

SUPREME COURT OF NIGERIA
13TH JANUARY, 2012. SC. 51/2005
CORAM: - **A. M. MUKHTAR, F. F. TABAI, I. T. MUHAMMAD,**
S. GALADIMA, N. S. NGWUTA, JJSC

1. ALADINMA MEDICARE LTD.
2. DR. DARLINGTON O. AMAMASI APPELLANTS
AND
1. REGISTERED TRUSTEE OF
OVERCOMERS CHRISTIAN MISSION
2. REV. EZEUGO EKEWUBA RESPONDENTS
3. E. J. I. EBIRIM
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APPEALS - Hearing - When appropriate - An appeal cannot be heard until it has been entered - In the registry of the appellate court (H1)

APPEALS - Judgment - Delivered without jurisdiction - Fate - The ruling of the Court of Appeal in an appeal not before it - Is a nullity since it was given without jurisdiction (H2)

FACTS

Plaintiffs/appellants commenced this action in the High court of Imo State, Owerri Judicial Division. They inter alia, sought to restrain defendants/respondents by themselves, their servants and agents from constituting nuisance by noise vibration into and about the premises and hospital of appellants situate at Plot 15, Aladinma Northern Extension Layout Plots C1 and C2. At the trial, appellants called five witnesses and closed their case on 8/11/2000. The case was first adjourned to 6/12/2000 and afterwards to 14/2/2001 for defence and address. On the 22/3/2001, the court granted the reliefs sought by appellants including an order for respondents to vacate Plots C1/ C2 within 2 days from 22/8/2001. Dissatisfied, respondents appealed to the Court of Appeal, Port Harcourt Division. In absence of order or motion for stay of the judgment in their favour, appellants filed a motion before the trial court to commit respondents to prison for disobeying the judgment of the trial court. The motion was filed on 11/4/2001 and on 19/4/2001 respondents filed a counter-affidavit in reaction to the motion for committal. They indicated that they

would raise a preliminary objection to the motion on the ground that it is unconstitutional, incompetent and an abuse of process of court. The motion was partly heard and adjourned at the instance of respondents' counsel. In a twist on the 11/7/2002, respondents filed a motion seeking for an order to, inter alia, stay further proceedings in the suit pending the hearing and determination of the preliminary objection to the motion for committal.

At the hearing of the motion for stay of proceedings on 13/11/2002, the learned trial Judge Nwosu-Iheme, J (as she then was) ruled that since the motion for committal had been taken half way, the preliminary objection be incorporated in respondents' reply to the motion for committal, adding that the issue of jurisdiction raised in the preliminary objection would be determined first. Aggrieved, respondents appealed to the Court of Appeal, Port Harcourt and on the 27/1/2002, respondents also filed a motion for stay of proceedings pending the determination of the appeal against the order that their preliminary objection be incorporated in their reply to the motion for committal. On 28/1/2002 the court delivered its ruling which denied the motion for stay of proceedings. On 2/12/2002, respondents filed another motion for stay before the same court. They filed a further, further and further affidavits. In reaction, appellants filed a counter-affidavit on 4/12/2002. Parties were ordered by the court to file briefs of argument in the motion for stay of proceedings. On 28/5/2003, the court, purporting to deliver its ruling on the motion for stay of proceedings, actually set aside the ruling of the trial court delivered on 13/11/2002. Aggrieved, appellants appealed to the Supreme Court, contending that the learned Justices of the Court of Appeal were not justified in abandoning the motion for stay of proceedings before them and proceeding to determine an interlocutory appeal not yet before them, as it was not ripe for hearing.

ISSUE FOR DETERMINATION

"Whether the learned Justices of the Court of Appeal were justified in abandoning the motion for stay of proceedings before them and proceeding to determine an interlocutory appeal not yet before them."

HELD (Unanimously allowing the appeal per **NGWUTA JSC**)
APPEALS - Hearing - When appropriate

1. However, the appeal cannot be heard until it is entered in the Registry of the appellate Court. It is entered when the record of the Court from which the appeal is brought has been received in the Registry of the appellate Court to which the appeal is brought at. An appeal cannot be heard until it has been entered after it has been brought. (p. 95 E)

Judgments - Delivered without jurisdiction - Fate

2. The lower Court converted the ruling on the application for a stay of proceedings before it to judgment in an appeal brought but not yet entered. The ruling/judgment of the lower Court setting aside the ruling of the trial Court delivered on 13/11/2002 was delivered without jurisdiction, and in violation of the appellants' right to be heard. The lone issue in the appeal is resolved in favour of the appellants. The appeal has merit and it is hereby allowed.

