. ONU,
N. TOBI, D. O. EDOZIE, JJSC

1. ASHLEY AGWASIM	DEFENDANTS/
2. CHUKWUDI TRANSPORT	APPELLANTS
SERVICE (NIG) LTD	
AND	
1. DAVID OJICHIE	PLAINTIFFS/RESPONDENTS
2. MRS. CECILIA OJICHIE	

APPEALS - Abuse of judicial process - Filing an appeal before Supreme Court - And a motion before Court of Appeal - Seeking same reliefs - Is an abuse of judicial process (H1)

ACTIONS - Parties - Abuse of judicial process - By a Litigant - May occur in various ways - Such as multiplicity of action (H2)

APPEALS - Abuse of process - Motion to re-list struck out appeal - Was rightly struck out - As an appeal on same issue - Was pending before the Supreme Court (H3)

FACTS

This is a case of motor-accident in which one Friday Ojichie lost his life. The Peugeot 504 deceased was traveling with as a passenger collided with 2nd appellant's luxurious bus being driven by 1st appellant. In an action filed by the dependents of the deceased, the trial Effurun High Court, Delta State, awarded the sum of N453,970.00 as damages against the appellants. They filed an appeal against the judgment before the Court of Appeal, Benin City.

Respondents filed a motion for dismissal of the appeal for want of diligent prosecution. The motion was granted and the appeal was dismissed. The appellants then filed an appeal before the Supreme Court

seeking that the ruling be set aside and the appeal be heard on its merit. At the same time, they filed a motion on notice before the Court of Appeal, seeking that their appeal be re-listed for it to be heard on merit. It is the striking out of this motion for re-listing that the respondents have now appealed against before the Supreme Court. Court of Appeal's reason for striking out the motion was because there was already an appeal against the dismissal of appellants' appeal now sought to be re-listed.

ISSUE FOR DETERMINATION

“Whether the Justices of the Court of Appeal Benin City properly directed themselves in refusing to restore the appeal in spite of the fact that the appellants applied for the restoration of appeal giving cogent and compelling reasons for their inability to be in court at the time the appeal was dismissed having regard that service of processes is fundamental in any judicial proceedings.”

HELD (Unanimously dismissing the appeal per lead judgment of **EDOZIE JSC**)

APPEALS - Abuse of judicial process

1. The clear position is that on 25/1/99, the Court of Appeal dismissed the Appellants' appeal for want of prosecution. In consequence the Appellants lodged an appeal to this court praying that the appeal that was dismissed should be re-listed and determined on merit by the Court of Appeal. Simultaneously with filing the said appeal to this court, the Appellants then filed the motion before the Court of Appeal seeking the substantially same reliefs prayed for in their appeal to this court against the dismissal of their appeal against the decision of the trial court.

Clearly, that was an abuse of judicial process. (p. 1128 D)

ACTIONS - Parties - Abuse of judicial process

2. It is trite law that the abuse of judicial process is the improper use of the judicial process by a party in litigation. It may occur in various ways, such as instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue or a multiplicity of actions on the same matter between the same parties. It also occurs by institut-

ing different actions between the same parties, simultaneously in different courts even though on different grounds; where two similar processes are used in respect of the exercise of the same right for example, a cross-appeal and respondents' notice, etc. see *Okorodudu v. Okoromadu*. [1977] 3 S.C. 21. (p. 1128 F)

Abuse of process - Motion to re-list struck out appeal

3. In the appeal on hand, and in the face of the appellants' appeal filed on 10/2/98 to the Supreme Court against the Court of Appeal's ruling of 25/1/99 and the Appellants' motion filed on 10/2/99 for the re-listing of the appeal that was dismissed by it, both processes filed simultaneously in different courts and seeking the same reliefs, the Appellants had grossly abused the process of court and the Court of Appeal was eminently justified in striking out the appellants' motion to re-list the appeal that was dismissed on 25/1/99 in default of filing their briefs. However meritorious that motion might be, the Court of Appeal did the right thing. Its ruling of 7/7/99 striking out the appellants' motion for re-listing the appeal dismissed is without reproach.

