

SUPREME COURT OF NIGERIA
25TH FEBRUARY, 2010. SC. 118/2002
CORAM:- A. I. KATSINA-ALU CJN, A. M. MUKHTAR,
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, JJSC

1. CHIEF J. OLORUNYOLEMI APPELLANTS
2. NIGERIAN LEGION
AND
MRS. HELEN AKHAGBE RESPONDENT

APPEALS - Records of proceedings - Whether complete on transmission - It is obvious from the depositions made - That the records were incomplete on transmission to Court of Appeal - As they were bereft of the exhibits at trial (H1)

INTERLOCUTORY APPLICATIONS - Appeals - Application for dismissal - Propriety of hearing - The hearing on 5/6/01 was unjustifiable - As the hearing notice for it was dated 31/5/01- And there was an intervening weekend between the two dates (H2)

COURT PROCESSES - Hearing notice - Proof of service - Effect of attendance in court - A party's presence in court on the day a matter is slated - Is not necessarily a confirmation of service on him - There needs to be actual proof of service (H3)

FACTS

The plaintiff/respondent had sued defendants/appellants jointly and severally before the High Court of Lagos State. Respondent's claim was for sundry reliefs by which she asserted that by virtue of the Nigerian Legion Decree No. 37 of 1988 and the Regulations made thereunder, she was the rightful person to be the Commander-General of the 2nd appellant, and by which she challenged the alleged unlawful interference with her rights of membership of the 2nd appellant by the appellants. After hearing, the learned trial judge gave judgment to respondent. Aggrieved, appellants appealed to Court of Appeal on 21/9/99. It was in evidence that upon transmission of the records of appeals from High Court to Court of Appeal,

Exhibits A to N used at trial were omitted. Whereupon appellants wrote to ACR of the trial court on 17th January 2001 requesting the production of the exhibits as supplementary record.

Notwithstanding the foregoing, Court of Appeal had issued a notice to file briefs of arguments, dated 14/2/01 and had directed for it to be served on the parties. In the notice appellants were allowed 60 days and respondent was allowed 45 days to file their respective briefs. But before the end of the period limited for appellants could lapse, respondent filed motion praying Court of Appeal to dismiss the appeal for failure to file appellants' brief. Moreover there was no proof that appellants were served with the notice to file briefs. Be that as it may, on 31/5/01 a hearing notice was issued to the effect that the motion for dismissal was to be heard on 5/6/01. It was eventually heard and the appeal dismissed for failure to file appellants' brief. Aggrieved, appellants have brought this appeal against the dismissal order of Court of Appeal.

ISSUES FOR DETERMINATION

"(i) Whether the Records of Appeal from the High Court of Lagos State have been completely transmitted to the court below as at the date of dismissal of the appeal for default of filing Brief of Argument.

IF THE ANSWER IS IN THE NEGATIVE

Whether the court below had any legal authority or jurisdiction to dismiss the appeal.

(ii) Whether the Motion on Notice dated 1st March 2001 is competent.

(iii) Whether on the face of the records any process emanating from the court below was served on the Appellants before the dismissal of the appeal.

IF THE ANSWER IS IN THE NEGATIVE

Whether the court below had jurisdiction as it is assumed to entertain the Motion on Notice for dismissal of the appeal."

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

Records of proceedings - Whether complete on transmission

1. I have carefully perused the documents referred to in the above reproduced depositions and I must say they are indicative of the fact that the record of proceedings of the trial court was incomplete, as

they were bereft of copies of the exhibits, as at the time the record was transmitted to the Court of Appeal. (p.741 B)

Application for dismissal - Propriety of hearing

2. Assuming that the appellants had not received the notice to file briefs of argument, as is postulated by the learned appellants' counsel, as is also apparent on the face of the supporting affidavit for dismissal, was the hearing of the motion on 5/6/01 justifiable? I think not, because the hearing notice for the motion was dated 31/5/01, and the record shows that the appeal was dismissed on 5/6/01. There was an intervening period of the weekend which should be subtracted in the counting of the allowed time of notice. The notice given to the appellants was definitely short. Again, this is on the assumption that the appellants were served with all these processes, which they denied receiving. (p. 741 E)

