

SUPREME COURT OF NIGERIA
17TH JANUARY, 2005 SC. 120/1996
CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, A. O. EJIWUNMI,
D. MUSDAPHER, S. A. AKINTAN, JJSC

1. ALSTHOM S. A.

2. SOCIETE APPELLANTS/CROSS-RESPONDENT
GENERALE BANK

AND

CHIEF DR. OLUSOLA

SARAKI RESPONDENT/CROSS-APPELLANT

COURTS - Adjournments - Discretion exercised in refusing adjournment
- Must be shown to be wrongful - Before appellate court can intervene
(H1)

COURTS - Appeals - Discretion - Exercised by trial court - Appellate
court should examine - All the facts in an appeal against discretion (H2)

PRACTICE & PROCEDURE - Trial rules - Adjournments - Trial court's
refusal of adjournment to defendant - And call for address - Without
closure of plaintiff's case - Is a breach of the rules (H3)

COURTS - Discretion - Adjournments - Trial court's abortion of the trial
- In refusing plea for adjournment - Is wrongful in the circumstances
(H4)

PRACTICE & PROCEDURE - Fair hearing - Procedure adopted by court
in closing trial - Is a breach of defendant's right to fair hearing (H5)

FACTS

Before the Lagos High Court, the plaintiffs/appellants filed an action against the defendant/respondent. Plaintiffs sought to recover the US Dollars now equivalent to N45,387,264.42 being outstanding debt accruing to the plaintiffs as a result of the loan granted by the 1st plaintiff to the

defendant. With the leave of the court, the parties filed amended pleadings in pursuit of the different positions taken by them in respect of the dispute. Trial commenced on the 27/7/1990 with plaintiff's only witness testifying. This witness was appointed by the plaintiffs as their attorney. His evidence were mainly documentary and most of the documents were tendered as exhibits. He said that 2nd plaintiff who guaranteed the loan granted to the defendant had repaid the amount which was then five million United States Dollars to the 1st plaintiff who made the grant. But the defendant has not repaid the loan.

The trial faced lots of protracted adjournments leading to undue delay. On the 15th March, 1993, the case was adjourned again to 15th June, 1993, for defence. On this date, defendant's counsel applied for adjournment to enable his client be in court and give evidence. Plaintiffs' counsel opposed the application vehemently. The court refused the application, closed the defendant's case and called for addresses by counsel for the parties. The records did not show the date the plaintiffs' case was closed. The trial court after hearing the addresses adjourned the case to 30th June, 1993, for judgment. He found in favour of the plaintiffs and awarded the amount claimed by them as the outstanding debt. Defendant's appeal to the Court of Appeal was upheld by a majority judgment. Being aggrieved, plaintiffs have now appealed to the Supreme Court and the defendant filed a cross appeal. As the determination of the cross appeal led to ordering a trial de novo, it was no longer necessary to consider the main appeal.

ISSUES FOR DETERMINATION

“(i) Whether the trial court had jurisdiction to ask the defendant to open his defence at the time it did when the plaintiff’s witness in the box is yet to conclude his evidence and the plaintiff is yet to announce a closure of its case.

(ii) If the first issue is resolved against the cross-appellant, did the trial Judge exercise his discretion judiciously and judicially when the court refused to grant the adjournment sought for on the 15th of June 1993.”

HELD (Unanimously allowing the cross appeal per **EJIWUNMI JSC**)

Adjournments - Discretion exercised in refusing

1. It is no doubt patent that the decision of the trial Judge in respect of the ruling refusing the adjournment to the cross-appellant is an exercise of the discretionary power of the learned trial Judge, and that it is settled law that it is a jurisdiction which is vested in the court. In my humble view, what is raised however in this appeal, is, whether the learned trial Judge exercised that discretion judicially and judiciously. It also must be borne in mind that in this regard, care must be taken not to attempt to substitute my discretion for the discretion of the courts below. The true principle, I believe, is that for an appellate court to interfere with the exercise of the discretionary power vested in the courts below, it must be shown how that power was wrongly exercised to justify the intervention of the appellate court. (p. 230 B)

COURTS - Appeals - Discretion

2. As part of the appeal was against the exercise of the discretionary power of the trial court, the court below in considering the appeal before it, has the duty of examining all the facts pertaining to the discretionary power exercised by the trial court. (p. 231 H)

Trial rules - Adjournments

3. No date was given when the plaintiffs/respondents actually closed the case, it is not possible to give any credence to that assertion of counsel in the absence of any evidence in the printed record to that effect. What is apparent from the printed record, is that on the 15th of March, 1991, the trial court granted leave to the plaintiffs/ cross-respondents to amend their Statement of Claim. Leave was also granted to the defendant/cross-appellant to file an amended Statement of Defence within 14 days and also leave to recall the 1st P.W. - B.A.M. Fashanu.