Appellants urged us to set aside the ruling/judgment of the Court below. There is nothing to set aside. The ruling/judgment delivered without jurisdiction, in an appeal not before the lower Court, is a nullity and I so declare. This may seem a pyrrhic victory for the appellants but every judgment is binding until it is set aside or declared a nullity. A subsisting judgment of the Court of Appeal is binding on Court below in our hierarchy of Courts. (p. 95 F)

REPRESENTATION

Okey Ehieze for Appellants

C. Ofodile, SAN with Nneka Ofodile-Umeadi (Mrs.) for Respondents

CASES REFERRED TO

Madukolu v. Nkemdilim (1962) All NLR 587

Amoo v. Alabi (2001) 112 LRCN 2163

Ogunremi v. Dada (1962) 1 All NLR 663

Ezeokafor v. Ezeilo (1999) 6 SCNJ 209

Airase v. Odili (1994) FWLR (pt.193) 314

Irepo LGC & Community v. Boundary settlement comm. & Anor (1988) 2 NWLR (Pt.69) 189

STATUTES & RULES REFERRED TO

Supreme Court Act, s. 22

Constitution of Federal Republic of Nigeria 1999, s.616

Court of Appeal Rules, O. 13 r. (1) & (2)

Supreme Court Rules 1999 as amended, O. 8 r. 12(2) & (5)

LEAD JUDGMENT BY NGWUTA JSC

B The appellants before were the plaintiffs in the High Court of Justice of Imo State, Owerri Judicial Division. They sued the Respondent and claimed, inter alia, and to restrain the Respondents by themselves, their servants and agents from nuisance by noise vibration or sound into and about the plaintiffs' premises and hospital at Plot 15, C Aladinma Northern Extension Layout Plots C1 and C2.

Pleadings were filed and exchanged. Trial opened and the appellants as plaintiffs in the trial Court, called five (5) witnesses and closed their case on 8/11/2000. The case was first adjourned to 6/12/ D 2000 and then from that date to 14/2/2001 for defence and address.

It would appear, from the order of the trial Court dated 22/3/ 2001, that the Respondents as defendants at the trial Court, abandoned the case whereupon the trial Court found in favour of the appellants and granted all their reliefs including an order for the Respondents to vacate Plots C1/C2 within 2 days from 22/8/2001. E

Dissatisfied with the Judgment of the trial Court, the Respondents herein appealed to the Port Harcourt Division of the Court of Appeal. In absence of order, or motion, for stay of the Judgment in F their favour, the Appellants filed a motion to commit the Respondents to prison for disobedience to the Judgment and orders of the trial Court.

The motion was filed on 11/4/2001 and on 19/4/2001, the G Respondents filed a counter-affidavit in reaction to the motion for committal. They indicated that they would raise a preliminary objection to the motion on the ground that it is unconstitutional, incompetent and an abuse of process of Court. At the instance of learned counsel for the Respondent, that motion then part-heard, was adjourned. However, on 11/07/2002, learned Counsel for the Respondents filed a motion for inter alia, an order to stay further proceedings in the suit pending the hearing and determination of the preliminary objection to the motion for committal. H

At the hearing of the motion for stay of proceedings on 13/11/

2002, the learned trial Judge Nwosu-Iheme, J (as she then was) decided that since the motion for committal had been taken half way, the preliminary objection be incorporated in the Respondents' reply to the motion for committal, adding that in the ruling the issue of jurisdiction raised in the preliminary objection would be determined first.

This ruling displeased the Respondents who then appealed to the Court of Appeal on 15/1/2002. On 27/1/2002, the Respondents filed a motion for stay of proceedings pending the determination of the appeal against the order that their preliminary objection be incorporated in their reply to the motion for committal.