This appeal is palpably groundless. It is accordingly dismissed.
(p. 1129 B)

NOTABLE POINT OF INTEREST

TOBIJSC

1. Litigation is not a game of chance

A litigant has no right to pursue *pari passu* two processes which will have the same effect in two courts at the same time, with a view to obtaining victory in one of the processes or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks.

In my humble view, the two processes were in law not available to the appellants simultaneously. Only one was available and the choice of which of these two was exclusively the appellants'. (p. 1130 H)

REPRESENTATION

R.A.S. Onwumuedo, for the respondents

No counsel appeared for the appellants

B

CASES REFERRED TO

Akanke Olowu and 3 ors v. Amudatu Abolore & Ors [1993] 6 S.C.N.J. (pt. 1)

C

Sken Consult v. Ukey [1981] 1 S.C. 8

Obimonure v. Erinosho [1966] AII N.L.R. 245

Katsina v. Makudawa [1971] N.M.L.R. 100.

Okorodudu v. Okoromadu. [1977] 3 S.C. 21

Oyegbola v. Esso of West Africa Inc. [1966] 1 AII N.L.R. 170

D

Harriman v. Harriman [1989] 5 N.W.L.R. (pt. 119) 6

Anyaduba v. N.R.T.V. Co Ltd [1990] 1 N.W.L.R. (pt. 127) 397

Jadesimi v. Okotie-Eboh [1986] 1 N.W.L.R. (pt. 16) 278

Alade v. Alemuloke [1988] 1 N.W.L.R. (pt 69) 207.

E

LEAD JUDGMENT BY EDOZIE JSC

Although an appreciation of the facts leading to this appeal is not relevant for its determination, it is nonetheless proper to state the facts albeit briefly. The case arose from a road accident that occurred on 31st December 1986 near Okuokoko village along Ughelli/Warri Road. The accident involved the collision of a luxurious Bus No. BD 9558A and a Peugeot 504 station wagon No. BD 5361HA which caused the death of Friday Ojichie, a passenger in the latter vehicle. In consequence of the death of Friday Ojichie, his dependents in a representative capacity as plaintiffs commenced proceedings in the High Court of Delta State holding at Effurum claiming jointly and severally damages in negligence against the 1st and 2nd Defendants as the driver and owner respectively of the Luxurious Bus. The trial court in its judgment delivered on 25/8/97 found negligence directly proved against the 1st Defendant and vicariously established against the 2nd Defendant and they were accordingly jointly and severally mulcted in damages in the sum of N453,970.00.

Against the judgment, the Defendants as Appellants lodged an appeal to the Court of Appeal Benin Division as per the Notice of Appeal dated 25th August, 1997 and filed the same day. After the settlement of the record of appeal, the Court of Appeal dealt with several interlocutory applications filed by the parties. One of such applications is a motion on notice dated 27/9/98 by the plaintiffs as Respondents and Applicants in the motion praying for the dismissal of the appeal on the ground that the Appellants had defaulted in filing their briefs of arguments as required by Order 6 Rule 10 of the Court of Appeal Rules Cap 62 Laws of Federation 1990. That motion was heard and granted by the Court of Appeal in its ruling delivered on 25th January, 1999 whereby it dismissed the Appellant's appeal for want of diligent prosecution. Dissatisfied with that ruling, the appellants simultaneously filed two processes. One process is an appeal filed on 10/2/99 by the Appellant delivered on 25th January, 1999, the relief sought in the appeal is that the ruling appealed against be set aside and that the appeal dismissed be heard on its merit.

