

SUPREME COURT OF NIGERIA
FRIDAY 4TH MAY, 2007. SC. 79/2002
CORAM:- S. U. ONU, D. MUSDAPHER, S. A. AKINTAN,
M. MOHAMMED, I. F. OGBUAGU, JJSC

1. OBA ADEGBOYEGA OSUNBADE
ADEYELU II (The Olugbon of Orile
Igbon, for himself and on behalf of the
Olugbon Chieftaincy Family)
 2. OBA BELLO AYINLA ADESITE II
(The Onikoyi of Ikoyi Ile, for himself and
on behalf of Onikoyi Chieftaincy Family)
 3. OBA JIMOH OYEYEMI OLOYEDE APPELLANTS
(The Aresadu of Iresadu for himself and on
behalf of the Aresadu Chieftaincy Family)
 4. OBA S. O. OYEDIRAN LAGBAMI
OSEKUN II (The Onepetu of Ijeru
Chieftaincy Family)
 5. OBA SAMUEL OLANIYI AYOOLA
AGUNBIADE (The Alajawa of Ajawa
for himself and on behalf of the
Alajawa Chieftaincy Family)
- AND**
1. OBA JIMOH OLADUNNI OYEWUNMI
(AJAGUNGBADE III)
 2. GOVERNOR OF OYO STATE RESPONDENTS
 3. A. AJALA, ESQ.
(The Assistant Chief Deeds Registrar)

ACTIONS - Commencement - Originating summons is used where special statutory provisions exist for its application - And not for proceedings where facts are in dispute (H1)

APPEALS - Court processes - Misuse of - Order to be made - Where originating summons was used in contentious matter - Appellate court is not to go into the merits - But should strike out the matter (H2)

FACTS

Before the High Court of Oyo State Ogbomosho, plaintiffs/appellants instituted this action against defendants/respondents by way of originating summons, seeking for a number of declaration and reliefs. Appellants sought to invalidate a vesting declaration which was registered at the Land Registry, Ibadan. In reply, 1st respondent filed a preliminary objection on the grounds that appellants had no locus standi to file the action, that originating summons is not the proper procedure to commence the action where facts are disputed, that 3rd respondent cannot be sued in his personal capacity and that action against 3rd respondent is statute barred.

1st respondent in any case filed a counter-affidavit against the supporting affidavit of the originating summons and withdrew the preliminary objection. The originating summon therefore went into full hearing. At the end of hearing, the learned trial Judge found in favour of appellants and held that the action was properly commenced by originating summons. Not satisfied, respondent appealed to the Court of Appeal in protest. Whereas the majority decision of the court allowed the appeal, set aside judgment of the trial court and dismissed appellants' claims, the minority decision struck out appellants' claim. Aggrieved by the majority decision, appellants appealed to the Supreme Court, seeking to know the appropriate order to be made in the circumstances of the matter.

ISSUE FOR DETERMINATION

"Whether the lower court was right not to have remitted the case for hearing on pleadings in the court after it had held that the action was initiated by the wrong process"?

HELD (Unanimously allowing the appeal per

OGBUAGU JSC)

ORIGINATING SUMMONS - Action - Commencement

1. It is now firmly settled that an originating summon is an unusual method of commencing proceedings in the High Court and it is confined to cases where special statutory provisions exist for its application. It is not advisable to make use of this procedure for hostile proceedings where the facts are in dis-

pute as in the instant case leading to this appeal. The case of Doherty v. Doherty (supra) and the other two cases referred to by the court below, have put to rest any doubt as to when it is appropriate to institute an action by originating summons. (p. 2698 F)

