

SUPREME COURT OF NIGERIA
FRIDAY 25TH JANUARY, 2013. SC. 204/2003
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-
COOMASSIE, B. RHODES-VIVOUR, N. S. NGWUTA,
S. S. ALAGO, JJSC**

EMMANUEL IKEAJA MPAMA APPELLANT
AND
FIRST BANK OF NIGERIA PLC RESPONDENT

FAIR HEARING - Test - Okafor's case - True test of fair hearing is the impression of a reasonable man present at the trial - Whether from his observation - Justice has been done in the case (H1)

APPEALS - Retrial order - Basis - Appellate court will inter alia order retrial - Where there is error in law - That did not render trial a nullity - And it cannot also be said that there is no miscarriage of justice (H2)

RULES OF COURT - Fair hearing - Imo State H.C. Rules O. 37 r. 18 - Court can only properly evaluate evidence adduced - When counsel in the matter have properly summed up (H3)

FACTS

Plaintiff/appellant commenced this action against one Mrs. Patience Ukauwa and another in the High Court of Imo (now Abia) State Umuahia as 1st and 2nd defendants claiming inter alia, declaration of title to the land in dispute. Pleadings were filed and exchanged. In its judgment, the court gave judgment to appellant as per his claims.

Dissatisfied, 2nd defendant (alone) appealed to the Court of Appeal Port Harcourt, wherein it among other issues, asked whether the trial Court was not in breach of the rule of fair hearing by not giving opportunity to counsel to sum up the case of 2nd defendant and comment thereon before judgment. Appellant equally raised issues among which is whether the trial court gave equal opportunity to each side to present its case and address to the court before judgment. The Court of Appeal in its judgment allowed the appeal, set aside the

judgment of the trial Court and ordered that the case be remitted to the Umuahia Judicial Division to be tried de novo by another Judge. Being aggrieved, appellant filed appeal in Supreme Court.

ISSUE FOR DETERMINATION

“Whether the Court of Appeal was right when it considered only one issue out of the three issues raised for determination on Appeal and in ordering a retrial de novo.”

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

FAIR HEARING - Test

1. On the test of fair hearing the Supreme Court per Karibi-Whyte, JSC in ROBERT OKAFOR & ORS V. A. G. & COMMISSIONER FOR JUSTICE & ORS (1991) 6 NWLR (PART 200) 659 held as follows:-

“The true test of a fair hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done in the case.”

What would be the impression of a reasonable man who was present in court on the 25th July, 1991 when Njiribeako J. adjourned the matter to the 31st October, 1991 for address only to return to court on that day i.e. 31st October, 1991 to be told that behind the Respondent and his Counsel and unknown to them, that court had fixed an earlier date known only to the court itself and the other counsel in the matter where an address of one of the parties’ counsel and a reply of the other counsel had been entertained by the Trial Court which had gone on to fix a date for judgment? (p. 124 F)

APPEAL - Retrial order - Basis

2. Was an order for retrial as ordered by the Court below justified? In other words under what circumstances can an Appellate Court order a retrial? In ABODUNDE & ORS V. THE QUEEN (1959) 4 FSC 70 the then Federal Supreme Court restated the following guiding principles that the Appellate Court must be satisfied about:

a) That there has been an error in law or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand this court is unable to say that there has been no miscarriage of justice.

b) That there are such special circumstances as would render it oppressive to put the Appellate Court on trial a second time.

c) That to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it. (p. 125 E)

RULES OF COURT - Fair hearing

3. The Court can only properly evaluate evidence adduced when counsel in a matter have properly summed up. Moreover the Learned Trial Judge would have considered himself bound by the provisions of Order 37 Rule 18 of the then Imo State High Court (Civil Procedure) Rules 1988 which provides that a party (or counsel appearing for him) should be given the opportunity to sum up his case and comment thereon. Rules of Court are after all meant to be obeyed. The Trial Court was clearly in error to have failed to observe this simple but fundamental rule of fair hearing. (p. 127 B)

REPRESENTATION

Appellant absent and not represented, for the Appellant
Ikechukwu Okoroafor, Esq., for the Respondent

CASES REFERRED TO

Asanya v. The State (1991) 3 NWLR (pt. 180) 422

Sanusi v. Ayoola (1992) NWLR (pt. 265) 275

Ugo v. Obiekwe (1989) 1 NWLR (pt. 99) 566

Awojugbagbe Light Industries Ltd v. Chinukwe (1995) 4 NWLR (pt. 390) 379

Ogunbiyi v. Ishola (1995) 5 NWLR (pt. 452) 12

7-up Bottling Co. v. Abiola & sons (2001) 13 NWLR (pt. 73) 469

Titiloye v. Olupo (1991) 9-10 SCNJ 122

Daramola v. A-G Ondo State (2000) 7 NWLR (pt. 655) 440

Okonji v. Njokanma (1991) 7 NWLR (pt. 202) 131

Akibu v. Oduntan (2000) 7 SC (pt. 11) 106

Federal Capital Development Authority v. Sule (1994) 3 SCNJ 71
Okafor v. A-G & Commissioner for Justice (1991) 6 NWLR (pt. 200) 659

