

COURT OF APPEAL ABUJA DIVISION
THURSDAY 30TH OCTOBER, 2014. CA/A/562/2012
CORAM:- A. D. YAHAYA, J. E. EKANEM, M. MUSTAPHA, JJCA

MICHAEL NWAKALOR APPELLANT
AND
BUKAR KALAMBE RESPONDENT

ORDERS OF COURT - Non suit - Condition for - It is made where it appears on the record that plaintiff's case has not wholly failed - And that in any case defendant would not be entitled to judgment (H1)

ORDERS OF COURT - Non suit - Applicable laws - Before the order can be made by court - The Act establishing the court or rules governing its procedure - Must provide for the order (H2)

ORDERS OF COURT - Non suit - Address of parties - Before the order can be made - Court must call on parties to address it on the propriety of making same - As failure to do so sets aside the order (H3)

FACTS

Plaintiff/appellant commenced this action against defendant/respondent at the High Court of the Federal Capital Territory Abuja, claiming for a declaration that he is the rightful owner of the property in dispute located at Cadastral Zone, Wuse District Abuja and for declaration that the land and what is on it is his and should revert to him, under the principle of "*quic quid plantatur solo solo cedit*".

Appellant also seeks for an order that all rent previously collected by respondent be paid to him (appellant), order that all rent accruable to the property be paid into the Honourable Court pending the final determination of the suit and that the sum of N50,000,000.00 be paid to him as damages for trespass. Trial commenced in the matter. At the end of the trial and adoption of final address of appellant's counsel, the court made an order of non-suit on the ground of lack of evidential proof. Dissatisfied with the order, appellant lodged appeal in the Court of Appeal Abuja Division.

ISSUES FOR DETERMINATION

(1) Whether the Lower Court was right in holding that the appellant did not sufficiently discharge the burden placed on him to warrant the grant of the reliefs sought.

(2) Whether the order of non-suit for lack of evidential proof made by the Lower Court was proper in law.

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

ORDERS OF COURT - Non suit - Condition for

1. A non-suit means giving the plaintiff a second chance to prove his case or a second bite on the cherry. It can only be made where it appears on the record that the case of the plaintiff has not failed in toto and that in any case the defendant would not be entitled to the judgment of the court. Where the dismissal of the case might work injustice to the plaintiff, non suit may be made. It implies that the plaintiff failed to prove something which was essential to his case even though it is apparent that he had shown some right or interest in the subject matter of the dispute.

In the instant case, from the pleadings and evidence led, it is apparent that the appellant had shown some interest in the plot in dispute but as earlier stated he failed to tender the certificate of occupancy that he pleaded, thus failing to prove something that was essential to his case. The best order in the circumstance was an order of non-suit which the Lower Court made. (pp. 927 F/928 C)

ORDERS OF COURT - Non suit - Applicable laws

2. It seems to me however that before an order of non-suit can be made by a court, the Act establishing the court or the rules of the court governing procedure in the court must provide for it.

However there is no provision in the Federal High Court Act or the High Court Civil Procedure Rules of the Federal Capital Territory for an order of non-suit. The argument by respondent's counsel that there is nothing in Section 257 of

the Constitution of Nigeria 1999 (as amended) or Section 27 of the Federal High Court Act which restricts the orders the court can make flies in the face of the position that the jurisdiction of the High Court of the Federal Capital Territory, Abuja, is to be exercised according to an Act of the National Assembly relating thereto and rules for regulating the practice and procedures of the court. See Section 257 of the Constitution of Nigeria 1999 as (amended). (p. 928 A/E)

ORDERS OF COURT - Non suit - Address of parties

3. Furthermore before an order of non suit can be made, the court must call on the parties to address it on the propriety of making such an order. Failure to do so will result in the order being set aside.

The only exception is where it is clearly inevitable on the evidence on record and the applicable law that an order of non-suit is the only one that can be made.