The second process is a motion on Notice dated 9th February, 1999 filed on 10/2/99 by the Appellants before the Court of Appeal seeking, among other things, "*an order for restoration/re-listing its Appeal No. CA/B/83/98 dismissed on the 25th day of January, 1999 for want of diligent prosecution to enable the matter to be heard on merit.*"

This motion was heard and struck out by the Court of Appeal in its ruling delivered on 7th July, 1999. Still undaunted, the Appellants have on 16th July, 1999 lodged before this Court an appeal against the ruling of the Court of Appeal delivered on 7th July, 1999 praying that the ruling be set aside so that the appeal could be re-listed and heard on its merit before the court below. It is that ruling delivered by the Court of Appeal on 7th July, 1999 striking out the motion to re-list the appeal dismissed for want of diligent prosecution that is the focus of this appeal.

Learned counsel for the parties filed and exchanged briefs of argument. The Respondents' counsel adopted and relied on his brief. As the Appellants' counsel was absent, the appeal was deemed argued on the brief he had filed. In the Appellants' brief of argument, the sole issue for determination was framed thus:-

B *“Whether the Justices of the Court of Appeal Benin City properly directed themselves in refusing to restore the appeal in spite of the fact that the Appellants applied for the restoration of appeal giving cogent and compelling reasons for their inability to be in court at the time the appeal was dismissed having regard that service of processes is fundamental in any judicial proceedings.”*

For the Respondents, the issue identified for determination is:-

C *“Were the learned Justices of the Court of Appeal Benin Division right in striking out the Appellants’ motion dated 9/2/99 on 7/7/99.”*

D In his brief of argument, learned counsel for the Appellants submitted that the Respondents’ motion for dismissal of the appeal was not served on them before the Court of Appeal proceeded to dismiss the appeal. It was pointed out that the motion on notice was allegedly served on them at Warri instead of through their counsel Chuks Nwolisa & Co. of 95 Ojuelegba road, Surulere Lagos being their correct address for service as indicated in their Notice of appeal against the judgment of the High Court. It was further pointed out that the said motion on notice did not indicate a hearing date. It was then submitted that failure to give notice of proceedings to the opposing party in a case where service is required is a fundamental omission (except where proceedings are ex-parte) which renders such proceeding void because the court has no jurisdiction to entertain the matter, citing in support of the proposition the following cases: - *Sken Consult v. Ukey* [1981] 1 S.C. 8, *Obimonure v. Erinosho* [1966] AII N.L.R. 245 *Katsina v. Makudawa* [1971] N.M.L.R. 100.

G Learned counsel referred to the affidavit in support of their motion for re-listing the appeal dismissed in which it was averred that the Appellants’ motion for the dismissal of their appeal was not served on them the Appellants before the dismissal of the Appeal by the Court below. He stressed that on becoming aware of the dismissal of the appeal, H the Appellants took sufficient, reasonable and diligent steps to restore the appeal for the matter to be decided on merit but that the court below for no good reasons refused to grant their application to re-list the appeal for it to be determined on merit. We were therefore urged to allow this ap-

peal and order that the appeal against the judgment of the trial court to be restored for it to be determined on its merit before the Court of Appeal.

Responding to the above submissions, learned counsel of the Respondents submitted in his brief of argument that the learned Justices of the Court of Appeal were right in striking out the Appellants' application B dated 9/2/99 but filed on 10/2/99 for the re-listing of the appeal dismissed for want of prosecution. It was contended that the lower court having dismissed the appeal on 25/1/99 became functus officio and therefore lacked the jurisdiction to entertain the Appellants' motion filed on 10/2/99 C for the restoration of the appeal.

It was canvassed that an appeal dismissed under Order 6 Rule 10 of the Court of Appeal Rules Cap 62 Vol. IV Laws of the Federation 1990 cannot be restored and re-listed as the Appellants sought to do and as authority for the proposition, the case of Akanke Olowu and 3 ors v. D Amudatu Abolore & Ors [1993] 6 S.C.N.J. (pt. 1) I was cited. Furthermore learned counsel contended in his brief that the court below satisfied itself that the Appellants were duly served the motion for dismissal of the Appellant's appeal before proceeding to dismiss it on 25/1/99 on the ground E that the Appellants had not filed their brief long after the expiration of the period of 60 days limited by the Rules for doing so. It was further argued that the Appellants were duly served with the Respondents' motion of the dismissal of the Appeal through their address in Warri provided by the F Appellants from which address they had previously received several processes.