Onifade v. Olayiwola (1990) 7 NWLR (pt. 161) 130

Araka v. Ajeagwu (2000) 12 SCNJ 206

^B Bamaiyi v. The State (2001) NWLR (pt. 715) 270

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 36(1)

^C Imo State High Court (Civil Procedure) Rules 1988, O. 37 r. 18, O. 26 r. 17

LEAD JUDGMENT BY ALAGOA JSC

This is an appeal against the judgment of the Court of Appeal ^D Port Harcourt Division delivered on the 29th November, 2001 which allowed the appeal from the judgment of Njiribeako, J. of the Umuahia High Court in Suit No.HU/104/86 delivered on the 16th October, 1991. The lower court ordered a re-trial of the said Suit No.HU/104/86 on the ground that the Trial Court violated the rule of fair hearing ^E in the sense that the present Respondent who was the 2nd Defendant during the trial at the High Court was not given the opportunity to sum up or address the Court before judgment of the Court was delivered on the 16th October, 1991.

^F Briefly the facts were that the present Appellant who was Plaintiff in the Trial Court took out a Writ of Summons against one Mrs. Patience Ukauwa and another in the High Court of Umuahia as 1st and 2nd Defendants claiming the following reliefs:-

^G a) A declaration that the Plaintiff is entitled to the statutory Certificate of Occupancy in respect of a piece or parcel of land situate and known as No.49 Awkuzu Lane, Umuahia, Imo state (now Abia State) of Nigeria (together with the building thereon) within the jurisdiction of the Court and with an annual rental value of N10.00.

^H b) An order of court compelling the defendants to return to the Plaintiff, title deed of the Plaintiff to the said piece or parcel of land which the Plaintiff handed over to the 1st Defendant as security for repayment of a loan of N5,000.00 (Five Thousand Naira) which the 1st Defendant gave to the plaintiff in 1982.

c) An injunction permanently restraining the Defendants, their

servants, agents and/or workmen from selling the said piece or parcel of land on 8/10/86 or thereafter as advertised in the Daily Star Newspapers of 4/9/86 or dealing with the piece or parcel of land (together with the building thereon) in any other manner whatsoever.

Pleadings having been filed and exchanged, the matter proceeded to be heard and the Trial court gave judgment to the Plaintiff (Appellant in this appeal before us) in all the reliefs sought. B

The 1st defendant did not appeal. The 2nd Defendant as Appellant in the Court below formulated three issues for determination by the lower Court namely:- C

a) Whether the Trial Court was not in breach of the rule of fair hearing by not giving opportunity to counsel to sum up the case of the 2nd Defendant and comment thereon before judgment.

b) Whether the failure of the Trial Court to consider or adequately consider the equitable defences pleaded by the 2nd Defendant was lawful. D

c) Whether the Trial Court properly evaluated the evidence before it and made adequate findings of facts before entering judgment for the plaintiff. E

The Plaintiff as Respondent in the court below also distilled three issues for determination:-

A. Whether the Trial Court gave equal opportunity to each side to present its case and address to the court before judgment. F

B. Whether the Trial Court adequately considered the evidence advanced to support the claim and defence of both sides.

C. Whether the Plaintiff (Respondent) proved his case and was entitled to judgment after proper evaluation of evidence of both parties. G

The Court below in its judgment delivered on the 29th November, 2001, considered only the first issue i.e. issue (a) formulated by the 2nd Defendant at the Trial Court and Appellant before the Court below i.e. "Whether the trial Court was not in breach of the rule of fair hearing by not giving opportunity to counsel to sum up the case of the 2nd Defendant and comment thereon before judgment." H

This the Court below considered it sufficient to dispose of the Appeal. The 2nd and 3rd issues were not considered by the Court

below. The Court below allowed the appeal, set aside the judgment of the Trial Court and ordered that the case be remitted to the Umuahia Judicial Division to be tried de novo by another Judge with N5,000.00 costs against the present Appellant and in favour of the Respondent.

B With leave of the Court below granted on the 28th February, 2002, the Appellant filed its Notice of Appeal consisting of three grounds out of which two issues were distilled for determination by the Supreme Court.