Following that order, there is nothing in the records to indicate that the cross-appellant took any step pursuant to that order and nothing also to show that the cross-respondents took any further step until the events that led to the abortion of the trial by the learned trial Judge. It follows from what I have said above, that I must hold that plaintiffs/

respondents did not before then bring their case formally to an end. Now, it is common ground that the trial had suffered several adjournments before it was brought to an end by the learned trial Judge. But in my respectful view, while such a situation where the trial of a simple case B such as the one in hand was made to last over several years, the trial court must nevertheless ensure that it did not act in breach of the rules of procedure. (p. 233 E)

C ***Trial court's abortion of the trial***

4. Having regard to the authorities to which I have referred to above, it was not right for the court to have assumed as closed the case for the plaintiffs. Moreso, where earlier on in the proceedings, the court had made orders which were still outstanding when the trial was aborted by D the court, I go on further to say that though the trial of the case was unduly prolonged simply because of the failure of the cross-respondents to take a definite step in the matter by formally closing its case, the defence would have begun to defend the action. I will also hold further E that the trial court erred in closing the plaintiffs/cross-respondents' case as it did and was also not right to have aborted the trial by closing the case for the defence. In my humble view, a further adjournment in the circumstances would have better met the justice of the case. The failure F of the court to bear in mind properly the antecedents of the case and the factual events in the history of the case as in my view, shows that the trial court erred in the exercise of its discretionary power with regard to the refusal of the prayer for an adjournment sought by the cross-appellant. And as the court below did not also consider the question raised in G the appeal in the light of what I have said above, I must also hold that the court erred in upholding this aspect of the appeal in its judgment. (p. 234 B)

H ***Procedure adopted by court in closing trial***

5. It seems that the cross-appellant was right to complain that his right of fair hearing was breached by reason of the procedure adopted by the trial court to bring the case to an end.

There is no doubt at all that the principle of fair hearing is fundamental to all court procedure and proceedings, and like jurisdiction, the absence of it vitiates proceedings, however well conducted. See *Salu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23 at 40.

Fair hearing, according to our law, envisages that both parties to a case be given an opportunity of presenting their respective cases without let or hindrance from the beginning to the end. It also envisages that the court or tribunal hearing the parties' case should be fair and impartial without showing any degree of bias against any of the parties.

Having regard to the conclusions reached above, I must therefore uphold the cross-appeal of the cross-appellant. It follows that the merit of the main appeal cannot be considered having regard to the views I have held about the defective procedure adopted by the trial court in the determination of the case. The judgment and orders of the court below are therefore set aside. The case is in the circumstances remitted to the High Court of Lagos State for trial *de novo* before a Judge of that jurisdiction. (p. 234 G)

NOTABLE POINT OF INTEREST

AKINTANJSC

1. Discretion to refuse adjournment - Exercise of

It is now a notorious fact that trials of cases in our courts are unduly delayed as a result of numerous requests for adjournments made by counsel and granted by the courts. It is a problem which, in my view, needs to be seriously looked into and tackled strictly by our courts. To that end, the exercise of discretion to refuse an application for an adjournment of a case fixed for hearing by a trial court, should therefore not be tampered with by an appellate court as a matter of course. But in the instant case, the procedure adopted by the learned trial Judge in not ensuring that the plaintiffs closed their case before calling on the defence to present its defence is totally unacceptable. Similarly, forcing the defence to close its case abruptly is also unacceptable and strange to our procedural law. (p. 238 E)

REPRESENTATION

O. Shasore with him, A. Ademola for the Appellants/Cross-Respondents
Prof. A. B. Kasunmu, SAN., (with him, Mrs. O. T. Adekoya) for the
Respondent/Cross-Appellant.

B

CASES REFERRED TO

Atugbue v. Chime (1963) 1 All NLR 208

Salu v. Egeibon (1994) 6 NWLR (Pt. 348) 23 at 40

University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143

C

Akinwande Jones & Anor v. H. A. Thomas & Ors (1962) LLR 9

Liquidator of Efufu C.P.M.S. Ltd. (J. F. Ogunkoya) v. Emmanuel Adeyefa
(1970) 1 ANLR 12

Oduote v. Oduote (1971) 1 All NLR 221 at 224

D

Ceekay Traders v. G. M. Co. Ltd. (1992) 2 NWLR (Pt. 222) 132

Atano v. A-G Bendel State (1988) 2 NWLR (Pt. 75) 201

Elike v. Nwakwoala & Ors (1984) 12 S.C 301

Isiyaka Mohammed v. Kano N.A. (1968) 1 All NLR 424

E

LEAD JUDGMENT BY EJIWUNMI JSC

This is an appeal and cross-appeal against the majority judgment
of the Lagos Division of the Court of Appeal sitting in Lagos (Coram:-
Sulu-Gambari, Kalgo, JJCA, as they were then) delivered on the 11th day
of August 1994. Uwaifo, JCA. (as he then was), also on the same date
delivered his dissenting judgment.

