

SUPREME COURT OF NIGERIA
10TH DECEMBER, 2010. SC. 30/2003
CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,
J. A. FABIYI, O. O. ADEKEYE, B. RHODES-VIVOUR, JJSC

PANALPINA WORLD TRANSPORT (NIG.) LTD. APPELLANT
AND

1. J. B. OLANDEEN INTERNATIONAL
2. THE OWNERS OF G & C ADMIRAL
3. MASTER OF G & C ADMIRAL RESPONDENTS
4. G & C AFRICA LINE
5. GRIMALDI & COBELFRET WEST
AFRICA RORO SERVICE

ACTIONS - Liability - Parties - Proper party - Where culpability of a person is suggested by the facts presented - As with Panalpina in this case - Such person ought to be made a party to the action (H1)

ACTIONS - Raising of issues - Statute of limitation - Time to raise - It cannot be raised at the threshold stage - Of determination of the parties to the suit (H2)

ORDERS OF COURT - Words & Phrases - "Striking out"- Instances - Where an order of "dismissal" is made - Following a hearing not based on merit - It is in law a mere striking out - With an option to relist (H3)

PRACTICE & PROCEDURE - Interlocutory applications - Struck out by court - Options of applicant - He can either file a fresh motion or apply to relist the one struck out - Depending on the circumstances that led to the striking out (H4)

FACTS

The 1st respondent as plaintiff, sued the 2nd to 5th respondents as defendants, jointly and severally before the Federal High Court, Lagos. Plaintiff's claim was for damages for breach of contract in that they failed to deliver plaintiff's cargo of red chillies from Tin Can Island Port Lagos, to Antwerp Bruxelles as and when due as a

result of which the cargo was rejected by the plaintiff's importers for late delivery. In its statement of claim, plaintiff pleaded the role played by appellant in transporting the cargo. Subsequently, plaintiff filed an application to join appellant as 5th defendant to the suit which application was heard and granted. Plaintiff also amended its statement of claim, with the leave of court, by further pleading that when the goods were rejected by the Belgian importers, the appellant admitted negligence of defendants and offered to find alternative buyers for the goods if the plaintiff would release the shipping documents to it. Consequently, the shipping documents were released to the appellant which nonetheless failed to find alternative buyers.

After pleadings were filed and exchanged among the parties, including the appellant, the matter came up on 4th July, 1999. The trial court suo motu struck out the name of the appellant as 5th defendant, on the basis that the appellant was at all material time, an agent of disclosed principals. Accordingly, that the plaintiff having sued the disclosed principals, had no cause of action against the appellant. The matter proceeded to trial, at the end of which the trial court dismissed plaintiff's suit. Aggrieved, plaintiff appealed to Court of Appeal. During the pendency of the appeal, plaintiff applied to have the appellant herein joined as a respondent to the appeal. The application was refused on the basis that there was no issue in the appeal relating to the person sought to be joined. Whereupon, the plaintiff with leave of court, filed two additional grounds of appeal raising issues relating to the appellant, and then reapplied to have the appellant joined as a party to the appeal. Appellant filed a counter-affidavit to the application. Court of Appeal eventually heard and granted the application. Dissatisfied, the appellant has brought this appeal against the ruling of Court of Appeal. Appellant contends inter alia, that it cannot validly be joined to the appeal after six years from the date of accrual of the alleged cause of action.

ISSUES FOR DETERMINATION

(1) Whether the appellant was originally a party to the proceedings at the trial court and could therefore be validly joined as a party to the case by the Court of Appeal on 2/11/2000 when it was clear to the said court that the joinder would have the effect of taking away the appellant's accrued statutory right of defence in the matter.

(2) Was the lower court right to have granted an order joining

the appellant as a party to the appeal when it was clear that the appellant was merely an agent of a disclosed principal who was already a party to the action.

(3) Was it necessary in the circumstance of the case for the appellant to first wait to be joined until the substantive appeal before the lower court come up for hearing before it can challenge its joinder and/or raise any statutory right of defence in the matter.

(4) Whether it was proper for the lower court and/or within its jurisdiction which had previously considered and refused a similar application also filed by the 1st respondent seeking to join the appellant as a party to now purport to overrule itself on the same issue in the same matter by granting the 2nd application to join the appellant as 5th respondent in the appeal.

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

ACTIONS - Liability - Parties - Proper party

1. At the completion of trial, the learned trial judge remarked in the penultimate paragraph of his judgment as follows -

"I sincerely hope that in view of my finding of fact that Captain Evensen of Panalpina falsely promised to get the plaintiff an express vessel, Panalpina will do something to alleviate the substantial loss suffered by the plaintiff."