Hearing notice - Proof of service - Effect of attendance in court

3. At any rate there is no evidence that the appellants were served with any of the controversial processes of court, and to say that the provision of Section 150 (1) of the Evidence Act supra can be invoked is a misconception. The fact that a party was in court on the day a matter is slated to come up is not necessarily a confirmation that the other party was actually served with the hearing notice. There must be actual proof of service on the necessary parties, i.e. the evidence of receipt vide signature of the party personally or his counsel, or an affidavit of service sworn to by the person who effected the service. Service of process on a party is so fundamental that absence of it may affect the jurisdiction of a court and render a court's proceeding a nullity. (p. 742 D)

NOTABLE POINT OF INTEREST
ONNOGHEN JSC

An appeal cannot be heard without the record of appeal

It is settled law that every material fact, evidence or document tendered in the proceeding at the High Court and relevant to the determination of the issues in controversy between the parties on appeal, should be transmitted as of necessity, to the appellate court as there can be no consideration of any appeal by an appellate court, or an

objection thereto unless and until there is before the court a record of appeal duly prepared and transmitted by the Registrar of the lower court or by the appellant himself upon the leave of the court being sought and obtained. (p. 744 B)

B REPRESENTATION

Prince A. A. Adetiloye for the Appellants.

Chief O. J. Onoja, with him M. A. Ebute, E. O. Agab and Famokun Adedamola for the Respondent.

C CASES REFERRED TO

Mark v. Eke (1997) 11 NWLR part 529 page 501

Effiong. v. Ironbar (1998) 13 NWLR part 582 page 687

Aniekan v. Aniekan (1999) 12 NWLR part 631 page 491

D Ajidahun v. Ajidahun (2000) 4 NWLR part 654 page 605

U.B.A. PLC v. Ajileye (1999) 13 NWLR part 633 page 116

Adewunmi v. S. G. B. Ltd. (1998) NWLR part 552 page 154

Kaduna Textiles Ltd v. Umar (1994) 1 NWLR part 319 page 143

E Habib Nigeria Bank Ltd., Wahab Opomulero & ors 2000 15 NWLR part 690 page 315

STATUTE & RULES REFERRED TO

Evidence Act, Cap 112, L. F. N., 1990, s. 150

F Court of Appeal Rules, O. 3 r. 21

LEAD JUDGMENT BY MUKHTAR JSC

This is an appeal against the decision of the Court of Appeal, Lagos Division, which dismissed the appeal before it for lack of filing
G briefs of argument. In his amended statement of claim the respondent in this appeal claimed the following reliefs jointly and severally against the appellants/defendants:-

H “1. *That by virtue of the Nigerian Legion Decree No. 37 of 1988 and the Regulations made there under, the Plaintiff is the right-ful person to be commandant-General of the 2nd defendant and entitled to exercise the powers and functions thereof.*

2. *The merger of the office of Commandant-General, with that of the Chairman of the Council, of the 2nd defendant and the purported exercise of the powers and functions of the two offices by*

the 1st Defendant is unlawful, illegal, unconstitutional, null and void.

3. *That the plaintiff is still a member and employee of the 2nd defendant entitled to his salaries and benefits per month from the 1st of July, 1991 till the date of judgment and thereafter.*

4. *That the purported deployment or adoption of deployment of the plaintiff by the 1st defendant to Benin vide his letter NL/OP/ 32/18 of 11th June, 1991 and his (sic) purported bar of the plaintiff from the premises of the 2nd defendant together with refusal to pay plaintiffs claims, salaries and benefits since July, 1991 as an unlawful interference with plaintiffs' membership and contractual rights with the 2nd defendant and same amounts to a breach of contract.*

5. *An order directing the 1st defendant with the National Council of the 2nd defendant to appoint the Plaintiff Commandant-General of the 2nd defendant, and pay him his outstanding claim of N24,044.20 as special damages together with all his salaries and benefits from the 1st of July, 1991 till judgment.*

6. *N100,000 general damages against the defendants for unlawful interference with the Plaintiff's aforesaid membership/contractual rights."*

After evaluating the evidence before him and considering the addresses of learned counsel, the learned trial Judge granted the above reliefs after giving judgment to the respondent, as follows:-

"Consequently therefore the claim of the Plaintiff succeed and JUDGMENT is hereby given in favour of the Plaintiff against the two Defendants jointly and severally as per his amended Statement of Claim with damages awarded at N75,000.00".

