

COURT OF APPEAL
19TH APRIL, 2011. CA/C/174/2010
CORAM:- K. B. AKAHS, J. MIKA'ILU, I. O. AKEJU, JJCA

AFRIBANK NIG. PLC APPELLANT
AND
UBANA EBRI UBANA RESPONDENT

APPEALS - Decision - Meaning - Issues - Appellate courts do not entertain points - Which the lower court had no opportunity to consider - And render its decision upon (H1)

APPEALS - Grounds - Validity - Competent issue must be distilled from a valid ground of appeal - And appellate court cannot consider an issue not decided by lower court - Except where the leave of court was obtained (H2)

JURISDICTION - Fundamentality of - Any act done by a court that lacks jurisdiction - Is an exercise in vain - Such a court can only exercise jurisdiction to inquire whether it has jurisdiction (H3)

COURTS - Trial - Speedy trial - There cannot be fairness in an ex parte hearing of a substantive suit - Purported trial herein at the pretrial conference - Renders the proceedings null and void (H4)

FACTS

Defendant/appellant was plaintiff's/respondent's tenant in the property located in Cross River State under a lease agreement that expired on 31st December, 2009. Appellant had through its letter dated 14th September, 2009, intimated respondent with its intention not to renew the agreement and suggested a pre-vacation inspection of the premises which the parties conducted on 7th November, 2009. When it became apparent that appellant was not taking steps to vacate the premises, respondent wrote a letter to appellant dated 8th December, 2009, wherein respondent expressed displeasure in appellant's failure to make adequate arrangements to enable respondent take possession of the property. Appellant did not respond to the letters but remained on the property.

Respondent took no further step in respect of the leasehold but proceeded to file writ of summons and Statement of Claim at High Court of Cross River State, Ugep Division. Appellant did not file any process in reaction to the claim. A hearing notice for pretrial conference was served on appellant who also did not attend the Conference. At the Pretrial Conference, respondent testified and tendered his Statement on Oath filed on 26th March, 2010 while his four “correspondences” with appellant were admitted together as exhibit 1. The Court thereafter entered judgment for respondent. Appellant felt dissatisfied with the judgment and thus appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

“2. Whether the provisions of the High Court (Civil Procedure) Rules 2008 prescribing how the evidence in chief of a witness is to be given is not one dealing with evidence (as opposed to practice and procedure) and if it is, whether the said provisions are not unconstitutional or contrary to the Evidence Act.

2.2. Whether the written statement on oath of Respondent which Respondent “adopted” as his evidence in chief and upon which the trial court predicated its judgment is not inadmissible having regards to Section 91 (3) of the Evidence Act?

2.3. Whether the learned trial judge was justified in embarking on the actual trial of this case on a date fixed for “pretrial conference”, (and if the answer is in the negative), whether proceedings of 19/5/2010 leading to the judgment of 9/6/2010 were not in breach of Appellant’s right to fair hearing?

Whether having regards to all the circumstances of this case Respondent’s action laid in breach of contract (and if it did which is not conceded), whether the award of N10,000,000.00 was justified?”

HELD (Unanimously allowing the appeal per ***AKEJU JCA***)

APPEALS - Decision - Meaning

1. What amounts to a decision in relation to a Court as defined in section 318 (1) of the constitution is a determination of the Court which includes judgment, decree, order, conviction, sentence or recommendation. Thus the court of Appeal does not entertain a point which the lower court had no opportunity to consider and render its decision.

I have had a calm study of the issues formulated and argued by the learned counsel for the Appellant in his Appellants' Brief and the Reply Brief. It is abundantly clear to me that issues 1 and 2 have no basis or foundation in this appeal being issues that were never placed before the lower court for adjudication and determination.
(p. 1032 H)

APPEALS - Grounds - Validity

2. A ground of appeal to be valid, the appeal must have its root in the judgment appealed against while a competent issue must be distilled from a valid ground of appeal. A fortiori, an issue for determination must itself be firmly rooted in the judgment of the lower court. An appellate court cannot consider an issue or issues not decided by the lower court except where the leave of court had first been sought and obtained. The treatment of such issue without leave of court is a nullity and a futile exercise. (p. 1033 C)

JURISDICTION - Fundamentality of

3. It is the law that jurisdiction is a fundamental and radical issue in any adjudication. Indeed it may be called the blood that runs through the court to give it life. Any act done or purportedly done by a court that lacks jurisdiction is an exercise in vain.