C 1. Whether the Court of Appeal was right in considering only one out of the three issues submitted for determination. (Grounds 1 and 2)

2. Whether in all the circumstances of this case there was a breach of the rule of fair hearing necessitating an order for retrial and did the said order not precipitate thereby a patent miscarriage of justice. (Ground 3)

The Respondent for its part also distilled two issues for determination by the Supreme Court which are as follows:-

E 1. Whether the Court of Appeal was right when it considered only one out of the three issues raised for determination at the Appeal having found that there was a breach of the rule of fair hearing against the Respondent.

F 2. Whether the finding of a breach of the rule of fair hearing requires proof of miscarriage of justice before any judgment reached thereby can be set aside, and if it does, was the Lower Court right in setting aside the trial court's judgment and ordering a retrial.

G These issues were formulated in the respective briefs of the Appellant dated the 25th August, 2003 and filed same day and the Respondent dated the 5th March, 2004, and deemed filed on the 9th March, 2004. This appeal came up for hearing on the 29th October, 2012. Appellant, though proved to have been served with a hearing notice for the day was absent and its filed Brief of Argument was deemed to have been argued.

H Ikechukwu Okoroafor, counsel for the Respondent adopted and relied on the Respondent's Brief of Argument earlier referred to in this write up and urged us to dismiss the appeal and affirm the decision of the lower court.

I have carefully considered the issues formulated in the Briefs

of Argument of the Appellant and Respondent and I consider the following sole issue appropriate to determine the appeal -

“Whether the Court of Appeal was right when it considered only one issue out of the three issues raised for determination on Appeal and in ordering a retrial de novo.”

This singular issue encompasses the grounds of appeal. In **FRANCIS ASANYA V. THE STATE** (1991) 3 NWLR (PART 180) 422, this court per Karibi White, JSC said that:

“The purpose of issues for determination is to identify what is in issue in the grounds of appeal to be argued, the issues in a number of grounds of appeal which involved the same issue could be formulated in one issue and argued together.” See also **DOKUN AJAYI LABIYI V. ALHAJI MUSTAPHA, MOBERUAGBA ANRETIOLA & ORS** (1992) NWLR (PART 258) 139; **SANUSI V. AYOOLA** (1992) NWLR (PART 265) 275; **UGO V. OBIKWE** (1989) 1 NWLR (PART 99) 566.

In **UNITY BANK PLC v. MR. EDWARD BOUARI** (2008) 7 NWLR (PART 1086) 372, this court per Ogbuagu, JSC said as follows:

“It is now firmly settled that a court can and is entitled to reformulate issue or issues formulated by a party or parties or counsel in order to give it precision and clarity.” See **ALSO AWOJUEBAGBE LIGHT INDUSTRIES LTD V. P. N. CHINUKWE & ANOR.** (1995) 4 NWLR (PART 390) 379; **OGUNBIYI V. ISHOLA** (1995) 5 NWLR (PART 452) 12, 24.

That is precisely what has been done here without any proper or radical departure from the issues formulated by the parties themselves. Appellant submitted in its Brief of Argument that the Court below was wrong to have failed to consider the second and third issues submitted to it for determination by the Respondent as the facts and circumstances of the instant case do not fall into the exception to the rule that all issues presented for determination must be considered. Appellant contended that in **7-up BOTTLING CO. V. ABIOLA & SONS** (2001) 13 NWLR (PART 73) 469, the only issue considered had to do with jurisdiction and that was why the Supreme Court held that there was no miscarriage of justice or denial of fair hearing as a result of the consideration of the lone issue of jurisdiction but in the present case the two other issues the Lower Court ne-

glected to consider were far from being ancillary issues as they were clearly crucial to the proper determination of the question of fair hearing raised in the Respondent's first issue for determination in that court. Appellant therefore submitted that failure of the court below to consider the other two issues before it amounted to a gross miscarriage of justice and a breach of the "audi alteram partem" rule. Reliance was placed on the following cases: TITIOYE V. OLUPO (1991) 9 - 10 SCNJ 122 at pp.130 and 138; DARAMOLA V. A. G. ONDO STATE (2000) 7 NWLR (PART 655) 440 at pp 473 - 474; OKONJI V. NJOKANMA (1991) 7 NWLR (PART 202) 131 at pp. 151 - 155; AKIBU v. ODUNTAN (2000) 7 SC (PART 11) 106 at 140; FEDERAL CAPITAL DEVELOPMENT AUTHORITY V. JOSHUA GYUHU SULE (1994) 3 SCNJ 71 at pp 94-96; TUNBI V. OPAWOYE (2000) 1 SCNJ 1 at 12; OLOWOLAGBA V. BAKARE (1998) 3 SCNJ 75 at 80; ONIFADE V. OLAYIWOLA (1990) 7 NWLR (PART 161) 130 at 165; ARAKA V. AJEAGWU (2000) 12 SCNJ 206 at 239.

