

SUPREME COURT OF NIGERIA
14TH JANUARY, 2005 SC. 237/2000
CORAM:- S. M. A. BELGORE, A. I. KATSINA-ALU, U. A.
KALGO, G. A. OGUNTADE, S. A. AKINTAN, JJSC

AUGUSTUS A. NDUKAUBA APPELLANT
(Substituted by Lazarus I. Ndukauba)

AND

1. CHIEF SILAS KOLOMO RESPONDENTS
2. ATTORNEY GENERAL OF RIVERS STATE

APPEALS - Fair hearing - Fresh issue of - Raised before Supreme Court
- May be considered (H1)

PRACTICE & PROCEDURE - Fair hearing - Principle of - Connotes
inter alia a party's entitlement - To counsel of his choice (H2)

PRACTICE & PROCEDURE - Fair hearing - Hearing Notice - Should be
issued afresh by the court - To a party his counsel withdraws (H3)

PRACTICE & PROCEDURE - Fair hearing - Representation by counsel
- Where plaintiff's counsel withdraws - Court should put plaintiff on
notice (H4)

FAIR HEARING - Denial of - Is fatal to the court's judgment - As it
renders the proceedings null and void (H5)

FACTS

Before the Port Harcourt High Court, plaintiff/appellant (deceased and substituted) filed an action against the defendants/respondents. The matter is in respect of a building which appellant claimed that he is entitled to the management and enjoyment of, until the lease is determined. Respondents had acquired the property as an abandoned property. The appellant testified in support of his case, was cross examined by the

defence and closed his case thereafter. On the next adjourned date, the 1st respondent testified and was cross examined by appellant's counsel. Between 2nd March, 1992, and 15th March, 1993, the case suffered about eight adjournments.

When the case came up subsequently, appellant's counsel informed the court that for a long time he has not seen the appellant or any of his relations. The trial court eventually granted him leave to withdraw from the case, did not issue fresh hearing notice to appellant and proceeded with the case to conclusion. It dismissed the appellant's suit on the ground that he has not shown any interest or locus standi to sue. Appellant's appeal to the Court of Appeal was dismissed. Being aggrieved, he has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the procedure whereby a substantial part of the defence up to judgment on the merits in the case was conducted in the absence of the plaintiff/appellant or counsel on his behalf, infringed the rules of fair hearing.

HELD (Unanimously allowing the appeal per **OGUNTADE JSC**)

Fair hearing - Fresh issue of

1. In the appeal before the Court of Appeal, the appellant did not raise the question of fair hearing as he has now done before us. This court has however elected to consider the point because the denial of fair hearing is considered a serious matter justifying a departure from the established procedural rule that a matter not agitated before the court below could not be raised before this court. See *Saliu v. Egeibom* (1994) 6 NWLR (Pt. 348) 23 at 49 and *Sokefun v. Akinyemi* (1980) 5-7 S.C. 1. We do this however because all the relevant facts are before us and the parties have in their briefs extensively dealt with the issue. (p. 283 E)

Fair hearing - Principle of

2. In a civil case the principle of fair hearing in relation to a plaintiff translates into these:

1. A plaintiff (or any party) is entitled to counsel of his choice.

2. A plaintiff must be afforded the opportunity to call all necessary witnesses in support of his case.

3. A plaintiff by himself or counsel must have the opportunity to cross-examine or otherwise challenge the evidence of witnesses called by his adversary.

4. At the close of the case and in accordance with the relevant court rules, a plaintiff must have the same right as given to his adversary to offer by his counsel the final address on the law in support of his case. (p. 285 C)

Fair hearing - Hearing Notice

3. In the instant case, the counsel retained by the appellant decided to withdraw further appearance for the appellant in the middle of the case and this was done without any notice or information to the appellant. The result was that the evidence given by D.W.2 in support of the respondents' case went unchallenged since D.W.2 was not cross-examined, further, whereas the counsel for 1st respondent filed a final address, which presumably the trial court would have read, the same opportunity was not available to the appellant. It seems to me in the circumstances that the appellant was not enabled to fully ventilate his case. With respect to the trial Judge, I think he was mistaken not to have directed that a fresh hearing notice be served on the appellant when his counsel withdrew from the case. Had this been done, appellant would have been enabled to engage a new counsel or straighten his relationship with his old counsel or appear by himself. Appellant might even have decided to do the cross-examination of D.W.2 himself. (p. 285 F)

