

SUPREME COURT OF NIGERIA
24TH JUNE, 2011. SC.52/2003
CORAM:- D. MUSDAPHER, J. A. FABIYI, O. O. ADEKEYE,
S. GALADIMA, B. RHODES-VIVOUR, JJSC

S & D CONSTRUCTION APPELLANT
COMPANY LIMITED

AND

1. CHIEF BAYO AYOKU

2. LAYO MOTORS LIMITED RESPONDENTS

COURT PROCESSES - Hearing notice - Service - When irrelevant - Service is not required on a party who knows - Or is reasonably presumed to know of the hearing date (H1)

PRACTICE & PROCEDURE - Courts - Trial - Need for consistency - There should be consistency in prosecuting a case at trial and appellate courts - Appellant herein has no justification to stay away from court on the date fixed for hearing (H2)

FAIR HEARING - Breach of - Complaint against - Propriety - Appellant who had the opportunity of being heard - But failed to utilize same - Cannot complain of breach of fair hearing (H3)

APPEALS - Concurrent findings - Supreme Court does not interfere - Except where a clear error of fact or law is established - Which is not so here (H4)

FACTS

On 8th September, 2000, learned trial judge of High Court of Lagos State dismissed plaintiff's/appellant's claim vide Order 33 Rule 3 of the Rules of the court. When this matter was called for trial, appellant was absent and not represented without any reason given to the Court. 2nd defendant/respondent was allowed to proceed with its counter-claim. Later on during the proceedings, learned counsel for appellant showed up in court. He raised the issue of his ill health as reason for his absence at the beginning of the proceedings. His application to stay proceedings was refused. He eventually par-

ticipated in the proceedings and secured an adjournment to cross-examine D.W.1. Nonetheless, appellant's counsel thereafter filed an application seeking to set aside the dismissal of appellant's claim. Learned trial Judge heard the application and dismissed it on 18th October, 2000.

When called upon to continue with his case, learned counsel for appellant refused to proceed with the cross-examination of D.W.1 for which adjournment was granted at his instance. The Court subsequently entered judgment on the counter-claim in favour of 2nd respondent. Being dissatisfied, appellant appealed to the Court of Appeal, Lagos Division against the refusal of his application. His contention is that he was not given fair hearing at the High court. The Court heard the appeal and dismissed same. Appellant also filed 2nd Notice of Appeal to challenge the trial court's judgment on the counter-claim in favour of 2nd respondent. The appeal was equally dismissed. Aggrieved further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether in the circumstance of this case, the Court of Appeal was right in dismissing the appellant's appeal on the ground that the explanations proffered by the appellant in the application to set aside the trial court's order dismissing the appellant's suit for want of prosecution was unsatisfactory.

(ii) Whether the Court of Appeal was right in dismissing the appellant's appeal on the ground that it was not the plaintiff's (appellant's) case at the trial court when it sought to set aside the order dismissing its suit that it was not aware of the hearing date.

(iii) Whether in the circumstances of this case, the Court of Appeal was right in dismissing the appellant's appeal on the ground that the plaintiff (appellant) had the opportunity to present its case.

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

COURT PROCESSES - Hearing notice - Service

1. It was canvassed on behalf of the appellant that hearing notice was not issued in respect of the two dates fixed for trial. To my mind, the new stance equates to clinging to a straw. A party as herein, who already knows or is reasonably presumed to know of the date for which its case is scheduled for hearing, does not require hearing notice to be served on it. (p. 2116 F)

Courts - Trial - Need for consistency

2. I also wish to make it clear that there should be consistency in prosecuting a case at the trial court as well as on appeal. There should be no somersault; as herein.

I hereby resolve issue 1 in favour of the respondents and against the appellant

In my view, the above stance of the court below has no blemish. It sounds plausible, in the main. Even if there were discussions about settlement, that was no reason or justification for the plaintiff to stay away from the court on a date the matter was fixed for hearing. In any event, the appellant tried to play a game of hide and seek. It maintained that its counsel was in court on 7th September, 2000 not to report settlement; but to inform the court that the appellant was unaware of the trial for that date

The court below agreed with the trial Judge that the explanation given for the plaintiff's absence was unsatisfactory. I also agree with the court below. The appellant and its counsel put up a poor and despicable show and got enmeshed in the web created by them. I accordingly resolve the issue in favour of the respondents and against the appellant. (pp. 2116H/2117 D/2119 C)

FAIR HEARING - Breach of - Complaint against - Propriety

3. In my considered view the above allegation of denial of fair hearing, like those earlier considered in this judgment, were self induced and/or imposed by the appellant and more especially its counsel whose conduct could hardly be comprehended by me from all that transpired as extant in the transcript record of appeal. Instead of doing his real job, counsel refused to act positively in most material and vital respects. That ought not to be. A party, who had the opportunity of being heard but failed to utilize same, as herein, cannot complain of breach of fair hearing. (p. 2120 D)

APPEALS - Concurrent findings - Interference

4. The two courts below made concurrent findings of fact in respect of all the issues canvassed in this appeal. It is only where an appellant is able to establish a clear error of law or fact that would warrant interference by this court. No compelling reason has been shown to warrant interference. I shall not interfere. (p. 2120 G)

