

IN THE SUPREME COURT OF NIGERIA

Suit No: SC184/2003

Petitioner: Musa Abubakar

And

Respondent: E.I. Chuks

Date Delivered: 2007-12-14

Judge(s): Niki Tobi, Sunday Akinola Akintan, Walter Samuel Nkannu Onnoghen, Ibrahim Tanko Muhammad, Pius Olayiwola

Judgment Delivered

The res in this litigation is No 2, Old Motor Park, Dilimi, Jos. What is in dispute is the ownership of the property. Both the appellant and the respondent claim ownership of the property. The respondent as plaintiff sued at the High Court, Jos, for a declaration of title to the property. He claimed that the appellant/defendant entered the property illegally shortly after the respondent left for his home town, Enugu, during the civil war. When he returned to Jos after the war, one Akanbi Badamasi was in occupation of the property. Akanbi Badamasi is now deceased. He died on 21st October, 1975. On enquiry, the respondent was told that the property was given to Akanbi Badamasi by Jos Local Government. The appellant/defendant has a different story. He averred in his statement of defence that the property was given to him by Akanbi Badamasi as a gift under Islamic Law. He averred that he will rely on the Islamic Law principle of Hauzi.

During the trial, the respondent called Mr. Samuel Lawal as PW 3. His counsel, Mr. Umoh, tendered I D 4 through the witness. Counsel for the appellant raised an objection. I think I should state here verbatim et literatim the relevant proceedings at pages 13 and 14 of the Record:

"PW 3 (continues). I live at No 11 Jingir Road, Jos. I am a Legal Practitioner of 12 years standing. In 1992 I was in the service of a firm of Legal practitioners of Amuka Lawal & Co. I know the defendant in this case. Our firm worked for the Defendant. I have seen ID4; it emanated from our firm.

Mr Umo: I seek to tender ID 4 in evidence.

Mr. Sangel: I object to tendering of ID 4 through this witness. The witness said that he knew the defendant when they worked for him. This document was written in the course of that employment. To tender this document through this witness will offend the provisions of section 170(1) of the Evidence Act. I rely on the case of Horn v Rickard (1963) NCLR 67 at 68. I submit that this witness cannot tender I D 4 in evidence.

Mr. Umoh: The objection is misconceived. This witness should not disclose anything contained in ID 4 that is what the law enjoins him not to do.

Court: I have looked at the document sought to be tendered in evidence; I have also listened to the evidence of this witness. The document sought to be tendered is dated 30/6/92; it emanated from the firm of Solicitors of Amuka, Lawal & Co. This witness was a solicitor in that firm. One B. B. Hassan, Esq was the author of the document sought to be tendered. The document has already been tendered for identification purpose only. Under the provisions of section 170(1) of the Evidence Act this witness is not allowed to:

'disclose any communication made to him in the course and for the purpose of his employment such legal practitioner by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted...'

As I observed earlier, the document sought to be tendered is already before the court but not in evidence. This witness is not being asked to disclose the contents of the document or to state its contents. It was not written by him. These facts take the document out of the contemplation of the provision of section 170(1) of the Evidence Act. The witness can tender the document formally but cannot state its contents on the basis of this reasoning I hereby accept this document in evidence. It shall be marked as Exh. 7 (taken as read).

Sgd

Chief Judge

24/2/2000'

Dissatisfied, the appellant went to the Court of Appeal. The court dismissed the Appeal. Mangaji. JCA. In his judgement said at pages 41 to 43 of the record, and I quote him in some detail:

'The first arm of learned counsel for the Appellant's argument is built around the perceived misconduct of PW3 who was said to have breached professional ethics in accepting to appear in Court to tender a document which he identified as one which was prepared in the Chambers in which he was employed at the time relevant to its preparation. Of course he was not the author of the letter and there is no evidence that he knew the contents of the document as same was prepared by a different Counsel who took the brief and received instructions from the Appellant. It is beyond doubt that independent of tendering Exhibit 7, PW3 did not say anything which showed that he was disclosing any communication made to him by the Appellant in the course and for the purpose of his employment as a legal practitioner. Neither did he state the contents of Exhibit 7. Indeed there is no evidence that PW3 is acquainted with the contents of the exhibit beyond identifying that that document came from the chambers in which he was employed at the time relevant to the drafting of it. Since PW3 did not participate in the making of Exhibit 7 and the Appellant neither briefed him in person nor ever had any dealing with him in his professional capacity, section 170 of the Evidence Act, 1990 is inapplicable ... I do not think that section 170 of the Evidence Act is meant to shield a client from adverse consequences when communication and instruction made by him to his solicitor turns out to be unfavourable to him. Of course where the communication is made to a particular Solicitor that Solicitor is debarred from disclosing same without the express consent of his client. But for another counsel in the Chambers to be subpoenaed to appear in court and identify whether a particular document emanated from the Chambers in which he is employed, nothing would appear to work to render him disqualified to lead such evidence. In my view Exhibit 7 was rightly tendered through PW3 and the learned trial Chief Judge was right to have dismissed Appellant's objection on that score.'

