

SUPREME COURT OF NIGERIA
29TH JULY, 2008 SC.123/2007
CORAM:- A . I. KATSINA-ALU, G . A. OGUNTADE,
F. F. TABAI, I. T. MUHAMMAD, P. O. ADEREMI,
C. M . CHUKWUMA-ENEH, JJSC

MR. PETER OBI APPELLANT/RESPONDENT
AND

1. INDEPENDENT NATIONAL
ELECTORAL COMMISSION RESPONDENT/APPLICANT

2. ALL NIGERIA PEOPLES PARTY
3. PRINCE NICHOLAS UKACHUKWU
4. PEOPLES DEMOCRATIC PARTY
5. DR. ANDY UBA RESPONDENTS

6. PEOPLES MANDATE PARTY
7. ARTHUR OBIEFUNA NWANDU
8. 1FEANYICHUKWU OKONKWO
(For himself and on behalf of Nigeria
Advance Party)

APPEALS - Notice of appeal - Place of filing - Where filed in the
Court of Appeal - Instead of court of trial as provided by O. 3 r. 2 (1)
Court of Appeal Rules - It becomes voidable - And such non compli-
ance can be waived under the rules (H1)

PRACTICE & PROCEDURE - Appeals - Irregularity - Waiver - Where
a party fails to promptly complain against a voidable error - He can-
not do so at a time injustice will occur (H2)

SUPREME COURT - Judgments - Jurisdiction - To interfere with its
final judgment - Falls within a very narrow compass - And cannot be
invoked in this case (H3)

FACTS

This application was filed by the 5th respondent/applicant af-
ter the Supreme Court has delivered final judgment in this case. Ap-

plicant prayed the Court to set aside its judgment delivered on the 14-06-2007 on the ground that appeal to the Court of Appeal was filed before that Court instead of at the court of trial contrary to O. 3 r. 2 (1) of the Court of Appeal Rules. Applicant who was aware of this irregularity failed to complain against it before the Court of Appeal, which may use its power under O. 7 r. 3 (1) to waive such non-compliance with the Rules. The 8th respondent raised the matter before the Court below but later dropped it after it appeared the parties had compromised the matter. And applicant failed to raise the issue before the Supreme Court till after final judgment.

ISSUE FOR DETERMINATION

Whether a Notice of Appeal filed in the Court of Appeal instead of the Federal High Court is void or voidable.

HELD (Unanimously striking out the application per **KATSINA-ALU JSC**)

Notice of appeal - Place of filing

1. Order 3 Rule 2(1) of Rules of the Court of Appeal provides that a notice of appeal shall be deemed filed when filed at the registry of the court of trial. It does not further prescribe that a notice of appeal shall be void if filed in the Court of Appeal rather than the High Court. Further Order 7 rule 3 of the Court of Appeal Rules provides:

"The court may in an exceptional circumstance and where it considers in the interest of justice so to do waive compliance by the parties with these rules or any part thereof."

I have no doubt that Order 7 rule 3 above is a saving provision for non-compliance with the provisions of the Court of Appeal Rules. Most rules of court in Nigeria have similar provisions. These proceedings were commenced in the Federal High Court. The rules of the High Court have similar provision in Order 3 rule 1, in my view, the non-compliance with Order 3 Rule 2 (i) as to the venue to file an appeal would at the highest only confer on the adversary the right to ask the Court of Appeal to pronounce the notice of appeal in question void. It is not by itself self-executing. (p. 447 D)

Appeals - Irregularity - Waiver

2. Remarkably, the 5th respondent/applicant had known of the ir-

regularity in the filing of the notice of appeal whilst proceedings were pending in that court. He never objected or raised Issue about the irregularity. The 5th respondent who had not then complained cannot now be allowed to complain of an occurrence he had previously thought little of. It would amount to allowing him to approbate and reprobate at the same time. The mistake of applicant's counsel is to have assumed that the mere filing of the appeal at the registry of the court below renders the appeal void without more. He believes he has a joker he can raise at any stage. This is a wrong assumption. Litigation premised on such approach would amount to or lead to injustice. I am also to state that at the same time the alleged notice of appeal was filed in the Court of Appeal on 18/4/07, the records of appeal were all before the Court of Appeal, which situation completely removed the possibility of the court below asking the appellant/respondent to go back to file his appeal at the High Court. See Order 1 rule 22 of the Court of Appeal rules. (p. 447 H)

SUPREME COURT - Judgments - Jurisdiction

3. The court has given a final judgment in accordance with its power under Section 235 of the 1999 Constitution. Its jurisdiction to interfere with its judgment falls within a very narrow compass as stated in a number of previous decisions of this court. This is not one of such reasons.

