

SUPREME COURT OF NIGERIA
FRIDAY 29TH JANUARY, 2016. SC. 188/2013
**CORAM:- I. T. MUHAMMAD, M. S. MUNTAKA-
COOMASSIE, O. RHODES-VIVOUR, C. B. OGUNBIYI,
C. C. NWEZE, JJSC**

1. RT. HON. UDUIMO ITSUELI APPELLANTS
2. OLUSEGUN OYESOLE	
AND	
1. SECURITIES AND EXCHANGE COMMISSION	
2. ADMINISTRATIVE PROCEEDING COMMITTEE OF SECURITIES AND EXCHANGE COMMISSION RESPONDENTS

APPEALS - Leave - Extension of time - The application is refused as the depositions in the affidavit are misleading - And the proposed grounds of appeal do not show any cogent and arguable issues (H1)

FACTS

Before the Federal High Court sitting in Lagos, both parties filed similar motions and asked for similar reliefs vis-à-vis the enforcement of the fundamental human rights in suit nos. FHC/L/CS/414/08 and FHC/L/CS/430/08. The suits were consolidated by the Court with the consent of the parties. Both applications and written addresses were considered by the Court and the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended) were taken into consideration. Respondents' contention in their affidavit evidence is that appellants received several notices informing them of 2nd respondent's proceedings.

They further argued that having failed to utilize the several opportunities given to present their case, appellants cannot be heard to complain of not given fair hearing. In its judgment, the Court was of the view that appellants having threw away the opportunity to make their presentations at 2nd respondent's proceedings, cannot be heard to complain of breach of fair hearing. The Court held that there was no breach of fair hearing in the matter. The suits were thus dismissed by the Court. Appellants being dissatisfied appealed to the

Court of Appeal Lagos Division. The Court unanimously upheld the decision of the trial Court. The appeal was therefore dismissed. Not yet satisfied, appellants appealed to the Supreme Court.

HELD (Unanimously dismissing the application per
MUNTAKA-COOMASSIE JSC)

APPEALS - Leave - Extension of time

1. Having considered the written addresses filed on behalf of both parties and considered the arguments, contentions of both learned counsel on behalf of their respective clients I conclude thus:-

a. it is clear to me that the deposition made by the deponent in support are replete with half truth as they do not represent the true position of the matter before us.

b. Also, I read thoroughly the depositions made in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the affidavit in support and they do not show or indicate any cogent reasons for the applicant's failure to appeal the judgment of the lower court within time neither do they show any exceptional circumstances as provided for by the Rules of this Honourable court to avail the applicants leave of court to appeal against the judgment of the Court of Appeal Lagos Division or the concurrent findings of the two lower courts.

Why the applicants refused or neglect to take advantage of our Rules? If I may ask. Not only that my lords, the depositions made in paragraphs 18, 19, 20, 21, 22, 23, 24 and 25 of the affidavit in support are quite misleading as the proposed grounds for the appeal annexed to the affidavit in support do not prima facie show or portray any cogent and arguable issues of mixed law and facts.

My lords on a serious note, the proposed grounds of appeal have been adequately determined and dealt with, admirably by the judgments of the lower court and the proposed fresh issues are academic and required further evidence to be determined by the court and are made possibly to overreach the respondents' position.

I cannot be seen to embark on academic exercise at this stage. In the overall interest of justice and for the fact that this court, with due respect to the counsel is expected to do substantial justice. You can only lead a horse to the river but you cannot force it to drink. That being the case, I hold that in this ruling the application in the overall interest of justice must fail. Same is hereby dismissed for lack of any merit. (p. 95 G)

REPRESENTATION

Mr. Babatunde Oluagbamila, with him, P. Abang, I. Uffort (Miss), for the appellants

Eric Otojahi, for the respondents

CASES REFERRED TO

Mimis Ltd. v. Ote (2005) 14 NWLR (pt. 945) 517

A-G Rivers State v. Ude (2006) 6 - 7 SC 131

Abana v. Obi (2005) 6 NWLR (pt. 920)

