

SUPREME COURT OF NIGERIA
13TH MAY, 2005. SC. 80/2000
CORAM:- S. M. A. BELGORE, S. U. ONU, U. A. KALGO,
N. TOBI, D. O. EDOZIE, JJSC

1. MAGNA MARITIME SERVICES LTD. APPELLANTS

2. U. D. U. ETUK

AND

1. S. A. OTEJU RESPONDENTS

2. GOLDEN RULE (NIG.) LIMITED

APPEALS - Objection - Courts - Where Court of Appeal fails to consider preliminary objection - Supreme Court is in a position to examine it (H1)

JUDGMENTS - Fair hearing - Default judgment - Is justifiable - Where a party employed delay tactics holding Court to ransom - And the judgment does not amount to denial of fair hearing (H2)

COURTS - Judgments - Legal practitioners - Where a party's case fails - For negligence of Counsel - It does not amount to - Visitation of Counsel's sin on the client (H3)

APPEALS - Judgments - Finality of - Absence of counsel - Where judgment of trial court is final - Appeal is an appropriate remedy (H4)

FACTS

Before the Federal High Court Lagos, the plaintiffs/appellants filed an action against the defendants/respondents. The claim was to recover the sum of about N2.8 million in respect of auto gas oil supplied to the respondents. The Court ordered that the appellant is granted 7 days from the date of the order to file its statement of claim and 21 days from date of service for the respondent to file statement of defence. The appellants filed and served the statement of claim within time but the respondents failed to file their statement of defence. Rather they filed a motion seeking

to set aside the service of the writ of summons for non compliance with Court Rules.

The trial Court held that the service was in accordance with Order 10 Rule 16 of the Federal High Court Rules. The respondents filed another application which was struck out. They further made an application for stay of proceeding which was also struck out. The actual trial commenced and while trial was going on, counsel for the respondents walked out of Court without the leave of the judge on the excuse that he was sick. The respondents later filed another application for stay of proceedings which was dismissed. The trial court at last delivered judgment in favour of the appellants. The respondents not being satisfied with that decision, appealed to the Court of Appeal. The appellants also cross appealed. The court allowed the main appeal and remitted the case to the trial court for a retrial. The appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the court below denied the plaintiff fair hearing by refusing to consider and make findings on the validly raised preliminary objection challenging the jurisdiction of the court in entertaining defendants’ appeal in any event.

2. Was the court below right in holding that the trial court denied the defendants fair hearing on 4/11/97 having dismissed an application filed by the defendants for stay of proceedings and proceeded and delivered judgment reserved?

3. Having regard to the circumstances of the suit, was the court below right in holding that the trial court visited the sin of Mr. Adeyemo, Esq., the defendants’ former counsel on the defendants.

4. Whether the court below was right when it held that the appropriate remedy open to the defendants on 4/11/97 was to appeal rather than comply with the provisions of Order 39 Rule 5 of Federal High Court Civil Procedure Rules (1990) Cap.34 Laws of the Federation.

5. Whether the court below was right in refusing to make findings on the plaintiffs’ cross-appeal.”.

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

APPEALS - Objection - Courts

1. This showed that the Court of Appeal has clearly identified the Notice of Appeal in respect of which the notice of preliminary objection was given; that is Notice of Appeal of 5th November, 1997. It declared as incompetent the Notice of Appeal of 3rd July, 1997 but said nothing about that of 5th November, 1997. But it went ahead in the judgment to set out the three grounds of appeal in it and went further to say that the three issues formulated from them “*substantially flow from the said three grounds of appeal*”. The Court of Appeal then proceeded to deal with the appeal in the normal way up to the end. From this, it appears to me that the Court of Appeal found nothing wrong with the notice of appeal of the main appeal of 4th November, 1997, and would appear to have overruled the preliminary objection. Even if it did not, I think by virtue of Section 22 of the Supreme Court Act, I am in a position to examine the issue as a matter of law. I have carefully studied the arguments of counsel in the preliminary objection in their respective briefs including the cases cited in support thereof and I am of the considered view that the grounds of appeal in the Notice of Appeal filed on 5/11/97, are quite proper having regard to the contents of the judgment of 4/11/97 complained about. I also agree with the Court of Appeal that the three issues formulated by the respondent thereon were properly distilled from the said grounds. That is the end of the notice of preliminary objection. (p. 1416 A)

Fair hearing - Default judgment

2. From the above, it is abundantly clear that the respondents’ counsel filed not less than 4 applications at different times from the 29th of April, 1996 (when the trial court ordered filing of pleadings) to 4/11/97 (when the ruling on his last application was delivered) a period of about 17 months. Up-till that time, he had not filed the Statement of Defence even though the trial court had continually reminded him of this on more than 3 occasions in the course of the proceedings. What is more even after the respondents’ counsel walked out on the trial Judge in the course of the proceedings, the latter still ordered hearing notice to be served on the former to appear at the next hearing date. In sum, there is no doubt in my mind that by the

conduct of the respondents' in these proceedings, he had taken upon himself deliberate decision to delay the whole proceedings and when he finally withdrew in October, 1997, he had already put the respondents' case in jeopardy. It is well established and generally accepted as true that
 B "justice delayed is justice denied." Therefore, the decision of the learned trial Judge to proceed to read her judgment on the case itself, after reading the ruling on application for stay of proceedings, is in my respectful view, most reasonable and justifiable in the circumstances of this case. The
 C learned counsel for the respondents was granted all the opportunities available to file the defence of his clients in the matter but he decided not to do so but instead filed numerous applications to delay and frustrate the trial court. In fact, the case was adjourned for more than a total of 17 times at the instance of the respondents' counsel.