Fair hearing - Representation by counsel

4. 1st respondent's counsel argued in his brief that the important thing was for a party to be afforded the opportunity to defend or prosecute the claim and that a party who does not utilize the opportunity could not complain of denial of fair hearing. That submission is sound in principle. But when related to the facts in this case it becomes unhelpful. This is because the appellant could not have known that the counsel he retained

would withdraw; he had given evidence and it was for counsel to continue. Further, there is no rule of law or practice to the effect that a plaintiff must be physically present in court to prosecute his claim. All that he needs do is to call witnesses in proof of his case. The withdrawal of further appearance by counsel was not one the appellant could have reasonably envisaged. It was the trial court, which gave appellant's counsel the permission to withdraw; and the same court should have brought the development to the notice of the appellant. (p. 286 B)

C
FAIR HEARING - Denial of

5. It is also no argument of wisdom to say that the judgment of the trial court would have been the same even if the appellant had fully participated. The denial of fair hearing to a party is often fatal to the judgment of the court. In *Salu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23 at 44, this court per Wali, JSC., observed:

"It has also to be remembered that the denial of fair hearing was a breach of one of the rules of natural justice, that is, the requirement that a party must be given a fair hearing. The consequence of a breach of the rule of natural justice of fair hearing is that the proceedings in the case are null and void. See Adigun v. Attorney-General of Oyo State (1987) 1 NWLR (Pt. 53) 678. If a principle of natural justice is violated, it does not matter whether if the proper thing had been done, the decision would have been the same, the proceedings will still be null and void. In other words, if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

The result is that the decision of the trial court and the court below confirming that decision must be set aside. This case must be heard de novo. The decision reached on the 1st issue for determination has rendered it unnecessary to consider the other issues. (p. 286 E)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Appellant was denied a hearing

The appellant had given evidence in the case as a plaintiff and it only remained for his counsel, who normally was presumed to have been fully briefed to continue with other witnesses and cross-examine defence witnesses. By withdrawing from the case on the excuse that he “never saw his client”, in this case, was unusual. Was he not briefed? Having been allowed to so withdraw from the case after leading his client midstream, the court ought to issue a Hearing Notice to the appellant so that he could make arrangement for a new counsel. To continue hearing the case in his absence amounted to hearing without giving him notice.

It is therefore clear that procedurally he was not given a hearing subsequent to the withdrawal of his counsel from the case. Thus there was no fair hearing from that stage amounting to a miscarriage of justice. (p. 287 D)

KALGO JSC

2. Principle of fair hearing - Implications

The principle of fair hearing implies that both sides to a case must be given an opportunity to present their respective cases. It also implies that each side is fully entitled to know what case is being made against it and to be given the opportunity to respond thereto. Fair hearing also imposes some obligations on the tribunal or court hearing the parties’ cases, and fundamentally the court or tribunal should not take or hear evidence in a case or receive any submissions or representation from one party at the back of the other.

Also fair hearing involves fair trial or vice versa and in all cases what is required is that from the observation of persons present at any trial or investigation justice must appear to be done in the case. And the fact that the appellant was not in court on various occasions before the withdrawal of his counsel from the case, does not mean that he waives his right to fair hearing or trial, since all trials in court must conform with settled principles of justice. (p. 288 H)

AKINTAN JSC

3. Fair hearing should not be sacrificed to the need for speedy trials

The law attaches great importance to the rule of fair hearing. It follows therefore that the effect of a breach of the rule of audi alteram partem or of fair hearing is to render the hearing liable to be set aside or declared invalid by the court. The court will treat the situation as if such a hearing never in fact took place. Also the desire of a court to dispose as many cases as possible, while understandable and expedient, should not be at the expense of giving a party a fair hearing. (p. 294 E)

REPRESENTATION

Dr. I. N. Ijiomah, for the Appellant.

Chief F. D. Lott, (with him, Mr. M. M. Kalu), for the Respondents.