In the instant case, the Lower Court did not invite the parties to address it before making the order of non-suit, thus denying them fair hearing. The effect is to vitiate the judgment rendering it null and void. (p. 928 G)

REPRESENTATION

C. I. Okoye, Esq. with E. N. Nwachukwu, Esq., for the Appellant
Max Ogar, Esq. with Mrs. Rosemary Edibo, Messrs. Dominic Anyiador and Folami Fashanu, for the Respondent

CASES REFERRED TO

UBN v. Biriye (2000) 23 WRN 77

Onibudo v. Akibu (1982) NSCC 210

Ibekwe v. Nwosu (2011) 9 NWLR (1251) 17

Edokpolor v. Asemota (1994) 7 NWLR (pt. 356) 314

Idundun v. Okumagba (1976) 10 SC 227

Ogunleye v. Oni (1990) 2 NWLR (135) 745

Madu v. Mbakwe (2008) 10 NWLR (1095) 293

First Bank of Nigeria Plc v. Okon (2010) 15 NWLR (pt. 1215) 57

Graig v. Graig (1966) ANLR 165

Akpakpuna v. Nzeka (1983) ANLR 350

Anyaduba v. Nigerian Renowned Trading Co. (1992) 6 SCNJ 204
 Orunwo v. Woko (2011) 17 NWLR (pt. 1277) 522
 Dingyadi v. INEC (2010) 18 NWLR (pt. 1224) 1

STATUTES & RULES REFERRED TO

- B Constitution of the Federal Republic of Nigeria, ss. 6(6)(b), 257
 Federal High Court Act, s. 27
 High Court Rules of FCT, O. 46 r. 1

LEAD JUDGMENT BY EKANEM JCA

- C In the amended statement of claim filed on 22nd March, 2010,
 at the High Court of the Federal Capital Territory, Abuja Judicial Di-
 vision (“the Lower Court” for short) in suit No.FCT/HC/CV/347/2007,
 the appellant (qua plaintiff) claimed as follows against the respon-
 D dent (qua defendant)

“(I) A declaration that he is the rightful owner of plot No.1334
 Cadastral Zone A7, Wuse District Abuja, Subject of Certificate of
 Occupancy No. FCT/ABJ/AN.3090.

- E (II) A declaration that the land and what is on it is his and
 should revert to him, under the principle of “quic quid plantatur solo
 solo cedit”

(III) Order that all rent previously collected by the trespasser
 be paid to him.

- F (IV) Order that all rent accruable to the House be paid into this
 Honourable Court pending the final determination of this suit

(V) The sum of N50,000,000.00 (Fifty Million Naira) only be
 paid to him as damages, for trespass.”

- G After full trial and adoption of final address of the appellant’s
 counsel, the Lower Court non-suited the appellant for want of evi-
 dential proof.

Aggrieved by the judgment, the appellant has appealed to this
 court by way of a notice of appeal which bears five grounds of ap-
 peal.

- H After settlement of briefs, learned counsel on both sides, on
 the hearing date, adopted and relied on their briefs of argument. In
 his brief Chief Karina Tunyan (SAN) of counsel for appellant formu-
 lated three issues out of the five grounds of appeal. The issues are:

“1. Whether the order of non-suit for lack of evidential proof

as given by the trial court after considering the High Court Civil Procedure Rules of the FCT, 2004 and the totality of the evidence before the trial court is proper in law. (Distilled from Grounds I and V)

“2. Whether the Approved Building plan as tendered by the Respondent as exhibit D1 in the trial court as his proof of title if juxtaposed with the Appellant’s Certificate of occupancy creates a superior title. (Distilled from Grounds III and V) ^B

“3. Whether the trial court was right in considering the issue of the purpose for the redesignation of the plot which was not an issue for determination before the court as a ground for non-suiting the case of the plaintiff appellant? (Distilled from Grounds II and V)” ^C

On his part, Max Ogar, Esq. for the respondent in his brief of argument adopted the issues formulated by appellant’s counsel.

In arguing issue 1, Learned Senior Counsel for the appellant submitted that non-suit as a form of judgment has been abolished. ^D He relied on *UBN V. BIRIYE* (2000) 23 WRN 77, 81 and *ONIBUDO V. AKIBU* (1982) NSCC 210. He noted that the High Court of the Federal Capital Territory Abuja (Civil Procedure Rules) 2004 does not provide for an order of non-suit and as such the Lower Court had no competence to make such an order. Learned Silk went on to submit that, assuming that the trial court was empowered to make ^E the order, the same would still be improper considering the totality of the evidence before the court and the cases of *IBEKWE V. NWOSU* (2011) 9 NWLR (1251) 17 and *EDOKPOLOR V. ASEMOTA* (1994) 7 NWLR (pt. 356) 314, 328. He added that the certificate of occupancy tendered by the appellant as against the building plan tendered by the respondent satisfied the second of the criteria stated in *IDUNDUN V. OKUMAGBA* (1976) 10 SC 227. Finally on this issue, Senior Counsel stated that the Lower Court failed to call upon counsel to address it on the desirability of making the order. ^F ^G