D The trial court is therefore more than justified to proceed to deliver its judgment under those circumstances enumerated above as no party to a case is entitled to hold the court to ransom at his or her own whims and caprices.

E In the circumstances, therefore, it is just and equitable for the learned trial Judge to deliver the judgment at the time she did.
 (pp. 1418 H & 1420 B)

F ***Judgments - Legal practitioners - Where a party's case fails***

3. From the above, it is very clear that the decision to proceed to deliver the judgment without hearing the application for extension of time to file defence, was not, as the Court of Appeal said, visitation of the sin of the counsel on the respondents. All that the trial court was saying was that as
 G Mr. Adeyemo was their counsel in the case, the respondents were bound by all actions or non-actions taken by him and this is a true fact. She was not penalizing the respondents for the negligent acts of their counsel. For these reasons, and having regard to the facts and circumstances of this
 H case, I am of the view that the Court of Appeal was wrong in holding that the trial court visited the sin of Mr. Adeyemo of counsel on the respondents by reading the judgment on 4/11/97. (p. 1421 F)

Judgments - Finality of

4. The judgment under consideration was delivered on 4/11/97. On that day, the learned counsel for the respondents was present in court but walked out of court shortly before the judgment was delivered. The judgment was against the respondents and since it was delivered in the absence of their counsel, Order 39 Rule 5 above may be applicable. But since the judgment of the trial court was a final decision of that court, an appeal lies to the Court of Appeal by virtue of the provisions of Section 220 of the 1979 Constitution which is applicable to this case. Therefore, the respondents had, in my view, the option of either to go back to the trial court and apply there to set aside the judgment under Order 39 Rule 5 above or file an appeal against the judgment in the Court of Appeal under Section 220 of the 1979 Constitution. The Court of Appeal, in its judgment did not say that the appellant could only appeal in this case, but it said that the respondent was exercising its constitutional right by appealing to it for setting aside the judgment. I entirely agree with that court on this, and hold that an appeal is an appropriate remedy in this case and gives the court and the parties better opportunity of considering the case on appeal. (p. 1422 C)

NOTABLE POINTS OF INTEREST**TOBI JSC*****1. Duty of counsel to be of good behaviour***

The proceedings show that he walked out on or from the court without permission on the alleged ground of ill health. The Rules of Professional Conduct in the Legal Profession set out minimum standard of conduct and behaviour of advocates in courts of law, including tribunals and counsel have a duty to maintain such minimum standard of conduct and behaviour. By Rule 1 of the Rules of Professional Conduct, it is the duty of the lawyer to maintain towards the court, respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Rule 3 enjoins a lawyer to display a dignified and respectful attitude towards the presiding Judge, again, not for the sake of his person, but for the maintenance of respect for and confidence in the

judicial office.

Counsel who is ill or indisposed has a duty to apply for adjournment of the case to enable him seek medical assistance. He has no right whatsoever to walk out on or from the court just like that. That is certainly
B a rude and unprofessional conduct, unbecoming of a legal practitioner, I condemn the conduct of the counsel. (p. 1424 B)

2. Court is to apply the rules in line with fair hearing

C A court of law can indulge a party only within the confines of its rules. In other words, a court of law can indulge a party in so far as its rules permit. Where rules of court in line with the fair hearing principles order a specific conduct on the part of the parties, the court has a duty to enforce the rules. In such a situation, the defence of fair hearing is not available to the
D aggrieved party because the rule itself has complied with fair hearing. (p. 1424 F)

REPRESENTATIONS

E O. E. Abang Esq., for the Plaintiffs/Appellants.
V. E. Chienyine Esq., for the Defendants/Respondents.

CASES REFERRED TO

F Atanda v. Ajani (1989) 6 S.C. (Pt.II) 87; (1989) 3 NWLR (Pt.111) 511
Olowolagba v. Bakare (1998) 3 S.C. 41; (1998) 3 NWLR (Pt.543) 528
Brawal Shipping Ltd. v. F. I. Onwadike Co. Ltd. (2000) 6 S.C. ((Pt.II) 133; (2000) 11 NWLR (Pt.678) 387
G Jos Steel Rolling Co. Ltd. v. Bernestielli (Nig.) Ltd. (1995) 8 NWLR (Pt.412) 201
Ariori v. Elemo (1983) 1 S.C. 13 at p.24; (1983) 1 SCNLR 1 at 24
Rasaki A. Salu v. Madam Towero Egebon (1994) 6 NWLR (Pt.308) 23
H Kotoye v. C.B.N. (1989) 2 S.C. (Pt.I) 1; (1989) 1 NWLR (Pt.98) 419 at 444
State v. Onagoruwa (1992) 2 NWLR (Pt.221) 35 at 56
Okoye v. Nigerian Construction & Furniture Co. Ltd. (1991) 6 NWLR (Pt.