CASES REFERRED TO

Salu v. Egeibon (1994) 6 NWLR (Pt. 348) 23 at 44

Elite v. Nwan-Kwoala & Ors (1984) 12 S.C. 301

E Oyeyemi v. Commissioner for Local Government, Kwara State (1992) 2 NWLR (Pt. 226) 661 at 685

Olumesan v. Ogundepo (1996) 2 NWLR (Pt. 433) 628

Mohammed v. Kano N. A. (1968) 1 All NLR 42

F Unongo v. Aper Aku & Ors. (1983) 11 S.C. 129 at 179

Sokefun v. Akinyemi (1980) 5-7 S.C. 1

Madukolu v. Nkemdilim (1962) 2 SCNLR 341

Adigun v. Attorney-General of Oyo State (1987) 1 NWLR (Pt. 53) 678

G Otapo v. Summonu (1987) NWLR (Pt. 58) 587 at 60

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999 s. 36(1)

H

LEAD JUDGMENT BY OGUNTADE JSC

This appeal is another reminder of the old abandoned property conundrum from Rivers State. Augustus A. Ndukauba, now deceased

commenced an action in 1988 against the respondents in this appeal claiming for:

(i) A declaration that the plaintiff is the person entitled to the control, management and enjoyment of the property known as Plot 138, Gborokiri (Borokiri) Layout (8 Etche Street) Port-Harcourt until the termination of the building lease in respect of the said plot. B

(ii) A perpetual injunction restraining the defendants, their servants and/or agents from interfering with plaintiff's control management and enjoyment of the said plot until the determination of the lease of the property. C

In the course of proceedings before the Port-Harcourt High Court of Rivers State, the plaintiff Augustus, A. Ndukauba died and his son, the present appellant was substituted for him. The parties later filed, and exchanged pleadings after which the case proceeded to hearing before Tabai, J., (as he then was). D

At the conclusion of hearing the trial court in its judgment on 21/6/93 dismissed the appellant's suit on the ground that "*he has not shown any interest or locus standi to sue.*" E

Dissatisfied, the appellant brought an appeal before the Court of Appeal, Port-Harcourt (Coram: Ogene, Pats-Acholonu and Ikongbeh, JJCA). The said court in a unanimous judgment affirmed the judgment of the trial court and dismissed the appeal. The appellant has brought a further appeal before this court on five grounds of appeal. The issue distilled for determination in this appeal from the five grounds of appeal are these: F

"(I) Whether the procedure whereby a substantial part of the defence up to judgment on the merits in the case was conducted in the absence of the plaintiff/appellant or counsel on his behalf, infringed the rules of fair hearing. G

(II) Whether the power of attorney (Exhibit B) in this case is a document that requires the consent of the governor in a transaction affecting land. H

(III) Whether the power created under the irrevocable power of attorney (Exhibit B) executed in favour of appellant's late father sur-

vived the plaintiff's late father for the benefits of the plaintiff/appellant by inheritance.

(IV) Was the Court of Appeal right in upholding the judgment of the trial court ordering dismissal of the plaintiff/appellant's case instead of striking it out."

The 1st respondent filed a brief but the 2nd respondent did not. In the 1st respondent's brief three issues were formulated as arising for determination in the appeal. Because the decision in this appeal turns only on the procedural point agitated in appellant's first issue, it suffices here for me to observe that the 1st respondent's first issue for determination is similar in substance to the appellant's first issue.

The facts relevant to the solitary issue to be considered are these: The appellant, who as I observed earlier was the plaintiff before the trial court testified in support of his case as P.W. 1 and was cross-examined by each of the defence counsel for 1st and 2nd respondents. The appellant after his testimony closed his case, which was then adjourned to 16/12/91. On the next date the 1st respondent testified and was cross-examined by appellant's counsel. Between the 2nd March, 1992 and 15th March 1993, the case suffered about eight adjournments. When the case next came up on 22/4/92, the minutes of proceedings for that day read:

"Plaintiff absent
1st defendant present
S. J. Ofoluwa, for the plaintiff
C. A. Egi, for the 1st defendant.

Mr. Ofoluwa for the plaintiff informs me that for a long time he has not seen his client the plaintiff nor any of his relations. He said that since the case is also fixed for the 28/4/92, he applies that the matter be adjourned till that day so that if he does not see the plaintiff before then he would apply to withdraw.

Application granted.
Adjourned to the 28/4/93 for mention."

On 28/4/93, the plaintiff was again absent. The record of court as to what counsel who appeared for him said reads:

"Plaintiff counsel says he has not seen the plaintiff for a long

time. Nor has he seen any of his relations. He said that in the circumstances, he cannot continue to appear to prosecute a claim whose plaintiff does not come to court. He therefore, asks for leave to withdraw from the case.

Application is granted.

B

Case stood down.”