Appellant went further to submit that since there was sufficient material for the Supreme Court to resolve fully the issues in controversy, an order for retrial of the matter before the Court below would not be necessary as this Court (the Supreme Court) can resolve the two issues not considered by the Court below and allow the appeal and enter judgment in favour of the Appellant especially as the issues do not require further evidence by virtue of section 22 of the Supreme Court Act and are matters of law alone. In support the following cases were cited - THE STATE v. GODFREY AJIE (2000) 7 SCNJ 1 AT 11; ISHAYA BAMAIYI v. THE STATE (2001) NWLR (PART 715) 270 at pp. 285-286 paras G - A, GLOBAL TRANSPORT V. FREE ENTERPRISES (2001) 2 SCNJ 224 at 244. It was the Appellant's further contention that except in the clearest of cases an intermediate Court such as the Court below ought to resolve all issues put before it. Reliance was placed on OWODUNMI V. REGISTERED TRUSTEES CELESTIAL CHURCH OF CHRIST (2000) 6 SCNJ. 399 pp. 426 - 427; (2000) 6 SC PART 111 page 60 at pp. 85 - 87; CHUKWU v. SOLEH BONEH (2003) 3 SCNJ. 18 at p. 38.

Appellant went on to submit that there was no breach of the rule of fair hearing at the High Court Umuahia and no miscarriage of justice was occasioned by failure of the Respondent's Counsel to sum up its case. The court below was therefore in error to have held that

the Respondent was not given an opportunity to sum up its case.

The Respondent has submitted for its part that the decision of the court below that issue 1 is sufficient to dispose of the appeal without considering the other issues was right and falls under those exceptions envisaged by the Supreme Court in the case of 7-UP BOTTLING COMPANY V. ABIOLA & SONS BOTTLING CO. LTD (2001) 13 NWLR (PART 730) page 469 at 514 where the Supreme Court per Kalgo JSC held as follows:

“It is well settled that an Appeal Court may consider all issues presented before it by the parties. There are however exceptions according to the facts and circumstances of each case. One of such circumstances as laid down by this Court is where the Court concerned is of the view that a consideration of one issue is enough to dispose of the appeal, it is not under any obligation to consider all the issues.”

Respondent drew attention to order 37 Rule 18 of the then Imo State High Court (Civil Procedure) Rules 1988 which states that “when a party beginning has concluded his case the other party shall be at liberty to state his case and to call evidence and to sum up and comment thereon” which provision is similar to order 26 Rule 17 of the High Court Rules considered by the Supreme Court in the MOGAJI V. ODOFIN case referred to by the Court of Appeal where the Supreme Court had held that those provisions are mandatory denial of which would cause a miscarriage of justice. Respondent described as faulty the submission by the Appellant in its Brief of Argument that the decision of the trial Court could not have been different even if the Respondent had addressed Court. Respondent went on to submit that the cases of AKIBU v. ODUNTAN (2002) 7 SC. part II page 106 at 140; OLOWOLAGBA V. BAKARE (1998) 3 SCNJ 75 at 80; TUNBI V. OPAWOYE (2000) 1 SCNJ. 1 and ARAKA V. EJEAGWU (2000) 12 SCNJ 206 at 239 cited by the Appellant are distinguishable and inapplicable. Respondent further submitted that it is not a principle of law that if a court finds that a party has not been given a fair hearing in a case the judgment reached thereby can only be set aside if there is proof of miscarriage of justice as argued by the Applicant. Reliance was placed on OGUNDOYIN V. ADEYEMI (2001) 13 NWLR (PART 730) page 403 at 422 where the Supreme Court following its decision in KOTOYE V. CBN (1989) NWLR (PART 98)

219 held that;

“The rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given the opportunity of a hearing.

B Once an Appellate Court reaches the conclusion that a party entitled to be heard before the decision was reached was not given the opportunity of a hearing the order or judgment thus entered is bound to be set aside.”

C For a fuller appreciation of facts and features culminating in this appeal, it is necessary, even vital to reproduce parts of the records. The record for the 25th July, 1991 is reproduced from page 52 thus:-

HOLDEN AT UMUAHIA

BEFORE THE HON. JUSTICE D. E. NJIRIBEAKO, J.

D THURSDAY THE 25TH DAY OF JULY, 1991

HU/104/86

EMMANUEL I. MPAMA

VS.

