

SUPREME COURT OF NIGERIA

10TH JUNE, 2005. SC. 170/2000

**CORAM:- M. L. UWAISS CJN, S. M. A. BELGORE, I. L. KUTIGI,
A. I. KATSINA-ALU, G. A. OGUNTADE, JJSC**

MRS. M. B. AMUSAN APPELLANT

AND

MR. DANIEL OBIDEYI RESPONDENT

ACTIONS - Limitation of - Torts - Where writ is issued beyond the time allowed - By the applicable limitation law - Action is statute barred (H1)

ACTIONS - Striking out - Where application was withdrawn - Or appellant's counsel was not available - But application was argued on merit - The proper order is dismissal (H2)

FACTS

Before the Ibadan High Court, the plaintiff/respondent took out a writ of summons against the defendant/appellant claiming the return of his Bernard Terrazo Floor Washing Machine or damages for loss of use. In 1983 the defendant engaged the plaintiff to do terrazo work of the floor of her building. The plaintiff therefore brought to the premises a Bernard Terrazo washing machine. The work was suspended in 1985 but resumed again in 1986. The work did not progress as it should. Plaintiff complained that his machine was seized by the defendant in April, 1986.

By a letter dated 6th. September, 1989, the plaintiff made a formal demand on the defendant to release the machine. The defendant denied possession of the machine by a reply dated 29th. September, 1989. This made the plaintiff file the suit. The defendant by motion on notice, prayed the court for an order setting down for hearing before trial the point of law raised in her statement of defence as to the action being statute barred, an order striking out the statement of claim and dismiss-

ing the suit on the grounds stated in the Schedule. The trial court dismissed the application. Not satisfied with the ruling of the High Court, the defendant appealed to the Court of Appeal which dismissed the appeal. The defendant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(a) Whether the plaintiff's action was statute barred by virtue of the Limitation Law, Cap.64 Laws of Oyo State, 1978.

(b) Whether the defendant's motion having failed, ought to have been dismissed or struck out.

HELD (Unanimously dismissing the appeal per **KUTIGI JSC**)

ACTIONS - Limitation of

1. *"The instant appeal, which is an action founded in tort, same shall not be brought after the expiration of five years. In calculating the period of limitation applicable in a case one will look at the writ and statement of claim, which alleges when the wrong suffered by the plaintiff was committed and placing it side by side with the date on which the writ was issued. If the writ was issued beyond the time allowed by the applicable limitation law which is Edict No. 11 of 1989, then the action can be said to be statute-barred. The Respondent filed the action in June 1992, while the cause of action accrued in September 1989. By simple arithmetical calculation the time lag is 3 years. The plaintiff/respondent's action before the lower court was filed within time and hence is not caught in the web of the Limitation Edict No. 11 of 1989, Oyo State. (p. 1749E)*

ACTIONS - Striking out

2. *Chief Niyi Akintola, in his reply to the foregoing - submitted that the learned judge would have made order of striking out if the application was withdrawn, or the appellant's counsel was not available to argue the motion, but where the application was argued on merits the proper order to make was that of dismissal. The view expressed by Chief Akintola represents the time honoured position of the law. The lower court was right to have made an order of dismissal in the matter as the application was heard on merit - both counsel made submissions on behalf of the parties*

following which the court gave a considered ruling.”

I have also read the ruling of the High Court and the judgment of the Court of Appeal as well as the brief of the defendant/appellant’s counsel in the case. The lower courts were right in their conclusions. I agree with them that the suit is not statute barred and the motion having failed was properly dismissed. (p. 1750A)

REPRESENTATION

Defendant/Appellant absent not represented.

Plaintiff/Respondent absent not represented.

RULES REFERRED TO

Supreme Court Rules, O. 6 r. 8(7)

LEAD JUDGMENT BY KUTIGI JSC

The plaintiff took out a Writ of Summons at the Ibadan High Court claiming the return of his Bernard Terrazo Floor Washing Machine or damages for loss of its use. The parties filed and exchanged pleadings. Thereafter, the defendant, by motion on notice, prayed the court for an order setting down for hearing before trial the point of law raised in her Statement of Defence as to the action being statute barred, and an order striking out the Statement of Claim and dismissing the suit on the grounds stated in the schedule thereto.

The learned counsel for the parties argued the motion and in a considered ruling, the learned trial Judge dismissed the application holding that the cause of action was not statute barred as contended by the defendant. The motion or application was dismissed.

Not satisfied with the ruling of the High Court, the defendant appealed to the Court of Appeal holden at Ibadan. By a unanimous judgment, the Court of Appeal dismissed the appeal upholding the finding of the trial court that the cause of action was not statute barred.

Still dissatisfied with the judgment of the Court of Appeal, the defendant now appealed to this court. When this case came up for hearing on 14/3/2005, both the plaintiff and the defendant were absent and not

represented by any counsel. It was also observed that only the defendant/appellant had filed appellant's brief. The plaintiff had not responded to the brief. It was also observed that the defendant/appellant had a pending motion dated 20/2/2004 and filed on 2/3/2004 before the court. The motion B was struck out for want of prosecution. The defendant/appellant's appeal was thereafter taken as argued on the brief filed by her vide the provisions of Order 6 Rule 8(7) Rules of the Supreme Court.

This is therefore an interlocutory appeal and I must be brief in order C to avoid commenting on issues still yet to be tried or decided in the substantive suit.