Ogundimu v. Kasunmu (2006) 41 WRN 1

ACB Plc. v Evulocha (2001) FWLR (pt. 60) 1611

Alagbe v. Abimbola (1978) 2 SC 89

Ibodo v. Enarofia (1980) 5- 7 SC 43

Doherty v. Doherty (1964) 1 All NLR 299

Yonwuren v. Modern Signs Ltd. (1985) 1 NWLR (pt. 1) 143

Mobil Oil (Nig.) Ltd. v. Agadaigho (1988) 2 NWLR (pt. 77) 385

Okere v. Nkem (1992) 4 NWLR (pt. 234) 132

Kotoye v. Saraki (1995) 5 NWLR (pt. 395) 256

Balogun v. Afokilu (1994) 7 NWLR (pt. 355) 206

F.H.A. v. Abosede (1998) 2 NWLR (pt. 537) 177

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

Both parties filed similar motions and asked for similar reliefs vis-à-vis the enforcement of the fundamental human rights. On 5th May, 2008, with consent of all the parties, the Federal High Court Lagos, consolidated the two suits i.e. suit Nos. FHC/L/CS/414/08 and FHC/L/CS/430/08. That court also ordered the main suits and the notice of preliminary objection to be taken together and that written addresses be submitted in respect of same. The written

addresses were duly adopted on 18/6/2008.

Both applications and written addresses were considered by the Federal High Court the provisions of the constitution of the Federal Republic of Nigeria as amended were taken into consideration. The relevant averments in various affidavit evidence of both parties were closely analysed. It was argued that based on the affidavits evidence before that court, i.e. Federal High Court, the applicants received several notices informing them of the 2nd respondent. The applicants' admission in paragraphs 8 and 7 of the supporting affidavits are said to show that the applicants were given more than the opportunity of making representations at the 2nd respondents proceedings. The cases of *Mimis Limited Vs. Ote* (2005) 14 NWLR (pt. 945) 517; *A. G. Rivers State Vs. Ude and Ors* (2006) 6 - 7 SC 131 and *Abana Vs Obi* (2005) 6 NWLR (pt. 920) were cited in support of the submission that a person who has been given the opportunity of being heard but threw away that opportunity cannot be heard to complain of not being given fair hearing.

The learned trial Judge, Federal High Court Lagos, continued to say since having regard to the provisions of Section 289, 295 and 297 of Investment and Securities Act the decision against which the instant suit is aimed at is not found, it was submitted that no cause of action exists in the present circumstance against the respondents particularly that the applicant were accorded several reasonable opportunities on 13th and 14th February, 2008 of being heard but failed to take advantage of same. The filing of the multiple similar applications and that same cannot and is not remedied by rushing to court to withdraw the earlier action or application, concluded learned SAN. It was therefore submitted that the filing of this application before the Federal High Court while an appeal seeking similar prayers on similar grounds was still pending, is an abuse of courts process.

In his reaction to the applicants' motion Chief Idigbe SAN for the Respondents said that the issue for determination is whether having regards to the circumstances of this case, the applicants rights to fair hearing have been breached by the respondents, he then informed the court that in the administration of the capital market and for the purposes of efficiency, the 1st respondent has been employed to establish committees for the smooth regulation of the matter.

The Federal High Court has this to say:-

"It has therefore been shown from the affidavit evidence before the court that the applicants were aware of the proceedings before the 2nd respondent and were served with the hearing notices. Instead of participating in the proceedings they walked out of it and so cannot therefore, in my view, be heard to complain of denial of fair hearing. They were given every opportunity to be heard but threw away the opportunity. In the case of Usani V. Duke (2006) 17 NWLR (pt. 1009) 610 it was held that "Where a party to a suit has been accorded a reasonable opportunity of being heard and in the manner prescribed under the law and for no satisfactory explanation, he fails or neglects to attend the sitting of the court, the party cannot thereafter be heard to complain of lack of fair hearing and that where a party is fully aware that his case is going on and voluntarily stops attending court, he cannot turn around to complain of want of fair hearing."

In the final analysis, I hold that the applicants' rights to fair hearing have not been breached and that the decisions of the respondents are not a nullity. These two suits must be dismissed they are hereby dismissed".

- At pages 40 - 41 of the record.

It is therefore clear that the preliminary objection filed by the applicants were found to be unmeritorious same was therefore dismissed by the Federal High Court. The applicants being dissatisfied unsuccessfully appealed to the Court of Appeal Lagos Division. That Court of Appeal herein after referred to as court below, unanimously upheld the decision of the Federal High Court and also dismissed the appeal.

The Appellants further appealed to the Supreme Court and filed a Notice of Appeal containing Nine (9) grounds of appeal. I reproduce the said grounds of appeal without their respective particulars.