We were urged to dismiss the appeal.

As is evident from the submissions of both counsel, it would appear as they conceived it that this appeal rested on service or failure to G appear as they conceived it that this appeal rested on service or failure to serve the Appellants the Respondents' motion for the dismissal of the Appellants' appeal against the judgment of the trial court. If that were so, one would appreciate with commendation that submissions of learned H counsel for the Appellants. It seems to me with respect, that learned counsel has misapprehended the substance of the ruling of the Court of Appeal delivered on 7/7/99, which is the subject matter of this appeal.

For their brevity, I will set out below the proceedings of that court

on 7/7/99 leading to the ruling appealed against.

“2nd Respondent is represented. Chief C. Nwolisa for appellants.

Chief Nwolisa says he has a motion dated 9/2/99 re-listing his appeal dismissed for want of prosecution and for stay of execution. He applied to withdraw prayer (2) for stay. Mr. Onwumuedo does not oppose withdrawal of prayer (2) for stay. But he is opposing prayer 1 because there is already an appeal against the dismissal.

Court: Motion is (sic) dated 9/2/99 struck out with N500 costs in favour of the Respondent.” (underlining is for emphasis)

It is evident from the above excerpt that the ruling of the court below is the order striking out the Appellants’ motion to re-list the appeal dismissed for want of prosecution on 25/1/99. The reason for striking out the motion as borne out from the underlined portion of the excerpt is that there was a pending appeal before this court filed by the Appellants against the dismissal of the Appellants’ appeal. **The clear position is that on 25/1/99, the Court of Appeal dismissed the Appellants’ appeal for want of prosecution. In consequence the Appellants lodged an appeal to this court praying that the appeal that was dismissed should be re-listed and determined on merit by the Court of Appeal. Simultaneously with filing the said appeal to this court, the Appellants then filed the motion before the Court of Appeal seeking the substantially same reliefs prayed for in their appeal to this court against the dismissal of their appeal against the decision of the trial court.**

Clearly, that was an abuse of judicial process. It is trite law that the abuse of judicial process is the improper use of the judicial process by a party in litigation. It may occur in various ways, such as instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue or a multiplicity of actions on the same matter between the same parties. It also occurs by instituting different actions between the same parties, simultaneously in different courts even though on different grounds; where two similar processes are used in respect of the exercise of the same right for example, a cross-appeal and respondents’ notice

etc. see **Okorodudu v. Okoromadu**. [1977] 3 S.C. 21; Oyegbola v. Esso of West Africa Inc. [1966] 1 All N.L.R. 170; Harriman v. Harriman [1989] 5 N.W.L.R. (pt. 119) 6 Anyaduba v. N.R.T.V. Co Ltd [1990] 1 N.W.L.R. (pt. 127) 397; Jadesimi v. Okotie-Eboh [1986] 1 N.W.L.R. (pt. 16) 278; Alade v. Alemuloke [1988] 1 N.W.L.R. (pt 69) 207. **In the appeal on hand, and in the face of the Appellants' appeal filed on 10/2/99 to the Supreme Court against the Court of Appeal's ruling of 25/1/99 and the Appellants' motion filed on 10/2/99 for the re-listing the appeal that was dismissed by it, both processes filed simultaneously in different courts and seeking the same reliefs, the Appellants had grossly abused the process of court and the Court of Appeal was eminently justified in striking out the Appellants' motion to re-list the appeal that was dismissed on 25/1/99 in default of filing their briefs. However meritorious that motion might be, the Court of Appeal did the right thing. Its ruling of 7/7/99 striking out the Appellants' motion for re-listing the appeal dismissed is without reproach.**

This appeal is palpably groundless. It is accordingly dismissed with N10,000.00 cost in favour of the Respondents against the Appellants.