The foregoing remark is acknowledging the culpability of Panalpina for the substantial loss suffered by the plaintiff/1st respondent. Where can the law apportion blame - is it on Panalpina as agent of the plaintiff/1st respondent or on Panalpina arising out of the transaction of disposing off the rejected cargo of the 1st respondent. Further, can the 1st - 4th defendants take the blame for the steps taken by Panalpina without their consent, knowledge and instruction? Surely the matter must proceed to full trial with all the relevant parties including Panalpina to unravel these conflicts based on evidence to support the pleadings. (p. 3013 D)

Raising of issues - Statute of limitation - Time to raise

2. The issue of statute of limitation which is a defence open to the defendants/respondents cannot be raised at the threshold stage of determination of the parties to the suit. The substantive appeal is still pending before the court of appeal. Furthermore, the appellant sub-

mitted in the Reply brief that the transaction between the appellant and the 1st respondent is based on simple contract on which the Federal High Court has no jurisdiction is an issue to be resolved not here in this appeal but in the main appeal before the lower court. I will advise the appellant to keep its gun powder dry until the battle front.

B The appellant's submission on issues 1- 3 is premature. (p. 3013 H)

Words & Phrases - "Striking out"- Instances

C 3. At this juncture, it is imperative, that I amplify on the position of the law as supported by the Rules. When an order of court is made in respect of an application not heard on the merits, it amounts to striking out simpliciter. Even where an order of dismissal is made following a hearing which is not based on the merits, such order is still considered in law a mere striking out. When a matter is struck out in **D** such circumstance, there is a liberty to relist. The simple explanation is that while the matter is discontinued as from that date, it is still alive and kept in the court's general cause list and can be brought back to the hearing cause list when an application to relist has been granted. In such case, the plaintiff still has another opportunity to re-open the **E** action after rectifying the deficiency that resulted in the striking out of the action. This is applicable even where the court has not included in the order of striking out that the plaintiff has an option to relist. The matter struck out has not left the cause list - as it is still a pending **F** case or pending cause. The same procedure applies even when a matter has been decided many years ago. (p. 3014 E)

Interlocutory applications - Struck out - Options of applicant

G 4. This same procedure is open to an applicant whose motion has been struck out. He can either file a fresh motion or bring an application to relist it which option depend on the circumstances that led to the striking out of the motion or the nature of the order made. Where there was an attack on the contents of such motion made prior to it being struck out - a fresh application must be filed. A motion brought **H** under the prerogative jurisdiction of the court which is struck out can be refiled and brought before another judge of the same jurisdiction. This is legally approved. The plaintiff/1st respondent took the proper steps in filing the application to join the appellant before another panel of the Court of Appeal after his application was refused for a

procedural defect. The applicant corrected this defect by filing an additional ground of appeal which stated that the trial judge erred in law in suo motu striking out the 5th defendant. (p. 3015 A)

NOTABLE POINT OF INTEREST

MOHAMMED JSC

B

1. Panalpina is a necessary party to the appeal at Court of Appeal

A necessary party to a proceeding is a party whose presence and participation in the proceeding is necessary or essential for the effective and complete determination of the claim before the Court.

C

In the present case, I am of the firm view that the Appellant whose name was struck-out from the action by the trial Court but restored on appeal by the Court of Appeal, is indeed a necessary and essential party whose presence and participation in the appeal now pending at the Court of Appeal, will ensure the effective and complete determination of the issues arising for determination in the 1st Respondent's pending appeal. (p. 3017 D)

REPRESENTATION

Mr. Ayo Olorunfemi for the appellant.

E

Respondents not in court and not represented.

CASES REFERRED TO

Green v Green 1987 3 NWLR pt. 61 p. 480

F

In-Re Mogaji (1986) 1 N.W.L.R. (Pt. 19) 579

Alor v. Ngene (2007) All FWLR pt. 362 pg. 1836

Liff v. Peasley (1980) A.E.R. 623 at pages 640-643

Oduola v. Ogunjobi (1986) 2 NWLR pt. 23 pg. 508 at pg. 513

Waterline Nigeria Limited v. Fawe Services Limited NWLR pt. 163 G pg. 88

RULES REFERRED TO

Court of Appeal Rules, O. 3 r. 6 (1)

H

LEAD JUDGMENT BY ADEKEYE JSC

The particulars of claim filed by J. B. Olandeen International Limited on the 19th of September, 1990 as plaintiffs before the Federal High Court Lagos reflected a claim brought jointly and severally

against the 1st - 4th defendants, the owners of G & C Admiral, Masters of G & C Admiral, G & C Africa Line and Grimaldi & Cobelfret West Africa Roro Service, shippers and receivers of a cargo of 196 Bags of Red Chillies from Tin Can Island Port Lagos to Antwerp, Bruxelles on Board G & C Admiral. The 1st-4th defendants were
 B then sued for a breach of contract particularly based on the alleged negligence of the defendants resulting in the non-delivery of the cargo of Red Chillies to the importers of the plaintiff. The full cost of the goods including the cost of freightage was N229,518.22k. The plaintiff supported this with a statement of claim in which the averments
 C clearly stated the particulars of claim and the particulars of Special Damage. Vide pages 2-6 of the Record.