The defendants not satisfied with the decision appealed to the Court of Appeal. The notice of appeal containing eleven grounds of appeal was filed on 21/9/99. On 1/3/01 the respondent/plaintiff filed a motion on notice seeking an order dismissing the appeal. On 5/6/01 the Court of Appeal took the motion and dismissed the appeal for want of diligent prosecution. This appeal before us is against the order of dismissal. As is the practice in this court and in compliance with the rules of this court the learned counsel for the parties exchanged briefs of argument, which were adopted at the hearing of the appeal. The following issues for determination were formulated in the appellants' brief of argument and they are:-

"(i) Whether the Records of Appeal from the High Court of

Lagos State have been completely transmitted to the court below as at the date of dismissal of the appeal for default of filing Brief of Argument.

IF THE ANSWER IS IN THE NEGATIVE

B *Whether the court below had any legal authority or jurisdiction to dismiss the appeal.*

(ii) Whether the Motion on Notice dated 1st March 2001 is competent.

C *(iii) Whether on the face of the records any process emanating from the court below was served on the Appellants before the dismissal of the appeal.*

IF THE ANSWER IS IN THE NEGATIVE

Whether the court below had jurisdiction as it is assumed to entertain the Motion on Notice for dismissal of the appeal.”

D Two issues for determination were formulated in the respondent’s brief of argument, and they are:-

“A. Whether the records of appeal were fully transmitted to the court below before the appellants appeal was dismissed.

E *B. Whether the lower court was right in dismissing the appeal based on the motion to dismiss same”*

I will adopt the appellants’ issues for determination starting with issue

F (i). In proffering argument on this issue the learned counsel for the appellants referred to the record of proceedings which show that Exhibits A to Q were not compiled as part of the records of appeal, and contended that the exhibits which could not be traced initially were not transmitted to the court below up till the date of the dismissal of the appeal. The exhibits were subsequently transmitted G to the lower court vide a letter dated 9/7/2001 from the office of the Chief Registrar of the High Court of Lagos State, a month after the dismissal of the appeal. Learned Counsel for the appellant referred to Order 3 Rule 21 of the Court of Appeal Rules, Effiong. v. Ironbar (1998) 13 NWLR part 582 page 687, Mohammed v. Nwobodo 2000 H FWLR part 15 page 2546 and Aniekan v. Aniekan (1999) 12 NWLR part 631 page 491.

In his reply, the learned counsel for the respondent submitted that before an appellate court could be fully seized of a matter, the appeal must have been entered. He referred to Section 150 of the

Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990 on presumption that record was fully before the lower court, and referred to page 251 of the record containing the notice to counsel to file their briefs of argument. He contended that by not replying the notice to file briefs of argument, the appellant has conceded that the record had been fully transmitted. He referred to Section 151 of the Evidence Act supra. It was further submitted that if the appellants were really sure that the record had not been fully transmitted they would have furnished such facts in an affidavit and brought a motion to set aside the order of dismissal of the appeal. The learned counsel placed reliance on the case of Ajidahun v. Ajidahun (2000) 4 NWLR part 654 page 605. B C

After the order of dismissal of the appeal was made by the Court of Appeal, the appellants filed a motion on notice, 'for an order staying execution of the terms and effects of the judgment of this Honourable court made on 6th day of June 2001 dismissing the appeal against the judgment of the High Court of Lagos State for lack of diligent prosecution pending the determination of the appeal against the said decision'. D

In support of the motion was an affidavit containing the following salient depositions:- E

"3. That upon the receipt of the Records of Appeal from the lower court, we immediately observed that it was incomplete as all the documents tendered as EXHIBITS marked A to N were not compiled." F

4. That in consequence of the fundamental omission, no brief of argument could be filed for the appreciation of issues by this Honourable Court.

5. That we immediately drew the attention of the Assistant Chief Registrar (Litigation) of the trial court to the lapse and proceeded further to file in the said court a letter dated 17th January, 2001 but filed on 19th January 2001 formally requesting for the production of the EXHIBITS as further Records of Appeal. Now shown to me and marked EXHIBITS A is a copy of the letter. G H

6. That we discussed the situation of things with the counsel to the Respondent at the trial court who indicated to us that he was not conducting the Respondent's case in respect of the appeal.

7. That the EXHIBITS have just recently been traced after an

in ordinate delay and they are yet to be transmitted to this Honourable Court.