NOTABLE POINT OF INTEREST

RHODES-VIVOURE JSC

1. Setting aside an Order of dismissal

The above states clearly that a case can be dismissed in Lagos State without a hearing on the merits. When a case is dismissed under
B Order 33 Rule 3 supra the order of dismissal can be set aside if there is compliance with Order 33 Rule 4 supra. That is to say the following must be resolved in favour of the applicant:

1. The applicant must show good reasons for being absent at
C the hearing.

2. The application must be brought within the prescribed period of six days.

3. Where the application is brought after six days of the delivery of the judgment, the applicant must apply for extension of time
D to bring the application, and give good reasons for his inability to bring the application to set aside the judgment within the six days prescribed by the rule.

4. The applicant must show that there is an arguable defence to the action, which is not manifestly unsupportable.

E 5. The applicant's conduct throughout the trial must not be such as is condemnable but is deserving of sympathy.

6. Where the judgment is shown to be tainted with fraud or is irregularly obtained.

F 7. Where the judgment was given for an amount in excess of what was due and claimed.

8. The applicant must show that the respondent will not suffer any prejudice or embarrassment if the judgment is set aside. See Sanusi v. Ayoola (1992) 9 NWLR (PT.265) Pg.295.

G The only good reason that would sway the court to set aside a judgment under Order 33 Rule 3 supra or a judgment in default of appearance of the plaintiff/appellant, would be a detailed explanation by the appellant of his absence on the day fixed for trial. In the courts below, the explanation was that he was aware of the dates for
H trial but hearing notice was not issued, while in this court, his case was that he was not aware of the hearing date. (p. 2129 B)

REPRESENTATION

G. A. Ugwu, for the Appellant

Y. Olalekan, for the Respondents

CASES REFERRED TO

- Obi v. Obi (2004) All FWLR (pt.224) pg. 2081
Sanusi v. Ayoola (1992) 9 NWLR (Pt.265) 275
Soleye v. Sonibare (2002) FWLR (pt.95) pg.221 B
Adeniran v. NEPA (2002) 14 NWLR (pt.786) pg. 30
Echi & Ors. v. Nnamani & Ors (2000) 5 SC 62 at 70
Olagunyi v. Oyeniran (1996) 6 NWLR (Pt. 453) 127
Fagbule v. Rodrigues (2002) 7 NWLR (pt.765) pg.188
Bangboye v. University of Ilorin (1999) 10 NWLR (pt.622) pg.290 C
OBMC Limited v. M.B.A.S. Limited (2005) All FWLR (pt.261) pg.215
Fajemirokun v. C. B. Nig Ltd. (2009) 5 NWLR (pt.1135) 588 at 599
Omo v. Judicial Service Commission, Delta State (2000) 12 NWLR (pt. 652) 444 D
Waterline Nig. Ltd v. Faire Services Ltd (2003) FWLR (pt.163) 88
SDC Cementation (Nig.) Ltd. v. Nagei & Co. Ltd (2003) FWLR (pt.156) pg.861
Okoye v. Nigeria Construction & Furniture Co. Ltd. (1991) 6 NWLR (Pt. 199) 501 at 541 E
Nigerian National Supply Company v. Establishment Sima of Vaduz (1990) 21 NSCC (Pt. 3) 526 at 537

RULES REFERRED TO

- High Court of Lagos (Civil Procedure) Rules 1994, O. 33 rr. 3, 4 F

LEAD JUDGMENT BY FABIYI JSC

This is an appeal against the judgment of the Court of Appeal, Lagos Division (“the court below” for short) delivered on 18th November, 2002. On 8th September, 2000, Holloway, J. of the High court of Justice, Lagos state dismissed the appellants claim vide order 33 Rule 3 of the Rules of the court. When the matter was called for trial, the appellant was absent and not represented without any reason given to the court. The 2nd respondent was allowed to prove the counter-claim. Learned counsel for the appellant, on the same date, showed up in court and participated in the proceedings and secured an adjournment to cross-examine D.W.1. H

The appellant’s counsel thereafter filed an application seeking

to set aside the dismissal of the appellant's claim. The learned trial Judge heard the application and dismissed it on 18th October, 2000. The appellant filed a Notice of Appeal dated 24th October, 2000 against the refusal of its application. Learned counsel for the appellant refused to proceed with the cross-examination of D.W.1 for which adjournment was granted at his instance. The trial court entered judgment on the counter-claim in favour of the 2nd respondent on 25th October, 2000. The appellant filed its 2nd Notice of Appeal dated 28th November, 2000 to challenge the judgment of the trial court.

The appeal was heard by the court below which dismissed same on 18th November, 2002. This is a final appeal by the appellant to this court.

In this court, briefs of argument were duly filed and exchanged. On 4th April, 2011 when the appeal was heard, learned counsel on each side of the divide adopted the brief of argument filed on behalf of his client.

