IN THE SUPREME COURT OF NIGERIA

Suit No: SC252/2000

Petitioner: Emespo J. Continental Ltd
And
Respondent: Corona Schiffah-Rts Gesellschaft & Ors

Date Delivered: 2006-05-05

Judge(s): Idris Legbo Kutigi , Sylvester Umaru Onu , Aloysius Iyorgyer Katsina Alu , Sunday Akinola Akintan , Aloma Mariam

Judgment Delivered

In a Suit before the Federal High Court holden in Lagos (from which this appeal emanated), the parties were initially, 'Emespo J. Continental Limited' as Plaintiff, and 'CMB S. A. (The owners of M. V. Concordia)', and 'Umarco (Nigeria) PLC,' as Defendants. The Defendants sometime in September 1991 acknowledged the shipment on board the vessel, motor spare parts owned by the Plaintiff in a container for carnage from Le Harve, France to Apapa Port Lagos, by the two bills of lading Nos ELOS 0003 and 0004. There was shortage in the goods when they were delivered, but the 2nd Defendant informed the Plaintiff that the container was landed without the original seal.

The Plaintiffs claim was predicated on the averment in paragraph 8 of the Statement of Claim, which reads: -

'8. In breach of the contracts contained in or evidenced by the said bills of lading and/or of their duty thereunder and or under convention or Rules applicable, the Defendants and their servants or agents failed properly and carefully to handle, carry keep, care for and discharge the goods and/or failed to deliver all the goods to the Plaintiff at Lagos and in the same good order and condition and quantity as when shipped but instead the Defendants short delivered the goods.'

The 2nd Defendant informed the Plaintiff that the container was landed by the vessel without the original seal. The Plaintiff wrote the Defendants seeking settlement, but to no avail, hence the action, whereof the Plaintiff claimed the following: -

'1. The sum of FF209, 672.00 (French Franc) currency of Invoice

2. The sum of N13, 218.00.

3. Interest on claims (1) and (2) above at the rate of 30% per annum from the 28th day of October 1991 until payment.'

The Defendants in their joint statement of defence denied most of the Plaintiff's claims. Both Defendants denied the supra reproduced paragraph (8) of Statement of Claim. The 2nd Defendant denied any liability to the Plaintiff, as it did not enter into any contract with the Plaintiff. The 1st Defendant also denied liability to the Plaintiff, as it was not the owner or demise charterer of the vessel, which earned the Plaintiffs goods, and so was not a proper party to the Suit.

The Plaintiff moved an application on notice seeking the following orders: -

'1. An order for leave to delete the words in bracket, to wit: (the owners of 'M.V. Concordia') appearing after CMB S.A., the 1st Defendant herein and saving therefore 'C.M.B S.A.' only as 1st Defendant in the parties to this Suit.

2. An order joining Corona Schiffannnrtsge Sellschaft (The owners of 'M.V. Concordia') as the 3rd Defendant in this Suit.

3. An order permitting service of all the Court processes in this Suit on the 3rd Defendant through the 1st and 2nd

Defendants herein.'

The above orders were granted as prayed by the learned trial Judge. Then about seven months thereafter, the party joined as a 3rd Defendant, filed and moved a motion for an order setting aside the joinder of the Defendant as a party to the action, and striking out the Suit against the 3rd Defendant. The grounds of the application were set out thus: -

'(a) This action is statute barred not having been brought against the Defendant within one year from the date of delivery of the goods or the date the goods ought to have been delivered by the Plaintiff by virtue of the provisions of the Carriage of Goods by Sea Act 1958.

(b) This is a point of law which is likely to be decisive of the litigation.'

The application was dismissed.

An application for judgment in default of appearance against the 3rd Defendant was moved, and in her ruling, the learned trial Judge entered judgment for the Plaintiff in the sum claimed.

Now, the ruling of Auta J. dismissing the application for striking out was appealed against by the 3rd Defendant to the Court of Appeal, on two grounds of appeal. At the Court of Appeal the said ruling was set aside. Aggrieved by the decision, the Appellant appealed to this Court on four grounds of appeal. In pursuance to the rules of Court, parties exchanged briefs of argument, which were adopted at the hearing of the appeal. In the Appellant's brief of argument, the following issues were formulated for determination: -

'1. Whether on the facts of the case, the Court of Appeal was correct in holding that the Plaintiff/Appellant had not established a case of a misnomer.