GROUND ONE

The Court of Appeal erred in law when it upheld the decision of the Federal High Court; wherein it declined to enforce the appellants' fundamental right to a fair and impartial tribunal on grounds that the Investment and Securities Act 2007 protects the respondents in their capital market regulation functions, and thereby came to the wrong decision which occasioned a miscarriage of Justice.

GROUND TWO

The Court of Appeal erred in law when it upheld the decision of the Federal High Court; in which it declined to enforce the appellants' fundamental right to a fair and impartial tribunal; on grounds that the decision of the 2nd Respondent is appealable, and
B thereby came to a wrong decision.

GROUND THREE

The Court of appeal erred in law when it declined to enforce the appellants' fundamental right to an independent and impartial
C tribunal on grounds that appellants were given opportunity to be heard by the 2nd respondent but fail to appear, and thereby reached a wrong decision.

GROUND FOUR

The Court of Appeal erred in law when it held as follows:-
D *"Nowhere in the appellants statement of facts at the lower court (which constitutes evidence in that court) did they state that they were denied fair hearing. Their statement of facts amounted to their pleadings, which must be direct, pointed and unequivocal.*

*With respect it is foolhardy for the appellants to now argue
E the issue of fair hearing in their brief of argument - a fact not pleaded in their statement". (p. 37 of the lead judgment)*

GROUND FIVE

The Court of Appeal erred in law when it held that the
F appellants did not furnish particulars or evidence or sufficient evidence at the Federal High Court to make out a case of likelihood of bias against the 2nd respondent, and thereby came to a wrong decision.

GROUND SIX

The Court of Appeal erred in law when it upheld the findings
G and decision of the 2nd respondent against the appellants, and dismissed the appeal, when likelihood of bias sufficient to taint the proceedings of the 2nd respondent was manifest on the record and thereby came to a wrong decision.

GROUND SEVEN

H The Court of Appeal erred in law when it failed to hold that the allegations of false and misleading statement and falsification of companies' account brought against the appellants are criminal offences which only a court with competent criminal jurisdiction could proceed against; and there by came to a wrong decision.

GROUND EIGHT

The Court of Appeal erred in law when it failed to hold that by virtue of Section 251 (1) (e) Constitution of the Federal Republic of Nigeria 1999, the Federal High Court has exclusive jurisdiction over matters arising from regulation of the capital market operations of incorporated companies and not the respondents; and thereby came to a wrong decision. B

GROUND 9

The Court of Appeal erred in law when it failed to hold that Section 284 (1), 294 and 289 of the Investment and Securities Act, which purport to vest exclusive jurisdiction on the Investments and Securities tribunal over capital market operations of incorporated companies are unconstitutional, null and void to the extent of their inconsistency with Section 251 (1) (e) 1999 constitution of the Federal Republic of Nigeria 1999; and hereby came to a wrong decision. C D

The appellants filed a motion on 2/5/2013. The application is seeking for the following six (6) reliefs as follows:-

1. An Order for enlargement of time within which the applicants may seek leave to appeal the judgment of the Court of Appeal, Lagos Division, in Appeal No. CA/L/01/2009 delivered on 25th February, 2011. E

2. Leave for the applicants to appeal the judgment of the Court of Appeal, Lagos Division in appeal No. CA/L/2009 delivered on 25th February, 2011.

310 An Order for enlargement of time within which the applicants may appeal the judgment of the Court of Appeal, Lagos Division, in appeal No CA/L/01/2009 delivered on 25th February, 2011. F

4. Leave for the applicants to appeal from concurrent findings of fact by the two lower courts. G

5. Leave for applicants to raise and argue fresh issues of law not canvassed in the Court of Appeal as set in the schedule hereto without their particulars but more elaborately set out in the proposed notice of Appeal as grounds 7, 8, and 9 thereof. H

6. And for such Order (s) as this Honourable Court may deem fit to make in the circumstances.

GROUNDS FOR THE APPLICATION

1. The applications are desirous to appeal the judgment of the Court below, albeit out of time.

2. The proposed notice of appeal contains nine complaints which show prima facie good grounds why the proposed appeal ought to be heard.

B 3. The applicants seek to raise and argue fresh issues in three grounds raising substantial points of law on extend of statutory powers of the Security and Exchange Commission and constitutionality of some provisions of the investments and Securities

C Act 2007, which required the leave of the honourable court.