On behalf of the appellant, three issues were formulated for a due determination of the appeal. They read as follows:-

“(i) Whether in the circumstance of this case, the Court of Appeal was right in dismissing the appellant's appeal on the ground that the explanations proffered by the appellant in the application to set aside the trial court's order dismissing the appellant's suit for want of prosecution was unsatisfactory.

“(ii) Whether the Court of Appeal was right in dismissing the appellant's appeal on the ground that it was not the plaintiff's (appellants) case at the trial court when it sought to set aside the order dismissing its suit that it was not aware of the hearing date.

“(iii) Whether in the circumstances of this case, the Court of Appeal was right in dismissing the appellant's appeal on the ground that the plaintiff (appellant) had the opportunity to present its case.”

On behalf of the respondents, three (3) issues were also couched for determination. They read as follows:-

“(i) Was it the case of the appellant at the trial court when it sought to set aside the dismissal of its suit that it was not aware of the dates fixed for hearing, and was the appellant in any event aware of those dates?

“(ii) Did the learned justices of the Court of Appeal give due consideration to the reasons proffered by the appellant for its ab-

sence in court on the date the matter was fixed for trial and rightly came (sic) to the conclusion that the court below was correct in the decision that they were unsatisfactory?

(iii) Were the learned justices of the Court of Appeal right to have held that the appellant had the opportunity to present its case before the trial court?"

Arguing issue 1, learned counsel for the appellant maintained that they are aware of the established principle of law that once there is a concurrent finding by the two courts below, unless it is shown that such findings are perverse or substantive that there was substantial error either in or procedural law, the court will not disturb such concurrent finding of fact. He cited the case of *Ojo v. Anibire* (2004) 5 SC (Pt.1) 13. Learned counsel submitted that there are special circumstances which warrant interference with concurrent findings of fact of the two courts below.

Learned counsel observed that the case of the appellant was not heard on the merits and yet it was dismissed for want of prosecution. He observed that courts of law are always reluctant in granting such orders. He cited the case of *Inakoju v. Adeleke* (2007) 2 MJSC 1 at 48. Learned counsel opined that the trial court had no competence to dismiss the appellant's case as it did and the court below was in error not to have set aside the decision of the trial court.

Learned counsel observed that there was no hearing notice issued to state clearly that 7th and 8th September, 2000 were dates meant for trial and that he was indisposed on 7th September, 2000. He also stated that parties were in the process of settlement. The court below, with respect to the appellant's awareness of hearing dates found as follows at page 235 of the Record.

"It is manifest from the passages reproduced above from the plaintiff's affidavit in support of the application and the Reply to counter affidavit that the plaintiff knew that the case was fixed for hearing on the 7th and 8th September, 2000. In any case it was not the plaintiff's case before the lower court when it sought to set aside the order dismissing its suit that it was not aware of the hearing date. The argument before this court premised on the fact that the plaintiff did not know of the hearing date was clearly an after thought and an attempt by the appellant's counsel to use the platform provided by brief writing as an opportunity to give fresh evidence on appeal with-

out first seeking the requisite leave of court.”

After the appellant’s suit was dismissed on 8-9-2000 an application to set aside the order was filed on 11-9-2000. In paragraphs 15 and 16 of the affidavit in support, it was deposed as follows:

B *“15. That Mr. Biodun Bakare told me and I verily believed that on 7th of September, 2000 he was actually in court at about 8.45 a.m. even though he was not feeling fine.*

16. That Mr. Biodun Bakare told me and I verily believed that he waited till 10.10 a.m at which time the court had not sat for the day and had to rush to the hospital when his state of health was deteriorating.”

The defendants filed a counter-affidavit in reaction to the above and the plaintiff filed a Reply to the counter-affidavit. Paragraph 16 of same reads as follows:-

D *“16 - That the fresh trial dates of 7th September, 2000 and 8th September, 2000 were fixed after the strike action of 29th June, 2000.”*

From the above, it is clear to me that the appellant was attempting to hide behind one finger when it said that it was not aware of the stated hearing dates. From admissions made under oath as set out above, the appellant was aware of same and no further proof is required’ See: Olagunyi v. Oyeniran (1996) 6 NWLR (Pt. 453) 127. There is no evidence stronger than the appellant’s admission. The court below was right in its conclusion that the appellant was aware of the stated hearing dates.

It was canvassed on behalf of the appellant that hearing notice was not issued in respect of the two dates fixed for trial. To my mind, the new stance equates to clinging to a straw. A party as herein, who already knows or is reasonably presumed to know of the date for which its case is scheduled for hearing, does not require hearing notice to be served on it.]
(See: Jonason Triangles Ltd. v. CM & P Ltd. (2000) 15 NWLR (Pt. 759) 176.)

H ***I also wish to make it clear that there should be consistency in prosecuting a case at the trial court as well as on appeal. There should be no somersault; as herein.*** (See: Ajide v. Kelani (1985) 3 NWLR (Pt.12) 248.)

I hereby resolve issue 1 in favour of the respondents

and against the appellant.