The propriety of counsel applying to withdraw from a civil case in which as plaintiff’s counsel he had prepared pleadings and led plaintiff’s only witness in evidence is not an issue before me in this appeal. Neither is the correctness of the order of the trial court allowing counsel to withdraw. I refrain from saying anything further on both. C

Now, there were no minutes on the record of the court on 28/4/93 as to the next date of hearing. However, the case came up the following day, that is, 29/4/94. The 2nd witness for the defence testified as D.W.2. The case was later adjourned to enable the 1st respondent’s counsel file a written final address. This was filed on 19/5/93. On the 21/6/93, the trial Judge delivered judgment in the terms earlier stated. D

In the appeal before the Court of Appeal, the appellant did not raise the question of fair hearing as he has now done before us. This court has however elected to consider the point because the denial of fair hearing is considered a serious matter justifying a departure from the established procedural rule that a matter not agitated before the court below could not be raised before this court. See Salu v. Egeibom (1994) 6 NWLR (Pt. 348) 23 at 49 and Sokefun v. Akinyemi (1980) 5-7 S.C. 1. We do this however because all the relevant facts are before us and the parties have in their briefs extensively dealt with the issue. E F G

The relevant facts were undisputed. Appellant’s counsel has argued before us that the proper course open to the trial court was to have adjourned the case and to order that a fresh hearing notice be served on the appellant or at the worst strike out or dismiss the suit for want of H prosecution. Counsel relied on Mohammed Ndejiko Mohammed & 4 Ors. v. Hussein & Anor. (1998) 11-12 S.C. 135; (1998) 14 NWLR (Pt. 584) 108; Saudu v. Mohammed (1998) 2 NWLR (Pt. 536) 130; counsel fur-

ther argued that it was a denial of the appellant's right to fair hearing as enshrined in the Nigerian Constitution for the trial court to proceed with the hearing of the case to conclusion without any notice being given to the appellant: *Salu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23 and *Ebak Iron v. Irek Okimba* (1998) 2 SCNJ 1 at 5.

The 1st respondent's counsel argued that fair hearing meant no more than a hearing which was fair to both parties. *Ndu v. State* (1990) 7 NWLR (Pt. 164) 550. He submitted that a party who failed to avail himself of the opportunity afforded him to defend or prosecute his claim in court could not complain of a denial of his right to fair hearing - *Ekerebe v. Efeizomor* (1993) 7 NWLR (Pt. 307) 588.

Section 36(1) of the Constitution of the Federal Republic of Nigeria (1999) provides:

"In the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

The clear elements of Section 36(1) above are:

1. There must be a fair hearing.
2. The court or tribunal must be one established by law.
3. The adjudicatory process must be conducted within a reasonable time.
4. The adjudicators must be independent and impartial.

The aspect of the above elements under consideration in this appeal relates to the fairness of the hearing before the court of trial. The question is: was the appellant's right to a fair hearing of his suit compromised in the proceedings before the trial court? In *Otapo v. Summonu* (1987) NWLR (Pt. 58) 587 at 60, this court per Obaseki, JSC., considered the nature of this concept of fair hearing thus:

"A hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused a hearing or not given an opportunity to be heard, the hearing cannot qualify as a fair hearing.Without fair hear-

ing, the principles of natural justice are abandoned; and without the guiding principles of natural justice, the concept of the Rule of Law cannot be established and grow in the society. As aptly stated by Nnamani, JSC., in Ex Parte Olakunrin (1985) 1 NWLR 652 at 668.

The principles of natural justice are part of the pillars that support the concept of Rule of Law. They are indispensable part of the process of adjudication in any civilized society. The twin pillars on which they are built are – the principles that one must be heard in his own defence before being condemned and that, put shortly, no one should be a judge in his own cause.”

In a civil case the principle of fair hearing in relation to a plaintiff translates into these:

- 1. A plaintiff (or any party) is entitled to counsel of his choice.**
- 2. A plaintiff must be afforded the opportunity to call all necessary witnesses in support of his case.**
- 3. A plaintiff by himself or counsel must have the opportunity to cross-examine or otherwise challenge the evidence of witnesses called by his adversary.**
- 4. At the close of the case and in accordance with the relevant court rules, a plaintiff must have the same right as given to his adversary to offer by his counsel the final address on the law In support of his case.**

In the instant case, the counsel retained by the appellant decided to withdraw further appearance for the appellant in the middle of the case and this was done without any notice or information to the appellant. The result was that the evidence given by D.W.2 in support of the respondents’ case went unchallenged since D.W.2 was not cross-examined, further, whereas the counsel for 1st respondent filed a final address, which presumably the trial court would have read, the same opportunity was not available to the appellant. It seems to me in the circumstances that the appellant was not enabled to fully ventilate his case. With respect to the trial Judge, I think he was mistaken not to have directed that a fresh hearing notice be served on the appellant when his counsel with-

drew from the case. Had this been done, appellant would have been enabled to engage a new counsel or straighten his relationship with his old counsel or appear by himself. Appellant might even have decided to do the cross-examination of D.W.2 himself.