4. None of the fresh issues sought to be raised further evidence.

The application is supported by a 26 paragraph affidavit sworn to by one Ms. Idara Joy Uffort.

D The 1st and 2nd respondents filed a counter affidavit containing seven (7) paragraphs as follows:-

1. That I am a Senior Litigation Officer in the law firm of Punuka Attorneys & Solicitors, counsel to the 1st and 2nd respondents in this appeal, and by virtue of which I am conversant with the facts of this case.

E 2. That I have the authority of the 1st and 2nd respondents and that of my employer to depose to the facts contained in this counter affidavit.

F 3. That the applicants pursuant to an Order of this honourable court served on the 1st and 2nd respondents a motion on notice dated the 22 of, April, 2013.

G 4. That the said motion on notice of the applicants is seeking an Order for enlargement of time within which the applicant may seek leave to appeal the judgment of the Court of Appeal, Lagos Division I appeal No. CA/L/O1/2009 delivered on the 25th of February, 2011 and for leave of Court of Appeal to appeal the judgment of the Court of Appeal Lagos Division as well as the concurrent findings of fact by the two lower courts as well as leave of court to raise and argue fresh issues of law not canvassed in the H Court of Appeal.

5. That on the 22nd of October, 2014 about 12:00 pm I was informed by Nnamdi Oragwu Esq., Partner in the law firm of Punuka Attorneys & Solicitors, counsel to the 1st and 2nd respondents in this matter, in our office at plot 45, Oyibo Adjarho

Street, Off Admiralty Way, Lekki Phase 1, Lagos of the following facts and I verily believe him as follows:-

a. That he has seen and read the applicants' motion on notice dated 22nd of April 2013 and the accompanying affidavit (hereinafter called affidavit in support), as well as the Exhibit and the brief of argument in support. B

b. That the depositions made by IDARA JOY UFFORT in the affidavit in support are either untrue or replete with half truths as they do not represent the true position of the matter before this Honourable Court. C

c. That the depositions made in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the affidavit in support do not show any cogent reasons for the applicant's failure to appeal the judgment of the lower court within time neither do they show any exceptional circumstances as provided for by the Rules of this Honourable Court to avail the applicants leave of Court of Appeal against the judgment of the Court of Appeal, Lagos Division or the concurrent findings of the two lower courts. D

d. That the depositions made in paragraphs 18, 19, 20, 21, 22, 23, 24 and 25 of the affidavit in support are misleading as the proposed grounds for the appeal annexed to the affidavit do not prima facie show any cogent and arguable issues of mixed law and facts. E

e. That the proposed grounds of appeal have adequately determined and dealt with by the judgment of the lower court and the proposed fresh issues are academic and require further evidence to be determined by the court and are made to overreach the respondents. F

6. That it is in the interest of justice not to grant the applicants' motion on notice dated 22nd April, 2013. G

7. That I depose to this affidavit in good faith and in accordance with the Oaths Act in force. H

Having considered the written addresses filed on behalf of both parties and considered the arguments, contentions of both learned counsel on behalf of their respective clients I conclude thus:-

a. it is clear to me that the deposition made by the deponent in support are replete with half truth as they do not represent the true position of the matter before us.

b. Also, I read thoroughly the depositions made in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the affidavit in support and they do not show or indicate any cogent reasons for the applicant's failure to appeal the judgment of the lower court within time neither do they show any exceptional circumstances as provided for by the Rules of this Honourable court to avail the applicants leave of court to appeal against the judgment of the Court of Appeal Lagos Division or the concurrent findings of the two lower courts.

Why the applicants refused or neglect to take advantage of our Rules? If I may ask. Not only that my lords, the depositions made in paragraphs 18, 19, 20, 21, 22, 23, 24 and 25 of the affidavit in support are quite misleading as the proposed grounds for the appeal annexed to the affidavit in support do not prima facie show or portray any cogent and arguable issues of mixed law and facts.

My lords on a serious note, the proposed grounds of appeal have been adequately determined and dealt with, admirably by the judgments of the lower court and the proposed fresh issues are academic and required further evidence to be determined by the court and are made possibly to overreach the respondents' position.

I cannot be seen to embark on academic exercise at this stage. In the overall interest of justice and for the fact that this court, with due respect to the counsel is expected to do substantial justice. You can only lead a horse to the river but you cannot force it to drink. That being the case, I hold that in this ruling the application in the overall interest of justice must fail. Same is hereby dismissed for lack of any merit.