Issue 2, put briefly, is whether the justices of the court below gave due consideration to the reasons proffered by the appellant for its absence in court on the dates the matter was fixed for trial. The appellants, in the main, advanced two reasons for its absence. Firstly, it contended that parties were discussing prospect for settlement. Secondly, the appellant claimed that its counsel was sick. On prospect for settlement, the court below at pages 236-237 of the record held as follows:-

"I do not think that there is any justification for a plaintiff to stay away from court on a date fixed for hearing of his case which was six years old in court on the excuse that it hoped settlement might be reached. It is particularly instructive to bear in mind that the excuse was not that a settlement had been reached"

In my view, the above stance of the court below has no blemish. It sounds plausible, in the main. Even if there were discussions about settlement, that was no reason or justification for the plaintiff to stay away from the court on a date the matter was fixed for hearing. In any event, the appellant tried to play a game of hide and seek. It maintained that its counsel was in court on 7th September, 2000 not to report settlement; but to inform the court that the appellant was unaware of the trial for that date.

On the claim of ill-health by the appellant's counsel, the learned trial Judge at page 100 of the record explained in detail why he disbelieved same. The suit was set down for two days. On 7-9-2000, counsel left before the court resumed sitting. No official from the appellant's company was present in court. On 8-9-2000 both counsel and appellant's representatives were not in court. No letter was written to court. The court stood down the matter for hearing in anticipation that counsel would come. After appellant's claim was dismissed, counsel came in to say 'I am just coming from my Doctor'. However, in the affidavit seeking to set aside the judgment, a clerk from counsel's chambers deposed that he went to the appellant's counsel's house to inform him that the proceedings were going on in appellant's absence and the counsel dressed up and came to the court.

The learned trial Judge saw the two positions as contradictory.

The cock and bull story was not believed by the trial judge. The appellant and its counsel embarked upon a farce. They cannot complain in the circumstance created by them.

The above is still not the end of the matter. There was no sick report shown to the trial court. No hospital card or prescription note was exhibited. The nature of illness was never stated. The appellant who sought the trial court's discretion did not place sufficient materials before the court to justify an exercise in its favour to its chagrin. See: *Williams v. Hope Rising Voluntary Funds Society* (1982) 13 MCC 36 cited by respondents' counsel. The principles to be considered by a court in setting aside a judgment obtained in the absence of a party were stated by this court in *Williams v. Hope Rising Voluntary Funds Society* (supra) at page 42. These are:-

"1. The reasons for the applicant's failure to appear at the trial in which judgment was given against him. There must be good reasons enough to excuse his absence.

2. Whether there has been undue delay in making the application to set aside the judgment so as to prejudice the party in whose favour the judgment subsists.

3. Whether the party in whose favour the judgment subsists would be prejudiced or embarrassed upon an order for re-hearing of the suit being made, so as to render such a course inequitable.

4. Whether the appellant's case is manifestly unsupportable.

5. Whether the applicant's conduct throughout the proceedings i.e. from service of the writ upon him to the date of judgment has been such as to make his application worthy of sympathetic consideration."

It was pronounced by Idigbe, JSC that 'all of the above ought to be resolved in favour of the application of the applicant before the judgment should be set aside. It is not enough that some of them can be resolved.' See: also *Sanusi v. Ayoola* (1992) 9 NWLR (Pt.265) 275 and *Nigerian National Supply Company v. Establishment Sima of Vaduz* (1990) 21 NSCC (Pt. 3) 526 at 537 cited by respondent's counsel.

In this matter, the appellant failed to show up in court on 8-9-2000 when its matter came up for hearing. He was not represented at the appropriate time and none of its officials was in court. It failed to satisfy the first and vital prerequisite.

The appellant complained that its suit was dismissed without a full blown trial of its claim, Such is not a big deal as the learned trial Judge acted in accordance with the provision of Order 33 Rule 3 of the High Court of Lagos State (Civil Procedure) Rules, 1994 which provides that -

"If, when a trial is called on, the defendant appears and the plaintiff does not appear, the defendant, if he has no counter claim shall be entitled to judgment dismissing the action, but if he has a counter claim, then he may prove such counter claim so far as the burden of proof lies upon him." B

It was not correct to state that the trial court had no competence to dismiss the appellant's case as it did. Learned trial court acted within its Rules. C

The court below agreed with the trial Judge that the explanation given for the plaintiff's absence was unsatisfactory. I also agree with the court below. The appellant and its counsel put up a poor and despicable show and got enmeshed in the web created by them. I accordingly resolve the issue in favour of the respondents and against the appellant. D

The 3rd issue is whether in the circumstances of this case, the court below was right in dismissing the appellant's appeal on the ground that the plaintiff had the opportunity to present its case. E

In respect of this issue, learned counsel for the appellant contended that the appellant was not afforded a fair hearing. He noted that the trial court refused to entertain the application for stay of proceedings pending determination of an interlocutory appeal. There is no real point in this complaint as it was designed to further stall the hearing of the matter. In any event, the said interlocutory appeal was taken along with the main appeal in the court below and so, nothing was lost in the game set up by the appellant. F

The court below at page 243 of the record held as follows:-

"The second issue queries whether in all the circumstances of this case the plaintiff could be said to have had a fair trial. The issue appears to me an abstract one. In the course of hearing, the plaintiff had the opportunity to present its case. But if it had not utilized the opportunity afforded it to ventilate its case that cannot be blamed on the respondent or the lower court." H

The appellant complained that 'the procedure adopted by the

trial court after discharging the respondents' witness and hurriedly adjourning the case to the following day for judgment is a short-cut which breached fair hearing. Learned counsel for the appellant applied for, and was granted adjournment to cross-examine D.W.1. When D.W.1 showed up, learned counsel refused to cross-examine him and asked for adjournment. This prompted the judge to discharge the witness. I cannot see any firm ground for complaint by the appellant as it was its counsel who refused to cross-examine the witness.