A court that has no jurisdiction over an issue can only exercise jurisdiction to inquire whether it has jurisdiction and no more.
(p. 1033 E)

Trial - Speedy trial

4. The argument of the Respondent's counsel about speedy trial with respect cannot be of assistance in this case. What the lower court did was to take justice to the abattoir only to be slaughtered by speed. There was none, and there cannot be fairness in a one sided or ex-parte hearing of a substantive case.

Speedy justice can sometimes be as injurious as delayed justice.

The purported trial by the pretrial judge at the pre-trial conference amounts to a serious irregularity that renders the proceedings there at null and void, and the result is that the parties must go back to the starting point for a proper or actual trial. (p. 1036 F)

NOTABLE POINT OF INTEREST**AKEJU JCA***1. Pretrial conference - Meaning & Purport*

A pre-trial conference is an informal meeting at which opposing attorneys (counsel) confer with the judge, to work toward the disposition of the case by discussing matters of evidence and narrowing the issues that will be tried. The conference takes place shortly before trial and ordinarily results in a pre-trial order. A pre-trial order is a court order setting out the claims and defence to be tried, the stipulations of the parties, and the cases procedural rules, as agreed to by the parties or mandated by the court at a pretrial conference Black's Law Dictionary 8th Edition page 1226.

The submission of the learned counsel for the Appellant is quite firm on this issue as it is a correct proposition of law that a court cannot change the Rules in the middle of the game. The business of the court on any particular date must be conducted strictly in line with the fixtures except for matters that may be ancillary thereto as guided by the Rules. It cannot be otherwise. A date for mention for instance cannot be converted to a date for hearing without the concurrence of the parties. Any judgment entered upon such a proceedings is a nullity.

The proceedings at a pre-trial conference should be conducted in the manner stated in order 20 Rules 2 and 3 of the 2008 Rules and no more. It does not include the full hearing of the action at the pre-trial level and/or delivery of judgment. (pp. 1035 C/1036 A)

REPRESENTATION

Mr. Dafe Diegbe For the Appellants
A. A. Obo Esq. For the Respondents

CASES REFERRED TO

IPSL V. Glover (2002) FWLR (Pt. 86) 605
Udene V. Ugwu (1992) 3 NWLR (pt. 491) 57
Ukwu V. Bunge (1992) 8 NWLR (pt. 678) 527
Pam v. Mohammed (2008) 16 NWLR (pt. 1112) 1
Oredoyin V. Arowolo (1989) 4 NWLR (pt. 114) 172
Teriba V. Adeyemo (2010) 11 NWLR (Pt. 1211) 242

Network Security Ltd. V. Dahiru (2006) All FWLR (Pt.419) 475

Okoye V. Nigeria Construction & Furniture co. Ltd. (1991) 6 NWLR (Pt. 1999) 501

Oloba V. Akereja (1988) 7 SCNJ 56; Adetayo V. Ademola (2010) All FWLR (Pt. 533) 1806

African Newspapers of Nigeria Ltd. V. Federal Republic of Nigeria B (1985) 2 NWLR (pt. 6) 137

STATUTES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, s. 318(1)

Evidence Act Cap. E14 Laws of Federation of Nigeria 2004, s. 91(3) C

RULES REFERRED TO

High Court of Cross River (Civil Procedure) Rules 2008, O. 20 rr. 2, 3 D

BOOK REFERRED TO

Black's Law Dictionary 8th edition, p. 1226

LEAD JUDGMENT BY AKEJU JCA

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The Respondent was the Plaintiff in Suit No. HUG/12/2010 at Ugep Division of the High Court of Cross River State which suit was commenced through the Writ of Summons filed with the Statement of Claim filed on 26th March, 2010 for the relief stated on the Writ of summons thus: F

“WHEREOF the Claimant claims from the Defendant the sum of N30 Million (Thirty Million Naira) only for breach of contract.”