H

MUHAMMAD JSC.

I read in advance the Ruling of my learned brother, Coomassie, JSC. I agree with him that the application is refused and is hereby

dismissed.

RHODES-VIVOUR JSC

I have read in draft the leading Ruling prepared by my learned brother Muntaka-Coomassie, JSC. I agree that the application fails and it is hereby dismissed for lack of merit

OGUNBIYI JSC

I read in draft the lead Ruling just delivered by my learned brother Hon. Justice Muntaka-Coomassie JSC. I agree that the application is devoid of any merit and should be refused and dismissed.

The law is trite that in an application of this nature, for the applicant to earn the favour of the court, he must satisfy two conditions which must co-exist conjunctively i.e. to say there must be good and substantial reason why a discretion should be exercised in favour of the application and secondly that the grounds of appeal sought to be introduced are arguable.

From the facts deposed on the affidavits and counter affidavit of parties taken together, and also the grounds predicated the application, I hold the view that the justice of this application does not operate in favour of the applicant. My learned brother has given detailed reasons for the refusal of the application and I adopt same as mine and dismiss the application for want of merit.

NWEZE JSC

I had the advantage of reading the draft of the leading Ruling which my Lord, Muntaka-Coomassie, JSC, just delivered now. I, entirely, agree with His Lordship that this application must fail.

As my Lord pointed out in the reasons for the Ruling, from the averments in the applicants' affidavit, counsel would seem to entertain the view that an application seeking leave to appeal is granted as a matter of course, *Ogundimu v. Kasunmu* (2006) 41 WRN 1; *ACB Plc. v Evulocha* (2001) FWLR (pt 60) 1611, 1621; *Williams v Hope Rising Voluntary Funds Society* (2001) 34 WRN 171; (1982) 13 NSCC 36.

How else can he justify what my Lord has described as “misleading depositions” in paragraphs 18; 19; 20; 21; 22; 23; 24 and 25 of the said affidavit? Be that as it may, suffice it to observe here that the above defect is not the only snag in this application. From my perusal of the entirety of the supporting grounds and the averments in the affidavit, I have no doubt that this application (which seeks, inter alia “an order for enlargement of time within which the applicants may appeal...”) is unmeritorious.

The position has, since, been settled that every such application must, conjunctively, surmount the twin conditions ordained in the Rules, *Alagbe v Abimbola* (1978) 2 SC 89; *Ibodo v Enarofia* (1980) 5- 7 SC 43; *Williams v Hope Rising Voluntary Funds Society* (1982) 1 All NLR (pt I) 1; *Doherty v. Doherty* (1964) 1 All NLR 299; *Yonwuren v Modern Signs Ltd.* (1985)1 NWLR (pt I) 143; *Mobil Oil (Nig) Ltd. v Agadaigho* (1988) 2 NWLR (pt. 77) 385.

Other cases include: *Okere v Nkem* (1992) 4 NWLR (pt 234) 132; *Kotoye v Saraki* (1995) 5 NWLR (pt 395) 256; *Balogun v Afokilu* (1994) 7 NWLR (pt 355) 206; *F.H.A. v Abosede* (1998) 2 NWLR (pt 537) 177; *Shanu v Afribank Nig Plc.* (2000) 13 NWLR (pt 684) 392; *Oloko v Ube* (2001) 13 NWLR (pt 729) 161.

The two conditions are conjunctive and not disjunctive, *Yonwuren v Modern Signs (Nig) Ltd.* (supra). They must be present in the affidavit, *Ikenta Best (Nig) Ltd. v A-G Rivers State* (supra) 26. Regrettably, the affidavit did not donate any such facts within these twin conditions.

No doubt, an application for extension of time could be granted if the delay is satisfactorily explained, *Alagbe v Abimbola* (1978) 2 SC 39; *Ojora v Bakare* (1976) 1 SC 47; *Re: Adewunmi and Co.* (1988) 3 NWLR (pt 83) 483. However, as noted above, counsel was wallowing under the impression that the discretion he asked for was grantable as a matter of course. This is not true, *Ogundimu v Kasunmu* (supra); *ACB Plc v Evulocha* (supra); *Williams v Hope Rising Voluntary Funds Society* (supra).

It is for these, and the more detailed reasons in the Ruling of my Lord, *Muntaka-Coomassie, JSC*, that I, too, hold the view that this application must fail. It is hereby struck out.