In paragraphs 6 - 10 of the statement of claim, the plaintiffs pleaded the role played by Panalpina World Transport Nigeria Limited as agent of the 1st - 4th defendants in using the vessel G & C Admiral in transporting the cargo of 196 bags of Red Chillies. Subsequently, the plaintiff on 15/3/91, precisely one year and eight months after commencement of the action before the Federal High Court, filed an application to join Panalpina World Transport Limited as the
 E 5th defendant. The application was moved and granted on the 15th of March, 1991. In the order made by court-Panalpina World Transport Nigeria Limited was joined as co-defendant in the suit, all processes of court were served on the company - while it was simultaneously granted 30 days to file its statement of defence. Vide pages
 F 18-19 of the Record. As 5th defendant, Panalpina World Transport Limited filed its statement of defence - vide page 23 of the Record.

The plaintiff filed an application to amend its particulars and statement of claim. In the amended particulars of claim filed on 14/5/91, it alleged breach of contract flowing from non-delivery of 196
 G bags of Red Chillies and claimed full costs of goods including the cost of freightage and general damages, loss of business totaling N1,469,518.22k.k. He gave the particulars of special damage in the amended statement of claim. The plaintiff pleaded that when the
 H goods were delivered late and consequently rejected by the Belgian importers, the 5th respondent admitted the negligence of the defendants and offered to find buyers for the cargo of Red Chillies on behalf of the plaintiff. By a letter dated the 29th of May, 1989, the 5th defendant authorized the plaintiff, through its bankers, to release its

shipping documents. The plaintiff complied with the directive and on the 6th of June, 1989, the plaintiff's bankers sent a telex to their London office directing that all shipping documents in the transaction be released to Panalpina World Transport S. A. Hoor Derlanna. Vide pages 12-17 of the Record.

The 1st - 4th defendants filed their statement of defence on 11/2/91. They denied therein paragraphs 13.14 and 15 of the statement of claim and averred that Panalpina World Transport (Nig.) Ltd. was an agent of the plaintiff in the cargo freight transaction as well as an agent of the 1st - 4th defendants. The alleged offer of Panalpina to find alternative buyer for the plaintiff's cargo was not with the knowledge, instruction or consent of the defendants but was done if at all, by Panalpina as agent of the plaintiff. B
C

In the statement of defence filed by the 5th defendant, Panalpina World Transport Limited - it denied paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the statement of claim. Vide page 23 of the Record. However in the court proceedings of the 4th of July, 1999, immediately after recording the appearance of counsel, the court suo motu struck out the name of the 5th defendant - the appellant in this appeal as a party in the suit before the trial court. The court's order to that effect reads: - D
E

"Having read the amended statement of claim of the plaintiff and particularly the admitted fact by the plaintiff in para 6 thereof that the 5th defendant joined by order of court was an agent of disclosed principals i.e. the defendants, the plaintiff has no cause of action against the 5th defendant. The plaintiff has already sued the disclosed principals. In the circumstance the court suo motu hereby strikes out the name of the 5th defendant with N100.00 costs against the plaintiff in favour of the 5th defendant." F
G

The matter proceeded to trial thereafter. The plaintiff's grouse before the trial court was in respect of the shipment of the container of 196 bags of red chillies which was carried on Board MV G & C Admiral from Tin Can Island Port Lagos to Antwerp-Belgium. The plaintiff alleged that though Panalpina World Transport Nigeria Ltd., assured him that the vessel G & C Admiral was an express cargo which would arrive Antwerp 14 days from the 14th of February, 1989, the same did not arrive there until the 6th of April, 1989 - two months after the shipment. The plaintiff's client rejected the cargo. Panalpina H

offered to find a buyer for the cargo of red chillies thereafter. The company requested the plaintiff to authorize its bankers to release the shipping documents to it to enable it effect the sale of the cargo. Though the shipping documents were released to the appellant by the plaintiff's bank, the appellant did not sell the cargo. The plaintiff
 B as a result suffered loss and damage. The plaintiff's suit was dismissed by the trial court. The plaintiff aggrieved by the decision of the trial court, filed an appeal against the judgment. The plaintiff as appellant before the Court of Appeal filed an application to join Panalpina World
 C of Transport (Nig.) Ltd. as a party to the appeal. On 10/6/96, the Court of Appeal refused the application on the ground that there was no issue in the appeal relating to Panalpina.

In refusing the application, the lower court said on page 66 of the Record that -

D *"The Court of Appeal will not exercise its discretion to permit a person to be made a party to an appeal or direct that notices be served on such person pursuant to Order 3 Rule 6 (1) of the Court of Appeal Rules if it is obvious that he would in no way be affected by the appeal and that there is no issue in the appeal relating to him or*
 E *on which he should be heard before a decision is made. In this case the first issue for determination not being a valid issue and there being no other issue in the appeal that concerns Panalpina, there would be no justification to order that Panalpina be made a party to the appeal."*

F The plaintiff/appellant filed another application on 9/11/98 to join Panalpina to the appeal again before the same Court of Appeal. Prior to the application, it filed two additional grounds of appeal. Panalpina World Transport (Nig.) Limited filed a counter-affidavit to
 G the said motion and exhibited the earlier ruling of the court refusing the previous application to join the appellant as a party to the appeal. The learned justices of the Court of Appeal granted the application thereby joining Panalpina as a party to the appeal in its considered Ruling delivered on 2/11/2000. Being aggrieved by the Ruling,
 H Panalpina henceforth to be referred to as the appellant approached this court for a review of the application. Notice of appeal was filed. Briefs were exchanged by the parties in the appeal.