The argument that we should allow the applications to be argued on their merits would appear to be an invitation to us to engage on a wild goose chase. The relevant facts are plain for all to see. It is in my view a clear case in which the jurisdiction of this court cannot be invoked. I would accordingly strike out the applications. (p. 448 G)

NOTABLE POINT OF INTEREST

TABAI JSC

1. Waiver - Rules of Court are not immutable

There is nothing so sacrosanct or immutable about the provisions of order 3 rule 2(1) or 5 as to render the rights or benefits derivable thereat from being waived. Rules of court remain rules of court and cannot be accorded a status as immutable as statutory provisions.

In this case the incompetence of the Notice of Appeal before the court below was not raised by the applicants/respondents until judgment was entered therein in their favour. And they gladly took the rights and benefits of that judgment. Although the 8th respondent/applicant raised the issue he sought the leave of the court below to withdraw the objection. The withdrawal was not opposed by the other respondents and so the objection was dismissed. The issue was also not raised when the appeal came before this court. The appeal was heard and the final judgment has since been entered for the appellant/respondent. In my view the above constitute exceptional circumstances to warrant the inference of waiver. (p. 451 A)

REPRESENTATION

Dr. O. Ikpeazu, SAN, (with him, P.N. Ikwueto, SAN. Emuka Ofodile. SAN. Dr. V. J. O. Azinge, O.J. Nnadi, U. M. Ezeami. Emeka I. O. K. Poko, Uzoamaka Ilobi, Pato Onukwuh, E.C. E/enduke, Joshua E. Alosa, T. U. Oguji, Andy Ubanyionwu. V.E. Okonkwo. Chugbo Euwezor, Echezona Etiaba, C.L Mbaeri. C.N.Abiakam, I. K. Bozimo. R.C. Okafor, I.K. Ogbogu, Prisca Ozalesike, P.O. Nwankwo. Uju Onukemiu, Chukwuma Nwachukwu), for the 6th and 7th Respondents/Applicants.

Kanu Godwin Agabi, SAN., (with him, Chief Chris Uche, SAN., Wole Adebayo. Chuka Ugwu, Patience Osagiede, Tony Okeke. Uchenna Awa. Onyinye Unogu, Anthony Ofodile. Chukwudi Iwobi). for the 1st Respondent/Applicant.

Ikechukwu Ezechukwu (with her, Ogedu Ogbenna), for the 2nd and 3rd Respondents.

Chief Assam E. Assam, SAN., (with him. Aik Ugbiz and A.L. Yabidu), for the 4th Respondent.

Chief Ladi Rotimi-Williams, SAN., (with him, J.O. Aghimien. SAN.. Chief C.O. Okpiabhede, Sir S.O. Odigie. Chief N. Novis, Rebecca D. Tanga. P. I. Oiwoh, Gabriel Orji. Abiodun Ojo, Selekeowe Larry, F. E. Aghimien), for the 5th Respondent/ Applicant.

Prince Orji Nwafor Orizu (with him, Amobi Nzeli, Obi Iluchukwu. Linus Okwute, Patience Igwe, Ugochukwu Ifeakandu. Love Okafoagu). for the 6th & 7th Respondents.

Ifeanyichukwu Okonkwo, 8th Respondent in person.

CASES REFERRED TO

The Honda Place Ltd, v. Globe Motors Holding Nig. Ltd. (2005) 7 S.C. (Pt. III) 182

Francis Adesegun Katto v. Central Bank of Nigeria (1991) 11-1 SI S.C 176 B

Oloba v. Akereja (1988) 7 S.C (Pt. I) 1

LEAD JUDGMENT BY KATSINA-ALU JSC

Let me thank counsel for the able manner in which they have put their submissions across to this court. C

It needs be said however that these applications would appear, to be one of much ado about nothing. The presentation before us and the array of counsel involved notwithstanding, the simple question for resolution is simply whether a Notice of Appeal filed in the Court of Appeal instead of the Federal High Court is void or voidable. **Order 3 Rule 2(1) of Rules of the Court of Appeal provides that a notice of appeal shall be deemed filed when filed at the registry of the court of trial. It does not further prescribe that a notice of appeal shall be void if filed in the Court of Appeal rather than the High Court. Further Order 7 rule 3 of the Court of Appeal Rules provides:** D