BELGORE JSC

I agree with the judgment of my learned brother, Edozie, J.S.C. that this appeal lacks merit. I also dismiss this appeal with N10,000.00 costs in favour of respondents against appellants.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Edozie, J.S.C. I agree with him that this appeal is devoid of merit. It is hereby dismissed with N10,000.00 costs in favour of the Plaintiffs/Respondents.

ONU JSC

I agree with my learned brother, Edozie, J.S.C. that this appeal is unmeritorious and I too accordingly dismiss it. I subscribe to the costs as assessed in the leading judgment.

B

TOBI JSC

On 25th august, 1997, the trial court delivered judgment in this matter. It was in favour of the plaintiffs and therefore against the defendants. On the same day, that is, 25th august, 1997, the defendants as appellants filed appeal. On 27th September, 1998, the plaintiffs as respondents and applicants filed a motion for the dismissal of the appeal on the ground that the appellants did not file their briefs of arguments. On 25th D January, 1999, the Court of Appeal granted the motion and dismissed the appeal for want of diligent prosecution.

The appellants thereafter filed two processes; one to the Supreme Court and the other to the Court of appeal. The one to the Supreme Court E was an appeal against the 25th January 1999 ruling of the Court of Appeal dismissing the appeal of the appellants for want of diligent prosecution. The one to the Court of Appeal was a motion dated 9th February 1999 for F “an order for restoration/re-listing its appeal No. CA/B/83/98 dismissed on the 25th day of January, 1999 for want of diligent prosecution to enable the matter to be heard on merit.” By a ruling of 7th July 1999, the Court of Appeal struck out the motion. Dissatisfied, the appellants have come to this court challenging the ruling of the Court of Appeal.

The above factual position creates a scenario of the appellants G pursuing the same matter by two court processes. In other words, the appellants, by the two court processes, are involved in some gamble or game of chance to get the best in the judicial process. While they appealed against the ruling of the Court of Appeal striking out their appeal H for want of diligent prosecution, they also filed a motion in the Court of Appeal for the “restoration or re-listing” of the appeal.

A litigant has no right to pursue pari passu two processes, which will have the same effect in two courts at the same time, with a view to

obtaining victory in one of the processes or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks.

In my humble view, the two processes were in law not available to the appellants simultaneously. Only one was available and the choice of which of these two was exclusively the appellants. They could appeal against the decision of the Court of Appeal. In the alternative, they could ask for the restoration of the appeal dismissed for want of diligent prosecution.

It is my view that one of the processes is clearly an abuse of the judicial process. See *Saraki v. Kotoye* [1992] 9 N.W.L.R. (pt. 264): *The Vessel Saint Roland v. Osinloye* [1997] 4 N.W.L.R. (pt. 500) 587; *Messrs. N.V Scheep v. M.V.S. Araz* [2000] 15 N.W.L.R. (pt. 691) 622. The question is which of the processes is an abuse of the judicial process? In the determination of abuse of the judicial process, the court will consider the content of the first process vis-à-vis the second one to see whether they are aimed at achieving the same purpose. Relating the above principle to the factual situation, I am come to the conclusion that the appeal filed at this court and the motion for restoration filed at the Court of Appeal were aimed to achieve generally the same purpose. And that is why the Court of Appeal rightly struck out the motion for restoration on 7th July 1999 when it came before the court for hearing.

This court has an inherent jurisdiction to prevent abuse of process by frivolous or vexatious proceedings, either in this court, or in any other court, which is brought before this court. In the light of the above, the motion for restoration of the appeal before the Court of Appeal was clearly an abuse of court process and the Court of Appeal rightly struck it out.

It is in the light of the above reasons and the fuller reasons given by my learned brother, Edozie, J.S.C in the leading judgment that I too dismiss the appeal with N10,000.00 costs in favour of the respondents against the appellants.