199) 501 at 541

STATUTES REFERRED TO & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1979, s.220

Supreme Court Act, s.22

Federal High Court Civil Procedure Rules 1990, O. 39 r. 5, O. 45 r. 2

Rules of Professional Conduct, rr. 1 & 3

LEAD JUDGMENT BY KALGO JSC

This appeal is not as complicated as portrayed by the learned counsel for the appellants in his brief of argument. There was no cross-appeal filed by the respondents in the appeal to this court and the reference to cross-appellant in the title of the appeal was misleading and wrong.

In the trial Federal High Court, Lagos, the appellants as plaintiffs claimed against the respondents jointly and severally:-

“.....the sum of N2,839,000.00 (Two Million Eight Hundred and Thirty-Nine Thousand Naira) being the equivalent of \$33,314.00 (Thirty Three Thousand Three Hundred and Fourteen Dollars) calculated at the autonomous rate of N85.00 per dollar, being the amount owed the plaintiff by the defendants as at 22nd March, 1993, in that the defendants failed or neglected to effect payment in full for auto gas oil supplied by the plaintiff and/or his agent to the defendants’ vessel (M/V Seafriend and Victory Reefer) at the defendants’ request.

..... interest on the said amount at the regulated rate of 21% monthly from 1st April, 1993, till judgment and thereafter at the same rate until the final liquidation of the entire sum with costs.”

On the 29th of April, 1996, the defendants hereinafter referred to as the respondents were reported to have been served with the Writ of Summons containing the appellants’ claims. On that day, the trial court made the following order:-

“Plaintiff is granted 7 days from the date of this order to file its Statement of Claim and the defendants 21 days from date of service of Statement of Claim to file the defence”.

The plaintiffs (now appellants) filed their Statement of Claim within time and served it on the respondents. On the 10/6/96, the respondents without filing any defence, filed a motion seeking to set aside the service of the Writ of Summons on them for non-compliance with the trial court's rules. The application was heard and on the 16th of October, 1996, the court ruled that the 1st respondent was personally served in accordance with Order 10 Rule 16 of the Federal High Court Rules and that the bailiff who served the process has filed proof of service testifying to the fact that the service was personal. There was no appeal against this ruling and the respondents had not up to that stage filed their defence to the action.

Again, on the 11th of December, 1996, the respondents filed another application for an order dismissing the suit on the ground that it was an abuse of the court process or in the alternative to consolidate it with a similar suit between the parties pending before Jinadu, J., in the same Federal High Court, Court 3, Lagos. On the 5th of May, 1997, when the application came up for hearing, it was discovered that the suit sought to be consolidated with the present case was in fact struck out by Jinadu, J., on 23/4/97. The application was overtaken by events and it was accordingly struck out.

On 2/5/97, the respondents filed an application before Jinadu, J., to re-list the suit struck out by him on 23/4/97, and on 12/6/97 they filed another application praying the trial court for stay of its proceedings in the case pending the determination of the application before Jinadu, J. The learned trial Judge heard the application for stay on 15/6/97, and after hearing counsel and studying the documents in the matter found that there was no special reason to stay the proceedings before her especially as she is of co-ordinate jurisdiction with Jinadu, J. She therefore struck out the application. Meanwhile the case had already been fixed for definite hearing on 5th May, 1997.

On the 18/5/97 when the actual trial commenced and the appellants called their first witness, P.W.1, the learned counsel for the respondents walked out of court without the leave of the trial Judge on the excuse that he was sick. At the end of the testimony of P.W.1, the case was adjourned

to 7/8/97 for continuation and a hearing notice for that day was ordered to be served on the respondent. On the 7/8/97 when the case came up for continuation, the respondents' counsel was still absent and they were not represented. The appellants' counsel closed their case and addressed the court. The case was adjourned to 16th October, 1997 for judgment. B

It is pertinent to observe that up to this stage the respondents neither filed their Statement of Defence nor filed any application for enlargement of time to do so.

Earlier on the 3rd of July, 1997, the respondents' counsel filed a notice of appeal to the Court of Appeal against the rulings of the trial court delivered on 16/10/96 and 18/6/97. On the 11/8/97, the respondents filed another application for stay of proceedings of the trial court pending the hearing and determination of the said appeal. The learned trial Judge was still patient and listened to the parties' counsel on the matter and adjourned D to 4/11/97 for ruling.

While the ruling is being awaited, the respondents waking up from their slumber about their defence, this time by a new counsel, filed on 31/10/97, application for change of counsel and for extension of time to file E their defence.

In a considered ruling on the application for stay of proceedings delivered on the 4/11/97, the learned trial Judge, Ukeje, J., comprehensively reviewed what has happened in the case up to that stage including F the effect of various rulings she had given earlier, and came to the conclusion that it was not appropriate to stay the proceedings in the case at that stage. She therefore dismissed the application and proceeded to read the judgment on the substantive case. The appellants succeeded in their action as plaintiffs in the absence of any defence by the respondents and G judgment was entered in their favour in the principal sum of \$33,314.00 Dollars. The claim on pre-judgment interest was dismissed.