8. *That at no time was any process served on us by the Registry of this Honourable Court.*

B 9. *That it, therefore, came to us as a surprise when we received a letter dated 26th June 2001 from the Appellants forwarding to us a letter dated 22nd June 2001 from the Respondent solicitors claiming that the appeal has been dismissed with an award of the sum of N200,000 (two hundred thousand naira) as damages by this Honourable Court. Now show to me and marked EXHIBIT B is a copy of the letter.*

10. *That we immediately conducted a SEARCH into the file of the appeal in this Honourable Court on 27th June 2001 whereupon the following facts were revealed.*

D (c) *A direction dated 14th February 2001 was issued by this Honourable Court directing the Appellants to file written brief within 60 days and the Respondent within 45 days thereafter. Now shown to me and marked EXHIBIT D is a copy of the said direction.*

E (d) *EXHIBIT D was neither served on us nor is there any proof of such service in the files of this Honourable court.*

(e) *Curiously and inexplicably the Respondent's learned counsel about 2 weeks after the issuance of EXHIBIT D, on 1st March 2001 filed an application for dismissal of the appeal when on the face of EXHIBIT D the Appellants still had 46 days to file their brief from the date of its issue.*

F (f) *The Respondents said application brought by way of MOTION ON NOTICE had indicated on its face an undertaking to serve the motion on us personally and not through the court's Registry. Now shown to me and marked EXHIBIT E is a copy of the said motion.*

(g) *EXHIBIT E was neither served as undertaken by the learned counsel to the Respondent nor is there a proof of service in the court's file.*

H (h) *On 15th May 2001, this Honourable Court directed that the motion on EXHIBIT E be fixed for 5th June 2001 and that, Hearing Notice to be issued and served on both parties. Now shown to me and marked EXHIBIT F is the said directive.*

(i) *The directive was complied with in part only on 31st May*

2001 (less than 3 working days), to the hearing date when the Hearing Notice was issued. Now shown to me and marked EXHIBIT G is the said Hearing Notice.

(j) EXHIBIT G was neither served on us nor is there a proof of service in the court's file."

I have carefully perused the documents referred to in the above reproduced depositions and I must say they are indicative of the fact that the record of proceedings of the trial court was incomplete, as they were bereft of copies of the exhibits, as at the time the record was transmitted to the Court of Appeal. There is nothing to show that the notice to file briefs of argument was served and received by the appellants. This notice was dated 14/2/01 and in it parties were required to exchange briefs of argument within 60+ 45 days. A careful calculation of the period from that 14/2/01 to when the 60+45 days will elapse will take us to the end of June 2001 roughly. The learned counsel for the respondent however was very impatient for even the 60 days allowed for the appellants to file the appellants' brief of argument had not expired when he hurriedly filed an application for the dismissal of the appeal on 1/3/01. **Assuming that the appellants had not received the notice to file briefs of argument, as is postulated by the learned appellants' counsel, as is also apparent on the face of the supporting affidavit for dismissal, was the hearing of the motion on 5/6/01 justifiable? I think not, because the hearing notice for the motion was dated 31/5/01, and the record shows that the appeal was dismissed on 5/6/01. There was an intervening period of the weekend which should be subtracted in the counting of the allowed time of notice. The notice given to the appellants was definitely short. Again, this is on the assumption that the appellants were served with all these processes, which they denied receiving.**

The provisions of the Evidence Act supra are not relevant to this discussion. In the light of the overall reasoning above, I answer the first issue for determination in the negative, and allow ground (1) of appeal covered by it.

On issue (2) and (3) supra, the learned counsel for the appellants has submitted that the affidavit in support of the application for dismissal of the appeal was bereft of certain important particulars like

the date the record of appeal was received, the date when the directive to file briefs of argument was issued or served. He further submitted that the motion on notice was filed prematurely. It was filed at a time when from the record of the court below the appellants still had 45 days to file their brief of argument. The learned counsel for the respondent has argued that the motion for dismissal was competent, in that 60 days had elapsed on 7/4/2001. He further argued that the mere fact that the hearing notice was issued at all for the hearing of the motion, coupled with the fact that the respondent/applicant was present or represented in court on 5/6/01 would raise the necessary presumption that same was actually served as directed. He referred to Section 150(1) of the Evidence Act, and the case of Kaduna Textiles Ltd v. Umar (1994) 1 NWLR part 319 page 143.

I believe I have already dealt with the calculation of the various periods in the treatment of issue (1). ***At any rate there is no evidence that the appellants were served with any of the controversial processes of court, and to say that the provision of Section 150(1) of the Evidence Act supra can be invoked is a misconception. The fact that a party was in court on the day a matter is slated to come up is not necessarily a confirmation that the other party was actually served with the hearing notice. There must be actual proof of service on the necessary parties, i.e. the evidence of receipt vide signature of the party personally or his counsel, or an affidavit of service sworn to by the person who effected the service.*** See Habib Nigeria Bank Ltd., Wahab Opomulero & ors 2000 15 NWLR part 690 page 315. ***Service of process on a party is so fundamental that absence of it may affect the jurisdiction of a court and render a court's proceeding a nullity.*** See Sken Consult (Nig) Ltd & Anor v. Godwin Sekondy Ukey (1981) 1 SC 6, and Mark v. Eke (1997) 11 NWLR part 529 page 501. The case of Kaduna Textiles supra cited by learned counsel is distinguishable from the instant case, for in the former case there was evidence of service vide an affidavit of service.