F

The appeal arose from the judgment of Adeniji, J., sitting then at
the High Court of Lagos State in its Lagos Judicial Division. In that court,
the two plaintiffs, appellants/cross-respondents claimed jointly and sever-
ally from the defendant/respondent and cross-appellant, the sum of
N45,387,264.42 (Forty Five Million, Three Hundred and Eighty Seven
Thousand, Two Hundred and Sixty Four Naira, Forty Two Kobo) being
outstanding debt owing to the plaintiffs as a result of the loan granted by
the 1st plaintiff to the defendant at his request which debt is now in the
sum of US \$9, 747,914.44 (Nine Million, Seven Hundred and Forty Seven
Thousand, Nine Hundred and Fourteen United States Dollars and Forty

G

H

Four Cents) as at 31st July 1987, converted to Naira at the prevailing exchange rate on the 31st August, 1987 of US \$1 to N4.6561 (b) the plaintiffs also claimed interest on the said debt at the rate of 18% per annum from the 1st of September 1987 until judgment and thereafter at the rate of interest on the said judgment until the debt is liquidated. B

The case was tried on pleadings and with the leave of court, the parties also filed amended pleadings in pursuit of the different positions taken by them in respect of the dispute. And on the 27/7/90, the trial court according to the records commenced with the taking of evidence C in the matter. The plaintiffs led evidence through their only witness, Babatunde Aderonti Moshood Fashanu and who had earlier been appointed as the Attorney for the plaintiffs. Apart from his oral testimony, this witness also tendered some documents in support of the case for the plaintiffs. The thrust of his evidence is that sometimes in March 1982 when D defendant was resident in London, he approached the 1st plaintiff abroad for a loan of five million United states dollars (\$5,000,000.00). The 1st plaintiff agreed to lend him that sum subject to 2nd plaintiff giving a guarantee. The 2nd plaintiff did give the guarantee. Thereafter the 1st E plaintiff gave the loan to the defendant. The loan had been repaid by 2nd plaintiff to 1st plaintiff. But the defendant had not repaid the loan.

The witness further testified that he obtained all the pieces of evidence from documents which came to his possession, after he was appointed by the plaintiffs as their attorney. He then tendered some of the F documents, which were admitted as exhibits. It was at this stage that the hearing of the case was adjourned to the 5th of October 1990 for continuation. But on that day, hearing was further adjourned without the G court taking any evidence. On the 10th of January 1991, the hearing of the case continued with the cross-examination of the witness. In the course of his evidence, he stated that though he knew that the defendant is a medical officer, it was also known to him that the defendant participated in politics and was a Senator in the 2nd Republic. But also, he knew H that in 1982, the defendant was resident in London. And during that period, the witness claimed that he was also in London between August/September 1981/82 doing his post-graduate studies. He claimed that he

often saw the defendant walking along the road that the witness took on his way to the college attended by the witness in London.

Furthermore, he claimed that on one of such occasions the defendant stopped to talk to him in the course of which he told the witness that he was resident in London and that he had a permanent suite at Churchill Hotel. On that date, hearing in the matter was adjourned to the 14th and 15th day of March 1991 for continuation. On the first adjourned dated, i.e. 14/3/91, no evidence was led and hearing was adjourned to the next day 15th of March. On that day, the learned trial Judge granted the plaintiff's application for leave to file an amended Statement of Claim. After that order, the trial Judge then granted leave to recall the first plaintiff's witness and adjourned further hearing to the 22nd and 23rd of May 1991.

On the first adjourned date, i.e. the 22nd of May, the court had to adjourn further hearing of the case to 19/7/91. This was because learned counsel for the plaintiffs H. A. Lardner, SAN., could not be in court due to other engagements. On that adjourned day, namely 19/7/91, the printed record does not show what transpired on that day as nothing was recorded to that effect. However the matter came before the court on the 7th of October, 1991, when H. A. Lardner, SAN., appeared for the plaintiffs but the defendant was not represented. The case was then adjourned to the 14th of October, 1991. On the 14th October, 1991, though counsel for the parties, namely Miss Bassey for the plaintiffs and Miss Maduako for defendant, were in court, the case was adjourned to the 11th and 12th of February, 1992. And on the 11th of February when the case was called, it was further adjourned for trial to the 14th and 15th of May, 1992 and although both parties were represented by counsel, namely Dawodu for plaintiffs and Miss Johnstone for defendant, the court adjourned it to 10th June 1992 for defence. And again though counsel on both sides appeared, the case was adjourned to the 10th day of June 1992. It must also be noted that on each adjourned date, the parties to the action were also absent. The plaintiffs, who were represented by P. W. 1, B. A. M. Fashanu were present only on the days evidence was taken from him. And he was last in court on the 10th January 1991.

Now as already noted above, the case was adjourned to the 10th

of June 1992. When the case was called on that day the parties were absent but their learned counsel, namely, Dawodu for plaintiffs and Delano for defendant appeared for the parties, its hearing was further adjourned to the 30th of September 1992. And on that day, parties were not in court although the plaintiffs were represented by their learned counsel, R. O. Dawodu and Chief F. R. A Williams, SAN., for the defendant, the matter was further adjourned to the 2nd and 3rd of December, 1992 for defence. The matter on the 2nd of December 1992 was however further adjourned to the 15th of March, 1993, though learned counsel for the parties as noted above were in court. The matter was again similarly adjourned when it was called on the 15th of March, 1993. The court on that day adjourned the case to 15th June, 1993 for defence.