The respondents were dissatisfied with that decision and they appealed to the Court of Appeal on 3 grounds. The appellants as H respondents in the Court of Appeal also cross-appealed on the issue of pre-judgment interest. Both parties filed their respective briefs there. The Court of Appeal, after hearing the appeal, per Aderemi, JCA., said:

“In the final analysis, the main appeal for all I have said (supra), succeeds; the judgment of the court below is hereby set aside; the suit is remitted to the Chief Judge of the Federal High Court for re-assignment to another Judge for re-trial.

B *For reasons that I have stated (supra), I shall refrain from making a pronouncement on the cross-appeal”.*

From this decision, the appellants appealed to this court on 6 grounds of appeal. Both parties filed and exchanged their respective briefs of argument in this court as per the rules of court.

C In their brief, the appellants raised 5 issues for the determination of this court and they are:

“1. Whether the court below denied the plaintiff fair hearing by refusing to consider and make findings on the validly raised preliminary D objection challenging the jurisdiction of the court in entertaining defendants’ appeal in any event.

2. Was the court below right in holding that the trial court denied the defendants fair hearing on 4/11/97 having dismissed an application E filed by the defendants for stay of proceedings and proceeded and delivered judgment reserved?

3. Having regard to the circumstances of the suit, was the court below right in holding that the trial court visited the sin of Mr. Adeyemo, F Esq., the defendants’ former counsel on the defendants.

4. Whether the court below was right when it held that the appropriate remedy open to the defendants on 4/11/97 was to appeal rather than comply with the provisions of Order 39 Rule 5 of Federal High Court Civil Procedure Rules (1990) Cap.34 Laws of the Federation.

G *5. Whether the court below was right in refusing to make findings on the plaintiffs’ cross-appeal.”.*

Of the 6 issues for determination formulated by the respondents in their brief, the first 5 are in many respects similar to those 5 issues raised H by the appellants. The 6th issue which raised the question of the jurisdiction of the Federal High Court to entertain the case of the appellants did not arise from any of the grounds of appeal and no leave was obtained to file it particularly as the respondents did not file any cross-appeal in this

court. I shall therefore discountenance respondents' issue 6 and since the other 5 issues are similar to those of the appellants, I shall consider only the issues raised by the appellants in the determination of this appeal.

Let me take issue 1 first. By this issue, the plaintiff/appellant is complaining that the Court of Appeal has denied it fair hearing for the failure or refusal of that court to consider and make findings on the notice of preliminary objection validly raised challenging the jurisdiction of that court to entertain the appeal before it. The preliminary objection which appeared on page 223 of the record was filed by the appellant on 20/1/99 and the reply to the objection was filed by the respondent on 8/3/99 (See page 242 of the record). On the 26th of April, 1999, the Court of Appeal after dealing with some preliminary issues, adjourned the appeal for hearing to 23/9/99. On 23/9/99, both counsel for the parties were in court. The appeal was accordingly heard and the plaintiff/appellant in his argument said on page 249 of the record:-

"I filed a notice of preliminary objection which I have since developed in my respondent brief. I urge the court to (sic) the appellant in support of the argument that the grounds of appeal are incompetent".

It would appear therefore that the preliminary objection having been covered in the briefs of the parties' counsel, was to be taken in the appeal itself. On page 264 of the record, the Court of Appeal in its leading judgment of Aderemi, JCA., referred to the notice of preliminary objection and the submission of the learned counsel for the respondent and had this to say:-

"I wish to observe that there are two Notices of Appeal filed by defendants/appellants and a cross-appeal brought by the plaintiffs/respondents/cross-appellants. The first Notice of Appeal which is dated 2nd July, 1997 and filed on 3rd July, 1997 which was against the two Rulings of Justice Ukeje delivered on 16th October, 1996 and 18th June, 1997 was brought by Mr. S. A. Adeyemo, on behalf of the defendants/appellants. That Notice of Appeal filed on 3rd July, 1997 would seem to have been abandoned as no brief was filed. Suffice it to say that the said Notice of Appeal is incompetent. The second Notice of Appeal is the one dated 5th November, 1997 and filed on the same date on behalf of the

defendants/appellants by their present counsel (Mr. Chieyine) directed against the judgment of Justice Ukeje delivered at the Federal High Court, Lagos Division on the 4th of November, 1997”.

This showed that the Court of Appeal has clearly identified the
B Notice of Appeal in respect of which the notice of preliminary
objection was given; that is Notice of Appeal of 5th November, 1997.
It declared as incompetent the Notice of Appeal of 3rd July, 1997 but
said nothing about that of 5th November, 1997. But it went ahead in
C the judgment to set out the three grounds of appeal in it and went
further to say that the three issues formulated from them “substan-
tially flow from the said three grounds of appeal”. The Court of Appeal
then proceeded to deal with the appeal in the normal way up to the
end. From this, it appears to me that the Court of Appeal found
D nothing wrong with the notice of appeal of the main appeal of 4th
November, 1997, and would appear to have overruled the prelimi-
nary objection. Even if it did not, I think by virtue of Section 22 of
E the Supreme Court Act, I am in a position to examine the issue as
a matter of law. I have carefully studied the arguments of counsel
in the preliminary objection in their respective briefs including the
cases cited in support thereof and I am of the considered view that
the grounds of appeal in the Notice of Appeal filed on 5/11/97, are
F quite proper having regard to the contents of the judgment of 4/11/
97 complained about. I also agree with the Court of Appeal that the
three issues formulated by the respondent thereon were properly
distilled from the said grounds. That is the end of the notice of
preliminary objection.