At the hearing of the appeal, the appellant raised four issues for determination in the appellant's brief filed on 13/5/04 as follows -

(1) Whether the appellant was originally party to the proceedings at the trial court and could therefore be validly joined as a party to the case by the Court of Appeal on 2/11/2000 when it was clear to the said court that the joinder would have the effect of taking away the appellant's accrued statutory right of defence in the matter.

(2) Was the lower court right to have granted an order joining the appellant as a party to the appeal when it was clear that the appellant was merely an agent of a disclosed principal who was already a party to the action. B

(3) Was it necessary in the circumstance of the case for the appellant to first wait to be joined until the substantive appeal before the lower court come up for hearing before it can challenge its joinder and/or raise any statutory right of defence in the matter. C

(4) Whether it was proper for the lower court and/or within its jurisdiction which had previously considered and refused a similar application also filed by the 1st respondent seeking to join the appellant as a party to now purport to overrule itself on the same issue in the same matter by granting the 2nd application to join the appellant as 5th respondent in the appeal. D

The 1st respondent in the respondent's brief filed on 14/10/05, E formulated two issues for determination as follows -

(1) Whether the appellant was originally party to the proceedings at the trial court and could therefore be validly joined as a party to the case by the Court of Appeal on 2/11/00 when it was clear to the said court that the joinder would have the effect of taking away the appellant's accrued statutory right of defence in the matter. F

(2) Was the lower court right to have granted an order joining the appellant as a party to the appeal when it (sic) clear that the appellant was merely an agent of a disclosed principal who was already a party to the action. G

The foregoing issues embrace issues one to three of appellant's issues for determination. I shall however rely on the issues for determination distilled by the appellant for ease of reference. The appellant argued issues one, two and three together. H

Issues One, Two and Three.

Whether the appellant was originally party, to the proceedings at the trial court and could therefore be validly joined as a party to the case by the Court of Appeal on 2/11/00 when it was clear to the

said court that the joinder would have the effect of taking away the appellant's accrued statutory right of defence in the matter.

Was the lower court right to have granted an order joining the appellant as a party to the appeal when it was clear that the appellant was merely an agent of a disclosed principal who was already a party
B to the action.

Was it necessary in the circumstance of the case for the appellant to first wait to be joined until the substantive appeal before the lower court come up for hearing before it can challenge its joinder and/or raise any statutory right of defence in the matter.
C

The appellant submitted that it was not originally a party to the proceeding at the trial court but was only joined as 5th defendant after one year eight months of commencement of the action against its principals by the 1st respondent, the learned trial judge was right when
D he suo motu struck out appellant's name from the proceedings. In the same vein, the Court of Appeal cannot validly join the appellant to the proceedings more than six years after the accrual of the cause of action on 2/11/00 when any claim against it was already statute-barred. Once it is clearly shown that an action is statute-barred in law,
E there is no law or rule of practice and/or procedure which says a party sought to be joined must first wait to be joined or should be put to the expense of allowing the action to proceed before raising the defence of limitation or accrued statutory right of defence. It is trite
F law that a party or a new cause of action cannot be added after the expiration of the time the law has provided that the action be brought against him and if added by an ex-parte order the court will readily set it aside. The appellant cited cases as follows –

Mabre v. Eagle Star Insurance Co. (1932) A.E.R. pg. 44 at pages
G 412 - 413.

Liff v. Peasley (1980) A.E.R. 623 at pages 640-643.

Oduola v. Ogunjobi (1986) 2 NWLR pt. 23 pg. 508 at pg.
513.

Balogun v. Panalpina World Transport (Nig.) Ltd. (1999) 1
H NWLR pt. 558 at page 83.

Wasa & Anor v. Kalla (1978) NSCC pg. 144 at pg 185.

The appellant submitted further that a party to a contract can elect to sue either the principals or agent but once he unequivocally makes an election to sue one, the other is released from liability. The

appellant being a mere agent of disclosed principals who already are parties to the action, can no longer be brought into the suit. The 1st respondent having elected to sue the appellant's principals - the appellant is released from liability and the 1st respondent is foreclosed from bringing the appellant into the suit.