2. Whether the conclusions reached by the Court of Appeal on the issues for determination formulated by the parties before it and the manner in which that Court considered the appeal did not prejudice the case of the Respondent (now Appellant) resulting in a miscarriage of justice'.

The issues were adopted in the Respondent's brief of argument. I will commence with issue (1) supra. It is a fact that the original writ filed by the Plaintiff/Appellant bore the name 'CMB S.A. (the owners of M. V. Concordia)' as the 1st Defendant. It is the contention of learned Counsel for the Appellant that the Defendant/Respondent admits to being 'The owners of M.V. Concordia' but does not admit to being in the Suit originally because it was not 'CMB S.A.'. He further contended that the words 'The owners of M.V. Concordia' were on their own, sufficient a name or description for the proper identification of the Defendant/Respondent for the purpose of the Suit. According to learned Counsel 'CMB S.A.' is a name, and 'The owners of M.V. Concordia' is another name, and therefore the description of the 1st Defendant in the original writ contained the name of the Defendant/Respondent and that of another. The case of the Owner of the M.V. Lupex v. NQCS Ltd (1995) 5 NSC. 311, was relied upon by learned Counsel to both parties. In that case Ayoola J.C.A. (as he then was) explained and described the purport of misnomer thus: -

'For there to be a misnomer, there must be a mis-description of an entity. Where there are two entities, a mistake in commencing an action in the name of one rather than the other would not be a misnomer.....

A crucial factor in determining whether what happened was misnomer or not is whether there is an existing entity, which has been given wrong name, such wrong name not being the name of another entity.'

Now, let me revisit, (this time most carefully) the initiation of this Suit right from its inception. The original Defendants, as per the writ of summons are as stated in the earlier part of this judgment. Both parties exchanged pleadings and the Defendants thereafter filed a motion on notice for 'an order striking out the names of the Defendants/applicants from this Suit, on the ground that they were improperly joined'. In support of the motion on notice are the following salient depositions in the affidavit: -

'5. That neither of the Defendants herein is either the owner or Demise Charterer of the M.V. Concordia.

6. That the first Defendant was the time charterers of the M.V. Concordia while the second Defendant was the ship owner's Agent in Nigeria.

7. That further to paragraph 6 above the first Defendant had initially time- chartered the M.V. Corona, but by clause 81 of the Rider to the chatterer party aforesaid, the owner had the option to swap the M.V. Concordia, which also belongs to the owners of the M.V. Corona.'

In order to pre-empt the granting of the orders that may follow the moving of the motion of striking out, the Plaintiff filed and moved the application to delete the words 'The owner of M.V. Concordia' and to join the Respondent in this appeal.

Before I proceed further I will go back to the paragraphs of the affidavit reproduced above, particularly paragraph (7), which talks of the option to swap M.V. Corona with the M.V. Concordia, (which was originally the 1st Defendant vessel) in the Rider to the charterer party. Clause 81 of the Chaterer party mentioned in the said paragraph (7) reads as follows: -

'Option to swap 'corona' ('CONCORDIA'). Owner option to swap the vessel with M.V. Concordia' to perform instead, provided no disadvantage time wise and cost wise to either party. Exact wording of this clause, incl. 1st refusal for purchase of the 'Corona' cranes by C.M.B. N.V./Nominee, to be mutually agreed on the principle of above provisions.'

By the above clause, the owner has the option to swap the vessel, but the affidavit in support did not state that the vessel has actually been swapped, but only that there was provision for the possibility of such taking place, but not that it has so taken place. Now, in this application to delete the words, \"The owners of M. V. Concordia\" and to join the Respondent, the affidavit in support had the following salient averments: -

'2. I am informed by B. C. Igwilo of Plaintiff Counsel of the following facts and I verily believe that upon filing of this Suit and its conduct thereof the 1st and 2nd Defendants brought before the Court copy of paper writings being a Non Demise Charterer agreement in respect of M.V. Concordia between the 1st Defendant and the party sought to be joined herein. The said document is annexed herewith and marked Exhibit A.