G From what I said earlier in considering this issue, I do not think the question of fair hearing has arisen here. The preliminary objection was earlier raised in a motion but later fully developed in the brief and the opposing side has also filed a reply brief to the notice of preliminary
H objection on 8/3/99. The Court of Appeal heard both parties on their respective briefs and identified the respondents’ complaint in respect of Notice of Appeal of 5/11/97 which was the object of the notice of preliminary objection. There was therefore in my respective view, no

question of fair hearing in the strict legal sense arising in this case. I therefore answer this issue in the negative and against the appellants.

I take issue 2 next. It asked whether the Court of Appeal was right in holding that the trial court denied the appellants fair hearing when on 4/11/97, it dismissed an application for stay of proceedings and proceeded to deliver judgment in the case. B

On the 20th of October, 1997, when the trial court was about to hear the application of the respondents for stay of proceedings pending appeal, the court said, on page 91 of the record, that:

“I shall hear the defendant’s motion and depending on the judging (sic) I shall proceed to deliver the judgment or withhold it, as it shall deem appropriate”. C

(Underlining mine)

Before this, the court informed the respondents’ counsel that the case was adjourned for judgment on 16th October, 1997, before his application for stay was filed. On the 4/11/97, the learned trial Judge delivered the ruling in the application and refused it. Immediately thereafter, learned counsel for the appellants urged the trial court pursuant to Order 45 Rule 2 to proceed to deliver its judgment to avoid lapsing. For the respondents, there was serious objection on the ground that there was before the court, an application for extension of time to file defence. The respondents’ counsel urged the trial court to give them the opportunity to argue their motion. The learned trial Judge, however, decided to proceed and delivered the judgment, which was what she found to be “*appropriate*”. D E F

It is pertinent to note that on 20/10/97 when the motion for stay was about to be heard, the learned trial Judge warned that the judgment in the case had been reserved to 4/11/97 and that on that day, she would proceed with whatever is appropriate. She repeated this on 4/11/97 when she was about to deliver the ruling on the application for stay. Is it appropriate in the circumstances of this case and having regard to what transpired in the proceedings to proceed to deliver the judgment? G H

Let me briefly go through the antecedent of this case. It was filed on 27/2/96, and personal service of the Writ of Summons was effected on

the 1st respondent. Pleadings were ordered on 30/4/96. The plaintiffs/appellants filed their Statement of Claim on 8/5/96, and was served on the defendants/ respondents. On 10/6/96, the respondents' counsel filed a motion for setting aside the personal service of the Writ of Summons on him. The application was heard and dismissed on 16/10/96 and respondents' counsel ordered to file their defence within 14 days. He did not do so and on 11/12/96, he filed an application for an order to dismiss the suit on the ground that it is an abuse of the process of court or in the alternative to consolidate the suit with another suit pending before Jinadu, J., a Judge of the same court in Lagos. The application was heard and it was discovered in the course of the hearing that the case before Jinadu, J., was struck out at the time. The application was then struck out and the case was fixed for definite hearing on 18/6/97. On 12/6/96, the respondents filed yet another application for stay of further proceedings pending ruling on his application for re-listing the suit struck out before Jinadu, J. The trial court still heard the application but refused it holding that even if there is an application to re-list the suit, it cannot operate as a stay in her court which is of coordinate jurisdiction with that of Jinadu, J. She then ordered that the trial in the case before her must proceed on that day. The trial thereafter proceeded with the plaintiffs/appellants' witness but the respondents' counsel on the excuse of ill-health, packed his books and walked out of the court. At the end of the trial on that day, the trial court still had the patience to order the issue of hearing notice to the respondents' counsel to appear at the next adjourned date (7/8/96) so that he could cross-examine the only witness of the appellant who testified. On 7/8/96, respondents' counsel failed to appear and the case proceeded without him and was adjourned for judgment to 16/10/97. The trial court did not sit on 16/10/97 but the judgment was further adjourned to 4/11/97.

On the 11/8/97, the respondents' counsel filed yet another motion for stay of proceedings pending appeal on two rulings of the trial court delivered on 16/10/96 and 18/6/97. The motion was heard and ruling given on 4/11/97 after which the judgment now complained of was delivered.