On 28/1/2002 the Court delivered its ruling which denied the motion for stay of proceedings. On 2/12/2002, they filed another motion for stay before the Court of Appeal, Port Harcourt. They filed a further, further and further affidavits. In reaction, the appellants filed a counter-affidavit of 19 paragraphs on 4/12/2002. The lower court ordered parties to file briefs of argument in the motion for stay of proceedings. The parties by their respective counsel complied.

On 28/5/2003, the lower court, purporting to deliver its ruling on the motion for stay of proceedings, actually set aside the ruling of the trial court delivered on 13/11/2002

Aggrieved by this ruling, the appellants appealed to this Court on two grounds from which the following lone issue was distilled for determination -

"Whether the learned Justices of the Court of Appeal were justified in abandoning the motion for stay of proceedings before them and proceeding to determine an interlocutory appeal not yet before them."

In their own brief of argument, the Respondents formulated the following issue for determination:

"Whether having regards to the established antecedents of this matter the appellants have established a right to the reliefs sought."

Arguing the lone issue in his brief, learned Counsel for the appellant said that what was before the lower Court for consideration and determination was the Respondents' motion for stay of proceedings dated 30/11/2002 and filed on 2/12/2002, adding that as directed by the lower Court, the parties filed briefs in the motion. He

said that the lower Court left what was before them to determine the interlocutory appeal which was not yet before the court as it was not ripe for hearing.

Learned counsel submitted that the hearing of an interlocutory appeal not yet before the court in place of the motion for stay of proceedings is outside the provisions of s.16 of the Court of Appeal Act. He referred to Order 13 rule (1) & (2) of the Court of Appeal Rules and said that the records in the interlocutory appeal were yet to be transmitted to the lower court, and that the appeal had not been entered. He referred to *Airase v. Odili* (1994) FWLR (Pt.193) 314 at 312-322 and impugned the hearing of the appeal by the lower court when the records were yet to be transmitted to it.

Learned counsel contended that the lower court acted without jurisdiction in hearing appeal not before it. He relied on *Madukolu v. Nkemdilim* (1962) All NLR 587. Relying on *Amoo v. Alabi* (2001) 112 LRCN 2163 at 2181 para 1, learned counsel argued that the appellants were denied the right to be heard. In urging us to set aside the decision of the lower court, learned counsel relied on *Adigun & ors. v. A-G Oyo State & ors; Irepo LGC & Community v. Boundary settlement comm. & Anor* (1988) 2 NWLR (Pt.69) 189. He urged us to allow the appeal based on the following reasons:

(1) The appellants were never afforded the opportunity of being heard before the Court of Appeal decided the interlocutory appeal not yet before it.

(2) What was before the court of Appeal was the motion for stay of proceeding and not the interlocutory appeal itself?

The Respondents filed a notice of preliminary objection on 4/5/2011, citing section 22 of the Supreme Court Act, Order 8 r. 12(2) & (5) of the Supreme Court Rules, 1999 and S.616 of the 1999 Constitution of the Federal Republic of Nigeria. He said he would argue the preliminary objection at the hearing to the effect that:

(1) The entire substratum of the appeal (i.e. final judgment of *Nwosu-Iheme, J* as she then was of the Owerri High Court, Imo State Nigeria) delivered on the 22/05/2001 page 4-5 of the record of proceedings has been overtaken by events having been reversed, set aside by the Judgment of the Court of Appeal delivered on the 11/05/2006 (See additional record).

(2) A decision in this appeal in favour of the appellant would

serve no useful or practical purpose as the very committal proceeding, cannot now proceed at the Owerri High Court.

(3) The reliefs being sought in this appeal are contradictory and legally untenable.

The preliminary objection is predicated on the following grounds:

(i) The final judgment on (sic) Nwosu-Iheme, J of the Owerri High Court, Imo State Nigeria delivered on the 22/05/2001 on which all subsequent proceedings (particularly the ruling of the 28/05/2003 are predicated has by the final judgment of the Court of Appeal delivered on the 11/05/2006, Suit No. CA/PH/43/2003 (See Additional record) been reversed/set aside.

(ii) Nwosu-Iheme, J. has since been elevated to the Court of Appeal bench, afortiori, can no longer sit over this matter to continue with any committal proceedings.

(iii) The reliefs sought for are not tenable in law and as a matter of fact.