The learned counsel for the appellant complained that he was not given room to address the court. The notes at page 125 of the Record do not support the assertion. It goes as follows:-

"Adesina: I have more or less completed my address.

Court: In that case Mr. Bakare who has not called any witness should proceed with his own address.

Bakare: I shall not proceed with the address for the same reason."

In my considered view the above allegation of denial of fair hearing, like those earlier considered in this judgment, were self induced and/or imposed by the appellant and more especially its counsel whose conduct could hardly be comprehended by me from all that transpired as extant in the transcript record of appeal. Instead of doing his real job, counsel refused to act positively in most material and vital respects. That ought not to be.

A party, who had the opportunity of being heard but failed to utilize same, as herein, cannot complain of breach of fair hearing. (See: *Omo v. Judicial Service Commission, Delta State* (2000) 12 NWLR (pt. 652) 444; *Okoye v. Nigeria Construction & Furniture Co. Ltd.* (1991) 6 NWLR (Pt. 199) 501 at 541) both cited by learned counsel for the respondents. I resolve this issue in favour of the respondents.

The two courts below made concurrent findings of fact in respect of all the issues canvassed in this appeal. It is only where an appellant is able to establish a clear error of law or fact that would warrant interference by this court. No compelling reason has been shown to warrant interference. I shall not interfere. (See: *Kale v. Coker* (1982) 12 SC 252; *Echi & Ors. v. Nnamani & Ors* (2000) 5 SC 62 at 70; *Fajemirokun v. C. B. Nig Ltd.*

(2009) 5 NWLR (pt.1135) 588 at page 599.)

I come to the unalloyed conclusion that the appeal lacks merit. It is hereby dismissed. I affirm the judgment of the court below. I award N50, 000, 00 costs in favour of the respondents against the appellant.

B

MUSDAPHER JSC

I have read before now the judgment of my lord Fabiyi, JSC just delivered with which I entirely agree, for the same reasons so comprehensively set out in the aforesaid judgment, which reasons I adopt as mine, I too, dismiss this appeal as lacking in merit, I affirm the judgment of the court below delivered on the 18/11/2002. I abide by the order for costs proposed in the aforesaid judgment.

D

ADEKEYE JSC

I have read in advance the lead judgment just delivered by my learned brother, J.A. Fabiyi, JSC. The facts of the case as narrated by my lord in his judgment. The learned trial Judge dismissed the plaintiff's case for want of prosecution on the 8th of September 2000. On the 8th of October 2000, the learned trial Judge dismissed the plaintiff's application to set aside the dismissal of his case for want of diligent prosecution. The learned trial Judge heard the counter-claim of the defendant and gave judgment against the plaintiff. The plaintiff now as appellant appealed against the interlocutory and final judgments of the trial court. Both appeals were consolidated and heard by the Court of Appeal. In the considered judgment delivered on the 18th of November, 2002, the Court of Appeal dismissed the appeal. This appeal emanated from that judgment of the Court of Appeal. The appellant raised three issues for determination but I intend to amplify on just two of them.

ISSUE ONE

1. Whether in the circumstances of this case, the Court of Appeal was right in dismissing the appellant's appeal on the ground that the explanations proffered by the appellant in the application to set aside the trial court order dismissing the appellant's suit for want of prosecution was unsatisfactory.

The appellant argued and submitted that the trial court had no competence to dismiss the case of the appellant in limine and the Court of Appeal was in error not to have set aside the decision of the trial court. The courts have come to the conclusion in numerous cases that dismissal of an action in limine is the most punitive relief that a court can grant against the plaintiff. Hence the courts are usually reluctant to grant it. The counsel cited the case of *Inokoju v. Adeleke* (2007) 2 MJSC pg.7 at pg.48. The cause of the absence of the appellant's counsel was the sudden sickness which the appellant's counsel developed in court and both the court Registrar and the respondents' counsel were aware of it. The appellant's counsel was also not informed by proper service of hearing notice that the two days, 7th and 9th of September 2000 were fixed for trial of the case. At the stage when the action was dismissed, parties to the suit had been discussing settlement through their respective counsel and the trial court was aware of it.

The respondent replied that it is an afterthought for the appellant to now claim in the lower court and in this court that it was not aware that the dates fixed for hearing of the case was the 7th and 8th of September, 2000. It is clear from the affidavit filed in support of its motion seeking to set aside the dismissal of its case that he was aware but he preferred to offer excuses to back up why he was not present in court on those two dates.