A(ii) That the said exhibit A does not disclose in sufficient details the address of the party sought to be joined.

(iii) That in an affidavit deposed to by one Kemi Koledafe on behalf of the 1st and 2nd Defendants on 18th November 1992, 2nd Defendant claimed to be agent in Nigeria of the party sought to be joined. Copy of the said affidavit is attached herewith and marked Exhibit B.

(iv) That it will be in the interest of justice to join as a party to this Suit the party sought to be joined herein for the complete, and effectual determination of this Suit.'

True the charterer has the words Corona Schiffah/Fag, owners of 'Corona', as a party to the charter, and clause 81 of Rider to the charter provides for an option to swap with 'Concordia', there is no categorical statement that they are also owners of 'Concordia', which they portend the new Defendant (now Respondent) to be. This to my mind is a mistake as to identity. See the case of Government of Midwest State v. Mid Motors Nig. Co. Ltd. 1997 11 NSCC 429 cited by learned Counsel for the Respondent. I also subscribe to the argument of learned Counsel that the Appellant did not make any mistake in the name of the party sued as 1st Defendant namely C.M B S.A. (the owner of M. V. Concordia), as service was effected on the 1st Defendant, appearance was entered, pleading was filed on it\'s behalf and it was represented by Counsel.

Learned Counsel for the Appellant is quarrelling with the use of the phrase, 'described as' by the Court below and Counsel, which he argued introduced unnecessary confusion, which misled them. Learned Counsel for the Appellant contended that it was wrong reasoning that because C.M.B S.A. which was described as the owners of M.V. Concordia, 'as described as' is the only interpretation that could be given to the brackets in which the words 'The owners of M. V.

Concordia' are enclosed. 'He further argued that if by the brackets, the Plaintiff/Appellant intended to qualify 'C.M.B. S.A., what does the qualification say and what is its effect' In his brief of argument learned Counsel for the Respondent gave a definition of the word 'bracket' as stated in Collins English Dictionary and Thesaurus, as \"a general name for parenthesis\', and that the word 'paranthesis' as a phrase, is often explanatory or qualifying, inserted into a passage with which it is not grammatically connected, and marked off by brackets, dashes, etc'. After the definition the learned Counsel submitted that the words 'the owners of M.V. Concordia', in the bracket after the name C.M.B S.A. do not refer to another legal entity but serve to qualify and explain C.M.B S.A., and that the mistake made by the Appellant was not a mistake of name but a mistake as to the true identity of the owner of M. V. Concordia.

Indeed the use of the words 'THE OWNERS of M.V. 'Concordia' as appears in bracket, after the words C.M.B S.A., was for the purpose of qualifying the said C.M.B S.A. whom I regard to be the entity sued. My view is that if the Plaintiff had meant 'M.V. Concordia' to be another party, as preferred by learned Counsel for the Appellant, the Plaintiff would have been explicit about it. Another definition of the word 'bracket', which re'inforces the definition provided by learned Counsel for the Respondent, (reproduced supra) is in the 2nd edition of Bryan A. Garner's 'Dictionary of modern Legal usage'. There, brackets are defined as, 'These enclose comments, corrections, explanations, interpretations, notes, or translations that were not in original text but have been added by subsequent author or others.'

Learned Counsel for the Appellant contended that where the identity of the party is otherwise established on the writ or claim, it could be shown that the name or description on the writ is wrong or does not accurately reveal the identity of the party and the Plaintiff is at liberty to apply to amend or correct it. He placed reliance on the case of International Bulk Shipping and Gejvices Ltd. v Minerals and Metals Trading Corporation of India (1996) 1 All E. R. 1017. He further contended that the substitution or addition of a party is a permissible means of amending a writ to correct a misnomer and this could be effected even where the period of limitation has expired. Where a party has been sued under a wrong name, the writ could be amended by joining that party in his correct name. Learned Counsel referred to the cases of Rodriguez v. Parker 1967 1 Q.B. 116, Mitchell v. Harris Engineering Co. Ltd. 1967 2 Q.B. 703, and Evans Construction Co. Ltd. V. Charrington and Co. Ltd 1983 Q.B. 810. These authorities are not on all fours with the instant case, where a party that was different from the original parties was added after the expiration of the limitation period and not on an application for amendment of the writ.