Court processes - Misuse of - Order to be made

2. I agree with the learned counsel for the 1st to 5th appellants, that sometimes it is advisable for the court below to express an opinion on the substantive issue even when it holds that it lacks jurisdiction. It is always done in the alternative. But where, as in the instant case, the law is settled about the appropriateness of using the writ of summons and not an originating summon where the merits are in dispute or likely to be in dispute, have now been firmly established. In the instant case, Onalaja JCA (Rtd.) rightly referred to the decided authorities of this court in respect thereof. As rightly held by Tabai, JCA (as he then was), the determination of that issue should have been the end of that appeal without the court below going into issues which I agree amounted, with respect, to an academic exercise. As it stands, I uphold the minority dissenting judgment of Tabai, J.C.A. (as he then was). I allow the appeal, set aside the majority judgment in respect of dismissing the suit instead of striking it out. The order I make therefore, is that the suit be and it is hereby, remitted back to the Oyo State High Court for its being heard de novo by another Judge after the filing and exchange of pleadings by the parties. (p. 2699 A)

REPRESENTATION

F. R. A. Williams (Jnr.), with Mohammed Sailau, Esq., Ayoola Ajayi, Esq., Folarin Poopola, Esq., Olaigbe E. Ogunniran, Esq., for the Appellants

Chief Akinlolu Olujinmi, SAN with Funke Sobaloju, Esq.; Oluropo Olujinmi, Esq.; Opeyemi Adeyinka, Esq.; Jumoke Gafar [Miss]; Akinsola Olujinmi, Esq. and Akinyemi Olujinmi, Esq., 1st Respondent
No appearance for the 2nd and 3rd Respondents

CASES REFERRED TO

National Bank of Nigeria v. Alakija (1978) 9 & 10 SC 59

Oloyo v. Alegbe (1983) 2 SCNLR 35

Katto v. Central Bank of Nigeria (1991) 9 NWLR (pt. 214) 126

NPA v. Panalpina World Transport (Nig.) Ltd. (1973) 5 SC 77

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RULES REFERRED TO

High Court (Civil Procedure) Rules of Oyo State 1988, O. 38, rr. 1, 2, 5

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BOOK REFERRED TO

Authority of Underhills Law Relating to Trust and Trustees 1959, p. 537

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LEAD JUDGMENT BY OGBUAGU JSC

The appellants who were the plaintiffs at the Ogbomosho High Court of the Oyo State Judiciary by an originating summons sued the defendants/respondents claiming certain declaration and some other reliefs.

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They also sought to invalidate a Vesting Declarations which was registered at the Land Registry in Ibadan and which they alleged, was null and void. A preliminary objection was filed on behalf of the 1st defendant on 21st October, 1994. The grounds are:

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“(i) The plaintiffs had no locus standi to institute this action.

(ii) An originating summon is not a proper procedure to commence action in which facts are to be seriously disputed.

(iii) The 3rd defendant cannot be sued in his personal capacity.

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(iv) The action against the 3rd defendant is statute barred under the Public Officers Protection Law of Oyo State.”

Three (3) days after filling the notice of preliminary objection, the 1st defendant/respondent filed a counter-affidavit against the supporting affidavit in respect of the originating summons. The

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above preliminary objection was withdrawn when the hearing/trial of the suit commenced on 29th November, 1994 and it was accordingly struck out. The originating summon went into full hearing and at the end, in his “**RULING/JUDGMENT**” on 20th February, 1995, the learned trial Judge, Jimoh, J. found in favour of the appellants

and held that the suit was properly commenced by an originating summons.

Dissatisfied with the said judgment, the respondents appealed to the Court of Appeal, Ibadan Division (hereinafter called “the court below”) which in its majority decision delivered on 12th July, 2001, allowed the appeal, set aside the judgment of the trial court and dismissed all the claims of the appellants. The minority judgment, struck out the appellant’s claims. B

Aggrieved by the majority decision, (in respect of the final orders made), the appellants have appealed to this court. It seems to me and I agree with the 1st to 15th appellants in their brief of argument that the appeal is not against the finding that an improper procedure/process was used in commencing the suit i.e. by an originating summon. The appeal is on what appropriate order was to be made in the circumstances. I will expatiate hereunder. C D