As regards issue 2, Senior Counsel straightaway gave a negative response. He referred to Exhibits P1 and D1 and relied on the case of *OGUNLEYE V. ONI* (1990) 2 NWLR (135) 745, 779 - 781 to submit that the former is an authentic title document and the rebuttable presumption of ownership raised by it in favour of the appellant was not rebutted. ^H

Arguing issue 3, Senior Counsel submitted that the purpose of re-designation of the plot in dispute was not an issue raised in the

pleadings of the parties; rather it was raised by the court suo motu. He finally urged the court to set aside the judgment of the Lower Court and grant all the reliefs sought or remit the case back to the High Court of the Federal Capital Territory for trial before another judge.

B In his reply to issue one, counsel for the respondent gave an affirmative answer thereto, stating that the order of non-suit simply meant that *“the plaintiff (now Appellant) did not fail completely, but then he did not do as much as is, ordinarily expected of him.”* He
C cited and relied on *IBEKWE V. NWOSU (2011) 9 NWLR (1251) 1* to support his stance. He was of the view that the appellant, though had the onus of proving title, yet did not lead evidence to show his title. He referred to exhibit P1 and said that it is not a document of title. He added that the Lower Court did not make an order dismissing
D the appellant’s case (which it should have done) based on its opinion that there was prima facie evidence of allocation of the plot in issue to the appellant. He was of the view that there was nothing in the Constitution of Nigeria or the High Court Act of the Federal Capital Territory which restricts the orders the Lower Court could make to
E the rules of court. What is paramount, he opined, was the interest of justice. He relied on Order 46 Rule 1 of FCT High Court Rules as well as the inherent powers of the court in Section 6 (6) (b) of the Constitution of Nigeria to support his opinion.

F He argued further that not calling on parties to address the court on the suitability or otherwise of an order of non-suit did not occasion a miscarriage of justice.

With regard to issue two, counsel submitted that the Lower Court did not make any pronouncement in favour of the respondent on the strength of exhibit D1. He urged the court to disregard
G all the arguments of the appellant relating to the issue.

Arguing issue three, counsel submitted that the remarks of the Lower Court, the subject of the issue, were in passing, id est, obiter dicta. He finally urged the court to dismiss the appeal.

H I must quickly deal with issue three formulated by appellant’s counsel. It has already been set out in this judgment and so I do not need to re-state it. It is derived from ground 2 of the grounds of appeal. The comment of the Lower Court which is the spring head of the ground and the issue was a statement made in passing by the

Lower Court and did not by any stretch of imagination form the reason or part of the reasons upon which the case was decided by the Lower Court. It is therefore not appealable. See MADU V. MBAKWE (2008) 10 NWLR (1095) 293, 312 - 314. Ground 2 of the grounds of appeal and consequently issue three in the appellant's brief are incompetent. I hereby strike the same out. B

After a perusal of the remainder of the issues along with the grounds of appeal, it is my view that the following two issues arise for the court's determination of the appeal:

(1) Whether the Lower Court was right in holding that the appellant did not sufficiently discharge the burden placed on him to warrant the grant of the reliefs sought. C

(2) Whether the order of non-suit for lack of evidential proof made by the Lower Court was proper in law.