On the 15th of June 1993, when the case was called, the parties were absent but only the learned counsel for the plaintiffs, R. O. Dawodu Esq. was present in court. The counsel then moved the court to close the case in view of the fact that both the defendant and his counsel were not in court. It would appear that sometime after this submission was made, Chief F. R. A. Williams, SAN., appeared in court for the defendant. He then informed the court that his client unfortunately was not in court and for that reason, he asked for an adjournment. This prayer was seriously resisted by learned counsel for the plaintiffs and he urged the court to refuse the prayer for adjournment. The court, Coram, Adeniji, J., after hearing the submissions of learned counsel then delivered a ruling in which he concluded by refusing the application for adjournment sought by learned counsel for the defendant to be in court.

There then followed the following exchange between learned counsel for the parties and the court. See page 252 of the Record. It reads:-
“Court: Chief Williams - What do you now intend to do. Chief Williams: My client is just not in court. Dawodu: I apply in this circumstance that case of defendant be closed and parties called to address. Court: I then close the case of the defence and call for address.”

The learned counsel thereafter addressed the court beginning with R. O. Dawodu for the plaintiffs, followed by that of Chief F. R. A. Williams, SAN. The court then adjourned for judgment which was delivered

on the 30th of June 1993 and which he concluded thus:

“Judgment is hereby entered for the plaintiffs in the sum of N45,387,264.42 (Forty-Five Million, Three Hundred and Eighty Seven Thousand, Two Hundred and Sixty Four Naira Forty-Two kobo) being outstanding debt owing to the plaintiffs as a result of a loan granted by the 1st plaintiff to the defendant at his request and which debt is now in the sum of US \$9,747,914.44 (Nine Million, Seven Hundred and Forty Seven Thousand, Nine Hundred and Fourteen United States Dollars and Forty Four Cents) i.e. as at 31st July, 1987 converted to Naira at the prevailing exchange rate on 31st August of US \$1 to N4,6651. Interest on the said debt at the rate of 18% per annum from 1st September 1987 until judgment debt and reducing (sic) balance until the total debt is liquidated.”

As the defendant was not satisfied with the judgment of the trial court, he appealed to the Court of Appeal. In that court, the defendant was successful. This is because the court below by its majority decision (Sulu-Gambari, Kalgo, JJCA (as they were then) upheld the argument proffered for the appellant by his counsel, Chief F. R. A. Williams SAN., as the 1st plaintiff/respondent had been paid the sum loaned to the appellant by the 2nd plaintiff who guaranteed the loan, the 1st plaintiff/respondent no longer had the right to sue for the same and that the claim of the 1st plaintiff/respondent ought to have been dismissed. Kehinde Sofola, learned Senior Advocate for the respondents conceded the point and claimed that the joinder of the 1st plaintiff/respondent was a misjoinder. On this aspect of its majority judgment the court below per Sulu-Gambari, JCA., said thus:-

“It is settled principle of law that non-joinder or misjoinder of parties is not fatal to the proceedings but the court may order a retrial in appropriate cases. In this case, it will be appropriate, and by virtue of the power conferred on this court by Section 16 of the Court of Appeal Act, I hereby make the Order to only strike out the name of the 1st plaintiff from the suit and accordingly also from the appeal.”

After making the order quoted above, the court by its majority judgment after considering the other issues raised in the appeal, upheld

the appeal of the defendant/appellant. The plaintiffs/respondents who were displeased with the majority judgment of the court below have now appealed to this court. It is pertinent at this stage to state that before the appeal was heard, the plaintiffs, now appellants in this court, had to brief another counsel to prosecute their appeal owing to the death of their leading counsel, Kehinde Onafowokan, that occurred after the judgment of the court below. Their new counsel, Odein Ajumogobia, SAN., who after a review of the facts and the judgment of the court below decided that he would have to, not only file an Amended Notice of Appeal, but sought the leave of this court to also file an Amended Statement of Claim which was further amended with leave. The appellants were duly granted the leave they sought to prosecute their appeal in this court. They were also granted leave to file an amended brief as prayed by their counsel. The appellants also with leave of court, filed reply brief in response to the amended brief filed for the respondent. The respondent also filed a cross-appeal to which the appellants as respondents to the cross-appeal also filed a cross-respondents' brief.

However, it is my view that having regard to the issues raised in the cross-appeal, it is prudent to consider first, the cross-appeal. Suffice it to say that if I find that the cross-appeal lacks merit, then the arguments proffered by learned counsel for the parties in respect of the main appeal would then be considered.