In order to get the records straight, I note that the 1st and 5th appellants filed a joint appeal and brief of argument. The 2nd, 3rd and 4th appellants filed separate appeals and briefs. From the briefs, in my respectful view, all the appellants and the 1st respondent, know and appreciate what the appeal is all about. This my view appears to have support in the issue raised in all the brief of the parties. The 1st, 2nd and 5th appellant’s lone issue for determination reads as follows: E

“Whether the lower court was right not to have remitted the case for hearing on pleadings in the court after it had held that the action was initiated by the wrong process”? F

Except that the 2nd appellant, added an alternative thus:

ALTERNATIVELY

“2.02 Whether the lower court was right not to have remitted the case for hearing on pleadings in the High Court after it had concluded that the contentious facts in the affidavit and counter affidavit could only be resolved by oral evidence.” G

As far as I am concerned, the above is substantially similar to the said lone issue except that it is differently couched. H

On 5th February 2007, when this appeal came up for hearing, the learned counsel for the 3rd appellant - Popoola, Esq., abandoned their issue and I relied on the 2nd issue that reads thus:

“2.3(2) What is the proper orders to make?”

The 4th appellant through his learned counsel - Oguniran, Esq., withdrew their issues 1, 2 and 3 and relied solely on the remaining issue 4. The said three (3) issues were accordingly struck out. Issue 4 reads as follows:

B *“4. Whether the order of dismissal is the proper order to make by the Court of Appeal in the light of its decision that there is a justiciable matter to be tried and the appellants have locus standi to institute this action.”*

The 1st respondent's only issue reads as follows:

C *“(i) What is the appropriate order the lower court could have made in this case having considered the issues submitted by the parties on the merit and allowed the appeal in part?.”*

I note that the 2nd and 3rd respondents did not file any brief neither were they represented in court by any learned counsel. I D note that the court below, in its majority judgment delivered by Onalaja, J.C.A. (Rtd.) at page 323 of the records, formulated its own issues out of all the issues formulated by the parties. They read as follows:

E *“(i) Whether the learned Judge was right to have held that the plaintiffs/1st to 5th respondents had the locus standi to institute this action and proper to have assumed jurisdiction in adjudicating the case (sic).*

F *(ii) Whether the learned Judge was right in holding that the action was properly instituted and commenced by originating summons and the treatment of 6th and 7th respondents who voluntarily withdrew participating in the action amounted to substantial miscarriage of justice of fair hearing.*

G *(iii) Whether the learned Judge was right having regard to the supporting affidavit evidence and the counter affidavit evidence to have granted ail the reliefs of declarations and injunctions sought in the originating summons.”*

H His Lordship treated or dealt with all the above three (3) issues. He, at pages 333 to 334 of the records, referred to the guide in respect of the validity of the commencement of an action by an originating summons in Order 38, rr. 1 and 2 of the High Court (Civil Procedure) Rules, 1988 of Oyo State and the interpretation given to it by this Court in the cases of Chief Theophilus Adebayo Doherty v. Chief Richard Ade Doherty (1968) NMLR 241 at 242 -

Per Ademola, CJN referring to the Book Authority of Underhills Law Relating to Trust and Trustees, 1959 at page 537, which he reproduced.

The other case is National Bank of Nigeria v. Lady Ayodele Alakija & Anor. 1978 9 & 10 SC 59; (1978) 2 LRN 75 - Per Eso, J.S.C., who he said "observed as follows:-

"(2) Originating summons should only be applicable in circumstances where there is no dispute on questions or facts or even the likelihood of such dispute;

(3) Application by originating summons should never be a substitute for initiating CONTENTIOUS issues of fact.

(4) Where the affidavit of the plaintiff leaves matters for conjecture, originating summon is not an appropriate procedure."