I agree with learned Counsel for the Respondent that there is no misnomer here. The case of Dennis Njemanze v. Shell B.P. Port Harcourt 1966 1 All N.L.R. page 8 is of assistance here on the issue of misnomer. In that case Bairamian J.S.C. in pronouncing on this said, inter alia as follows: -

'It was not enough to complain of the trial Judge's refusal to amend, it was necessary to show that there were reasonable grounds of excuse in naming the Defendant wrongly and that the name of Shell B.P. could not have given rise to any reasonable doubt as to which company was being sued. An amendment of the title of an action cannot be had merely for the asking.....'

In other words it is not automatic. The Court of Appeal was in my view right when it held thus; (as per the lead judgment).

'With regard to the issue of misnomer, I am of the opinion that the learned trial Judge erred in holding that this was a case of mis- naming of a Defendant. It is settled law that a misnomer occurs when the correct person is brought to Court under a wrong name ..... The Respondent's error in suing the 1st Defendant who were the time charterers of the vessel does not fall within the purview of a 'misnomer'.

In the light of the above discussion I answer issue (1) supra in the affirmative, and hold that ground (1) of appeal to which it is married fails.

Now to issue (2), in respect of which learned Counsel for the Appellant complained that the Court below committed two grievous errors that culminated in a miscarriage of justice in that Court. The first error, according to learned Counsel was the unjustifiable striking out of the third Issue raised for determination by the Appellant. The second error was the procedure of that Court in deciding on the issue of whether the alleged joinder of the Defendant/Respondent after the

expiration of the limitation was valid before deciding on whether there had been a case of misnomer. According to Counsel the consideration and determination of this latter issue would have settled the preliminary issue of whether there was a joinder simpliciter at all or a mere exercise of correcting the name of Defendant by means of a joinder. These errors had the effect of shutting out any effective consideration of the case of the Plaintiff/Appellant, which was that the joinder was a mere amendment of the Suit to correct a misnomer.

Learned Counsel for the Respondent has submitted that the third issue for determination at the Court of Appeal did not encompass any of the two grounds of appeal and was a mere surplusage, and that it is trite law that issues for determination must flow from the grounds of appeal. He placed reliance on the case of Godwin Okeke and Ors v. Madam Ebi Oruh 1997 4 S.C. part II 37. He further submitted that issues formulated by a Respondent who has not cross-appealed should flow from the Appellant's grounds of appeal, and referred to Mogaji v. Military Administrator, Ekiti State, 1998 2 NWLR part 538, Taiwo v. Saibu 1982 2 SC 104, and Government of Gongola State v. Tukur (No. 2) 1987 2 N.W.L.R. part 68 page 308.

Now, what was this issue that is now a subject of controversy' The issue as is contained in the Respondent (then Appellant's) brief, and which can be seen on page 201 of the printed record of proceedings is: -

'3. Following from the above whether the joinder of the Appellant could be said to be a mere amendment of the Suit or could take effect as such.'

Learned Counsel for the Respondent has already stated the position in law of an issue for determination, vis a vis grounds of appeal. Perharps I should reproduce the grounds of appeal raised in the Court of Appeal for the purpose of proper examination. There were two grounds and the grounds are as follows: -

'(i) The learned trial Judge erred in law in refusing the Defendant's application dated 31st October, 1996 for an order setting aside the joinder of the Defendant earlier made by the Court on 3rd of March, 1994. Particulars.

(a) The action was already statute barred against the Defendant as at the time of the said joinder

(b) The decisions of the Court of Appeal in ..... were not properly applied in this case.

(ii) The learned trial Judge erred in law when he held that from the facts of this case, what obtains is only mis-naming the Defendant..... and therefore the limitation period has no effect on this case. Particulars. The Defendant did not become a party to the proceedings on grounds of misnomer rectified by amendment of the writ but by way of joinder.'