MRS. PATIENCE I. UKAUWA & ANOR.

E Parties present.

Ijioma I. N. with him Meribe N. O. for Plaintiff.

Analaba V. C. MRS. for the 1st Defendant

2nd Defendant in person

F Ijioma: My Lord, it is probable that it is because of the downpour that Mr. Aghanwa 2nd Defendant’s Counsel is not here yet. He comes from Enugu and this case is for address and he has to start. I have agreed with my learned colleague for 1st Defendant for 31st October.

G COURT: Case is adjourned to 31st October for address.

(Sgd) D. E. Njiribeako

Judge

25/7/91

At page 53 of the Record is the following entry:

H HOLDEN AT UMUAHIA

BEFORE HIS LORDSHIP HON. JUSTICE D. E. NJIRIBEAKO

J.

THURSDAY THE 26TH DAY OF SEPTEMBER, 1991

HU/104/86

EMMANUEL I. MPAMA

V.

PATIENCE IBENYE UKAUWA

Parties absent.

Ijioma I. N. for the plaintiff.

Analaba V. C. Mrs. for the 1st Defendant. My Lord this matter is B
adjourned for address.

Address by Mrs. Analaba:

At this stage Mrs. Analaba Counsel for the 1st Defendant went
on to address court followed at the end of her address by the reply of C
counsel for the Plaintiff Mr. I. N. Ijioma at page 54 of the record after
which address at same page 54 of the record the trial Judge recorded
the following -

COURT: Case is adjourned for judgment on Friday 4th October,
(Sgd) D. E. Njiribeako D

Judge

26/9/91

The records of the court are very clear and leave no one in
doubt as to what transpired in the Trial Court. Counsel for the 2nd E
Defendant (the present Respondent) was absent from court for rea-
sons which counsel for the Plaintiff and the 1st Defendant and the
court conjectured may not have been his fault and the court at the
behest of both counsel present adjourned the case to the 31st Octo-
ber for address. The date of the Trial Judge's signature reads 25th F
July, 1991 and it is safe to presume that the case was adjourned to
31st October, 1991 for address.

One would have expected that the next date the trial court
would convene to take addresses was the 31st October, 1991, but
curiously address of counsel for the 1st Defendant and reply by counsel G
for the Plaintiff were taken on the 26th September, 1991 and the
case adjourned for judgment on the 26th September, 1991 to Friday
4th October which again it is safe to presume was 4th October, 1991
as the Learned Trial Judge's signature for that day's proceedings reads
26th September, 1991. Curiously, counsel for the Plaintiff and the H
1st Defendant was present in Court on the 26th September, 1991
not being a date to which the matter was adjourned by the Trial
Judge for addresses of Counsel. There is nothing in the records to
even remotely suggest that addresses had been shifted to the nearer

date of 26th September, 1991 instead of the adjourned date in open court of the 31st October, 1991. There is nothing in the records to show that a hearing notice had been served on the Respondent or its Counsel shifting the date for addresses from 31st October, 1991 to the 26th September, 1991.

B Once this scenario became clearly understood and appreciated by the court below, other issues became very irrelevant as there can be no greater denial of justice to a party than that. Counsel to the Plaintiff and the 1st Defendant were to say the least dishonest and the trial court was perhaps too trusting to have allowed addresses to
C be taken before the actual adjourned date in open court for addresses. The dictum of Kalgo JSC in 7-UP BOTTLING COMPANY V. ABIOLA & SONS BOTTLING CO. LTD (Supra) is very apt. This is one such case in which a consideration of one issue was most certainly enough to dispose of the appeal. For the Appellant to have
D contended that the trial court could have come to the same finding as it did even if the Respondent's counsel were given the opportunity to sum up its case is dishonest. I think the question here is whether the 2nd Defendant/Respondent's Counsel was entitled in the first
E place to be heard and whether he was given this opportunity to be heard before a decision is arrived at one way or the other.

F Fair hearing is undoubtedly a constitutional provision and the right of the Respondent's Counsel to sum up his case is provided by the rules of Court of the then Imo State. In this regard reference has already been made to Order 37 Rule 18 of the then Imo State High Court (Civil Procedure) Rules, 1988.

On the test of fair hearing the Supreme Court per Karibi-Whyte, JSC in ROBERT OKAFOR & ORS V. A. G. & COMMISSIONER FOR JUSTICE & ORS (1991) 6 NWLR (PART 200) 659 held as follows:-
G

"The true test of a fair hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done in the case."