The next case is M.O. Oloyo v. B.A. Alegbe, Speaker Bendel State House of Assembly (1983) 2 SCNLR 35 at 67 - Per Eso, J.S.C., which he also reproduced at pages 335 - 336 of the records. At page 336, His Lordship stated inter alia:

"Applying the above authorities to the instant case, the affidavit raised contentious facts of ownership of land by families of the 1st to 5th respondents (i.e. appellants) and no doubt, the facts in the affidavit and counter-affidavit were irreconcilable in conflict, it is the law in such situation oral evidence shall be given. Falobi v. Falobi (1976) 9 & 10 SC 1; (1976) 1 NMLR 169; Eze v. A.G. Rivers State (1999) 9 NWLR (Pt. 619) page 430 CA; Chigbu v. Tonimas Nig. Ltd. (1999) 3 NWLR (Pt. 593) page 115 {sic} C. A.; Adeyemo v. Beyioke (1999) 13 NWLR (Pt. 635) page 472 CA; Gbadamosi v. Alete (1998) 12 NWLR (Pt. 578) page 402 {sic} C. A."

His Lordship concluded as follows:

"As stated above, the learned Judge made a finding of fact that the action was not hostile proceedings therefore held that their action was not properly initiated by originating summons. In the light of the above judgments of the Supreme Court which are binding on this court, I am strongly of the view after looking at the facts deposed to in the affidavit and counter affidavit they raised contentious and hostile proceedings pointedly that this action ought not to have been commenced or initiated by originating summons, the finding of the learned Judge to the contrary was perverse and being an appellate court which is reluctant or loathes disturbing the finding of facts by

the lower court. As the finding of the learned Judge was perverse having regard to the contentious facts which could only be resolved by oral evidence, this is an exception to general rule that an appellate court should not disturb or interfere with the judgment of the lower court, Having declared that this action was wrongly commenced, instituted or initiated by originating summons being perverse, I set aside the said finding. Woluchem v. Gudi (1981) 5 SC 291; UAC (Nig.) Ltd. v. Fasheyitan (1998) 11 NWLR (Pt. 573) page 179 (sic) SC; IMB Ltd. v. Dabiri (1998) 1 NWLR (Pt. 533) page 284 (sic) C.A.”

Surprisingly to me, and in spite of the above findings of fact and holdings which have solid support in the said above decided cases and in some other decided authorities of the court below and this court in that regard, His Lordship referred to *“the 3rd encompassed issue by the court”* (supra) and stated from pages 336 (last paragraph) and 337, inter alia, as follows:

“But assuming as I have done all along, that the action as was framed and in the form it has been presented to the court is proper (it could not be), the appellant (sic) should still fail. That takes me to the 3rd encompassed issue by this court whether the respondents, 1st to 5th having regard to the evidence adduced in the supportive affidavit, the counter affidavit, the 1st and 5th respondents sought declaratory and injunctive orders are entitled to grant of the reliefs (sic).”

It is on this (with respect), wrong and unjustified assumption, that His Lordship, dismissed the action of the appellants having gone into the merits of the said suit and set aside the decision of the trial court on the ground that it was based on his discretion on wrong principle of law. I note at page 343 of the records that in the concluding judgment of the court below, His Lordship, stated inter alia, as follows:

“...The encompassed issue (ii) formulated by this Court is meritorious and therefore resolved in favour of the appellant (sic). The appeal is therefore allowed.”

As the appeal succeeds in part, the judgment of High Court Ogbomosho delivered on 20th day of February, 1995 is hereby set aside for the reasons adumbrated and advanced in this judgment, all the claims and reliefs sought by 1st to 5th respondents are hereby dismissed” I note at page 344 of the records that Tabai, J.C.A. (as he

then was), in his judgment while agreeing entirely with the reasoning and discussion on the 1st issue of locus standi which he adopted as his, His Lordship, stated inter alia, as follows:

"I also agree with the elaborate discussion in the leading judgment on the propriety or otherwise of commencing this action by way of originating summons and the conclusion reached thereat..." B