In the instant case there was nothing to indicate that the appellants were served with the processes. I will reproduce the record of the proceedings of that 5/6/01 when the appeal was dismissed, hereunder. It reads:-

“UPON READING this motion before the court and the affida-

vit of Gbenga Tutuola sworn on 1st day of May 2001, AND AFTER HEARING J. R. Akomolafe (Esq.) of counsel for Respondent/Applicant, Appellant counsel absent and unrepresented.

IT IS ORDERED AS FOLLOWS:-

- 1. Appeal is dismissed for want of diligent prosecution.*
- 2. That costs assessed at N2,000 be awarded to Respondent/ B Applicant.”*

It is clear from the above that no indication was given of whether the appellants were served or not. All it says is that the appellants' counsel was absent and unrepresented. The usual procedure is to record that he was served or not served, but that was not the case. C

Authorities abound that failure to serve a party of processes in proceedings is a fundamental omission which will render proceedings and judgment a nullity See U.B.A. PLC v. Ajileye (1999) 13 NWLR part 633 page 116, Amuweh Trans (Nig.) Ltd. v. V. O. A. D Trans (Nig.) Ltd. (1998) 6 NWLR part 555 page 684, and Adewunmi v. S. G. B. Ltd. (1998) NWLR part 552 page 154, relied upon by learned counsel for the appellants.

These issues are in the circumstances resolved in favour of the appellants and grounds 2, 3 and 4 of appeal to which they are married succeed. E

In the final analysis the appeal succeeds and is allowed. I hereby order that the appeal be heard on its merit after the briefs of argument would have been properly exchanged. I make no order as to costs. F

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Mukhtar, JSC in this appeal. I agree entirely with it and, for the reasons given therein I too, allow the appeal and order that the appeal before the Court of Appeal, Lagos Division be heard on its merits. I too make no order as to costs. G

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother MUKHTAR JSC, just delivered. I agree with his H

reasoning and conclusion that the appeal has merit and should be allowed.

It is very clear from the record that as at the time the appeal was dismissed for want of diligent prosecution, the complete record of appeal had not been transmitted to the lower court. The exhibits in particular were yet to be transmitted from the High Court to the Court of Appeal - that made whatever '*record*' of appeal that was compiled to be grossly inadequate or incomplete for the purpose of entering the appeal for hearing at the appellate court. It is settled law that every material fact, evidence or document tendered in the proceeding at the High Court and relevant to the determination of the issues in controversy between the parties on appeal, should be transmitted as of necessity, to the appellate court as there can be no consideration of any appeal by an appellate court, or an objection thereto unless and until there is before the court a record of appeal duly prepared and transmitted by the Registrar of the lower court or by the appellant himself upon the leave of the court being sought and obtained.

The rationale is that though an appeal is a rehearing of the matter, the rehearing in this case is by considering the case based on the printed record before the appellate court, which includes the exhibits tendered therein.

There is also the issue of service of relevant processes in the proceedings on the appellant before the appeal was dismissed. The lack of service of the processes on the appellants constitutes another fundamental defect as it breached the right to fair hearing of the appellants before the lower court.

It is for the above and the more detailed reasons contained in the lead judgment of my learned brother *MUKHTAR JSC* that I too find merit in this appeal and consequently allow same.

I abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal allowed.

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CHUKWUMA-ENEH JSC

I have had the advantage of reading in advance the judgment of my learned brother Mukhtar, JSC just delivered and I agree with

him that the appeal has merit and should be allowed. I also allow it and endorse the order on cost as in the lead judgment.

MUNTAKA-COOMASSIE JSC

I have had the privilege of reading in draft the lead judgment of my learned brother Mukhtar JSC just delivered and agree with him that this particular appeal is pregnant with a lot of merit deserving it to be allowed. For the reasons he relied in allowing this appeal, I adopt same and I too find out that the appeal lacks merit and I dismiss same. I abide by the consequential orders. I also make no order as to cost.

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