H ***What would be the impression of a reasonable man who was present in court on the 25th July, 1991 when Njiribeako J. adjourned the matter to the 31st October, 1991 for address only to return to court on that day i.e. 31st October, 1991 to be told that behind the Respondent and his Counsel***

and unknown to them, that court had fixed an earlier date known only to the court itself and the other counsel in the matter where an address of one of the parties' counsel and a reply of the other counsel had been entertained by the Trial Court which had gone on to fix a date for judgment? In ADEBAYO OGUNDOYIN v. DAVID ADEYEMI (2001) 13 NWLR (PART 730) 403 this Court held on the nature of fair hearing that,

"Each party to a dispute before a court of law or any other tribunal must be given fair hearing not only to allow each other state his own case in court or before a tribunal but also to give each party notice of the and place of hearing which is the principle of audi alteram partem. This principle arises from the rule of natural justice. Fair hearing is also a rule of natural justice."

See also DONATUS NDU V. THE STATE (1990) 7 NWLR (PART 164) 550 AT 578; OYEYEMI V. COMMISSION FOR LOCAL GOVERNMENT KWARA STATE (1992) 2 NWLR (PART 226). 661; MOHAMMED & ANOR V. OLAWUNMI (1990) 2 NWLR (PART 133) 458 at 485. In EX PARTE OBINYAN (1973) 12 SC 23, this Court held that

"fairness is a determining factor for the applicability of the rules of natural justice."

Was an order for retrial as ordered by the Court below justified? In other words under what circumstances can an Appellate Court order a retrial? In ABODUNDE & ORS V. THE QUEEN (1959) 4 FSC 70 the then Federal Supreme Court restated the following guiding principles that the Appellate Court must be satisfied about:

a) That there has been an error in law or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand this court is unable to say that there has been no miscarriage of justice.

b) That there are such special circumstances as would render it oppressive to put the Appellate Court on trial a second time.

c) That to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it.

This court also per Obaseki, JSC in TOTAL v. NWAOKO (1978) 5 SC 1 at page 14 held as follows:

“where it is established before a Court of Appeal that vital issues which depend much on the appraisal and evaluation of the evidence are left undetermined a case for retrial is made out for such a failure has occasioned a miscarriage of justice.” See also the following cases UDENGWU V. UZUEGBU & ORS (2003) 13 NWLR (PART 836) 136; EZEOKÉ V. NWAGBO (1988) 1 NWLR (PART 72) 616 at 629; DURU V. NWOSU (1989) 4 NWLR (PART 113) 24 at 43; ATANDA V. AJANI (1989) 3 NWLR (PART 111) 511 at 535; SANUSI V. AMEYOGUN (1992) 4 NWLR (PART 237) 527 at 556.

Relating it to the present case, when counsel for the Respondent is denied the opportunity to sum up his case and address court, vital issues which depend on the appraisal and evaluation of evidence would have been left undetermined occasioning a miscarriage of justice. See also POLYCARP OJOGBUE & ANOR V. AJIE NNUBIA & 4 ORS (1972) 1 ALL NLR (PART 2) 226. IN ALHAJI ABDULLAHI BABA V. NIGERIAN CIVIL AVIATION & ANOR. (1991) 5 NWLR (PART 192) 388, this court yet again gave a rundown of some of the factors it considers vital in the determination of the question whether there has been fair hearing or not.

i. Has the person to be affected by the outcome of the case been present all through the proceedings to hear all the evidence against him?

ii. Has he been given the right to cross-examine witnesses who gave evidence against him?

iii. Has he been granted access to and the opportunity to read all the documents tendered in evidence at the hearing of the case?

iv. Has he been given the opportunity to know the case he has to meet at the hearing and to adequately prepare for his defence?

Such a list of requirements that make for a fair hearing cannot by any stretch of the imagination be exhaustive. The need for Counsel to sum up his case and address court cannot be over-emphasized. For one it is of immense value to the judge in his appreciation of facts and summing up of evidence before him. This is made explicitly clear in the case of MOGAJI v. ODOFIN (1978) 4 SC 91 at Page 94 where the Supreme Court held as follows:-

“In short, before a judge before whom evidence is adduced by the parties in a Civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of

all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier not by the number of witnesses called by each party, but by the quality of the probative value of the testimony of those witnesses.” B

The Court can only properly evaluate evidence adduced when counsel in a matter have properly summed up. Moreover the Learned Trial Judge would have considered himself bound by the provisions of Order 37 Rule 18 of the then Imo State High Court (Civil Procedure) Rules 1988 which provides that a party (or counsel appearing for him) should be given the opportunity to sum up his case and comment thereon. Rules of Court are after all meant to be obeyed. The Trial Court was clearly in error to have failed to observe this simple but fundamental rule of fair hearing. C D