From the above, it is abundantly clear that the respondents' counsel filed not less than 4 applications at different times from the

29th of April, 1996 (when the trial court ordered filing of pleadings) to 4/11/97 (when the ruling on his last application was delivered) a period of about 17 months. Up-till that time, he had not filed the Statement of Defence even though the trial court had continually reminded him of this on more than 3 occasions in the course of the proceedings. What is more even after the respondents' counsel walked out on the trial Judge in the course of the proceedings, the latter still ordered hearing notice to be served on the former to appear at the next hearing date. In sum, there is no doubt in my mind that by the conduct of the respondents' in these proceedings, he had taken upon himself deliberate decision to delay the whole proceedings and when he finally withdrew in October, 1997, he had already put the respondents' case in jeopardy. It is well established and generally accepted as true that "*justice delayed is justice denied.*" Therefore, the decision of the learned trial Judge to proceed to read her judgment on the case itself, after reading the ruling on application for stay of proceedings, is in my respectful view, most reasonable and justifiable in the circumstances of this case. The learned counsel for the respondents was granted all the opportunities available to file the defence of his clients in the matter but he decided not to do so but instead filed numerous applications to delay and frustrate the trial court. In fact, the case was adjourned for more than a total of 17 times at the instance of the respondents' counsel.

In a similar situation such as in this case, the West African Court of Appeal in the case of U.A.C. Ltd. v. Krekchi 13 WACA 219 at 220 held:

"Counsel for the appellant has cited to us a number of authorities which appear to establish that where a defendant is in default in filing his defence, in the sense that he does not do so within the right time, that nevertheless, the court will look at the defence filed out of time before entering judgment. I do not think that those authorities are applicable in the present circumstances. In this case it is not merely a default to file the defence within the prescribed time by reason of carelessness or negligence, but it is an attempt to file the defence in direct disobedience and defiance of an Order from the court. At no time did the appellant attempt to comply

with the order of the court; at no time did he attempt to show that he was unable to comply therewith, and the only conclusion that I can come to is that he deliberately refused to obey the court's order. Such an attempt to disobey the court would, if it were upheld by this Court of Appeal, render nugatory the powers which are conferred on the trial court for the enforcement of its control of proceedings. In my view, therefore, the Judge was, so far as this ground is concerned, entirely justified in granting the order for judgment".

The trial court is therefore more than justified to proceed to deliver its judgment under those circumstances enumerated above as no party to a case is entitled to hold the court to ransom at his or her own whims and caprices.

In the circumstances, therefore, it is just and equitable for the learned trial Judge to deliver the judgment at the time she did. I so find and answer this issue in the affirmative.

I shall now consider issue 3.

There is no doubt at all that the new counsel for the respondents had filed a motion for extension of time to file Statement of Defence and it was mentioned on 4/11/97 when the ruling on stay of proceedings was delivered. The motion was however not heard by the learned trial Judge in an effort to avoid a reserved judgment from lapsing and in the interest of justice. The Court of Appeal in considering this issue had this to say:

"There is a breach of that fundamental duty by the court below when it refused to hear and determine the application for an order for extension of time. The observation of the trial Judge on the conduct of Mr. S. A. Adeyemo, former counsel to the defendants/appellants leaves me in no doubt that that court was conscious of the negligent manner in which that counsel was handling the defendants/appellants' case. The lower court's refusal to entertain the application for leave to file a defence out of time cannot be any other thing but visitation of the sin of the counsel on the innocent litigant who must always rely on him. The law frowns at such a practice by a court of law, it breeds injustice."

I entirely agree with the Court of Appeal that a court has a duty to hear and determine all applications or issues brought or raised before it by

litigants. See Atanda v. Ajani (1989) 6 S.C. (Pt.II) 87; (1989) 3 NWLR (Pt.111) 511; Olowolagba v. Bakare (1998) 3 S.C. 41; (1998) 3 NWLR (Pt.543) 528; Brawal Shipping Ltd. v. F. I. Onwadike Co. Ltd. (2000) 6 S.C. ((Pt.II) 133; (2000) 11 NWLR (Pt.678) 387. There is also no doubt that the trial court was fully conscious of the conduct of Mr. Adeyemo B who was the first counsel of the respondents in relation to the case. But despite the recalcitrant conduct and attitude of the said counsel throughout the proceedings, the learned trial Judge refused to make any order of costs against him or his clients in all the rulings delivered against him. In the last C ruling she delivered on 4/11/97, the learned trial Judge said:

“The predicament in which the defendants found themselves flow from their counsel’s decision and handling of his case. Although the defendants are bound by that decision of their counsel, I shall not compound it further. I shall make no order as to costs”. D

And after delivering the judgment on 4/11/97, learned trial Judge ended up by saying:

“The totality is that Mr. Adeyemo, learned counsel on behalf of the defendants having decided not to heed this court’s invitation to participate E in the hearing of this case, did so to the detriment of his client, who upon all authorities, supra, is bound by that decision.”

No order of costs was also made in the judgment against the respondents. There was also nothing on the record to show that the motion F for extension of time to file the defence was fixed for hearing on 4/11/97.

From the above, it is very clear that the decision to proceed to deliver the judgment without hearing the application for extension of time to file defence, was not, as the Court of Appeal said, visitation G of the sin of the counsel on the respondents. All that the trial court was saying was that as Mr. Adeyemo was their counsel in the case, the respondents were bound by all actions or non-actions taken by him and this is a true fact. She was not penalizing the respondents for the negligent acts of their counsel. For these reasons, and having H regard to the facts and circumstances of this case, I am of the view that the Court of Appeal was wrong in holding that the trial court visited the sin of Mr. Adeyemo of counsel on the respondents by

reading the judgment on 4/11/97. I answer this issue in the negative.