A careful perusal of the issue and the grounds of appeal make it patently clear that the said third issue has no relationship whatsoever with the two grounds of appeal. Authorities abound on the essence of issues raised for determinations in parties' briefs of argument. Issues are meant to flow from the grounds of appeal in an appeal, and where they do not so flow, they become incompetent and will be struck out by the Court. See Nteogwuile v. Otuo (2001) 16 NWLR Part 238 page 58, and Olowosogo v. Adebanjo 1988 4 NWLR Part 88 page 275. A Respondent who has not cross-appealed, (in which case he may raise issue to marry his ground of appeal), must when formulating an issue for determination in his brief of argument distill it from the grounds of appeal framed by the Appellant in his notice of appeal. Where an issue is not married to a ground of appeal, then it becomes an issue with no leg to stand on and such issue has no place in our legal system, and deserves to be truck out for being incompetent. See Alhaji Kokoro-Owo and 6 Ors. v. Lagos State Government and 4 Ors (2001) 11 NWLR part 723 page 237, U.A.C. Nigeria Ltd v. Global Transport S.A. 19965 NWLR part 448 page 291, and Nnaji v. Ede 1996 8 NWLR part 466 page 332.

In this vein, I am satisfied that the learned justice of the Court of Appeal did not err when he opined and held thus, (on this said third issue). 'Not only is this third issue formulated by the Respondent a surplusage, in view of the first and second issues, but it is in competent as it does not encompass any of the two grounds of appeal. It is therefore struck out. However, I shall be guided by the two issues by the Appellant because the two issues raised by the Respondent fall within the context and purview of the issues formulated by the Appellant.'

I subscribe to learned Respondent Counsel's argument that the above procedure adopted by the Court of Appeal is proper and within the law. See Musa Sha (Jnr) and Anor. v. Da Rap Kwan and Ors (2000) 5 S.C. 178 cited by Counsel. Issue (2) supra is resolved in favour of the Respondent and its related grounds of appeal fail.

Learned Counsel for the Respondent has urged that ground of appeal No 4 be struck out as no issue is distilled from it. It is a fact that the Appellant did not formulate an issue to be covered by the said ground (4) of appeal, but the arguments under issue (1) briefly touched on the point of limitation period. That is not to say however that an issue was raised as required. The position of the law is that a ground of appeal in respect of which no issue has been formulated is deemed abandoned, and should be struck out. See Newswatch Communications Ltd. v. Atta 2000 2 NWLR part 645 page 592, Labiyi v. Anretiola 1992 8 NWLR part 258 page 139, and Bankole v. Pelu 1991 8 NWLR part 211 page 523. Ground (4) of appeal is therefore struck out.

The end result is that the appeal fails in its entirety and it is dismissed. The judgment of the lower Court is hereby affirmed. I assess cost at N10, 000.00 in favour of the Respondent against the Appellant.

Judgment delivered by
Idris Legbo Kutigi. J.S.C.

I read before now, the judgment just delivered by my learned brother Mukhtar J.S.C. I agree with her that the appeal has no merit. It is accordingly dismissed with N10, 000.00 costs in favour of the Respondent against the Appellant.

Judgment delivered by
Sylvester Umaru Onu. J.S.C.

I have had the privilege of a preview of the judgment just delivered by my learned brother Aloma Mukhtar, J.S.C. just delivered. I am in entire agreement with it that the appeal lacks merit and it is accordingly dismissed with N10, 000 costs to the Respondent.

Judgment delivered by
Aloysius Iyorger Katsina-Alu, J.S.C.

I have had the advantage of reading in draft the judgment delivered by my learned brother Mukhtar J.S.C. in this appeal. I agree with it and, for the reasons given therein, I also would dismiss the appeal with N10, 000.00 costs in favour of the Respondent.

Judgment delivered by
Sunday Akinola Akintan. J.S.C.

I had the privilege of reading the draft of the leading judgment written by my learned brother, Mukhtar J.S.C. I entirely agree with his reasoning and conclusion that the appeal lacks any merit. I accordingly also dismiss the appeal and affirm the judgment of the Court of Appeal. I abide by the order on costs.