B 1st respondent's counsel argued in his brief that the important thing was for a party to be afforded the opportunity to defend or prosecute the claim and that a party who does not utilize the opportunity could not complain of denial of fair hearing. That submission is sound in principle. But when related to the facts in this case it becomes unhelpful. This is because the appellant could not have known that the counsel he retained would withdraw; he had given evidence and it was for counsel to continue. Further, there is no rule of law or practice to the effect that a plaintiff must be physically present in court to prosecute his claim. All that he needs do is to call witnesses in proof of his case. The withdrawal of further appearance by counsel was not one the appellant could have reasonably envisaged. It was the trial court, which gave appellant's counsel the permission to withdraw; and the same court should have brought the development to the notice of the appellant.

F It is also no argument of wisdom to say that the judgment of the trial court would have been the same even if the appellant had fully participated. The denial of fair hearing to a party is often fatal to the judgment of the court. In *Salu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23 at 44, this court per Wali, JSC., observed:

G *"It has also to be remembered that the denial of fair hearing was a breach of one of the rules of natural justice, that is, the requirement that a party must be given a fair hearing. The consequence of a breach of the rules of natural justice of fair hearing is that the proceedings in the case are null and void. See Adigun v. Attorney-General of Oyo State (1987) 1 NWLR (Pt. 53) 678. If a principle of natural justice is violated, it does not matter whether if the proper thing had been done, the decision would have been the same, the proceedings will still be null and void. In other words, if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision*

would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.”

The result is that the decision of the trial court and the court below confirming that decision must be set aside. This case must be heard de novo. The decision reached on the 1st issue for determination has rendered it unnecessary to consider the other issues.

The appeal is allowed with N10,000 costs against the respondents. Suit is to be tried de novo.

BELGORE JSC

I read the judgment of my learned brother, Oguntade, JSC., in draft and I agree that this appeal has great merit. The appellant had given evidence in the case as a plaintiff and it only remained for his counsel, who normally was presumed to have been fully briefed to continue with other witnesses and cross-examine defence witnesses. By withdrawing from the case on the excuse that he “never saw his client”, in this case, was unusual. Was he not briefed? Having been allowed to so withdraw from the case after leading his client midstream, the court ought to issue a Hearing Notice to the appellant so that he could make arrangement for a new counsel. To continue hearing the case in his absence amounted to hearing without giving him notice.

It is therefore clear that procedurally he was not given a hearing subsequent to the withdrawal of his counsel from the case. Thus there was no fair hearing from that stage amounting to a miscarriage of justice.

I therefore allow this appeal for the foregoing reasons and the fuller reasons in the judgments of my learned brother, Oguntade, JSC. I award N10,000.00 costs against the respondent.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Oguntade, JSC., in this appeal. I agree with it and, for the

reasons he has given I, too, allow the appeal and order a re trial.

I abide by the order for costs.

KALGO JSC

B

I have had the privilege of reading in draft the judgment of my learned brother, Oguntade, JSC., just delivered. I agree that there is merit in this appeal and that it should be allowed.

C

The facts giving rise to this appeal have been carefully and comprehensively set out in the leading judgment and I do not intend to add anything thereto. In this court, the appellant raised 4 issues for determination. The 1st issue, which in my view is the main substantive issue in the appeal, the determination of which will affect the outcome of the

D appeal itself, reads :-

“Whether the procedure whereby a substantial part of the defence up to judgment on the merits in this case was conducted in the absence of the plaintiff/appellant or counsel on his behalf infringed the rules of fair hearing”.

E

This issue touches on the well known adage in legal parlance called “fair hearing”. It is not in dispute that in this case, the appellant, who was the plaintiff at the trial court, was absent in court and his own counsel was permitted to withdraw from the case when the defence of the respondent was conducted. In addition the counsel to the respondent after closing his defence was allowed to file a final address in court without the knowledge of or giving such opportunity to the appellant.

F

This means that the appellant was unable to cross-examine the defence witnesses of the respondent or submit a final address in the trial court. What is more, the learned trial Judge did not call upon the appellant after the withdrawal of his counsel to know his stand on the case. The learned trial Judge gave judgment in favor of the respondents and dismissed the

G

H appellant’s claims on the evidence before him.