The Respondents filed “Affidavit in support of preliminary objection dated 2nd May, 2011” consisting of 15 paragraphs. They argued the lone issue they framed, contending that this court does not adjudicate on hypothetical academic or legally untenable issues. He referred to the Additional Records for the judgment of the lower court delivered on 11/05/2006 which he said set aside the very foundation and basis of the proceedings by Nwosu-Iheme, J.

Learned Counsel drew attention to page 136 of the records and argued that the reliefs claimed are legally and practically impossible and that in absence of enforceable consequential orders judgment for the appellants, this case would be a pyrrhic victory. He referred to Ord. 8 r.12 (2) of the Supreme Court Rules 1999 (as amended) and pages 130-131 of the records and submitted that the lower court “clearly considered and found favour with the Defendants/Applicants’ submission.” He said that the substance of the reasoning of the lower Court shows that it was the application and not the appeal that was dealt with. Learned Counsel urged us to draw the necessary inferences of fact and decide in accordance with the justice of the case; adding that in any case, the Respondents are entitled to justice.

In summary, learned Senior Counsel for the Respondent urged

us to dismiss the appeal based on the following:

“(i) *The Court below fully considered the submission of the parties before it as per their briefs. He referred to pages 119-120, 111- 118 of the record, the contents of which he said was ‘enough hearing’.*

B (ii) *The trend and flow of the ruling showed SUBSTANTIAL consideration of those submissions.*

(iii) *This Court under its inherent powers and statutorily (sic) ord. 8 r. 12(2) Supreme Court Rules in its appellate jurisdiction can give any judgment that seemed to have escaped the Court below.”*

C I will at this stage dispose of the preliminary objection. The answer is that this appeal is not dependent on the fate of the final judgment in the matter. Even though the final Judgment in the matter before the trial Judge has been set aside by the lower Court in D CA/PH/143/2003 the Judgment which is the subject of this appeal remains valid unless it is set aside on appeal. Even if the committal proceedings could still be taken, the fact that the trial Judge is no longer in a position to proceed with it is immaterial as another Judge of the Imo State High Court could take the proceedings.

E The third ground of preliminary objection is that the reliefs sought for in the appeal “are not tenable in law and as a matter of facts”. The reliefs sought in the appeal are:

“(i) To set aside in its entirety the ruling and orders of the Court of Appeal delivered on the 28/5/2003.

F (ii) To remit the case back to the Court of Appeal for the purpose of delivering a ruling in the motion for stay of proceedings or alternatively;

(iii) To dismiss the defendants’/Respondents’ motion for stay G of proceeding to the extent that they failed to prove their entitlement to same.”

The last two reliefs are dependent on the main case which has been disposed of by the Court below. None of the two reliefs can stand on its own. Consequently, the preliminary objection, in so-far H as it relates to the two reliefs, is sustained. The reliefs are hereby struck out. The issues have become academic.

The matter before the lower Court on 28/5/2003 was its ruling on a stay of proceeding: The proceeding of that date was headed “Ruling”. However, for no apparent reason, the lower Court said:

“This is an appeal against the decision of Nwosu-Iheme delivered on 22nd March 2001 in Suit No.HOW/212/97.” (See page 127 of the record).

On page 128 of the record, the lower Court noted that -

“The Respondents also filed a brief of argument and rejected the two issues formulated by the appellants for determination because they do not relate to the application for stay of proceedings before the Court of Appeal.” B

He contended that from the motion, affidavit and counter-affidavit filed before the Court, the only issue that calls for determination is as follows: C

“Whether the applicants have shown any special exceptional circumstance for the granting of a stay of proceedings.”

Its own record and the issue framed by the appellant as respondent, which was not specifically rejected should have been brought to the lower Court back on track as it were. D

Ord. 3 r.5 of the Court of Appeal Rules 2002 provides:

“An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Court below.”