Issue 4 deals with whether the Court of Appeal was right in holding that the appropriate remedy opened to the respondents after the judgment of 4/11/97 was to appeal rather than proceed under Order 39 Rule 5 of the Federal High Court (Civil Procedure) Rules, (Cap. 134 of Laws of the Federation 1990).

Order 39 Rule 5 provides that:

“Any judgment obtained against any party in the absence of such party may on sufficient cause shown be set aside by the court upon such terms as to the court may seem fit”.
(Underlining mine)

The judgment under consideration was delivered on 4/11/97.
On that day, the learned counsel for the respondents was present in court but walked out of court shortly before the judgment was delivered. The judgment was against the respondents and since it was delivered in the absence of their counsel, Order 39 Rule 5 above may be applicable. But since the judgment of the trial court was a final decision of that court, an appeal lies to the Court of Appeal by virtue of the provisions of Section 220 of the 1979 Constitution which is applicable to this case. Therefore, the respondents had, in my view, the option of either to go back to the trial court and apply there to set aside the judgment under Order 39 Rule 5 above or file an appeal against the judgment in the Court of Appeal under Section 220 of the 1979 Constitution. The Court of Appeal, in its judgment did not say that the appellant could only appeal in this case, but it said that the respondent was exercising its constitutional right by appealing to it for setting aside the judgment. I entirely agree with that court on this, and hold that an appeal is an appropriate remedy in this case and gives the court and the parties better opportunity of considering the case on appeal.

The last issue 5 was whether the Court of Appeal was right in refusing to make any findings on the cross-appeal of the appellants. The Court of Appeal, in its judgment, allowed the respondents’ appeal, set aside the decision of the trial court, and ordered retrial of the whole case before

another Judge. The cross-appeal by the appellants was in respect of pre-judgment interest which was dismissed by the trial court for lack of evidence in support of the claim. The learned trial Judge properly referred to the case of Jos Steel Rolling Co. Ltd. v. Bernestielli (Nig.) Ltd. (1995) 8 NWLR (Pt.412) 201 and came to the following conclusion:

“In this case, there not shown any evidence that the parties intended that the debt should attract interest. Further the plaintiffs have not shown whether the claim is based on contract or statute; neither is the basis of computation shown.

The head of claim for pre-judgment interest fails and is dismissed.”

Although a cross appeal is independent of the main appeal, in this case, the decision on the cross-appeal would necessarily depend on the main appeal since the whole judgment of the trial court was set aside by the Court of Appeal for a fresh trial. I am of the view therefore that the Court of Appeal was right in refusing to make any finding on merits on the cross-appeal.

Having resolved issues 1, 2 and 3, in favour of the appellants, I find that there is merit in this appeal and I allow it. I set aside the decision of the Court of Appeal and restore that of the trial court. I award the costs of N10,000.00 in favour of the appellants.

BELGOREJSC

I am in full agreement with the judgment of my learned brother, Kalgo, JSC. I had the opportunity of discussing it fully at conference and I hardly have anything more to add than to say the appeal has merit. I also set aside the decision of the Court of Appeal and restore that of the trial Federal High Court. I make the same order as to costs.

ONUJSC

I have been privileged to read before now the judgment of my learned brother, Kalgo, JSC., just read and with it I am in entire agreement that the appeal is meritorious and must perforce succeed.

I make similar consequential orders inclusive of costs as contained in the leading judgment.

B TOBI JSC

I have read in draft the judgment of my learned brother, Kalgo, JSC, and I agree with him. This appeal has merit and I also allow it.

Let me first deal with the conduct of the first counsel who did the case for the respondents. The proceedings show that he walked out on or from the court without permission on the alleged ground of ill health. The Rules of Professional Conduct in the Legal Profession set out minimum standard of conduct and behaviour of advocates in courts of law, including tribunals and counsel have a duty to maintain such minimum standard of conduct and behaviour. By Rule 1 of the Rules of Professional Conduct, it is the duty of the lawyer to maintain towards the court, respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Rule 3 enjoins a lawyer to display a dignified and respectful attitude towards the presiding Judge, again, not for the sake of his person, but for the maintenance of respect for and confidence in the judicial office.

Counsel who is ill or indisposed has a duty to apply for adjournment of the case to enable him seek medical assistance. He has no right whatsoever to walk out on or from the court just like that. That is certainly a rude and unprofessional conduct, unbecoming of a legal practitioner, I condemn the conduct of the counsel.

A court of law can indulge a party only within the confines of its rules. In other words, a court of law can indulge a party in so far as its rules permit. Where rules of court in line with the fair hearing principles order a specific conduct on the part of the parties, the court has a duty to enforce the rules. In such a situation, the defence of fair hearing is not available to the aggrieved party because the rule itself has complied with fair hearing.