In the instant case, a lot of the facts were in dispute. See for instance paragraphs 4, 5, 13 and 15 of the affidavit in support of the summons and their denial in the counter-affidavit deposed to on behalf of the 1st defendant/appellant. These facts can only be resolved by oral evidence duly tested by cross-examination. I hold therefore that this suit was wrongly commenced or instituted by originating summons, and it is for that reason incompetent. The jurisdiction of the Ogbomosho Judicial Division of the High Court of Oyo State was not properly invoked. See Madukolu v. Nkemdilim (1962) 2 SCNLR 341 at 348; (1962) 1 All NLR 587. The proper order for the court below would have been to strike out the suit. The learned trial Judge did not do that. Rather, he assumed jurisdiction, heard the matter and in his judgment on the 20/2/95, all the reliefs claimed." C

His Lordship continued thus: E

"There is no competent claim before him and he lacked the jurisdiction to hear and determine the suit. The result is that I resolve this issue in favour of the appellants"(sic).

At page 345, His Lordship further stated inter alia, as follows: F

"And having regard to the fact that this issue is one of competence and jurisdiction, its resolution determines the appeal. I shall not therefore deliberate on the last and third issue as that might be a mere academic exercise. The appeal having succeeded, what then is the appropriate consequential order?... I shall therefore make only such consequential orders which the trial court was competent to make and that is an order striking out the suit. See NEPA v. Ugabaja (supra) at 117. I take this cautious approach so as to avoid the danger of an order that may be construed as having determined the self-same suit at the court below on the merits." G

His Lordship finally declared the entire proceedings in the trial court including the judgment null and void and set the same aside. He struck out the suit for being incompetent.

I note that Adekeye, J.C.A. also allowed the appeal in part but H

associated himself/herself with the consequential orders including costs in the lead judgment. But at page 348 of the proceedings, His Lordship stated inter alia, as follows:

“Where the facts in the affidavit and counter-affidavit are in conflict - it is the law that in such a situation, oral evidence shall be given to resolve the conflict. *Falobi v. Falobi* (1976) 9 & 10 S.C. 1; *C.U. Mbaji & Sons Ltd. v. A.I. Ahunanya* (2000) 8 NWLR (Pt. 669) page 498.”

“Generally speaking, originating summons should only be applicable in circumstances where there is no dispute on questions of fact or even the likelihood of such dispute. It should not be seen as a substitute for initiating contentious issues of fact. Consequently, originating summons should only be applicable in such circumstances as where there is no dispute on questions of fact or even the likelihood of such dispute. *National Bank of Nig Ltd. v. Lady Ayodele Alakija & Ors.* (1979) & 10 S.C. pg. 59; *Chief T.A. Doherty v. R.A. Doherty* (1968) NMLR pg. 241; *Oloyo v. Alegbe* (1983) 2 SCNLR pg. 35 at 67; *Unilag v. M. I. Aigoro* (1991) 3 NWLR (Pt. 179) pg. 376.

I subscribe to the conclusions that the finding of the learned trial judge that the action was properly commenced and initiated by originating summons was wrong in the circumstances of the prevailing facts and that same shall be set aside for being perverse. *Ebba v. Ogodo* (1984) 1 SCNLR pg. 372; *Akinloye v. Ejiyola* (1968) NMLR 92; *Iriri v. Erhurhobara* (1991) 2 NWLR (Pt. 173) page 252; *Woluchem v. Gudi* (1981) 5 SC 291; *Nwokoro v. Nwosu* (1994) 4 NWLR (Pt. 337) at 172.”

It is now firmly settled that an originating summon is an unusual method of commencing proceedings in the High Court and it is confined to cases where special statutory provisions exist for its application. It is not advisable to make use of this procedure for hostile proceedings where the facts are in dispute as in the instant case leading to this appeal. The case of *Doherty v. Doherty* (supra) and the other two cases referred to by the court below, have put to rest any doubt as to when it is appropriate to institute an action by originating summons. I note with satisfaction that the 1st respondent in his Brief from paragraph 8.6 to paragraph 8.19, concede honourably that the court below was right in its findings that the case was not properly com-

menced and/or initiated by originating summons. I commend his learned counsel.