The appellant urged this court to resolve issues one to three in favour of the appellant and strike the name as the 5th respondent in the appeal before the lower court. B

The 1st respondent submitted by way of reply that the crux of the matter is, at what point in time did the cause of action accrue. There was ample evidence before the court regardless of the denial of the appellant in paragraph 10 of the statement of defence filed on 3/7/91 by two witnesses called by the 1st - 4th defendants that the appellant agreed to sell the cargo after the 1st respondent's client refused delivery of the cargo. The appellant demanded for the shipping documents of the cargo which were sent to the appellant by the 1st respondent's banks. There was confirmation that same was received by the appellant. The relationship between the appellant and the 1st respondent came into existence between 6/6/89 and 6/6/90. In respect of the relationship between the appellant and the 1st respondent, Article 3 Rule 6 of the Carriage of Goods By Sea Act Cap 44 Laws of the Federation 1990 cannot avail the appellant as it can no longer hide under the cloak of agent of a principal. It is a simple contract to which the six year limitation law is applicable. The 1st respondent did not realize that the appellant was not acting as agent of the 1st- 4th defendants/respondents until they averred in their pleadings that the appellant acted as agent of the 1st respondent when it offered to sell the cargo of 196 bags of chillies rejected on delivery. The 11th of February, 1991 was the date of accrual of action between the 1st respondent and the appellant. C D E F G

The appellant was rightly joined as a party, the 5th defendant in the suit. The learned trial judge having rightly joined the appellant as the 5th defendant in the suit before it, cannot turn round to strike out the appellant as a party in the same suit. The court made a mistake of striking out the name of the appellant from the suit suo motu without calling on the counsel to the parties to address the court on the issue. H

The 1st respondent cited the cases of *Kumi v. Balogun* (1978) 1 SC 53.

Olusanya v. Olusanya (1983) 4 SCC Vol. 14 pg.97 at pg. 102

paragraphs 15-20.

This court is urged to resolve the issues in favour of the 1st respondent.

B Issue Four

Whether it was proper for the lower court and/or within its jurisdiction which had previously considered and refused a similar application also filed by the 1st respondent seeking to join the appellant as a party to now purport to overrule itself on the same issue in the same matter by granting the 2nd application to join the appellant as 5th respondent in the appeal.

The appellant referred to the application filed by the 1st respondent before the Court of Appeal, Lagos seeking to join the appellant as 5th defendant/respondent in the appeal - coram M. A. Akanbi, U. A. Kalgo and E. O. Ayoola. The court in its ruling delivered on 10/6/96 refused the application for joinder.

The 1st respondent filed another application on 9/11/98 seeking to join the appellant as a party before the lower court. It was strongly opposed by the appellant. The court overruled itself on the issue in the same matter and by the same application joined the appellant as the 5th defendant/respondent. The application was an abuse of court process. The action of the court was ultra vires as it had constituted itself into an appellate court over its own decision. Whereas the court ought to have refused the second application.

This court is urged to resolve the issue above in favour of the appellant, allow the appeal and strike out the said appellant's name from the appeal proceedings.

G I have considered the copious submission of the parties in this appeal. I see the issues involved in this appeal as simple and within narrow limit. The crucial question is, whether it is necessary to join the appellant - Panalpina World Transport (Nig.) Ltd. - first as a 5th defendant in the suit before the Federal High Court and consequently as a respondent in the appeal before the Court of Appeal. It is imperative to shed light on the background facts of this case. The plaintiff/appellant/respondent filed an application on 8/3/91 to join Panalpina as the 5th defendant in the suit. The application was moved and granted. On 4/7/91 in an unusual turn of event, the same trial

judge suo motu, though counsel to both parties were in court, struck out the name of the appellant as 5th defendant - on the basis that the 5th defendant though joined by order of court, was an agent of disclosed principals who were already sued in the matter. The trial judge predicated same on the paragraph 6 of the amended statement of defence. B

The relevant paragraph reads -

"The 5th defendant avers that it duly secured a place for and loaded the said container on the 17th February, 1989 on the vessel G & C Admiral whose owners issued a Bill of Lading No. LOS/ANT-1 dated the 17th February, 1989." C

There was no appeal on the issue of striking out of the 5th defendant - which by virtue of the application filed to join it show that it was a necessary party in the suit. Rather it decided to raise the issue of joinder in the substantive appeal in the matter filed before D the lower court. As a prelude, the 1st respondent filed on 9/11/98 an application for an order of the lower court joining Panalpina World Transport Nigeria Limited which name was struck out by the trial court on 4/7/91, as the 5th respondent in the substantive appeal.

The 1st respondent had filed a similar application before another panel of the Court of Appeal which refused the application for the reason of a simple procedural lapse which made the application incompetent. The relevant issue which related to the appellant in the appeal was not supported by any ground of appeal. That rendered that issue formulated irrelevant to the proceedings and consequently F invalid. E

In the affidavit in support of this application for joinder of the appellant filed on 9/11/98, the 1st respondent/applicant deposed through its counsel that - Paragraph 4 - G

"The appellant then brought an application dated the 26th day of September, 1996 to amend its notice of appeal and to serve same on Panalpina based on this honourable court's advice. This application was granted on the 5th day of May, 1997."

Paragraph 5 H

"That the lower court's order of 4/07/91 was made by that court without any invitation to any of the counsel to argue for or against the order before it was made."

Paragraph 6

“That the lower court made the said order despite paragraph 6 of the Amended Statement of Claim which showed a cause of action against Panalpina and which showed Panalpina as an interested party.”