In this appeal, the learned trial Judge accommodated the respondents in many respects; all in genuine effort to do justice but the counsel did not take advantage of the fair mind of the trial Judge. No party has the

right to hold a court of law to ransom. This is what I see from the totality of the conduct of the respondents in this appeal. The learned trial Judge did all that was humanly possible to hear the case of the respondents but they bluffed the court. A party who has the temerity to bluff the court at the trial stage, without justification, cannot be heard on appeal to seek redress on the subject matter of the bluff. My learned brother has adequately narrated the several indulgences of the learned trial Judge to the respondents, and I need not repeat them here. B

The Court of Appeal was therefore clearly in error in setting aside the judgment of the learned trial Judge. I am of the view that the learned trial Judge was right and therefore the Court of Appeal was wrong in its decision. The appeal is accordingly allowed. I set aside the decision of the Court of Appeal and restore that of the trial court. I also award N10,000.00 costs in favour of the appellants. D

EDOZIE JSC

I had read before now the draft of the leading judgment of my learned brother, Kalgo, JSC. I agree with his reasoning and conclusion in allowing the appeal. E

The appeal turns largely on whether in the peculiar circumstances of this case, the learned trial Judge of the Federal High Court, Ukeje, J.. (as she then was), breached the defendants' right to fair hearing when in refusing to entertain the defendants' belated application for enlargement of time to file their Statement of Defence, she proceeded to deliver the judgment previously adjourned for delivery. As a complaint predicated on fair hearing has to do with the manner of the trial of a case, the background facts of the proceedings leading to the judgment of the trial court need to be appreciated. Those background facts are well articulated in the leading judgment aforesaid and I do not find it desirable to recount them. Suffice it to say that, from the record of proceedings, it is manifest that the defendants had more than ample opportunity to file their Statement of Defence from 29/4/96 when pleadings were ordered with the plaintiffs granted 7 days to file Statement of Claim and the defendants 21 days for F G H

their defence after service of the Statement of Claim. Although it was not indicated when the defendants were served with the Statement of Claim, it is on record that the defendants' counsel admitted on 10/6/96 that the Statement of Claim had been served on him. From that date, that is 10/6/96 to 18/6/97, when the plaintiffs opened their case (a period of about one year) the defendants had ample opportunity to file their defence but rather than avail themselves of that opportunity, their learned counsel indulged in filing series of motions all aimed at dribbling and frustrating the court and as if that was not enough, learned counsel for the defendants displayed unethical behaviour when he walked out of the learned trial Judge for refusing to grant him an adjournment.

Disappointed with the abysmal manner in which learned counsel for the defendants had conducted the case, the learned trial Judge at p. 142 of the record commented thus:-

"It is essential to advert to the attitude of S. A. Adeyemo Esquire, learned counsel representing the defendants in this case. The defendants caused this suit to be adjourned for a total of 17 times from inception on 15/4/96 till judgment. The adjournments were for a variety of reasons, mostly avoidable. Matters came to a head when on 18th June, 1997, Mr. Adeyemo had asked for a needless adjournment which was refused and he worked out of court and the matter continued without his clients, the defendants or any representation on their behalf."

The expression "fair hearing" means a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties in a case and one of such rules is the rule of audi alteram partem. See *Ariori v. Elemo* (1983) 1 S.C. 13 at p.24; (1983) 1 SCNLR 1 at 24; *Rasaki A. Salu v. Madam Towero Egebon* (1994) 6 NWLR (Pt.308) 23. Fair hearing lies in the procedure followed in the determination of the case and not in the correctness of the decision. It is synonymous with trial and implies that every reasonable and fair minded observer who watches the proceedings should be able to come to the conclusion that the court has been fair to all the parties: See *Kotoye v. C.B.N.* (1989) 2 S.C. (Pt.I) 1; (1989) 1 NWLR (Pt.98) 419 at 444; *State v. Onagoruwa* (1992) 2 NWLR (Pt.221) 35 at 56.

Where a party to a suit has been accorded a reasonable opportunity of being heard and in the manner prescribed under the law and for no satisfactory explanation it fails or neglects to attend the sitting of the court or boycotts same, that party cannot thereafter be heard to complain about lack of fair hearing. In the case of *Okoye v. Nigerian Construction & Furniture Co. Ltd.* (1991) 6 NWLR (Pt. 199) 501 at 541, this court observed, inter alia, as follows:-

“I must also bear in mind the fact that the duty of court under Section 33(1) of the Constitution is to give the person whose civil right or obligation is to be determined the opportunity of fair hearing. If he knew that the proceedings were going on and did not apply to be heard or the opportunity was made available to him and he failed to or neglected to take it, he cannot now properly complain of a denial of fair hearing. If he was aware that such a proceeding was going on, he could not properly fold his hands and fail to take steps to avail himself a hearing. It is when he has taken such steps and is rebuffed that he can complain of a denial.”

In the instant case, where the defendants were given ample opportunity to file their defence and participate in the trial but for reason best known to them, they flouted the orders by the trial court to file their defence and in addition boycotted the trial, they cannot be heard to complain about denial of hearing on the ground that their application for enlargement of time to file a defence was not heard. I am satisfied that the defendants were not only tardy in presenting their case but deliberately endeavoured to stifle the proceedings. The learned trial Judge was magnanimous and patient in accommodating the defendants but despite the indulgence by the court they remained recalcitrant. I am satisfied that the defendants did not establish a case of denial of fair hearing and the finding of the court below to the contrary is erroneous.

For the foregoing reasons and those comprehensively set out in the leading judgment of my learned brother, Kalgo, JSC., I also allow the appeal and restore the judgment of the trial court with costs as ordered in the leading judgment.