The principle of fair hearing implies that both sides to a case must be given an opportunity to present their respective cases. It also implies that each side is fully entitled to know what case is being made against it

and to be given the opportunity to respond thereto. Fair hearing also imposes some obligations on the tribunal or court hearing the parties' cases, and fundamentally the court or tribunal should not take or hear evidence in a case or receive any submissions or representation from one party at the back of the other. (See *Elite v. Nwan-Kwoala & Ors* (1984) 12 S.C. 301. B

Also fair hearing involves fair trial or vice versa and in all cases what is required is that from the observation of persons present at any trial or investigation justice must appear to be done in the case. See *Mohammed v. Kano N. A* (1968) 1 All NLR 42; *Unongo v. Aper Aku & Ors.* (1983) 11 S.C. 129 at 179. And the fact that the appellant was not in court on various occasions before the withdrawal of his counsel from the case, does not mean that he waives his right to fair hearing or trial, since all trials in court must conform with settled principles of justice. D See *Ariori & Ors. v. Muraino Elemo & Ors.* (1983) 1 S.C. 12 at 19-20.

The right to fair hearing is entrenched in Section 36(1) of the 1999 Constitution which is in *pari materia* with Section 33(1) of the 1979 Constitution which applied to this case and courts are bound to comply E with these provisions. And although the issue of fair hearing was raised in this case only in this court on appeal, this court granted the leave to raise and argue it.

It is very clear to me that having regard to the facts and circumstances of this case, the rules of natural justice and the principle of fair F hearing had been contravened by the trial court in this case. The result of this breach is that the proceedings of the court in the case will be null and void. See *Salu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23 at 41-42. I answer issue 1 in the affirmative. G

For the above and the more detailed reasons given by my learned brother, Oguntade, JSC, in the leading judgment, I also do not consider it necessary to consider the other 3 issues raised by the appellant, and I accordingly find merit in the appeal. I allow it and set aside the decision H of the Court of Appeal and remit the case for trial *de novo* in the trial High Court. I award N 10,000.00 costs in favour of the appellant against the respondents.

AKINTAN JSC

The original plaintiff in this case, Augustus A. Ndukauba, instituted this action at Port Harcourt High Court in Rivers State as suit No. PHC/262/88. His claim was for (i) a declaration that the plaintiff is the person entitled to the control, management and enjoyment of the property at plot 138, Gborokiri Layout Port Harcourt until the determination of the building lease in respect of the said plot; and (ii) a perpetual injunction restraining the defendants, their servants and or agents from interfering with the plaintiff's control, management and enjoyment of the said plot until the determination of the lease. The plaintiff died in the course of the hearing at the High Court and he was substituted by his son, Lazarus I, Ndukauba. The trial took place before Tabai, J., (as he then was).

The plaintiff's case is that one Joseph Ezeakunne was granted a lease of the property in dispute by then Eastern Nigeria Government. The lease was admitted as Exhibit A at the trial. The original plaintiff (the substituted plaintiff's father), was granted an irrevocable power of attorney (Exhibit B), by the said Joseph Ezeakunne to manage and control the property. Pursuant to the irrevocable Power of Attorney, the plaintiff's father built a 16 room house on the land but during the civil war, the property was categorized as an abandoned property. The property was, however, released to the lessee after the civil war. The instrument of release was admitted as Exhibit C. But in 1982, the plaintiff received information that the 1st defendants claimed ownership of the house by purchase from the Rivers State Government. This was the basis of the plaintiff's action. The 2nd defendant admitted selling the property to the 1st defendant as an abandoned property.

The defendants' case was that the plaintiff lacked locus standi to prosecute the claim in that the Power of Attorney executed in favour of his late father by the lessee was not with the consent of the Governor of Rivers State which was a pre-condition prescribed in the deed of lease. The learned trial Judge accepted the contention put across by the defence and dismissed the plaintiff's action. On appeal to the Court of Appeal, his appeal was also dismissed. The present appeal is against the decision of the Court of Appeal.

The appellant formulated four issues in the appellant's brief filed in this court. One of these issues was raised for the first time in this court. It is issue I which is:

"Whether the procedure whereby a substantial part of the defence up to judgment on the merits in this case was conducted in the absence of the plain tiff/appellant or counsel on his behalf, infringed the rules of fair hearing." B

The appellant based his attack on the proceedings of the trial court when it took the evidence of D.W.2 in the absence of the plaintiff and his counsel. At the resumed hearing of the case on 28 April, 1993, the plaintiff was recorded as being absent but the 1st defendant was present. Learned counsel for the plaintiff was present. The proceedings for that day as recorded by the learned trial Judge is as follows:

"Resumed on Wednesday the 28th day of April, 1993. D

Plaintiff absent.