Still dissatisfied, the appellant has appealed to this Court. Briefs were duly filed and exchanged. The appellant formulated the following single issue for determination:

"3.01 Whether it was wrong and contrary to Appellant's Legal Professional privilege for Mr. Samuel Lawal Esq, former counsel to the Appellant in the same dispute, to testify against the Appellant and tender Exhibit 7."

The respondent formulated two issues for determination:

"2.2. Whether Exhibit 7 that was tendered through PW3 is admissible in evidence having regard to the provisions of Section 170(1) of the Evidence Act Cap 112 Laws of Federation Nigeria 1990, same having been pleaded.

2.3. Whether the trial judge in admitting Exhibit "7" had exercised his discretion judiciously and judicially."

Learned counsel for the appellant, Mr. A. A. Sangei, submitted on the lone issue that the Court of Appeal was wrong in admitting Exhibit 7. Relying on sections 170 and 171 of the Evidence Act, learned counsel submitted that the evidence of PW3 and Exhibit 7 were inadmissible as PW3 was a partner in the law firm of Amuka, Lawal and Co. He cited Horn v Richard 1963 NNLR 67 at 68; Alfred Crompton Amusement Machines Ltd, v Customs and Excise Commissioners (No. 2) (1972) 2QBD 102 at 131 to 132 and Elabanjo v Tijani (1986) 5 NWLR (Pt. 46)952.

Learned counsel urged the court to allow the appeal and expunge the evidence of PW3 and Exhibit 7 from the Record of the trial court.

Learned counsel for the respondent, Mr. Solomon Umoh, submitted on Issue No 1 that the test for admissibility is relevancy and that it is the surrounding circumstances that will determine the relevancy of a fact. Citing Okonji v Njokanma (1999) 14 NWLR (Pt. 638) 250 at 267, counsel pointed out that Exhibit 7 was extensively pleaded in paragraph 18 of the Further Amended Statement of Claim, a paragraph that was never denied in the Statement of Defence. Relying on Joshua v State (2000) 5 NWLR (Pt. 685) 599; Utteh v State (1992) 2 NWLR (Pt. 223) 257 and section 170 of the Evidence Act, counsel submitted that the evidence of PW3 did not violate section 170.

On Issue No 2, learned counsel submitted that the learned trial Judge exercised his discretion judiciously and judicially in admitting Exhibit 7 as the evidence passed the test of purpose and relevance. Assuming, but without conceding, that the trial Judge was wrong in admitting Exhibit 7, learned counsel submitted that by section 227 of the Evidence Act, the wrongful admission of the exhibit cannot constitute a ground of appeal. He cited Yongbush v Bulus (1997) 2 NWLR (Pt. 489) 624. He contended that the appeal, to say the least, is academic, speculative, mischievous and only intended to

engender delay and frustrate the proceedings at the lower court. He cited *NIDB_v Fambo Nig. Ltd.* (1997) 2 NWLR (Pt. 489) 549. He urged the court to dismiss the appeal.

I agree with learned counsel for the respondent that what determines admissibility is relevancy. Section 6 of the Evidence Act provides in part:

"Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others..."

Sections 7 and 8 go further to expand and illustrate the requirements of relevancy in section 6. They are "facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction" (section 7) and "facts which are the occasion cause or effect immediate or otherwise, of relevant fact or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction" (section 8).

Admissibility is a rule of evidence and it is based on relevancy. See *Sadau v The State* (1968) 1 All NLR 124; *Ogunzee v The State* [1997] 8 NWLR (Pt.518) 566. In determining the admissibility of evidence, the court will not consider how it was obtained; rather the court will take into consideration whether what is admitted is relevant to the issues being tried. See *Igbinovia v The State* (1981) 2 SC 5. In *Elias v Disu* (1962) 1 All NLR 214, this court held that in determining admissibility of evidence, "it is the relevancy of the evidence that is important and not how the evidence was obtained."