Paragraph 10

- B *“That Panalpina is a necessary party to this appeal and is directly affected by this appeal as this honourable court, by its order dated 5/5/97 granted leave to the appellant to appeal against the lower court’s said order and leave to file additional grounds of appeal which are directly on the lower court’s Order.”*

C Paragraph 11

“That the additional grounds of appeal dated 26/9/96 and filed on 2/10/96 was duly served on Panalpina by the bailiff of this honourable Court.”

- D It is apparent from the foregoing that the gravamen of the application before the lower court and the crucial issue for determination by that court was the propriety of the order of the trial court made suo motu to strike out the name of the 5th defendant/appellant as a party in the suit. Justice of the case demands that the learned
- E trial judge hears the evidence of the parties to decide the role played by the parties in the contract of carriage before coming to the conclusion whether the appellant was an agent of disclosed principals. During the trial of the suit, after striking out the appellant as the 5th defendant, there was evidence from two defence witnesses of the 1st- 4th
- F defendants/respondents confirming the pleadings of the plaintiff/1st respondent in their evidence in court that the appellant offered to sell the rejected cargo by the client, and the shipping documents were sent to the appellant by the bankers of the 1st plaintiff/respondent.
- G One of these witnesses is an official of the appellant itself. The evidence of the two witnesses was summarized by the parties in the judgment of the learned trial judge at page 40 lines 19-23 of the Record and page 43 lines 16-20.

Paragraph 6 of the Amended Statement of Claim reads –

- H *“Sometime in January, 1989, the plaintiff through its Director, Mr. Jubril Oladeinde made enquiry from Panalpina World Transport Nigeria Limited (agents to the defendants) whose office is at No.4 Creek Road Apapa, Lagos as to the procedure of exporting red chillies to Antwerp with intention to export same.”*

Paragraph 13

"The plaintiff will contend at the trial of this case that the defendants through their agents Panalpina World Transport Nigeria Limited admitted their negligent act and offered to find a buyer for the plaintiff's cargo in order to reduce the plaintiffs suffering in terms of economic loss." B

The 1st - 4th defendants/respondents in paragraph 12 of their statement of defence on page 8 of the record averred that -

Paragraph 12

"The defendants deny paragraphs 13, 14, 15 of the statement of claim and assert once more that Panalpina World Transport Nigeria Limited was an agent of the plaintiff as well as an agent of the defendants. The alleged offer of Panalpina to find alternative buyer for the plaintiff's cargo was not with the knowledge, instruction or consent of the defendants but was done, if at all by Panalpina as agent of the plaintiff." C D

At the completion of trial, the learned trial judge remarked in the penultimate paragraph of his judgment as follows -

"I sincerely hope that in view of my finding of fact that Captain Evensen of Panalpina falsely promised to get the plaintiff an express vessel, Panalpina will do something to alleviate the substantial loss suffered by the plaintiff." E

The foregoing remark is acknowledging the culpability of Panalpina for the substantial loss suffered by the plaintiff/1st respondent. Where can the law apportion blame - is it on Panalpina as agent of the plaintiff/1st respondent or on Panalpina arising out of the transaction of disposing off the rejected cargo of the 1st respondent. Further, can the 1st - 4th defendants take the blame for the steps taken by Panalpina without their consent, knowledge and instruction? Surely the matter must proceed to full trial with all the relevant parties including Panalpina to unravel these conflicts based on evidence to support the pleadings. F G H

The issue of statute of limitation which is a defence open to the defendants/respondents cannot be raised at the threshold stage of determination of the parties to the suit. The substantive appeal is still pending before the court of appeal.

Furthermore, the appellant submitted in the Reply brief that the transaction between the appellant and the 1st respondent is based on simple contract on which the Federal High Court has no jurisdiction is an issue to be resolved not here in this appeal but in the main appeal before the lower court. I will advise the appellant to keep its gun powder dry until the battle front. The appellant's submission on issues 1- 3 is premature.

Finally, the fourth issue challenged the jurisdiction of the lower court to overrule itself on the same issue in the same matter by granting the 2nd application to join the appellant as 5th respondent in the appeal. The appellant regarded the order of the 2nd panel of the lower court as ultra vires of its power as it has subtly constituted itself into an appellate court to sit over its own decision.

As I have mentioned earlier in this judgment, the first panel refused the application for joinder due to procedural defect which rendered the application incompetent. There was no issue in the appeal relating to the appellant-hence the panel was incapacitated from invoking Order 3 Rule 6 (1) of the Court of Appeal Rules to join him as a party. The application was filed before another panel which granted the order as prayed. **At this juncture, it is imperative, that I amplify on the position of the law as supported by the Rules. When an order of court is made in respect of an application not heard on the merits, it amounts to striking out simpliciter. Even where an order of dismissal is made following a hearing which is not based on the merits, such order is still considered in law a mere striking out. When a matter is struck out in such circumstance, there is a liberty to relist. The simple explanation is that while the matter is discontinued as from that date, it is still alive and kept in the court's general cause list and can be brought back to the hearing cause list when an application to relist has been granted. In such case, the plaintiff still has another opportunity to re-open the action after rectifying the deficiency that resulted in the striking out of the action. This is applicable even where the court has not included in the order of striking out that the plaintiff has an option to relist. The matter struck out has not left the cause list - as it is still a pending case or pending cause. The same procedure applies even when a matter has been decided many years**

ago.