*1st defendant present. O. D. A. Alegbe for
Ofoluwa for the plaintiff*

C. A. Esi for the 1st defendant. E

Plaintiff counsel says he has not seen the plaintiff for a long time. Nor has he seen any of his relations. He said that in the circumstances he cannot continue to appear to prosecute a claim whose plaintiff does not come to court. He therefore asks for leave to withdraw from the case. Application is granted. Case is stood down." F

At the resumed hearing, which was on the following day, 29th April, 1993, the plaintiff was recorded as absent and no counsel appeared for him too. Mr. C. A. Esi was recorded as appearing as counsel for the 1st respondent. The learned trial Judge then proceeded to take the evidence of D.W.2. The witness was not cross-examined and at the conclusion of the evidence of D.W.2, the learned Judge's record is as follows:

"Adjourned to the 10/5/93 for the admission of a written address as requested by counsel....." H

Only the 1st respondent's counsel submitted a written address. The learned Judge thereafter delivered his judgment in the case on 21/6/93. It is this procedure adopted by the learned Judge that was attacked as

amounting to lack of fair hearing and denial of justice.

It is necessary at this juncture to briefly go into the history of the case. The claim was filed in court on 30th June, 1988. The actual trial started with the evidence of the substituted plaintiff who testified as P. W. 1 on 27th November, 1989 and his evidence was concluded in 1991. Further hearing was on that day adjourned to 14/10/91. The parties were recorded as present at the hearing on that day. The plaintiff was also present at the resumed hearing on 14/10/91 when learned counsel for the plaintiff informed the court that the plaintiff was closing his case and the case was adjourned to 16th and 18th day of December, 1991 for defence. It was not on record that the court sat on the two afore-mentioned dates fixed for the defence. The next date when the court deliberated over the case was on 20/2/92. The plaintiff was recorded as absent on that day but learned counsel for the parties were present. D.W. 1 gave evidence on that day and he was duly cross-examined by learned counsel for the plaintiff. Further hearing in the case was then adjourned to 2nd and 3rd March, 1992. The plaintiff and his counsel were present in court at the resumed hearing on 2/3/92 but the case had to be adjourned to 6th and 13/4/92 at the request of the defendant. The next date the case came up was 13/4/94. The plaintiff was absent; but his counsel was in court. The case was on that day adjourned to 19th and 22/5/92. When the case came up on 19/5/92, the plaintiff was absent and the matter was adjourned to 29/5/92. No reason for adjournment was recorded and no counsel was recorded as present on that day. The matter was however adjourned to 28th and 29/5/92. It was not on record that the case came up on any of the adjourned dates of 28th or 29/5/92.

The next time the case came up was 6/7/92. The plaintiff was absent on that day and no counsel was recorded as present in court on that day. The matter was on that day adjourned to 28/7/92 for mention. Also on 28/7/92 when the case came up, the parties were again absent but the plaintiff's counsel was present. The matter was then adjourned to 21/10/92 at the request of counsel for the defendant who wrote for an adjournment. On 21/10/92, the plaintiff was also absent but both counsel were present. The case was however further adjourned to 9/12/92 and

the court did not give any reasons why the trial could not proceed on that day. At the hearing on 9/12/92, the plaintiff was also absent but his counsel was present. The case was again adjourned to 4th and 6/12/93 at the request of learned counsel for the defendant. The next time the case came up was on 15/3/93 and the plaintiff was absent while both counsel B in the case were present. Again the matter was adjourned to 22/4/93 without giving any reason for the adjournment. When the case came up on 22/4/93, the plaintiff was again absent but both counsel were present. The record of proceedings for that day reads, inter alia, thus:

“Mr. Ofoluwa for the plaintiff informs me that for a long time he C has not seen his client, the plaintiff nor any of his relations. He says that since the case is also fixed for the 28/4/93 he applies that the matter be adjourned till that day so that if he does not see the plaintiff before then, D he would apply to withdraw. Adjourned to the 28/4/93 for mention.”

It was at the resumed hearing of the court on 28/4/93, already reproduced earlier above, that the learned counsel applied to withdraw from the case on the ground that he could still not find his client. The court granted the request, stood down the case and thereafter proceeded E to take the evidence of D.W.2 and continued the trial up to conclusion and judgment in the absence of either the plaintiff or his counsel.