A document is admissible in evidence if it is relevant to the facts in issue and admissible in law. The converse position is also the law, and it is that a document which is irrelevant to the facts in issue is not admissible. Documents which are tendered to establish facts pleaded cannot be rejected on the ground of irrelevancy in so far as they confirm the facts pleaded. See *Oyetunji v Akgnni* (1986) 5 NWLR (Pt. 42) 461, In other words, a document which is consistent with the pleadings is admissible, if the document is admissible in law.

The fact that a document has been admitted in evidence, with or without objection, does not necessarily mean that the document has established or made out the evidence contained therein, and must be accepted by the trial Judge. It is not automatic. Admissibility of a document is one thing and the weight the court will attach to it is another. The weight the court will attach to the document will depend on the circumstances of the case as contained or portrayed in the evidence.

Relevancy and weight are in quite distinct compartments in our Law of Evidence. They convey two separate meanings in our adjectival law and not in any form of dovetail. In the order of human action or activity, in the area of the Law of Evidence, relevancy comes before weight. Relevancy, which propels admissibility, is invoked by the trial Judge immediately the document is tendered. At that stage, the Judge applies sections 6, 7, 8 and other relevant provisions of the Evidence Act to determine the relevance or otherwise of the document tendered. If the document is relevant, the Judge admits it, if all other aspects of our adjectival law are in favour of such admission. If the document is irrelevant, it

is rejected with little or no ado.

Weight comes in after the document has been admitted. This is at the stage of writing the judgment or ruling as the case may be. At that stage, the Judge is involved in the evaluation of the evidence vis-a-vis the document admitted. While logic is the determinant of admissibility and relevancy, weight is a matter of law with some taint of facts.

I think I have talked enough law to accommodate the factual situation in this appeal. Exhibit 7 is the centre of the quarrel. It is a one-page letter from Amuka, Lawal and Co., Solicitors and Advocates to C.T.A. (B), Works/Lands and Survey Department, Jos North Local Government Council. Exhibit 7, written in the name and under the signature of B. B. S. Hassan on behalf of the appellant, did not dispute the claim by one Baba Aku as to ownership, but asked for the sum of N21, 255.00; being amount for guarding the premises for fourteen years at the rate of N1,200 per year and repair done to the property.

On the issue of relevancy, I should read paragraph 18 of the Further Amended Statement of Claim:

"18. The plaintiff avers that the defendant herein has never challenged his title to the property but rather has only been insisting that he should be paid some amount of money which he spent on the property. The plaintiff shall rely on the letter issuing from the office of Amuka Lawal & Co. who acted as defendant's solicitors when the local government directed the defendant to vacate the plaintiff's premises. The letter which was copied to the plaintiff by the defendant's solicitor is hereby pleaded."

It is clear from the averment in paragraph 18 that Exhibit 7 is duly pleaded. Considering the statement of defence, particularly paragraph 5 thereof, Exhibit 7 is relevant. This court cannot, at this interlocutory stage, decide whether Exhibit 7 has the strength to turn the table in favour of the case of the respondent. It may or may not. That is for the trial

Judge to decide. But this court has enough evidence to decide on the issue of relevancy. On the authority of *Oyetunji v Akanni* (supra), I am of the firm view that Exhibit 7 which is duly pleaded in paragraph 18 of the further amended statement of claim is relevant in the adjudication of the issue of ownership of the property in dispute.

I move to the second issue and it is whether PW3, Samuel Lawal, a Legal Practitioner from the Chambers of Amuka, Lawal and Co. can tender the exhibit. Learned counsel for the appellant submitted that he cannot do so in the light of section 170 of the Evidence Act, 1990. The section provides in part:

"170 (1) No legal practitioner shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment ..."

The operative and functional word in the section is "disclose". The word mean to make known, especially something that has been kept secret, publicly. Disclosure, the noun variant of the word "disclose" means the act of disclosing secret facts. A person can only disclose a fact which is not known to the public. In other words, a person can only disclose facts which are hidden from the public. And public here does not necessarily convey its general unguarded parlance of people in general or for the use of many persons. It could mean for the use of any person. It conveys the opposite meaning of "not private".

What is the position of Exhibit 7 in terms of secrecy' Had it the content or quality of secrecy only known to PW3 at the time it was tendered through him' If the answer to the question is in the affirmative, then Exhibit 7 is caught by section 170 of the Evidence Act, as PW3, a Legal Practitioner cannot disclose the contents. It is clear from the proceedings that Exhibit 7 was already identified as ID4 in the court. Can there be a better example of a public place than a court of law' I think not. PW3 was led to tender ID 4 as an exhibit; which he did, and so Exhibit 7 came to being. And what is more, PW3 was on subpoena.