"The court may in an exceptional circumstance and where it considers in the interest of justice so to do waive compliance by the parties with these rules or any part thereof." E

I have no doubt that Order 7 rule 3 above is a saving provision for non-compliance with the provisions of the Court of Appeal rules. Most rules of court in Nigeria have similar provisions. These proceedings were commenced in the Federal High Court. The rules of the High Court have similar provision in Order 3 rule 1, in my view, the non-compliance with Order 3 Rule 2 (i) as to the venue to file an appeal would at the highest only confer on the adversary the right to ask the Court of Appeal to pronounce the notice of appeal in question void. It is not by itself self-executing. F

Remarkably, the 5th respondent/applicant had known of the irregularity in the filing of the notice of appeal whilst pro- G

ceedings were pending in that court. He never objected or raised Issue about the irregularity. The court below was led into giving the judgment in favour of the 5th respondent/appellant with the knowledge that the notice of appeal was filed not at the High Court but in the Court of Appeal. The 8th respondent, Ifeanyi Okonkwo, had raised the point. If the Court below had not at the time struck out the appeal or penalized the appellant/respondent it would be because it thought little of non-compliance. The 5th respondent who had not then complained cannot now be allowed to complain of an occurrence he had previously thought little of. It would amount to allowing him to approbate and reprobate at the same time. The mistake of applicant's counsel is to have assumed that the mere filing of the appeal at the registry of the court below renders the appeal void without more. He believes he has a joker he can raise at any stage. This is a wrong assumption. Litigation premised on such approach would amount to or lead to injustice. I am also to state that at the same time the alleged notice of appeal was filed in the Court of Appeal on 18/4/07, the records of appeal were all before the Court of Appeal, which situation completely removed the possibility of the court below asking the appellant/respondent to go back to file his appeal at the High Court. See Order 1 rule 22 of the Court of Appeal rules. The case *The Honda Place Ltd, v. Globe Motors Holding Nig. Ltd.* (2005) 7 S.C. (Pt. III) 182, relied upon in counsel's address only related to an order made by this court upon an application heard in chambers. This court sitting in open court overruled the order made in chambers. This is quite a regular situation unlike the situation on hand.

The court has given a final judgment in accordance with its power under Section 235 of the 1999 Constitution. Its jurisdiction to interfere with its judgment falls within a very narrow compass as stated in a number of previous decisions of this court. This is not one of such reasons.

The argument that we should allow the applications to be argued on their merits would appear to be an invitation to us to engage on a wild goose chase. The relevant facts are

plain for all to see. It is my view a clear case in which the jurisdiction of this court cannot be invoked. I would accordingly strike out the applications. I make no order as to costs.

OGUNTADE JSC

B

I have had the advantage of reading in draft a copy of the lead judgment just delivered by my learned brother, Katsina-Alu. JSC., presiding. This application calls on us to set aside our judgment which was delivered on 14-06-07. The reason relied upon is that the appellant/respondent had filed his appeal to the court below in the same court instead of filing it at the court of trial. C

The complaint of the 5th respondent/applicant relates solely to an alleged infraction of the Rules of Procedure in the court below. Order 3 rule 2(1), provides that appeals shall be filed at the court of trial. If it was not so filed, this gave the right to the applicant to complain to the court below which may or may not use its powers under Order 7 rule 3(1), to waive such non-compliance. Indeed the 8th respondent before this court raised the matter before the court below and later dropped the matter after it appeared the parties had compromised matter. The court below then made a formal order on the matter. That order became an appealable order, the same having been made in the course of proceedings. The applicant never appealed against it. When the appeal by the appellant/respondent came before us, the matter was not raised. We gave judgment on the merit and considered all the issues raised in the appeal. E F

In view of the facts surrounding this application the conclusion to be arrived at is that there is no jurisdiction in this court to alter or review its judgment just because a party wants to raise a matter which it could earlier have raised in the course of hearing but failed to raise. I would also strike out this application. G

MOHAMMED JSC

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The Preliminary Objections are upheld. The applications to set aside the judgment of this court of 14/04/2007, are hereby struck out. No order as to costs.