The defendant/appellant has on page 2 of her brief identified 3 issues for determination in the appeal. They can conveniently be reduced to (2) as follows-

D (a) Whether the plaintiff's action was statute barred by virtue of the Limitation Law, Cap.64 Laws of Oyo State, 1978.

(b) Whether the defendant's motion having failed, ought to have been dismissed or struck out.

E A summary of the undisputed facts of this case is that the defendant engaged the plaintiff to do the terrazo work of the floor of her building sometime in 1983. To carry out the job, the plaintiff brought to the premises a Bernard Terrazo Washing Machine. The work was suspended F in 1985, but resumed again in 1986. When the work did not progress as it should, the plaintiff complained that his machine with which he worked in the defendant's building was seized and detained by the defendant in April 1986 (see Exhibit A dated 6th September, 1989, attached to the motion). This was denied by the defendant (see Exhibit B dated 29th G September. 1989). There were exchanges of correspondence by both parties through their counsel. The plaintiff finally filed this suit in court on 22/6/92 challenging the unlawful detention of his Terrazo Floor Washing Machine.

H The learned trial Judge after very careful consideration of the affidavit evidence before him and the addresses of counsel said on page 34 of the ruling as follows-

"Exhibit A, dated 6th September, 1989, attached to this application

is the formal demand on the defendant/applicant for the release of the machine. There is no indication in either the affidavit or counter affidavit whatsoever that there was ever any demand for the machine from the defendant since 1986 and before the letter Exhibit A talkless of any refusal by the defendant to return or release same. The only demand for the machine from the defendant by the plaintiff was through his counsel and this was sometime in 1989. The denial of possession of the said machine was also sometime in 1989 through the defendant's counsel (see Exhibits A and B) respectively. B

In my view, the cause of action in this case arose on the receipt by the plaintiff of Exhibit B in which the defendant in effect denied possession of the machine. In other words, the Limitation Law 1989 would not bar the institution of this action which was filed sometime in 1992, just about 3 years after the cause of action arose. C D

In the circumstance, I hold that this action is not statute barred and I hereby dismiss the defendant's application for not being meritorious."

The Court of Appeal, which endorsed the ruling of the High Court, also said in the lead judgment on page 61 of the record thus- E

"The instant appeal, which is an action founded in tort, same shall not be brought after the expiration of five years. In calculating the period of limitation applicable in a case one will look at the writ and statement of claim, which alleges when the wrong suffered by the plaintiff was committed and placing it side by side with the date on which the writ was issued. If the writ was issued beyond the time allowed by the applicable limitation law which is Edict No. 11 of 1989, then the action can be said to be statute-barred. The Respondent filed the action in June 1992, while the cause of action accrued in September 1989. By simple arithmetical calculation the time lag is 3 years. The plaintiff/respondent's action before the lower court was filed within time and hence is not caught in the web of the Limitation Edict No. 11 of 1989, Oyo State. F G H

On issue No.II - The applicant's counsel, Mr. S. A. Onadele posed the question whether the applicant's action on notice should have been dismissed or struck-out even if the lower court did not find convincing

*evidence that the cause of action arose in April, 1986, end of justice would have been met to strike out the appellant's motion instead of dismissing it so as to give the appellant chance to revisit the issue when further evidence emerge at the trial. **Chief Niyi Akintola, in his reply to the***
B foregoing - submitted that the learned judge would have made order of striking out if the application was withdrawn, or the appellant's counsel was not available to argue the motion, but where the application was argued on merits the proper order to make was that of dismissal. The
C view expressed by Chief Akintola represents the time honoured position of the law. The lower court was right to have made an order of dismissal in the matter as the application was heard on merit - both counsel made submissions on behalf of the parties following which the court gave a considered ruling."

D I have also read the ruling of the High Court and the judgment of the Court of Appeal as well as the brief of the defendant/appellant's counsel in the case. The lower courts were right in their conclusions. I agree with them that the suit is not statute barred and
E the motion having failed was properly dismissed. I discovered that the appellant has nothing new to advance in this court which she had not belaboured in the lower courts. The issues therefore fail.

F The two issues having been resolved against the defendant/appellant, the appeal fails. It is hereby dismissed. No order as to costs.

UWAIS CJN

G I have had the advantage of reading in draft the judgment read by my learned brother, Kutigi, JSC. I entirely agree with him that this appeal is devoid of merit and it fails.

I too hereby dismiss it with no order as to costs.

H

BELGORE JSC

It seems this appeal is not designed for anything but for the delay of the substantive cause. A simple matter of detinue has taken over ten years due to abuse of right of interlocutory appeal. The two lower courts B have spelt out clearly that this matter is not caught by Limitation Law. Now the appellant who complained of illusory delay is now the one delaying hearing of substantive matter for over ten years.

I am therefore in full agreement with my learned brother, Kutigi, C JSC., that this appeal lacks merit and for his short but lucid reasons I also dismiss the appeal with N10,000.00 costs to the respondent.

KATSINA-ALU JSC

I have read before now in draft the judgment of my learned brother, Kutigi, JSC. I entirely agree with it and, for the reasons he gives, I too would dismiss the appeal. I make no order as to costs.

OGUNTADE JSC

I have had the privilege of reading in draft the judgment of my learned brother, Kutigi, JSC., just delivered. I entirely agree with the F reasons given therein and his conclusion. I have nothing to add.

G

H