THE CROSS-APPEAL

Two issues were raised in the cross-appellant's brief for the determination of the cross-appeal. They read thus:-

“(i) Whether the trial court had jurisdiction to ask the defendant to open his defence at the time it did when the plaintiff's witness in the box is yet to conclude his evidence and the plaintiff is yet to announce a closure of its case.

“(ii) If the first issue is resolved against the cross-appellant, did the trial Judge exercise his discretion judiciously and judicially when the court refused to grant the adjournment sought for on the 15th of June 1993.”

And for the cross-respondent, only one issue was identified for

the determination of the case having regard to the three grounds of appeal filed by the cross-appellant. It reads: -

“Whether the learned Justices of the Court of Appeal were right in their unanimous decision that on the facts and circumstances of this case, the learned trial Judge had not improperly exercised his discretion to refuse a further adjournment for the appellant to be personally present and be called to give evidence.”

However, after a comparative study of the issues set down above, it became clear to me that the determination of this cross-appeal would be better considered along the issues identified by the cross-appellant.

Issue No. 1

The argument on this issue in the cross-respondents’ brief began with a reference to the history of the hearing of this case from its commencement on the 18th of October, 1989, when trial dates were fixed for the 14th, 15th and 16th of February 1990 to the 15th of June 1993, when the trial Judge, following the application of learned counsel for the cross-appellant for an adjournment, delivered a ruling in which that application was refused. And then went on to call upon the cross-appellant to open its case and also closed the defence of the cross-appellant. This ruling was so given despite the submission of learned counsel for the cross-appellant that the cross-respondents were still to close their case.

It is then submitted for the cross-appellant that before the court below, the questions that arose from that ruling of the learned trial Judge were agitated before that court. These were, whether in all the circumstances, it was proper to call upon the defendant, the cross-appellant to open his case when the cross-respondents had not closed their case, and also whether it was proper for the trial Judge to close the cross-appellant’s case as was done and in the process refused the prayer for an adjournment at the instance of the cross-appellant.

It is clear from the majority judgment of the court below that the argument advanced for the cross-appellant against the ruling of the trial court did not persuade the lower court to set aside the ruling of the trial court. Now, at this point, it is the contention of learned counsel for the cross-appellant that though before the court below, counsel for the cross-

appellant specifically argued that the case of the cross-respondents had not been closed and that it was therefore wrong to ask the defence to open and/or close his defence, court did not in its judgment deal with that submission of counsel. It is therefore argued for the cross-appellant that as there was no record of a formal closure of the cross-respondents B case, plaintiffs in the trial court, it was wrong of the court to have upheld the decision of the trial court in the circumstances. In support of this contention, reference was made to the unreported decision of the Court of Appeal in Suit No. CA/B/337/96 Olori Motors and Co. Ltd. & Anor. v. C Union Bank of Nigeria Ltd. delivered on the 14th of May 1998.

Responding, it is argued for the cross-respondents in the brief filed on their behalf by the learned counsel, that the issue raised in the appeal can only be determined by a close and detailed examination of the printed records of the appeal. Learned counsel Mr. H. Odein Ajumogobia, D SAN., is of course right in that submission. I must however point out that in any appeal before this court, it is obligatory for the record of appeal to be read very carefully by the Justices of the court empaneled to hear and determine the issue or issues raised in any particular appeal E raised before the court. Be that as it may, the learned counsel then proceeded to review the history of the case to support his submission, that it is simply not true as asserted by learned counsel for the cross-appellant, that Mr. Fashanu did not make himself available to give evidence under F cross-examination. He then invited attention to when Mr. Fashanu was in court and was cross-examined by learned counsel for the cross-appellant. He then proceeded to contend that the argument in respect of issue G (1) now urged in this court by the cross-appellant was not urged in the court below and did not form any part of the judgment of the court below. Furthermore, it is argued for the cross-respondents that it was open to the cross-appellant to have reacted when the trial court called upon counsel to address it by not addressing the court for the reasons he is now canvassing in the appeal. H

In any event, from all the argument advanced in the cross-respondents' brief, it is manifest that it is the view of their learned counsel that the learned trial Judge exercised his discretion properly in refusing an

adjourment to the cross-appellants. And that the court below was right to have affirmed the reasoning and judgment of the trial court on this aspect of the appeal in their judgment. In support, reference was made to several authorities including the following:- University of Lagos v. Aigoro B (1985) 1 NWLR (Pt. 1) 143; Akinwande Jones & Anor v. H. A. Thomas & Ors (1962) LLR 9; Ughoma v. Olise (1971) 1 All NLR 8; Odusote v. Odusote (1971) 1 All NLR 221 at 224.

It is no doubt patent that the decision of the trial Judge in respect of the ruling refusing the adjourment to the cross-appellant is an exercise of the discretionary power of the learned trial Judge, and that it is settled law that it is a jurisdiction which is vested in the court. In my humble view, what is raised however in this appeal, is, whether the learned trial Judge exercised that discretion judicially and judiciously. It also must be borne in mind that in this regard, care must be taken not to attempt to substitute my discretion for the discretion of the courts below. The true principle, I believe, is that for an appellate court to interfere with the exercise of the discretionary power vested in the courts below, it must be shown how that power was wrongly exercised to justify the intervention of the appellate court. See Ceekay Traders Ltd. v. Gen. Motors Co. Ltd. (1992) 2 NWLR (Pt. 222) 132; Rasaki A. Salu v. Madam Towuro Egeibon (1994) 6 NWLR (Pt. 349) 23.