The claim was also stated in paragraph 17 of the Statement of Claim. The salient facts of the relationship of the parties are in paragraphs 3, 5, 9, and 11 of the Statement of Claim as follows: G

“3. Claimant states that in 1988, he entered into an agreement wherein the Defendant rented the property (building) of the claimant for her financial business of banking. The property is located at Obojukwa-Abanankpai, Nko in Yakurr Local Government Area of Cross River State. H

5. It is further averred that in a letter Ref. No. AEC.ROPH/252/09/2009 dated 14th day of September, 2009 the Defendant wrote to the claimant notifying him of the expiry of the lease by 31st

December, 2009 and Defendant's management's intention not to renew the agreement. The letter is hereby pleaded.

9. Claimant aver that he then notified the Defendant of his disappointment of the Defendant's behaviour in not taking steps to make good the defaced areas of the property before that day 8/12/09. Defendant was also informed of increase in rent if the Defendant was minded to continue in the occupation of the property. The letter from the claimant to Defendant dated 8/12/09 is hereby pleaded.

11. Defendant held on to the property in January, February, and March 2010. Claimant was left with no option than to remind Defendant of that continuous occupation of his property against the agreement in a letter dated 3rd March 2010. The letter is hereby pleaded."

The Appellant was the Respondent's tenant in the property located at Obojukwa Abanankpai Nko, cross River State under a lease agreement that expired on 31st December, 2009. The Appellant had, through its letter dated 14th September, 2009 intimated the Respondent with its intention not to renew the agreement and suggested a pre-vacation inspection of the premises which the parties conducted on 7th November, 2009. When it became apparent that the Appellant was not taking steps to vacate the premises, the Respondent wrote a letter to the Appellant dated 8th December, 2009 wherein the Respondent expressed displeasure in the Appellant's failure to make adequate arrangements to enable him take possession of the property on 31/12/2009. The Respondent however said in the same letter that:

"However, we want to remind you that your current rent expires on 31 December, 2009. Note also that rent on same property has been increased to N3,000,000.00 (Three Million Naira) only per year with effect from 1st January, 2010."

Also in the letter of 3rd March, 2010, the Respondent said inter alia:

"Your present hold up to the property after its expiry date of December, 31st 2009 is not only a trespass, but it is causing some bad blood within the family.

However, the period so extended by you, that is (1/1/2010 - 31/12/2010) shall be paid for at the rate of N3, 000,000.00 (Three Million Naira) only. This position was brought to your notice early

enough, *See attached.*”

The Appellant did not respond to the letters but remained on the property. The Respondent took no further or other step in respect of the leasehold but proceeded to file the Writ and Statement of Claim in commencement of this action against the Appellant.

The Appellant as the Defendant did not file any process in reaction to the claim. A “HEARING NOTICE FOR PRETRIAL CONFERENCE” was served on the Appellant who also did not attend the Conference. At the Pretrial Conference held on 26/4/2010, the Respondent testified and tendered his Statement on Oath filed on 26th March, 2010 while his four “correspondences” with the Defendant (Appellant) were admitted together as exhibit 1. The Court then adjourned for judgment which was delivered on 9/6/2010 by Hon. Justice Michael Edem who concluded as follows:

“Judgment be and is hereby entered for the claimant. In the light of the claimant’s loss of his goodwill in the family, loss of road construction clientele, loss of potential tenants and severe economic loss and hardship, (paragraphs 14, 15 and 16 of the Statement on Oaths refer), I consequently assess and award damages in the sum of N10 Million Naira to the claimant. N5, 000 cost in favour of the claimant.”

The Appellant felt dissatisfied with the judgment of the court and appealed to this court on four grounds as in the Notice and Grounds of Appeal filed on 13/9/2010. The Appellant’s Brief of Argument settled by Mr. Dafe Idiege was filed on 26/10/2010 and the following issues were distilled from the four grounds of appeal:

“2. Whether the provisions of the High Court (Civil Procedure) Rules 2008 prescribing how the evidence in chief of a witness is to be given is not one dealing with evidence (as opposed to practice and procedure) and if it is, whether the said provisions are not unconstitutional or contrary to the Evidence Act.