I have no doubt in my mind that the lower court was perfectly right in allowing the appeal from the judgment of the Umuahia High Court in present day Abia State in Suit No.HU/104/86 and in ordering a retrial of same. E

That judgment of the court below in Appeal No.CA/PH/178/94 dated 29th November, 2011 is hereby affirmed. The case is to be remitted back to the Chief Judge Abia State for retrial de novo before another Judge. Parties are however to bear their own costs. F

MOHAMMED JSC

This appeal is against the judgment of the Court of Appeal Port-Harcourt Division delivered on 29th November, 2001 in a case of land dispute in which the Court of Appeal allowed the appeal against the judgment of Umuahia High Court of Abia State given on 16th October, 1991. The Court of Appeal allowed that appeal and ordered the rehearing of the case by another Judge of the Abia state High Court. The main ground upon which that appeal was allowed was that the conduct of the Trial High Court of denying the then 2nd Defendant/Appellant, now the Respondent in this court the right of fair hearing. H

Although the Appellant before this Court in his Appellant's brief

of argument had raised three issues for the determination of the appeal, the undisputed facts of this case had made it plain that the issue touching on the allegation of denial of fair hearing, is in fact the only real issue for determination in this appeal. The record of the trial Court shows at page 52 that the case between the parties was adjourned to 31st October, 1991 for address of Counsel to the parties. However, before the date fixed for the address, the record of Trial Court shows at pages 53 - 54 that counsel to the 1st Defendant and counsel to the plaintiff were allowed the address the Court on 26th September, 1991 in the absence of the 2nd Defendant and its Counsel. The fact that the plaintiff and the 1st Defendant's counsel were allowed to address the Court earlier than the 31st October, 1991, the date fixed for the address by the Court on 25th July, 1991, without any notice of the change of the date for the address, no doubt constitutes a breach of the right of fair hearing to the 2nd Defendant/Appellant before the court of Appeal, to justify that court setting aside the judgment the Trial Court arrived at in complete breach of right of fair hearing. In other words, the judgment of the Trial Court which denied the 2nd Defendant now the Respondent in this the right to address the Trial Court before judgment, had resulted in miscarriage of justice which the Court below took the right step to correct in its decision to justify the setting aside of the judgment of the trial Court and ordering a retrial. In view of the order of retrial, that Court was also right in refusing to look into the other issues in line with the case of *Ayandiba v. N.R.T.C. Ltd.* (1992) 5 N.W.L.R. (Pt.243) 535 at 561.

In any case, in the absence of clear proof of service on the 2nd Defendant at the Trial Court who is now Appellant, of the hearing notice relating to the hearing of the case on 26th September, 1991, leading to the judgment of the Trial Court, the occurrence of miscarriage of justice in the proceedings of the Trial Court culminating in the judgment that went on appeal to the Court of Appeal, was quite obvious. The decision of this Court in *Forcados Oro Obodo v. Stafford Oluwu & Ors.* (1987) 3 N.W.L.R. (Pt.591) 11 at 121 where Belgore JSC (as he then was) plainly stated that it was a breach of right of fair hearing to deny a party the right of presenting final address after taking the evidence of the parties, as happened in the present case.

For the foregoing reasons and more elaborate reasons contained in the lead judgment of my learned brother Alagoa JSC, just

delivered with which I entirely agree, I also find no merit in this appeal. Accordingly, the appeal is hereby dismissed and I abide by the orders made in the lead judgment including the order on costs.

MUNTAKA-COOMASSIE JSC

I was opportune to have read the lead judgment just delivered by my learned brother Alagoa JSC. The whole issues centered on important principle of our law, namely, the old age maxim leading to fairness and the canon of natural justice “hear the other side”-Audi Alteram partem. It is a guide to any person saddled with deciding other peoples cases especially in court. A judge should permit and allow both parties or both sides to be heard and he or she should be patient to listen to the point of view or the case of each and every side no matter how stupid that point of view might be.

In the appeal before us the learned trial Judge, Njiribeako J. adjourned the matter before it to 31st of October, 1991 for the learned counsel to address the court before the delivery of judgment. On the same date the respondent and his learned counsel attended the court to address that court only to be told that the address was taken on 26th of September, earlier than 31st of October, 1991. On appeal the Court of Appeal held that there is a clear case of breach of principle of fair hearing.

The parties in the case were not given the same equal opportunity to present their case. The action of the Trial Judge was against the provisions of section 36(1) of our Constitution 1999 which states:-

(1) “In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality”.

It is clear from the record when the Trial Judge decided to receive addresses of both counsel on 26/10/1991 instead of earlier date of 31/10/1991, the respondent herein was never served with the hearing notice for the new date i.e. 26/10/1991. This, in my view, amounts to a gross violation of the respondent's right to a fair hearing as provided by the above stated constitutional provisions.