Having regard therefore to the argument of counsel, the first point that needs to be considered is, what led to the ruling of the 15th June 1993, wherein the learned trial Judge refused the application for an adjourment sought for by the learned counsel for the cross-appellant. The reasons given by the learned trial Judge, Adeniji, J., for refusing the application reads in part thus:-

“At least since 14/5/92 till date, I have granted adjournments for the defence to commence forth. In my view it is the duty of parties to ensure their presence at trial, and the machinery for the administration of justice cannot be allowed to grant (sic) to a halt (sic) simply because a witness fails or refuses to attend court. See NPA v. Constructing (1992) S.C.....

Further just as the defendant is entitled to fair hearing, the plaintiff too under our Constitution is entitled to fair and quick disposing (sic) of his case; which he appears not to be getting here. No sufficient material (sic) have been placed before me on which I can exercise any discretion. For the above reasons, the application for adjournment is hereby refused.” B

As I have before now quoted what happened in this regard, I do not need to repeat same here. I will only now need to say that the counsel in obedience to the order of the court then addressed the court. Following which judgment was reserved for the 30th of June 1993. C

Now, the question that has to be considered is, whether the learned counsel for the cross-appellants was right in his assertion that there is nothing in the Printed Record to show when the plaintiffs/cross-respondents closed their case before the court enquired what the cross-appellants wished to do. Following the reply of the learned counsel for the cross-appellants, Chief Williams, SAN., that his client “*is just not in court*”; the court then acceded to the request of counsel for the cross-respondent that the case for the defence be closed, and it was accordingly closed. It is the further submission of learned counsel for the cross-appellants that nowhere in the ruling did the court advert to the fact as to whether or not the cross-respondents as plaintiffs had closed their case before the court called upon the defence to open his case. D E

Based upon the above two facts disclosed in the Printed Record, it is the submission of learned counsel for the cross-appellant that the trial court wrongly exercised its discretion. He further argued that as the court below similarly failed to advert its mind to those facts, that court was wrong to have upheld the exercise of the discretionary power of the trial court to refuse the prayer for an adjournment of the trial court by the learned counsel for the cross-appellant. Although the argument of the learned counsel for the cross-respondents have been reviewed above, it suffices for me to reiterate that his view is that the court below was right to affirm the trial court. And he added that all the questions now raised in this appeal were not raised in the court below. My short answer to that aspect of his submission is that, **as part of the appeal was against the** F G H

exercise of the discretionary power of the trial court, the court below in considering the appeal before it, has the duty of examining all the facts pertaining to the discretionary power exercised by the trial court.

B Having said that, I must now turn quickly to consider whether
 plaintiff in a civil trial is obliged to formally close its case and that fact
 must be recorded by the trial court, before the defendant is called upon to
 begin its own case. It does seem from the decisions of this court to
 which I will presently refer to, that the proper procedure in a trial re-
 C quires that he who alleges as the plaintiff must be permitted to close his
 case before the defendant is required to begin. On this point, I wish to
 refer to what this court in the Liquidator of Efufu C.P.M.S. Ltd. (J. F.
 Ogunkoya) v. Emmanuel Adeyefa (1970) 1 ANLR 12, said per Lewis,
 D JSC., at p. 15-16

*“It seems manifest therefore that it was learned trial Judge himself
 who stopped the case at that stage. If that were so and we have no rea-
 sons for holding to the contrary, then the complaints of the plaintiff
 E before us are fully justified. Civil cases are proved by preponderance or
 weight of evidence and it is not the duty of a court unless in accordance
 with any rules of court to the effect to preclude a party claiming reliefs
 from discharging that duty, a right to which he is ex debito justitiae en-
 F titled.”*

In Atugbue v. Chime (1963) 1 All NLR 208 Brett, FJ. said at page
 210 -

*“Counsel have not been heard on the merits of the case either in
 the High Court or in this court and as in my view the case will have to be
 G retried. I express no opinion on the correctness of the Judge’s ruling on
 the evidence before him. It will be enough to say that the procedure
 adopted was not authorized by law, and that Mr. Okoye, who had at no
 time acquiesced in it, was fully entitled to decline to address the court
 H before his entire case had been closed. The proper course would have
 been to allow the plaintiff to call the whole of his evidence before decid-
 ing any of the issues of fact..... the party beginning should be allowed to
 conclude his evidence. Once he has done so, it is open to the other party*

to submit that there is no case for him to answer, in which case the Judge should decline to give ruling at that stage unless the party states that he does not intend, in any event, to call evidence; Tandoh v. C.F.A.O. (1944) 10 WACA 186. In an exceptional case 'it cannot be open to doubt that where a plaintiff himself has shown that he has no case a Judge trying a case as Judge and jury is entitled to stop the case after the plaintiff has closed his case and addressed the court: Aduke v. Aiyelabola (1942) 8 WACA 43.'