2.2. Whether the written statement on oath of Respondent which Respondent “adopted” as his evidence in chief and upon which the trial court predicated its judgment is not inadmissible having regards to Section 91 (3) of the Evidence Act?

2.3. Whether the learned trial judge was justified in embarking on the actual trial of this case on a date fixed for “pretrial conference”, (and if the answer is in the negative), whether proceedings of

19/5/2010 leading to the judgment of 9/6/2010 were not in breach of Appellant's right to fair hearing?

(sic, 2.4) Whether having regards to all the circumstances of this case Respondent's action laid in breach of contract (and if it did which is not conceded), whether the award of N10,000,000.00 was justified?

In the Respondent's Brief of Argument, the learned counsel, A. A. Obo Esq. adopted the above four issues and also argued them seriatim.

On the first issue the learned counsel for Appellant argued that although by Section 274 of the Constitution of the Federal Republic of Nigeria, 1999 and by Sections 82, 83 and 84 of the High Court Law of Cross River State, 2004, the Chief Judge of Cross River State is empowered to make Rules regulating the practice and procedure in the High Court of the State, the Chief Judge in making the Cross River State High Court (Civil Procedure) Rules 2008 (which I will henceforth call the 2008 Rules) has by Order 31 Rule 1 (2) thereof prescribed how a witness will prove the existence or non-existence of relevant facts in his examination in chief which is an enactment relating to evidence and for which the Hon. Chief Judge has no constitutional power to legislate.

According to learned counsel, Order 31 Rule 1 (2) of the 2008 Rules is inconsistent with Section 4 (3) and item 23 on the Exclusive Legislative list in the 1999 Constitution and therefore void by virtue of Section 1 (3) of the Constitution, and to the extent of the inconsistency the Rules of Court are void and no proceedings can be founded thereon. He cited *Ifegwu V. FR.N* (2001) 47 WRN 86 at 101.

The learned counsel submitted that in the alternative, the 2008 Rules are inconsistent with provisions of the Evidence Act and void. He particularly referred to Section 189 (2) of the Evidence Act which he said requires that a witness be examined, or questioned on relevant facts on which he relies but Order 31 Rule 1 (2) of the 2008 Rules has stipulated that the witness must not be questioned on relevant facts but his oral evidence shall be limited to confirming and adopting his written disposition. He referred to *Ntam V. The State* (1967) 5 NSCCI. He referred also to Sections 77 and 156 (1) (2) of the Evidence Act both of which he said require that oral evidence must be direct and demonstrative.

The learned counsel submitted that except as provided in Sections 33-37, thereof, the Evidence Act does not permit a witness to present his previous written statement as the truth of a fact on which he testifies as allowed by Order 31 1 (2) of the 2008 Rules. He cited *Doka & Ors v. The State* (1967) 5 NSCC 308. He argued that the Evidence Act prescribes the limited uses to which the previous statement of a witness can be put. B

On this issue the Appellant's counsel argued that the Hon. Chief Judge acted ultra vires his powers by enacting Order 31 Rule 1 (2) of the Rules and urged that the provision be declared null and void. C In another vein the learned counsel argued that order 31 Rule 1 (2) of the Rules is inconsistent with section 4 (3) and item 23 in the Exclusive Legislative List set out in Part 1 of the Second schedule to the 1999 constitution and so is unconstitutional and void by virtue of Section 1 (3) of the Constitution. D

The learned counsel particularly made the following submission at page 7 (4.20) of his Brief:

"It is submitted with respect that the inconsistency between the 1999 Constitution and the above rules of court arises not by reason of incompatibility with one another, but by reason of the fact that the rules are ultra vires the Constitutional powers of the enacting authority." E

Also at page 7 (4.21) the learned counsel submitted:

"We submit in the alternative that even if their Lordships were to hold that Order 31 Rule 1 (2) of the High Court (Civil Procedure) Rules, 2008 is not unconstitutional same is clearly inconsistent with several provisions of the Evidence Act, and to that extent void." F