Alor v. Ngene (2007) All FWLR pt. 362 pg. 1836

Waterline Nigeria Limited v. Fawe Services Limited NWLR pt. 362 pg. 88.

This same procedure is open to an applicant whose motion has been struck out. He can either file a fresh motion or bring an application to relist it which option depend on the circumstances that led to the striking out of the motion or the nature of the order made. Where there was an attack on the contents of such motion made prior to it being struck out - a fresh application must be filed. A motion brought under the prerogative jurisdiction of the court which is struck out can be refiled and brought before another judge of the same jurisdiction. This is legally approved. The plaintiff/1st respondent took the proper steps in filing the application to join the appellant before another panel of the Court of Appeal after his application was refused for a procedural defect. The applicant corrected this defect by filing an additional ground of appeal which stated that the trial judge erred in law in suo motu striking out the 5th defendant. This error is confirmed firstly by the fact that there was no application from both parties to strike out the 5th defendant and secondly by the apparent conflict of facts in the amended statement of claim of the 1st respondent, the statement of defence of the 1st- 4th respondents and that of the appellant. Vide pages 7-8, 12-17 and 23-24 of the Record. Such conflict of facts can only be resolved by oral evidence and this in turn can only be achieved by joining all interested parties in the suit.

In the final analysis, I resolve all the issues in the appeal against the appellant. I hereby dismiss the appeal and order, confirming the Ruling of the second panel of the lower court delivered on 2/11/00, that the present appellant, Panalpina World Transport Nigeria Ltd. be joined as a party - the 5th respondent in the appeal, pending before the lower court. I make no order as to costs.

MOHAMMED JSC

The 1st Respondent in this appeal was the Plaintiff at the Federal High Court Lagos where it filed its action for damages for breach

of contract of carriage of goods by sea. The trial Court on 15th March, 1991 granted the Plaintiff's application to join the Appellant in this appeal as the 5th Defendant in the action.

However, before the matter went into hearing, the same trial Court suo-motu struck-out the name of the Appellant from the action after
B it had already filed its statement of defence. At the end of the hearing, the case of the Plaintiff now 1st Respondent in this Court was dismissed.

At the Court of Appeal where the Plaintiff/1st Respondent filed
C its appeal against the dismissal of its case, another application was filed by it again to join the Appellant as the 5th Respondent in the appeal but the Court of Appeal on the ground that there was no issue affecting the Appellant in the appeal before that Court refused the application. The decision was given on 10th June, 1996. How-
D ever, before the appeal could be set down for hearing, the Plaintiff 1st Respondent after filing additional ground of appeal against the decision of the trial Court striking-out the name of the Appellant from the action, filed another application again to join the Appellant to the appeal which was heard and granted by the Court of Appeal thereby
E making the Appellant the 5th Respondent in the appeal. This decision was given by the Court of Appeal on 2nd November, 2000. The present appeal by the Appellant therefore is against the Ruling of the Court of Appeal of 2nd November, 2000 joining the Appellant as the 5th
F Respondent in the appeal still pending at the Court of Appeal.

In the Appellant's brief of argument, as many as 4 issues were raised for the determination of the appeal. They are -

"1. Whether Appellant was a party at trial Court and could therefore be validly joined as a party in the appeal on 2nd November, 2000 as to do so would deprive Appellant of statutory right of defence of limitation.

2. Whether Appellant as agent of disclosed principal who is already a party in the appeal can also be joined.

*3. Whether the Appellant can challenge its joinder and raise its
H defence of limitation at the hearing of the appeal.*

4. Whether Court of Appeal having earlier refused the application for joinder has jurisdiction to entertain the present application for joinder granted on 2nd November, 2000."

Taking into consideration that this interlocutory appeal is es-

essentially against the Ruling of the Court of Appeal of 2nd November, 2000 joining the Appellant in the 1st Respondent's appeal now pending at the Court of Appeal Lagos, the only real issue for determination in the appeal is whether or not the Court of Appeal was right in joining the Appellant in the appeal of the 1st Respondent awaiting determination by that Court. It is quite clear from the record of this appeal that the Appellant was originally a party to the action before the trial Court which suo-motu decided to strike-out the name of the Appellant. In view of the additional ground of appeal filed by the 1st Respondent/Appellant at the Court of Appeal raising the issue of the conduct of the trial Court in striking-out the name of the Appellant suo-motu from the action, the Appellant thereby became a necessary party that must be joined in the appeal before the appeal could be heard and determined in the course of which the issue of striking-out the name of the Appellant by the trial Court could also be resolved. A necessary party to a proceeding is a party whose presence and participation in the proceeding is necessary or essential for the effective and complete determination of the claim before the Court. See *In-Re Mogaji* (1986) 1 N.W.L.R. (Pt. 19) 579.