On a cursory look at the submission of both parties, I am convinced by the appearance of the counsel for the appellant in court on those two days - the 7th and 8th of September 2000 and his disposition in support of his motion seeking to set aside the dismissal of his case, that he was fully aware that the case was fixed for trial. It is trite law that hearing notice will not be issued or served on parties who already know or are reasonably presumed to have known of the date on which a matter is slated for hearing. The prospect of settlement broke down. On the 15th of June 2000, the appellant asked for an adjournment as the hearing was to have commenced with the opening of the appellants case. I also hold that the lower court gave due and proper consideration to the grounds upon which a judgment obtained in the absence of a party may be set aside and rightly came to the conclusion that the appellant failed to advance cogent and justifiable reasons for its absence in court on the date this matter

was dismissed. The lower court had in the circumstance rightly affirmed the judgment of the trial court. The Court of Appeal held at pages 238-239 of the Record that:

“I entirely agree with the trial Judge that the explanation given for plaintiff’s absence was unsatisfactory.”

Order 33 Rule of the High Court of Lagos State (Civil Procedure) Rules 1994 provides that -

“If when a trial is called on, the defendant appears and the plaintiff does not appear, the defendant if he has no counter claim shall be entitled to judgment dismissing the action, but if he has a counterclaim, then he may prove such counterclaim so far as the burden of proof lies upon him.”

The trial court acted within the ambit of the Rules of court hence it cannot be correct to hold that the trial court had no competence to dismiss the appellant’s case as submitted in the appellant’s brief.

The courts in Nigeria have the inherent powers to strike out matters before them for want of diligent prosecution. The power to dismiss for want of diligent prosecution, though allowed by the rules of court should be sparingly used. The rationale, following the decision of this court in the case of *Lagos v. Aigoro* (1985) 1 ALL NLR (pt.1) pg.58 at pg. 69 is that unless and until the court has pronounced a judgment upon the merits or by consent, it ought to use the power which it certainly has to punish any mistake or blunder committed either by the parties or their counsel by an imposition of costs or terms and do everything possible to keep cases alive and hear them on their merits, rather than applying the guillotine of dismissal for want of prosecution.

In the circumstance of power of court to dismiss a case due to failure of plaintiff to appear at the hearing, the principles applicable are: -

a. Although the rules talks of dismissal, the courts in practice merely strike out the suit in order to allow the plaintiff an opportunity to come back and re-litigate the matter if he so desires since such has not been heard or decided on its merit.

b. The discretion given to the judge to dismiss under the rule must be judicially and judiciously exercised devoid of arbitrariness.

c. For the defendant’s application to dismiss to succeed, he must show -

i. That there had been an inordinate delay by the plaintiff and

what is inordinate delay depends on the facts of each case.

ii. That such inordinate delay is inexcusable meaning until credible excuse is given; the natural inference is that it is inexcusable.

iii. That the defendant is likely to be seriously prejudiced by such delay and the longer the delay, the more likelihood of serious prejudice.

iv. If there has been inordinate delay due to negligence of counsel whilst the plaintiff is personally blameless, it will be unjust to deprive him of the chance of prosecuting his claim.

C Prejudice

v) Unless the court specifically orders so, a dismissal under this rule is not a bar to the plaintiff bringing another action based upon same facts as dismissal under this rule is always interpreted as mere striking out.

D vi) Courts of law should always loath to dismiss when there is no hearing on the merits.

In the instant appeal, the learned trial Judge held that the claim of the learned counsel for the appellant to be sick was a bare assertion as there was no document like a doctor's certificate or a letter from his chambers to establish same. The learned justice of the Court of Appeal on the purported claim to settlement by the appellant observed on pages 236-237 of the Record that "I do not think that there is any justification for a plaintiff to stay away from court on a date fixed for hearing of his case which was six years old in court on the excuse that it hoped settlement might be reached. It is particularly instructive to bear in mind that the excuse was not that a settlement had been reached." It is apparent from the record of the proceedings that besides the learned counsel, even the appellant itself was absent from court on a hearing date.

Waterline Nigeria Limited v. Faire Services Limited (2003) FWLR (pt.163) Pg.88, Obi v. Obi (2004) All FWLR (pt.224) pg.2081.

SDC Cementation (Nig.) Ltd. v. Nagei & Co. Limited (2003) FWLR (pt.156) pg.861, Soleye v. Sonibare (2002) FWLR (pt.95) pg.221, OBMC Limited v. M.B.A.S. Limited (2005) All FWLR (pt.261) pg.215, Ukachukwu v. NYSC (2006) All FWLR (pt.308) pg.1272.

The appellant's application to set aside the judgment dismissing the appellant's suit was refused on the 18th of October 2000 by the trial court as it lacked the materials upon which to exercise such

discretion in favour of the appellant.

It is now settled law that a party applying that his matter struck out or dismissed for want of diligent prosecution be re-listed must fulfil the following conditions -

a. There must be good reasons for being absent at the hearing. B

b. That there has not been undue delay in bringing the application as to prejudice the respondent.

c. That the respondent will not be prejudiced or embarrassed if the order for re-hearing is made. C

d. That the applicant's case is not manifestly unsupportable.

e. That the applicant's conduct throughout the case is deserving of sympathetic consideration.