In his own Brief of Argument on this issue, the learned counsel for the Respondent submitted that order 31 Rule 1 (2) of the 2008 Rules does not in anyway offend any of the provisions of the Constitution, and not in conflict with any of the sections of the Evidence Act mentioned by Appellant's counsel. G

He submitted that order 31 Rule 1 (2) does not provide that a witness must not be questioned on all relevant facts during examination in chief, it only means that there is in existence evidence which the witness is to adopt and confirm. He described the use of the words demonstrative, confirmative or adoptive by the Appellant's counsel as "a mere play of words." H

The learned counsel submitted that since it is not in doubt that the Hon. Chief Judge is empowered to make the rules of practice and procedure for the court, the action was within the limits of the powers of His Lordship who had enacted the Rules for speedy dispensation of justice which is now pursued all over the world.

B I had stated at the introductory part of this judgment that the Appellant filed no process at the lower court in respect of this case and did not attend the pretrial conference, the notice of which it received. The learned counsel for Appellant also did not appear at the lower court. It therefore goes without saying that the issues numbers 1 and 2 now raised before this court by the Appellant were not placed before the lower court for adjudication (sic, . That) court consequently did not have the opportunity of considering them. In other words there is no decision of the lower court on those issues in any part of the judgment delivered on 9th June, 2010 now under appeal.

The appellate jurisdiction of the Court of Appeal is statutory. It is donated by the Constitution of the Federal Republic of Nigeria 1999 (The Constitution), the Court of Appeal Act 2004 and other enabling statutes. Section 240 of the Constitution of Federal Republic of Nigeria 1999 provides for the appellate jurisdiction of the Court of Appeal as follows:

“subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the High Court of the Federal Capital Territory Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of the Federal Capital Territory Abuja, Customary Court of Appeal of a State and from decisions of a Court Martial or other Tribunals as may be prescribed by an Act of the National Assembly”.

It is beyond the realm of any ambiguity that by sections 241, 242, 244, 245 and 246 of the constitution, appeal is to lie from only the decisions of those courts mentioned therein to the Court of Appeal either as of right or with leave. ***What amounts to a decision in relation to a Court as defined in section 318 (1) of the constitution is a determination of the Court which includes judgment, decree, order, conviction, sentence or recommendation.***

Thus the court of Appeal does not entertain a point which the lower court had no opportunity to consider and render its decision. See Oredoyin V. Arowolo (1989) 4 NWLR (pt. 114) 172; Babalola V. State (1999) 4 NWLR (pt. 115) 264.

I have had a calm study of the issues formulated and argued by the learned counsel for the Appellant in his Appellants' Brief and the Reply Brief. It is abundantly clear to me that issues 1 and 2 have no basis or foundation in this appeal being issues that were never placed before the lower court for adjudication and determination.

A ground of appeal to be valid, the appeal must have its root in the judgment appealed against while a competent issue must be distilled from a valid ground of appeal. A fortiori, an issue for determination must itself be firmly rooted in the judgment of the lower court. See Teriba V. Adeyemo (2010) 11 NWLR (Pt. 1211) 242. **An appellate court cannot consider an issue or issues not decided by the lower court except where the leave of court had first been sought and obtained. The treatment of such issue without leave of court is a nullity and a futile exercise.** See Akpan V. Bob (2010) 17 NWLR (1223) 421; African Newspapers of Nigeria Ltd. V. Federal Republic of Nigeria (1985) 2 NWLR (pt. 6) 137.

It is the law that jurisdiction is a fundamental and radical issue in any adjudication. Indeed it may be called the blood that runs through the court to give it life. Any act done or purportedly done by a court that lacks jurisdiction is an exercise in vain. See Madukolu V. Nkemdilim (1962) 2 SCNLR 341; Ukwu V. Bunge (1992) 8 NWLR (pt. 678) 527; Udene V. Ugwu (1992) 3 NWLR (pt. 491) 57; Oloba V. Akereja (1988) 7 SCNJ 56; Adetayo V. Ademola G (2010) All FWLR (Pt. 533) 1806.