That being the case I will agree with the unanimous decisions of the lower court as read by Akpiroroh JCA as he then was.

For the above little contribution and the more detailed reasons adumbrated in the lead judgment the appellant appeal could not have any merit, same must and is hereby dismissed. The case shall be
 B reverted back to the Chief Judge of Abia State of Nigeria for re-assignment for hearing before another judge of the high Court.

RHODES-VIVOUR JSC

C The Court of Appeal ordered a retrial of this suit due to the fact that the Trial Court violated the rule of fair hearing, Audi alteram partem means hear the other side. It is a maxim denoting basic fairness and a canon of natural justice. It simply means that a judge
 D should allow both sides to be heard and should listen to the point of view or the case of each side.

Section 36(1) of the Constitution guarantees fair hearings/trials. It states in part:

E *“...a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”*
 See Udo v. State 1988 3 NWLR pt.82 p.316, Otapo v. Sunmonu 1987 2 NWLR pt.58 p.587, Akoh v. Abuh 1988 3 NWLR pt.85
 F p.696.

It has been stated in a plethora of cases that the true test of fair hearing is the impression of a reasonable person who was in court. Whether from his observation of the conduct of the case justice was done. On 25th of July, 1991 Mr. Justice J. Njiribeako adjourned the
 G case to the 31st of October, 1991 for address, on the 31st of October, 1991, the respondent and his counsel came to court, for address only to be informed that address was taken on the 26th of September 1991 instead of the adjourned date of 31st of October, 1991 .

Now, was the Court of Appeal right on these facts to remit the
 H case back to the trial court for trial de novo by another Judge. There is said to be a fair hearing when all sides in a case are given the same or equal opportunity to present their case. The Trial Judge must at all times ensure that there is a level playing field. Addresses were fixed by the learned trial judge for the 31st of October, 1992. Hearing

address on the 26th of October, 1991 only from the learned counsel for the plaintiff/appellant and not informing the other side of the new date amounts to a gross violation of the respondents right to a fair hearing as provided by section 36(i) of the Constitution. A reasonable man in court would wonder why the respondents were denied their right to address the court and why the dates for addresses were changed without informing the respondent, The Court of Appeal was correct to remit the case back for trial de novo by another judge. B

For this and the much fuller reasoning in the leading judgment delivered by my learned brother, Alagoa, JSC which I was privileged to read in draft form the judgment of the Court of Appeal is confirmed, I would send this case back to the Chief Judge of Abia State for retrial before another judge. C

NGWUTA JSC

The crucial issue in this appeal is issue 1 in the appellant's brief of argument, hereunder reproduced:

"Whether the Court of Appeal was right in considering only one out of the three issues submitted for determination. (Grounds 1 and 2)" E

It is a threshold issue in the appeal and its resolution will determine whether or not the other two issues can be resolved. From the record, His Lordship, Njiribeako J, on 25th July 1991, adjourned the matter to 31st October 1999 for address of learned Counsel for the parties. The address was taken not on 31st October, 1991 as fixed by the Court but on 26th September, 1991 and in absence of learned Counsel for the appellant. A hearing notice for the new date was not served on Counsel for the appellant or the appellant in person. F G

Counsel for the appellant was denied the opportunity to sum up and comment on the evidence before the Court. This is a violation of Order 37 Rule 18 of the Imo State High Court (Civil Procedure) Rules 1988 which provides: H

"When a party beginning has concluded his case the other party shall be at liberty to state his case and call evidence and to sum up and comment thereon."

Counsel for a party may not want to sum up the evidence and

comment thereon but the record must show that he was offered the opportunity to do so. The procedure adopted by the Trial Court was a violation of the rules of natural justice. See *Deduwa v. Okorodudu* (1976) 1 NWLR 136. It constitutes a violation of the appellant's right to a fair hearing entrenched in S.36 of the 1999 Constitution as amended and contrary to the argument of learned Counsel for the Respondent, the appellant who established a denial of his right to a fair hearing under the Constitution is not required to prove that he suffered a miscarriage of justice. A miscarriage of justice is inherent in a denial of a right to a fair hearing.

Having resolved the threshold issue in favour of the appellant, the lower Court was right to have restrained from resolving the other issues. A resolution of the issues would pre-empt the retrial order by the lower Court.

Having had the privilege of reading the draft of the lead judgment of my Lord Alagoa, JSC, based on the above but principally on the reasons and conclusion arrived at subsequently, I also allow the appeal and adopt the consequential orders in the lead judgment.

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