In the present case, I am of the firm view that the Appellant whose name was struck-out from the action by the trial Court but restored on appeal by the Court of Appeal, is indeed a necessary and essential party whose presence and participation in the appeal now pending at the Court of Appeal, will ensure the effective and complete determination of the issues arising for determination in the 1st Respondent's pending appeal. It is for the above reasons and fuller reasons given by my learned brother Adekeye, JSC in the leading judgment that I entirely agree that this appeal must fail. Accordingly I also dismiss the appeal and abide by the order on costs made in the leading judgment.

CHUKWUMA-ENEH JSC

I have read before now the judgment prepared and delivered by my Learned brother, Adekeye, JSC., in this matter. He has treated all the issues raised in the matter exhaustively. I agree with his reasoning and conclusion that there is

no merit in the appeal and that it should be dismissed. I also dismiss it and endorse all the orders contained therein.

FABIYI JSC

B I have had a preview of the judgment just delivered by my learned brother - Adekeye, JSC. I agree with the reasons therein contained to arrive at the conclusion that the appeal should be dismissed.

C *The appellant maintained that since an application filed to join it as a party was refused, albeit on procedural ground, by the court below on 10/6/96, that court became functus officio to entertain a similar application when the procedural default is rectified. That stance is wrong. The applicant in such a situation could come back to court*
D *to represent the application once the default is rectified.*

The appellant should tarry with caution. It can raise the defences available to it at a later stage - when the appeal is heard. Specifically, the question of whether principal /agent can be sued in the same action will be taken when the appeal is heard. The appellant
E *needs to avoid 'much haste; less speed'.*

With the above and based on the reasons contained in the lead judgment, I too, hereby dismiss the appeal. I endorse the consequential orders therein contained.

F As well, I make no order as to costs.

RHODES-VIVOUR JSC

G The 1st Respondent, as Plaintiff in the Federal High Court Lagos sued the 2nd, 3rd, 4th, and 5th Respondents, as 1st to 4th defendants for breach of contract of carriage of goods by sea. In the trial court the plaintiff brought an application to join the appellant as the 5th defendant. The court granted the application but before trial commenced struck out the name of the 5th defendant suo motu. The case
H proceeded to hearing and at the end the plaintiff lost. His case was dismissed. He lodged an appeal at the Lagos Division of the Court of Appeal against the dismissal of his case. In that court, the plaintiff, now the appellant filed an application to join the appellant in this

appeal as the 5th respondent. For the purpose of clarity the 5th defendant who was struck out suo motu is the appellant in this court. On 10/6/1996 the Court of Appeal refused to join the appellant as the 5th respondent. In refusing the application the Court of Appeal said:

“In this case, the first issue for determination not being a valid issue and there being no other issue in the appeal that concerns Panalpina, there would be no justification to order that Panalpina be made a party to the appeal.” B

Undaunted the plaintiff/appellant amended his Notice of Appeal and filed a second application to join the appellant as the 5th respondent. This time, the Court of Appeal acceded to his prayer. The appellant in this appeal was joined as the 5th respondent in a Ruling delivered on 2/11/2000. Aggrieved with the decision, the 5th respondent in the appeal pending before the Court of Appeal Lagos filed this Interlocutory Appeal before this court. The central issue for determination is: C

“Whether the Court of Appeal was correct to order the appellant joined as the 5th respondent. D

The reason for making a person a party to an action is that he should be bound by the result of the action. Consequently the question to be settled in the action must be one which cannot be effectually and completely settled unless he is a party. See *Laiumoke V. Doherty* 1969 NMLR p. 281 *Green v. Green* 1987 3 NWLR pt. 61 p. 480 *Peenok Investment Ltd. v. Hotel Presidential Ltd.* 1982 12 SC. F p. 1

Joinder is necessary, to ensure that proper parties are before the court for determining the point in issue. Application to join may be made at anytime. The refusal by the Court of Appeal to join the appellant as the 5th respondent was correct. It was simply because of a procedural default. The subsequent Ruling by the same court ordering the appellant joined as the 5th respondent is also correct in that after the application was refused, the appellant before the Court of Appeal (the 1st respondent) was granted leave to file additional grounds of appeal and one of the grounds of appeal reads: G

“The learned trial judge erred in Law in suo motu striking out the 5th defendant”. H

PARTICULARS OF ERROR

(i) There was no application from both parties to strike out the

5th defendant

(ii) There was indeed an application to join them which the court granted”

The 5th defendant is Panalpina World Transport Nig. Ltd., the 5th respondent in the appeal pending in the Court of Appeal, and the B appellant before this court.

After reading the additional ground of appeal it becomes abundantly clear that the appellant’s presence as a party is mandatory before any issue formulated from the ground can be effectually and C completely settled by the court.

For this, and the much fuller reasoning in the leading judgment delivered by my learned brother, Adekeye, JSC, I would dismiss the appeal. The Ruling of the Court of Appeal delivered on the 2nd day of November, 2000 is affirmed.

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