A court that has no jurisdiction over an issue can only exercise jurisdiction to inquire whether it has jurisdiction and no more. See Attorney General Lagos state V. Dosunmu (1989) SCNJ (Pt. II) 194.

Based on the foregoing reasons, it is indeed the path of law and justice for this court to turn its face against issues 1 and 2 in the Appellants' Brief in spite of the fact that the Respondent's counsel did not raise any objection and indeed argued the issues with almost

equal force. The two issues (nos. 1 and 2) raised and argued by the Appellant's counsel are hereby discountenanced in this judgment.

Issue No. 3 is about the lower court embarking on actual trial of the case on a date fixed for pretrial conference and whether the proceedings of 19/5/2010 leading to the judgment of 9/6/2010 are
B not in breach of Appellant's right to fair hearing.

The learned counsel for the Appellant argued that by Order 20 of the 2008 Rules, a pretrial conference could only be held after the parties had filed and exchanged pleadings and as there was no
C exchange of pleadings by the parties, it was not necessary for Appellant to attend a pretrial conference. He submitted that it was wrong to convert the pretrial conference to an actual trial of the case.

The learned counsel submitted on the authority of *Bendel Construction Co. Ltd V. Anglocan Development Co. Ltd. (1972) 3 SC 97*
D at 39 that when an action has been adjourned for a specific purpose, the court cannot without the consent of parties proceed to transact other business or to hear the case on merit. He submitted also that by proceeding to take evidence on the date when the case was not
E fixed for hearing, the Appellant's right to fair hearing has been breached which rendered the whole proceedings a nullity. He placed reliance on *Okoye V. Nigeria Construction & Furniture co. Ltd. (1991) 6 NWLR (Pt. 1999) 501*; *IPSL V. Glover (2002) FWLR (Pt. 86) 605*.

In his argument on this issue, the learned counsel for the Respondent contended that order 20 Rule 6 (b) of the 2008 Rules
F stipulates what the court should do when a Defendant who has been served notice of pretrial conference fails to appear or partake thereat and the law empowers the court to enter judgment against such a Defendant. He argued that order 30 Rule 2 of the Rules empowers
G the claimant to prove his case and having been given the opportunity the Appellant cannot complain of fair hearing which is for those who are kicking in the judicial process. He submitted also that equity aids the vigilant. Reference was made to the following cases; *Newswatch Communications Ltd. V. Atta (2006) All FWLR (pt. 318)*
H 580; *Network Security Ltd. V. Dahiru (2006) All FWLR (Pt.419) 475*; *BCC Ltd. V. Imani & Sons Ltd. (2007) All FWLR (Pt. 348) 806*.

The learned counsel further argued that if as in this case the claimant opted to enter the witness box to testify, he was right in law and it will be unreasonable to argue that the matter ought to have

been adjourned.

There is at page B of the record a “HEARING NOTICE FOR PRE-TRIAL CONFERENCE” signed by the Registrar of the lower court and dated 26th April, 2010. It is a notice that the parties were to attend the court on 19th day of May 2010 for a Pre-Trial Conference, the purposes of which were therein set out as follows: B

“(a) Disposal of non-contentions matters which must or can be dealt with on interlocutory application;

(b) Giving such directions as the future course of the action as appear best adopted to secure its just, expeditious and economical C disposal

(a) Promoting amicable settlement of the case or adoption of alternative dispute resolutions.”

A pre-trial conference is an informal meeting at which opposing attorneys (counsel) confer with the judge, to work toward the disposition of the case by discussing matters of evidence and narrowing the issues that will be tried. The conference takes place shortly before trial and ordinarily results in a pre-trial order. A pre-trial order is a court order setting out the claims and defence to be tried, the stipulations of the parties, and the cases procedural rules, as agreed to by the parties or mandated by the court at a pretrial conference Black’s Law Dictionary 8th Edition page 1226. D

The proceeding of 19th May 2010 is at page 9 of the record of appeal. It shows that the claimant and his counsel, Barrister A. Obo were in court but Defendant and counsel were absent. E

It went this way:

“Obo: Our originating processes had been served on the Defendant. No response. F

We have even filed pre-trial information notice, still no reaction from the Defendant. G

May we prove our matter?”