Since issue two raises in part an issue of fair hearing on the ground of failure to call upon the parties to address the court before making the order of non-suit, I shall deal with it first. D

The Lower Court after finding that the appellant did not sufficiently discharge the burden placed on him to warrant a grant of the reliefs sought by him, entered a verdict of non-suit for lack of evidential proof. The appellant's contention is that non-suit as a judgment has been abolished. It was also contended that even if the Lower Court had the power to non-suit it ought to have called upon the parties to address it on the propriety or otherwise of the order before making it. The respondent contended otherwise. E F

A non-suit means giving the plaintiff a second chance to prove his case or a second bite on the cherry. It can only be made where it appears on the record that the case of the plaintiff has not failed in toto and that in any case the defendant would not be entitled to the judgment of the court. Where the dismissal of the case might work injustice to the plaintiff, non suit may be made. It implies that the plaintiff failed to prove something which was essential to his case even though it is apparent that he had shown some right or interest in the subject matter of the dispute. See YESUFU V. AFRICAN CONTINENTAL BANK (1976) 4 SC 1, FIRST BANK OF NIGERIA PLC V. OKON (2010) 15 NWLR (pt. 1215) 57 and IBEKWE V. NWOSU (2011) 9 NWLR (1251) 17. G H

It seems to me however that before an order of non-suit can be made by a court, the Act establishing the court or the rules of the court governing procedure in the court must provide for it. I draw strength for this conclusion from the case of

ONIBUDO V. AKIBU (1982) ALL NLR 207, 224 where ANIAGOLU,
B JSC, stated as follows;

"I think that the best order that would have met the justice of the case would have been one non-suiting the plaintiffs. But there is no provision either in the High Court Law of Lagos State or in the
C *High Court of Lagos State (Civil Procedure Rules) for an order of non-suit. It would therefore not have been competent for the High Court to make an order of non -suit in the case..."* See also UNION
BANK OF NIG. PLC v. DAPPA-BIRIYE (2000) 23 WRN 77, 81.

In the instant case, from the pleadings and evidence led,
D ***it is apparent that the appellant had shown some interest in the plot in dispute but as earlier stated he failed to tender the certificate of occupancy that he pleaded, thus failing to prove something that was essential to his case. The best order in the***
E ***circumstance was an order of non-suit which the Lower Court made. However there is no provision in the Federal High Court Act or the High Court Civil Procedure Rules of the Federal Capital Territory for an order of non-suit. The argument by***
F ***respondent's counsel that there is nothing in Section 257 of the Constitution of Nigeria 1999 (as amended) or Section 27 of the Federal High Court Act which restricts the orders the court can make flies in the face of the position that the juris-***
G ***isdiction of the High Court of the Federal Capital Territory, Abuja, is to be exercised according to an Act of the National Assembly relating thereto and rules for regulating the practice and procedures of the court. See Section 257 of the Constitution of Nigeria 1999 as (amended).***

Furthermore before an order of non suit can be made, the court must call on the parties to address it on the propri-
H ***ety of making such an order. Failure to do so will result in the order being set aside.*** See GRAIG V. GRAIG (1966) ANLR 165, 169 and AKPAKPUNA V. NZEKA (1983) ANLR 350, 361. ***The only exception is where it is clearly inevitable on the evidence on record and the applicable law that an order of non -suit is the***

only one that can be made. See ANYADUBA V. NIGERIAN RENOWNED TRADING CO. (1992) 6 SCNJ 204, 217.

In the instant case, the Lower Court did not invite the parties to address it before making the order of non -suit, thus denying them fair hearing. The effect is to vitiate the judgment rendering it null and void. See ORUNWO V. WOKO (2011) 17 NWLR (1277) 522 and DINGYADI v. VINEC (2010) 18 NWLR (1224) 1, 90. Having held as above, the need does not arise to go into issue one which requires a consideration of the merits of the case.

On the whole, the appeal succeeds. The order of non-suit entered by the Lower Court is hereby set aside. I order that the suit shall be heard de novo by the High Court of the Federal Capital Territory. The parties shall bear their costs.

YAHAYA JCA

I have read before now, the lead judgment by my learned brother Ekanem JCA and I agree with his reasoning and the conclusion reached therein. For sure, a trial judge has to invite counsel for the parties to address him before he can non-suit a party. Failure to hear the parties before a non-suit is entered is a travesty of justice and the only open course for an appellate court, is to set aside the proceedings for breach of fair hearing. There is no need to even consider whether any miscarriage of justice had in fact been occasioned.

I therefore also set aside the entire proceedings in Suit No.FCT/HC/CV/347/2007 of the High Court of the Federal Capital Territory, Abuja. I order for a re-trial before the Court differently constituted. I abide by the order as to costs.

MUSTAPHA JCA

I agree with the judgment and reasons of my learned brother, Joseph Ekanem, JCA, I also abide by the orders made.

I award no cost to either side.