Let me examine the cases cited by learned counsel for the appellant. I will take them in the order he cited them. The first one is Horn v Richard (supra).

The issue before the court was whether a legal practitioner can swear an affidavit in respect of his client's case while he is representing the client. Mr. Murray, counsel for the defendant swore an affidavit in respect of security of costs. Counsel for the plaintiff, Mr. Rickett, raised a preliminary objection to the affidavit of Mr. Murray. Holden, J. held that an affidavit sworn by counsel representing a party to the proceedings is unobjectionable in principle provided that it does not by reason of its subject matter offend against the rule that a client's communications to his counsel are privileged, or the requirement that counsel should not put himself in a position where he may be subjected to cross-examination or in any way enter personally into the dispute. The Judge held per curiam that the swearing of affidavit by members of the Bar is in the main an undesirable practice and that if counsel alone has the knowledge necessary to swear the affidavit, and the facts to which he is to swear are likely to be in dispute, he should for the purposes of the application withdraw from the case and brief another counsel.

In Alfred Crompton Amusement Machines Ltd, v Customs and Excise Commissioners (1972) 2 All ER 353, the issue before the court was whether communications between the defendants and their solicitor to obtain advice and in anticipation of litigation to provide evidence and information for arbitration were privileged. Forbes, J. held that the communications were privileged.

In Elabanjo v Tijani (supra), the plaintiff tendered Exhibit C, a Public Notice posted by the defendant on the land in dispute. It was an admission by the defendant that she sold the land in dispute to the plaintiff. It was written by her solicitors, Coker and Coker. The issue before the court was whether Mr. Otukoya, who appeared for the plaintiff, was a competent witness. This court held that all persons are competent to testify, unless the court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions by reason of tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind as provided for in section 154(1) and (2) of the Evidence Act. As counsel to the case did not suffer from any of the disabilities mentioned in section 154 (1) and (2) of the Evidence Act, he was legally a competent witness.

None of the cases is relevant to the issue involved in this case. Horn v Richard involved the swearing of affidavit by counsel. There is no such issue in this appeal. The position of the English case of Alfred Crompton Amusement Machines Ltd, is quite different from this case. As the document was marked ID4, there was no privileged communication in view of the fact that the contents were already public property. The case of Elabanjo v Tijani is against the appellant. I am surprised that counsel cited it. As this court held that counsel, who does not suffer any of the disabilities mentioned in section 154 (1) and (2) of the Evidence Act, is a competent witness, I did not expect counsel for the appellant to cite the case as authority in favour of the appellant.

This is yet another interlocutory appeal which, on a sober and good judgment on the part of counsel, ought to have been avoided and taken after the judgment, if the judgment goes against the appellant. Unfortunately, it is not so as the appeal

has come all the way to this court because of the admission of Exhibit 7. I cannot blame counsel because the Constitution gives his client the right to appeal and he is perfectly in order to exercise the constitutional right.

Appeal on this matter was filed in the Court of Appeal on 3rd March, 2000. Today is 14th December, 2007. It has taken more than seven years to fight the admissibility of an exhibit, an issue which could have been taken at the end of the case after final judgment. In order to save litigation time and money of litigants, it is my view that all interlocutory appeals must stop at the Court of Appeal. This will involve the amendment of section 241 of the 1999 Constitution. I do not think it is out of place to recall that the Constitutional Debate Co'ordinating Committee, 1998, under my Chairmanship, which recommendations gave birth to the 1999 Constitution, recommend to the Provisional Ruling Council during the Military Regime of General Abdulsalami Abubakar, that all interlocutory appeals should stop at the Court of Appeal. The Council in its wisdom rejected the recommendation. In view of the fact that the Supreme Court is inundated with interlocutory appeals, which take so much of the time of the Court, a situation which results in congestion of the court, it is hoped that the National Assembly will amend section 241 of the Constitution to make the Court of Appeal a final court in interlocutory appeals. That will save so much litigation time. That will save so much money for litigants. That will save the Supreme Court so much time to take final substantive and final appeals. As it is, seven long years are wasted for no reason. I say no more.

In sum, the appeal fails and it is dismissed. I award N10, 000.00 costs in favour of the respondent.

Judgment delivered by

Sunday Akinola Akintan, J.S.C.