TABAI JSC

I have carefully examined the various applications and the Preliminary Objections of the appellant/respondent to the competence of these applications, I have also considered the submissions of counsel for the parties. The main ground of the application is that the Notice of Appeal against the judgment of the trial court to the Court of Appeal was incompetent for non-compliance with Order 3 rule 2(1), of the Court of Appeal Rules 2002. And one ground of the Preliminary Objection was Order 7 rule 1 of the self same Court of Appeal Rules.

Order 3 rule 2(1), provides to the effect that all appeals shall be brought by Notice of Appeal to be filed in the Registry of the court below. And Order 3 rule 5 provides that an appeal shall be deemed to have been brought when the Notice of Appeal has been filed in the Registry of the court below. There is no doubt that in view of the foregoing provisions a Notice of Appeal is only competent when it filed in the Registry of the court which decision is being challenged on appeal.

However Order " Rule 3(1) and (2) provides as follows
 3(1) *"The court may, in exceptional circumstances, and where it considers it in the interest of justice so to do waive compliance by the parties with these rules or any part thereof.*

(2) *Where there is such waiver of compliance with the Rules, the court may, in such manner as it thinks right, direct the appellant or the respondent as the case may be to remedy such non-compliance or may, notwithstanding, order the appeal of proceed or give such directions as it considers necessary in the circumstances."*

The submission of learned senior counsel for the appellant/respondent/objector is that in view of the peculiar exceptional circumstances of this case the court below and indeed the defendants/applicants/respondents should be taken to have waived compliance with 3 rule 2(1) of the Court of Appeal Rules. Learned senior counsel for the 1st, 4th and 5th applicants contended, on the other hand, that non-compliance affects the issue of jurisdiction which is so fundamental that cannot be waived. I want to say straight away that I am not, with respect, persuaded by the argument of counsel for the de-

fendants/ applicants/respondents.

There is nothing so sacrosanct or immutable about the provisions of order 3 rule 2(1) or 5 as to render the rights or benefits derivable thereat from being waived. Rules of court remain rules of court and cannot be accorded a status as immutable as statutory provisions. In Francis Adesegun Katto v. Central Bank of Nigeria (1991) 11-1 SI S.C 176; (1991) 9 NWLR (Pt. 214) 126 at 147, this court stated the status of rules of court as follows;

"As mandatory rules of court are not as sacrosanct as mandatory statutory provisions, courts of justice are more inclined to regard as directory or permissive any provision in rules of court which appears mandatory, if it is implicit in the provision in question or if combination of other provision with the provision in question so dictated or if the ends of justice demands that it be so construed."

And in Oloba v. Akereja (1988) 7 S.C (Pt. I) 1; (1988) 3 NWLR (Pt D 84) 508 at 528, this court per Oputu, JSC said:

"All rules of court are made in aid of justice. That being so, the interest & justice will have to be given paramountcy over any rule compliance with which will lead to outright injustice."

It is clear from the above authorities that rules of court including Order 3 Rules 2(1) or 5 of the Court of Appeal Rules can be waived.

In this case the incompetence of the Notice of Appeal before the court below was not raised by the applicants/respondents until judgment was entered therein in their favour. And they gladly took the rights and benefits of that judgment. Although the 8th respondent/applicant raised the issue he sought the leave of the court below to withdraw the objection. The withdrawal was not opposed by the other respondents and so the objection was dismissed. The issue was also not raised when the appeal came before this court. The appeal was heard and the final judgment has since been entered for the appellant/respondent. In my view the above constitute exceptional circumstances to warrant the inference of waiver.

For the foregoing and the fuller reasons contained in the ruling of my learned brother, Katsina-Alu. JSC. I hold that the Preliminary Objections are sustainable and are hereby sustained. The result is that this court has no jurisdiction to entertain the applications which are accordingly struck out.

MUHAMMAD JSC

After having considered the submissions of counsel for the appellants/respondents, the 6th. 7th and 8th respondents. The applications filed by Dr. Andy Uba; INEC and PDP are accordingly struck out for want of jurisdiction.

ADEREMI JSC

The ruling of court upholding the Preliminary Objection was read in the open court and all the applications pending were struck out.
I agree with the ruling just read.

CHUKWUMA-ENEH JSC

I agree with the lead judgment delivered by Katsina-Alu, JSC. There is no merit in the applications before me. Each is thereby struck out accordingly. I make no order as to cost.

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