It was emphasized in the case *Williams v. Hope Rising Voluntary Funds Society* 1982) 13 NSCC Pg.36 by Idigbe JSC (of blessed D memory) that -

"All of these matters ought to be resolved in favour of the application of the applicant before the judgment should be set aside. It is not enough that some of them can be so resolved."

(*Atiku v. Yola Local Government* (2003) FWLR (PT.177) pg.837, E
Shittu v. Peugeot Automobile Nigeria Ltd. (2005) All FWLR (Pt.253) pg.682, *Sanusi v. Ayoola* (1992) 9 NWLR (Pt.265) pg.275, *Nigerian National Supply Company v. Establishment Sima of Vaduz* (1990) 21 NSCC (Pt.3) Pg. 526, *Banna v. Telepower (Nig.) Limited* (2005) F All FWLR (pt.334) pg.1813.

I agree with the learned counsel for the respondent that setting aside a judgment obtained in the absence of a party is a matter borne out of the discretion of the learned trial Judge. An appellate court will not make it a habit to interfere with the exercise of discretion by a lower G court simply because if faced with a similar application, it would have exercised its discretion differently. An appellate court can only interfere if the lower court failed to apply the correct principles of law in reaching its conclusion.

Saraki v. Kotoye (1990) 4 NWLR (pt.143) pg. 144. H

University of Lagos v. Olaniyan (1985) 1 NWLR (pt.1) pg.156

The lower court also duly considered the reasons given by the appellant and found them to be without merit.

ISSUE THREE

Another question to be answered is whether the learned justices of the Court of Appeal was right to have held that the appellant had the opportunity to present its case before the trial court.

In order to answer this question, the proceedings of the 7th and 8th of September 2000 must be closely examined. The learned
 B counsel for the appellant appeared in court on the 7th of September 2000. He left the court premises before the court sat for reason of a sudden illness which both the trial court and lower court concluded was not properly substantiated in their judgments. The case was fixed
 C for hearing on those two days because it had been pending in court for six years and the hope for settlement between the parties had not materialized. The case had to be adjourned to the 8th of September 2000 for hearing. The appellant's counsel and representative of the appellant were both absent from court when the court sat and the
 D case was called. There was no legal practitioner or an official representative from the counsel's chambers and no report about his state of health. The court had to adjourn till later in the day to give the appellant and his counsel the opportunity to appear in court and participate in the hearing. When both of them failed to turn up, the
 E court dismissed the appellant's case for want of prosecution upon the oral application of the respondent's counsel. The court commenced hearing on the counterclaim.

I shall re-state the relevant part of the proceedings for that day
 F after the appellant's counsel turned up later in the day.

Court - The application for adjournment is refused. I had thought that Mr. Bakare has come to court today since the further hearing had been adjourned till today on insistence of the same Mr. Bakare on 18/10/2000. Mr. Bakare you may proceed with the cross
 G examination.

Bakare - I urge the court to adjourn the case.

Court - Since Mr. Bakare is still refusing to proceed with the cross-examination despite the court ruling, witness is discharged.

Adesina - I have more or less completed my address.

H Court - In that case Mr. Bakare who has not called any witness should proceed with his own address.

Bakare - I shall not proceed with the address for the same reasons. Vide page 125 of the record.

Surprisingly the appellant complained that the procedure adopted

by the trial court after discharging the respondents' witness and hurriedly adjourned the case to the following day for judgment is a short-cut which breached fair hearing.

The learned justices of the Court of Appeal held that -

"In the course of hearing, the plaintiff had the opportunity to present case, but if it had not utilized the opportunity afforded it to ventilate its case, that cannot be blamed on the respondent or the lower court." B

The right of fair hearing is a constitutional right enshrined in Section 36 of the 1999 constitution. The right to fair hearing is a very essential right for a person to secure justice. The basic attributes of fair hearing include (a) That the court shall hear both sides not only in the case but also on all material issues in the case before reaching a decision which may be prejudiced to any party in the case (b) That the court or tribunal gives equal treatment, opportunity and consideration to all concerned. (c) That the proceedings be heard in public and all concerned shall be informed of and have access to such place of hearing (d) That having regard to the circumstances in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done. C D E

(Usam v. Duke (2004) 7 NWLR (pt.871) pg.116, Fagbule v. Rodrigues (2002) 7 NWLR (pt.765) pg.188, Adeniran v. NEPA (2002) 14 NWLR (pt.786) pg.30, Bamgboye v. University of Ilorin (1999) 10 NWLR (pt.622) pg.290, Awoniyi v. The Registered Trustees of the Rosicrucian order Amorc (2000) 4 SC (Pt.1) Pg.103.) F

The burden is on the party alleging breach of fair hearing in a case to prove the breach and he must do so in the light of the facts of the case. (Maikyo v. Itolo (2007) 7 NWLR (pt.1034) pg.443.)