The claimant was there and then sworn on Bible and he testified after which the case was adjourned to 9th June 2010 when the judgment was read and the lower court awarded N10,000,000.00 H damages to the Respondent without according the Appellant any or further opportunity of being heard.

It is revealed from the above proceedings that contrary to the business of a pre-trial conference for which the parties were invited,

no pre-trial conference took place, rather it was full trial and adjournment for judgment which was eventually delivered.

The submission of the learned counsel for the Appellant is quite firm on this issue as it is a correct proposition of law that a court cannot change the Rules in the middle of the game. The business of the court on any particular date must be conducted strictly in line with the fixtures except for matters that may be ancillary thereto as guided by the Rules. It cannot be otherwise. A date for mention for instance cannot be converted to a date for hearing without the concurrence of the parties. Any judgment entered upon such a proceedings is a nullity. See *Olubusola Stores Ltd. V. Standard Bank* (1975) NSCC 137; *Kano V. Bauchi Meat Products Co. Ltd.* (1978) 9-10 SC 51.

The proceedings at a pre-trial conference should be conducted in the manner stated in order 20 Rules 2 and 3 of the 2008 Rules and no more. It does not include the full hearing of the action at the pre-trial level and/or delivery of judgment.. Order 20 Rule 6 cited by Respondent's counsel is self explanatory enough. It can come into play only when:

(1) The pre-trial conference must have been signed by the party or his/her counsel jointly, or

(2) There must have been disobedience of a scheduling or pre-trial order.

Both of which are not relevant here.

The argument of the Respondent's counsel about speedy trial with respect cannot be of assistance in this case. What the lower court did was to take justice to the abattoir only to be slaughtered by speed. There was none, and there cannot be fairness in a one sided or ex-parte hearing of a substantive case. See *Pam v. Mohammed* (2008) 16 NWLR (pt.1112) 1. ***Speedy justice can sometimes be as injurious as delayed justice.***

The purported trial by the pretrial judge at the pre-trial conference amounts to a serious irregularity that renders the proceedings there at null and void, and the result is that the parties must go back to the starting point for a proper or actual trial.

The fourth and remaining issue in this appeal concerns the actual dispute to be decided at the fresh trial. That is the contention

between the parties; hence a consideration of that issue in this judgment and its resolution will preempt the trial to be conducted by the lower court. In my view, justice demands that the lower court be given the benefit of deciding the issue.

Consequently I allow the appeal and the judgment of the lower court delivered on 9th June, 2010 upon pre-trial conference is set aside and a fresh trial is ordered to be conducted by another judge within the jurisdiction. B

Consequently the case is remitted to the chief Judge of Cross River State for reassignment. C

I make no order as to costs.

AKAAHS JCA

I read before now the judgment of my learned brother Akeju, JCA. I entirely agree with his reasoning and conclusion that the appeal has merit and so should be allowed. Pretrial conference is meant to narrow down the issues in contention which paves the way for the main trial. According to Black's Law Dictionary Eight Edition pre-trial conference is described at page 1226 as- E

"An informal meeting at which opposing attorneys confer, usually, with the judge, to work toward the disposition of the case by discussing matters of evidence and narrowing the issues that will be tried. The conference takes place shortly before trial and ordinarily results in a pretrial order." F

It is wrong for a trial Judge to convert a pre-trial conference into an actual trial and any judgment delivered in such proceedings that are tantamount to deciding the merit of the case will be declared a nullity. G

I think the point is well taken in the submission by the learned counsel for the Appellant that a pretrial conference can only be held after the parties have filed and exchanged pleadings. It is at this stage that counsel can meet to agree on non contentious evidence thereby narrowing the issues to be tried. H

It is for this and the more detailed reasons contained in the lead judgment of my learned brother, Akeju, JCA that I too allow this appeal and abide by the order made on costs.

MIKA'ILU JCA

I have read in draft the lead judgment of my learned brother
Isaiah Olufemi Akeju JCA. I am in agreement with the reasons given
in it and the conclusion reached. The case is therefore for Retrial.

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