However, the appeal cannot be heard until it is entered in the Registry of the appellate Court. It is entered when the record of the Court from which the appeal is brought has been received in the Registry of the appellate Court to which the appeal is brought at. See *Ogunremi v. Dada* (1962) 1 All NLR 663; *Ezeokafor v. Ezeilo* (1999) 6 SCNJ 209 at 218. ***An appeal cannot be heard until it has been entered after it has been brought.*** E F

The lower Court converted the ruling on the application for a stay of proceedings before it to judgment in an appeal brought but not yet entered. The ruling/judgment of the lower Court setting aside the ruling of the trial Court delivered on 13/11/2002 was delivered without jurisdiction, and in violation of the appellants’ right to be heard. The lone issue in the appeal is resolved in favour of the appellants. The appeal has merit and it is hereby allowed. G H

Appellants urged us to set aside the ruling/judgment of the Court below. There is nothing to set aside. The ruling/judgment

delivered without jurisdiction, in an appeal not before the lower Court, is a nullity and I so declare. This may seem a pyrrhic victory for the appellants but every judgment is binding until it is set aside or declared a nullity. A subsisting judgment of the Court of Appeal is binding on Court below in our hierarchy of Courts.

Appeal is allowed. Parties to bear their respective costs.

MUKHTAR JSC

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Ngwuta JSC. I agree that the appeal has merit, and deserves to be allowed.

MUHAMMAD JSC

I read before now the judgment of my learned brother, Ngwuta, JSC. I agree with him that the appeal has merit and should be allowed. I allow the appeal and abide by orders made in the lead judgment including order as to costs.

GALADIMA JSC

I have read in draft, the Lead Judgment of my learned brother, NGWUTA JSC, just delivered with which I agree entirely. The Appellants, in the Imo State High Court, Owerri Judicial Division sued the Respondents restraining them, their servants and agents from nuisance by abatement of noise or sound into and about the plaintiffs' premises and Hospital located at Plot 15, Aladinma Northern Extension Layout specifically, plots C1 and C2.

Pleadings were filed and exchanged by the respective parties and the trial commenced. The court found in favour of the Appellants. The Respondents were ordered to vacate plots C1 and C2. Not satisfied with this judgment, the Respondents appealed to the Court of Appeal, Port Harcourt Division. On their part, the Appellants filed a motion to commit the Respondents to prison for non-compliance with the orders of the trial High Court. The Respondents filed a counter-affidavit in reaction to the Appellants' Motion for Committal.

Further, at the hearing of the motion for stay of proceedings, the learned trial judge decided to consider the part heard motion for committal together with the preliminary objection to the committal proceedings, adding that in the ruling the issue of jurisdiction raised in the preliminary objection would be determined first. This ruling which did not go down well with the Respondents made him to appeal to the Court of Appeal and at the same time they filed a motion for stay of proceedings pending the determination of the appeal against the order that their preliminary objection be incorporated in their reply to motion for committal. In its ruling the trial High Court refused to stay proceedings. Delivering its Ruling on further application for stay of proceedings in the Court of Appeal, the court actually set aside the Ruling of the trial court delivered on 13/11/2002. Further aggrieved, the Appellants appealed against this ruling, complaining that the learned Justices of the Court of Appeal were not justified in abandoning the motion for stay of proceedings before them and proceeding to determine on interlocutory appeal not yet before them, as it was not ripe for hearing.

The argument and submissions of the respective counsel for the parties on the foregoing scenario have been carefully set out in the lead judgment, based on the lone issue formulated by the Respondents. I agree with the learned counsel that what was before the lower court for determination, was the Respondents' motion for stay of proceedings dated 30/11/2002 and filed on 2/12/2002. The parties were ordered to file their briefs on the motion and they did. The lower court did what it ought not have done. It went on to determine the interlocutory appeal which was not yet before it. It was not even ripe for hearing. By order 13 Rules (1) and 2 of the Court of Appeal Rules, when the records had not been transmitted the appeal cannot be said to have been entered. See also *AIRASE v. ODILI* (1994) FWLR (pt.193) 314 at 321-322. In other words no appeal can be heard until it is duly entered in the Registry of the Appellate Court; and it is entered when the record of the court from which the appeal is brought has been received in the Registry of that Appellate Court.

The lower Court, with due respect, was wrong when it converted the ruling on the application for a stay of proceedings before it to judgment in an appeal brought but not yet entered.

The Ruling of the lower court setting aside the ruling of the trial

High Court delivered on 13/11/2002 was delivered without jurisdiction. This is clearly violation of the Appellants' right to be heard. I declare that ruling a nullity.

In view of the foregoing and the more detailed consideration of the lone issue by my learned brother NGWUTA, JSC, I make no
B order as to costs.

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