I agree with the learned counsel for the 1st to 5th appellants, that sometimes it is advisable for the court below to express an opinion on the substantive issue even when it holds that it lacks jurisdiction. See Katto v. Central Bank of Nigeria (1991) 9 NWLR (Pt. 214) at 126; (1991) 12 SCNj 1 - Per Akpata, JSC. ***It is always done in the alternative.*** See also the case of NPA v. Panalpina World Transport (Nig.) Ltd. (1973) 5 SC 77 also cited and relied on in the 1st to 5th respondent's Brief. ***But where, as in the instant case, the law is settled about the appropriateness of using the writ of summons and not an originating summon where the merits are in dispute or likely to be in dispute, have now been firmly established. In the instant case, Onalaja JCA (Rtd.) rightly referred to the decided authorities of this court in respect thereof. As rightly held by Tabai, JCA (as he then was), the determination of that issue should have been the end of that appeal without the court below going into issues which I agree amounted, with respect, to an academic exercise. As it stands, I uphold the minority dissenting judgment of Tabai, J.C.A. (as he then was). I allow the appeal, set aside the majority judgment in respect of dismissing the suit instead of striking it out. The order I make therefore, is that the suit be and it is hereby, remitted back to the Oyo State High Court for its being heard de novo by another Judge after the filing and exchange of pleadings by the parties.*** See Order 38 rule 5 of the Oyo State High Court (Civil Procedure) Rules, 1988 and Order 2 of the said Rules.

Costs follow the events. The appellants are entitled to costs fixed at N10,000.00 (ten thousand naira) payable to them by the respondents.

ONU JSC

Having had the privilege to read before now the judgment just read by my learned brother, Ogbuagu, J.S.C., I am in entire agreement with him that this appeal be and is hereby allowed. Accordingly, I set aside the majority judgment in respect of dismissing

the suit while remitting it back to the Oyo State High Court for its being heard de novo by another Judge after the filing and exchange of pleadings by the parties with costs of N10,000.00 to them payable by the respondents.

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MUSDAPHER JSC

I have had the opportunity to read in advance the judgment of my Lord Ogbuagu, J.S.C., just delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also allow the appeal. I set aside the majority judgment of the court below in relation to the final order. I uphold the minority decision. The order I therefore make is to strike out the claims of the plaintiffs and remit the case back to the trial court, for trial de novo after the delivery of pleadings. I abide by the order for costs contained in the aforesaid judgment.

AKINTAN JSC

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I had the privilege of reading the draft of the lead judgment written by my learned brother, Ogbuagu, J.S.C. The facts of the case are adequately set out in the judgment and all the issues raised in the appeal are fully discussed therein. I entirely agree with the reasoning and conclusions as set out in the said judgment.

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The main issue raised in the appeal is whether it was proper for the action to have been initiated by originating summons having regard to the fact that there were a number of disputed facts and issues. The law is settled that where there are disputed facts, such actions could not be initiated by originating summons. Similarly, I believe and hold that the proper order a trial court should make where it finds that the action before it was wrongly commenced by way of originating summons is to order pleadings and not to dismiss such action or pronounce on the merit of the case.

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In conclusion, I also allow the appeal and make similar consequential orders as are made in the lead judgment, including that on costs.

MOHAMMED JSC

I had the privilege before today of reading the judgment of my learned brother, Ogbuagu, J.S.C., which he has first delivered. I am in complete agreement with him that the appeal is meritorious and ought to be allowed. Accordingly, the appeal is hereby allowed. The majority judgment of the court below dismissing the plaintiffs/ B appellant's suit rather than striking it out and remitting the claims of the plaintiffs in the originating summons to the trial court for hearing and determination on pleadings, is hereby set aside. I abide by the orders made in the leading judgment including the order on costs. C Appeal allowed.

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