I have taken the pains to set out in detail what took place on each occasion when the matter came up before the learned trial Judge. This is F necessary in determining if in fact the appellant had been denied fair hearing. The principle of fair hearing is not only a common law right but also a constituted right guaranteed under Section 33(1) of the 1979 Constitution and now under Section 36(1) of the 1999 Constitution. Fair G hearing within the meaning of Section 36(1) means nothing less than a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties. It envisages the age-long accepted principle of compliance with the principle of natural justice in its narrow technical sense of the twin pillars - namely audi alterant partem and nemo iudex in H causa sua: See *Ntukidem v. Oko* (1968) 5 NWLR (Pt. 44) 909; *Bamigboye v. University of Ilorin* (1999) 6 S.C. (Pt. II) 72; (1999) 10 NWLR (Pt. 622) 290; and *U.N.T.H.M.B. v. Nnoli* (1994) 8 NWLR (Pt. 363) 376.

An important essence of the right to fair hearing is that a party should not be denied of the opportunity of not only fully presenting his case but must be afforded full opportunity to present his defence to the defence being put up against his case: see *Tunbi v. Opawole* (2000) 1 S.C. 1 (2000) 2 NWLR (Pt. 644) 275. The test of measuring fairness of a proceedings in the High Court or court of first instance is different from that in the appellate court. Thus, the test at the court of first instance is the impression of any reasonable person who was present at the trial. But in the appellate court, the test is whether having regard to the rules of court and the law, justice has been done and appears to have been done to the parties: see *Tunbi v. Opawole* *supra*. Again a hearing can only be fair when all the parties to the dispute before the court are given a hearing. If therefore one of the parties is refused a hearing or not given opportunities to be heard, the hearing cannot qualify as fair hearing. See *Olumesan v. Ogundepo* (1996) 2 NWLR (Pt. 433) 628; *Otapo v. Summonu* (1987) 2 NWLR (Pt. 58) 587; and *Gukas v. Jos Int. Breweries Ltd.* (1991) 6 NWLR (Pt. 199) 614. The right to fair hearing does not stop with the parties being present in court. It also includes a right to be heard at any material stage of the proceedings. See *Agbahomovo v. Eduyegbe* (1999) 2 S.C. 79; (1999) 3 NWLR (Pt. 594) 170; *Ekuma v. Silver Eagle Shipping Agencies Ltd.* (1987) 4 NWLR (Pt. 65) 472. The law attaches great importance to the rule of fair hearing. It follows therefore that the effect of a breach of the rule of *audi alteram partem* or of fair hearing is to render the hearing liable to be set aside or declared invalid by the court. The court will treat the situation as if such a hearing never in fact took place. See *Oyeyemi v. Commissioner for Local Government, Kwara State* (1992) 2 NWLR (Pt. 226) 661 at 685; and *Olumesan v. Ogundepo*, *supra*. Also the desire of a court to dispose as many cases as possible, while understandable and expedient, should not be at the expense of giving a party a fair hearing see *Olumesan v. Ogundepo* *supra*, 628 at 653.

The facts of the instant case, as set out above, clearly show that there were a number of serious and grave flaws in the procedure adopted by the learned trial Judge. In the first place, there seems to be total absence on record whether the second defendant, Attorney-General of Rivers

State, was put on notice before the trial started. The failure or omission is enough to render the entire trial a nullity since it is a pre-condition that before a court could assume jurisdiction, all the parties must be properly served with the court process. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341). Again it was not on record that the learned trial Judge ever B ordered hearing notices to be issued on the absent parties when they failed to show up during the numerous occasions they failed to turn up for the trial, particularly when both parties had counsel failed to appear. Finally is the decision of the learned Judge to immediately proceed with the trial up to judgment after he granted the request from learned counsel C for the plaintiff to withdraw from the case on the ground that he had not seen his client for quite some time. All these omissions are grave enough to justify the allegation that the appellant had been denied fair hearing. The result of denial of fair hearing is, as already stated above, that the D entire proceedings is a nullity.

For the above reasons and the fuller reasons given in the leading judgment just delivered by my learned brother, Oguntade, JSC., the draft of which I had read and adopted, I also allow the appeal, set aside the E judgment and orders made by the learned trial Judge and the judgment of the Court of Appeal. In their place, I hereby order that the case be remitted back to High Court of Rivers State to be heard de novo by a judge of that judiciary. I make similar order on costs as made in the lead judgment. F

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