In the instant case, I have earlier given a synopsis of the events that occurred before the trial court closed the case for the cross-appellant and to an end the oral hearing of the case, and proceeded to judgment following addresses by counsel. The question being, whether the cross-respondents as plaintiffs, had formally closed their case as required of them. In this regard, it must be noted though that during the trial, learned counsel who appeared then for the cross-respondents mentioned that they had closed their case. I now refer to page 250 of the record, where it is shown that on the 15th of June 1993, that learned counsel was quoted as saying that "*the plaintiff closed its case since 1991, and since then defendants' counsel has asked for adjournment for one reason or the other - see 10/9/ 92.*" The first observation that I need to make is, that from the records, it does not appear that the case came before the trial court on that day - 10/9/92. Secondly, **no date was given when the plaintiffs/respondents actually closed the case, it is not possible to give any credence to that assertion of counsel in the absence of any evidence in the printed record to that effect. What is apparent from the printed record, is that on the 15th of March, 1991, the trial court granted leave to the plaintiffs/ cross-respondents to amend their Statement of Claim. Leave was also granted to the defendant/ cross-appellant to file an amended Statement of Defence within 14 days and also leave to recall the 1st P.W. - B.A.M. Fashanu.**

Following that order, there is nothing in the records to indicate that the cross-appellant took any step pursuant to that order and nothing also to show that the cross-respondents took any further step until the events that led to the abortion of the trial by the

learned trial Judge. It follows from what I have said above, that I must hold that plaintiffs/respondents did not before then bring their case formally to an end. Now, it is common ground that the trial had suffered several adjournments before it was brought to an end by the learned trial Judge. But in my respectful view, while such a situation where the trial of a simple case such as the one in hand was made to last over several years, the trial court must nevertheless ensure that it did not act in breach of the rules of procedure.

Having regard to the authorities to which I have referred to above. It was not right for the court to have assumed as closed the case for the plaintiffs. Moreso, where earlier on in the proceedings, the court had made orders which were still outstanding when the trial was aborted by the court, I go on further to say that though the trial of the case was unduly prolonged simply because of the failure of the cross-respondents to take a definite step in the matter by formally closing its case, the defence would have begun to defend the action. I will also hold further that the trial court erred in closing the plaintiffs/cross-respondents' case as it did and was also not right to have aborted the trial by closing the case for the defence. In my humble view, a further adjournment in the circumstances would have better met the justice of the case. The failure of the court to bear in mind properly the antecedents of the case and the factual events in the history of the case as in my view, shows that the trial court erred in the exercise of its discretionary power with regard to the refusal of the prayer for an adjournment sought by the cross-appellant. And as the court below did not also consider the question raised in the appeal in the light of what I have said above, I must also hold that the court erred in upholding this aspect of the appeal in its judgment. It seems that the cross-appellant was right to complain that his right of fair hearing was breached by reason of the procedure adopted by the trial court to bring the case to an end.

There is no doubt at all that the principle of fair hearing is fundamental to all court procedure and proceedings, and like juris-

diction, the absence of it vitiates proceedings, however well conducted. See Salu v. Egeibon (1994) 6 NWLR (Pt. 348) 23 at 40; Ceekay Traders v. G. M. Co. Ltd. (1992) 2 NWLR (Pt. 222) 132; Atano v. A-G Bendel State (1988) 2 NWLR (Pt. 75) 201.

Fair hearing, according to our law, envisages that both parties to a case be given an opportunity of presenting their respective cases without let or hindrance from the beginning to the end. It also envisages that the court or tribunal hearing the parties' case should be fair and impartial without showing any degree of bias against any of the parties. See Elike v. Nwakwoala & Ors (1984) 12 S.C 301; Isiyaka Mohammed v. Kano N.A. (1968) 1 All NLR 424.

Having regard to the conclusions reached above, I must therefore uphold the cross-appeal of the cross-appellant. It follows that the merit of the main appeal cannot be considered having regard to the views I have held about the defective procedure adopted by the trial court in the determination of the case. The judgment and orders of the court below are therefore set aside. The case is in the circumstances remitted to the High Court of Lagos State for trial de novo before a Judge of that jurisdiction. The order as to costs is that parties shall bear their own costs.

KUTIGIJSC

The preliminary issue raised in the cross-appeal is whether or not the trial court had jurisdiction to have asked the defendant to open his defence at the time it did, when the plaintiffs' witness in the box was yet to conclude his evidence, and the plaintiffs were yet to announce a closure of their case. Directly related to this issue is the question whether or not the trial court exercised its discretion judiciously and judicially when the court refused to grant the adjournment sought for on the 15th June, 1993.