The appellant cannot complain of breach of fair hearing G where it was afforded the opportunity to present its case and to also defend the counter claim, but failed to avail itself of the opportunity. The appellant cannot blame the trial court for failure to prosecute its case. (Okoye v. Nigerian construction And Furniture co. Ltd. (1991) 6 NWLR (pt.199) pg.501, Omo v. Judicial Service Commission Delta State (2000) 12 NWLR (pt.682) pg.444, Ogolo v. Fubara (2003) 11 NWLR (pt.31) pg.231, Ossai v. Wakwah (2005)4 NWLR (pt.959) pg.208.) H

With fuller reasons given by my lord in his lead judgment, I I

also agree that the appeal lacks merit and it is accordingly dismissed. I award N50, 000.00 as costs of the appeal.

GALADIMA JSC

B I have had the privilege of reading in draft the lead judgment of my Brother FABIYI JSC, just delivered.

The trial Court and the Court of Appeal made concurrent findings of fact in respect of all the issues canvassed in this appeal. The Appellant is not able to establish a clear error of law or fact on these findings. I cannot interfere with same as there is no compelling reason to do so. See BEST (NIG.) LTD V. BLACKWOOD HODGE (NIG) LTD & 2 ORS (2011) 1 - 2 SC (PT.1) 55 AT 78; ANYAEZE V. ANYASO (1983) 5 NWLR (PT.291) 1 AND FAJEMIROKUN V. C.B. (NIG) LTD. (2009) D 2 - 3 SC (Pt.1) 26.

I strongly feel that the two courts below were absolutely correct to hold that a party who had the opportunity of being heard but failed to utilize same, as in this case, cannot complain of breach of fair hearing. There is no iota of truth in allegation of denial of fair hearing by the Appellant. The Court Notes at page 125 of the Record do not support this assertion.

I have made these observations in support of comprehensive resolution of all the issues raised in the appeal by my learned brother, FABIYI JSC. I too agree that this appeal ought to be dismissed and it is accordingly dismissed. I award N50,000.00 costs in favour of the Respondents.

RHODES-VIVOUR JSC

G I have had the benefit of reading in draft the leading judgment of my learned brother Fabiyi, JSC, and I agree with his reasoning and with the result he proposes.

Learned counsel for the appellant made heavy weather of the fact that the case was not heard on the merits, yet it was dismissed for want to prosecution. Generally an order for dismissal signifies that the trial court had entertained the matter on the merits. Order 33 Rule 3 of the High Court of Lagos State (Civil procedure) Law 1994 is an exception. It reads:

“If when a trial is called on, the defendant appears and the plaintiff does not appear, the defendant, if he has no counterclaim shall be entitled to judgment dismissing the action, but if he has a counterclaim, then he may prove such counterclaim so far as the burden of proof lies upon him.”

The above states clearly that a case can be dismissed in Lagos State without a hearing on the merits. When a case is dismissed under Order 33 Rule 3 *supra* the order of dismissal can be set aside if there is compliance with Order 33 Rule 4 *supra*. That is to say the following must be resolved in favour of the applicant:

1. The applicant must show good reasons for being absent at the hearing.
2. The application must be brought within the prescribed period of six days.
3. Where the application is brought after six days of the delivery of the judgment, the applicant must apply for extension of time to bring the application, and give good reasons for his inability to bring the application to set aside the judgment within the six days prescribed by the rule.
4. The applicant must show that there is an arguable defence to the action, which is not manifestly unsupportable.
5. The applicant's conduct throughout the trial must not be such as is condemnable but is deserving of sympathy.
6. Where the judgment is shown to be tainted with fraud or is irregularly obtained.
7. Where the judgment was given for an amount in excess of what was due and claimed.
8. The applicant must show that the respondent will not suffer any prejudice or embarrassment if the judgment is set aside. See *Sanusi v. Ayoola* 1992 9 NWLR PT. 265 PG.295.

The only good reason that would sway the court to set aside a judgment under Order 33 Rule 3 *supra* or a judgment in default of appearance of the plaintiff/appellant, would be a detailed explanation by the appellant of his absence on the day fixed for trial. In the courts below the explanation was that he was aware of the dates for trial but hearing notice was not issued, while in this court his case was that he was not aware of the hearing date.

Paragraph 16 of the appellants Reply to counter affidavit is

clear that the appellant was aware that the hearing dates were fixed for 7th and 8th September 2000. Hearing Notice is not necessary when parties are aware of the dates fixed for trial. Much as counsels are allowed to urge the semblance of the truth, they must be consistent about it, and that calls for having a retentive memory. A completely different reason has been given before this court for his absence at the trial court. He cannot be allowed to shift ground as it suits his whim and fancy. After all we as judges are to discover the truth.

Finally both courts below were satisfied that the appellant was unable to explain his absence at the hearing of the case on 8/9/2000. This is a concurrent finding of fact and this court rarely upsets such findings except the findings are perverse/there is a miscarriage of justice or violation of some principle of law or procedure. See *Uka v. Irolo* 2002 7 SC pt.11 pg, 97 *Okonkwo v. Okonkwo* 1998 10 NWLR pt.571 pg. 554.

I also hold the view as in the leading judgment prepared by Fabiyi, JSC that the appellant was unable to explain his absence from court on 8/9/2000 to the satisfaction of the court. When there is no credible explanation, no indulgence can be given.

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