The facts have been stated in the lead judgment of my learned brother, Ejiwunmi, JSC., which I read before now and with which I agree. I do not wish to repeat anything here. On the facts I will definitely resolve the issues in favour of the defendant. The plaintiffs commenced

their case on 27/7/90 and the 1st witness was cross-examined on 10/1/91. On 107 3/91 the court granted leave that the 1st witness be recalled. However, on 15/6/93 the court proceeded to close the case of the Defence and took address when plaintiffs' case was yet to be formally closed. The court then gave judgment for the plaintiffs as claimed.

I must observe that the issue was also raised in the Court of Appeal. That court had this to say in its majority judgment on page 291 of the record -

"Having examined the proceedings of the court and having seen how protracted and having seen how protracted the case had been in the course of trial and while agreeing that adjournment was granted in favour of the appellant for about five times to enable him appear and give evidence and considering the reason given that "the defendant was engaged in another matter which was then over", it cannot be said, as contended by the learned Senior Advocate for the Respondents, and I agree with him, that the learned trial Judge exercised his discretion improperly....."

I have therefore come to the conclusion that there is nothing wrong in the exercise of the discretion of the learned trial Judge refusing to grant further adjournment for the appellant to be personally present and called to give evidence."

The minority judgment also agrees with this conclusion as shown on pages 317-318 of the record.

I think with all due respect, the court below was wrong. If the plaintiffs never concluded giving evidence in their case especially when 1st P.W. was in the witness box, it was definitely wrong for the trial court to have closed their case for them. The trial court was equally wrong when it further proceeded to call on the defence to open its case and to have refused the application for an adjournment which would enable it call its defence. The trial court went wrong again, and for the third time, when it proceeded to close the case for the defence. The parties herein were clearly never heard by the court. They were not given a fair hearing. This is fatal to the entire proceedings. The judgment delivered by the trial court being a nullity is therefore set aside. So also is the

judgment of the Court of Appeal which was founded on it. You cannot put something on nothing! The case is remitted to the Lagos State High Court for hearing de novo by another Judge. I endorse the order for costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Ejiwunmi, JSC. I entirely agree with it.

It is particularly plain from the record of the trial court that at the stage the trial court called upon the defendant to open his defence, the plaintiffs had not closed their case. The trial court similarly closed the defendant's case when his counsel asked for an adjournment to enable the defendant to come to court to start his defence. This procedure adopted by the trial court is unknown to our law.

On the state of the facts of this case I also would allow the cross-appeal. Accordingly I declare the judgment of the trial court a nullity which I hereby set aside. Similarly the judgment of the court below is also set aside. The case is remitted to the High Court of Lagos State for a retrial. I abide by the order for costs.

MUSDAPHER JSC

I have the honour to read before now the judgment of my Lord Ejiwunmi, JSC., with which I entirely agree. For the same reasons I declare the trial to be a nullity as it was conducted in breach of fair hearing. I allow the cross-appeal and abide by the orders in the leading judgment.

AKINTAN JSC

I was privileged to have read the leading judgment just delivered by my learned brother, Ejiwunmi, JSC. I entirely agree with his conclusion that the cross-appeal should succeed and that the main appeal should be struck out. The facts of the case as well as all the issues raised in the appeal are well set out in the leading judgment. I therefore need not repeat them.

The main issue canvassed in the cross-appeal is whether the approach adopted by the learned trial Judge in forcing both the plaintiffs and the defendant in the case before him to close their respective cases after he had refused a request for a further adjournment of the case. It is settled law that adjournments of cases fixed for hearing are not obtained as a matter of course. They may be granted or refused at the discretion of the court. The exercise of such discretion, however, is a judicial act which must be premised on well established legal principles. It is therefore an act against which an aggrieved party may lodge an appeal. To succeed in such an appeal, the appellant must satisfy the appellate court that the trial court acted on an entirely wrong principle or failed to take all the circumstances of the case into consideration and that it is manifest that the order would work injustice to the appellant: See *Okeke v. Oruh* (1999) 4 S.C. (Pt. II) 37; (1999) 6 NWLR (Pt. 606) 175 at 188. The facts of the instant case, as already well set out in the leading judgment, clearly reveal that the trial had suffered from numerous delays caused by applications for adjournments granted by the learned trial Judge during the course of the trial. It is now a notorious fact that trials of cases in our courts are unduly delayed as a result of numerous requests for adjournments made by counsel and granted by the courts. It is a problem which, in my view, needs to be seriously looked into and tackled strictly by our courts. To that end, the exercise of discretion to refuse an application for an adjournment of a case fixed for hearing by a trial court, should therefore not be tampered with by an appellate court as a matter of course. But in the instant case, the procedure adopted by the learned trial Judge in not ensuring that the plaintiffs closed their case before calling on the defence to present its defence is totally unacceptable. Similarly, forcing the defence to close its case abruptly is also unacceptable and strange to our procedural law.

It is therefore for the above reasons and the fuller reasons given in the leading judgment, which I also adopt, that I allow the cross-appeal and strike out the main appeal. I also make similar consequential orders as are made in the leading judgment.