The dispute that led to this interlocutory appeal arose over admission of a document tendered at the trial of the case instituted by the present respondent who was the plaintiff at the trial. He had instituted the action at Jos High Court. The

claim before the court, as set out in paragraph 15 of the Statement of Claim, was for:

- (1) a declaration of title to the property (a house) at No. 2 Old Motor Park, Dilimi, Jos;
- (2) an injunction restraining the appellant, as defendant, from further trespassing on the property; and
- (3) an order directing the defendant to render an account for the rents collected from other occupants from the months of June, 1971 till judgment.

The plaintiffs' case, as pleaded in his statement of claim, was that the house at No. 2 Old Motor Park, Dilimi, Jos belonged to him. During the civil war, he had to leave Jos for his home town, Enugu. The said property was then abandoned during the period he was away. When he returned to Jos after the civil war, he discovered that the appellant was claiming ownership of the house. The action was therefore instituted to restore his ownership of the property. This appeal arose over the admission by the trial Chief Judge of a document earlier tendered for identification. It was tendered and admitted as Exhibit 7 through one Samuel Lawal (PW3), a Legal Practitioner. An objection to the admission of the document was made by learned Counsel for the defendant in the case on the ground that the witness who was to tender the document was from the chambers which had acted for the defence. His evidence was therefore said to be improper under section 170(1) of Evidence Act.

The point as to whether the evidence of the witness was in conflict with the provisions of Section 170(1) of Evidence Act has been well discussed in the lead judgment written by my learned brother, Niki Tobi, JSC. I had the privilege of reading the draft of the said lead judgment and I entirely agree with his reasoning and conclusion that the learned trial Chief Judge was right in overruling the objection raised on the competency of the witness (PW3) to give the evidence he gave in the matter. I therefore have nothing to add to what has been said in the lead judgment.

I will, however, like to comment further on what transpired after the document had been admitted. What transpired after the document had been admitted, as recorded on page 14 of the printed record is as follows:

"Mr. Sangei (Counsel for defendant) I am applying for an adjournment. We want to contest the ruling of this court.

I urge the court to defer the cross-examination of this witness until our proposed appeal is filed, argued and disposed.

Court: This suit is hereby adjourned to 12/4/2000 and 14/4/2000 for hearing. If the appeal is entered in the Court of Appeal and the proceedings of this court are stayed, I will off my hands until the appeal is determined. If the situation is not as stated above, I will continue until I determine the issue in controversy between the parties.

Sgd

Chief Judge

24/2/2000'

The above was the last action taken at the High Court level in respect of the trial. The notice of appeal against the ruling was filed as indicated above by Mr. Sangei, learned Counsel for the defendant. The appeal was taken by the Court of Appeal and dismissed. This is a further appeal from the decision of the Court of Appeal dismissing the appeal. The issue in controversy between the parties in the case has remained unresolved since the matter was adjourned by the learned trial Chief Judge on 24/2/2000.

Although it was not on record that an order for stay of proceedings was made by the Court of Appeal in the matter, yet the trial court failed to proceed with the trial. The decision of the learned trial Chief Judge to unilaterally grant a stay even before the notice of appeal was filed is totally wrong. It was a wrong exercise of his judicial discretion. Similarly, the application made by learned Counsel for the defence that further proceedings be stayed in the matter until the determination of his proposed appeal was also wrong and contrary to the directives given by this court on numerous occasions on the need to curtail unnecessary pursuit of interlocutory appeals.

The stand of this court has been as aptly expressed by Obaseki, JSC in *International Agricultural Industries Ltd & Anor v. Chika Brothers Ltd.* (1990) 1 NWLR (Pt. 124) 70 at 80-81. There he said as follows:

"It is sad to observe that it was at the tail end of the proceedings in the High Court that this interlocutory decision to reject the document was made. It is even sadder to observe that the proceedings before the High Court had to be stayed to allow the pursuit of appeal proceedings against the decision. Although the hearing before the Court did not take more than an hour to conclude, it took 8 years for the appeal to travel from High Court through Court of Appeal to this court. If the plaintiff had allowed the learned trial Judge to conclude the hearing and deliver his judgment, he could still have had the opportunity to raise the issue of admissibility in the appeal courts. He would have enjoyed the added advantage that if the point raised succeeded, the decision in the case could have been reversed in his favour and the rights of the parties in the matter determined finally. What is the position now'

Although the point raised before us has been upheld and resolved in the appellant's favour, the rights of the parties cannot be determined finally in this court as hearing before the High Court, Aba, had not been concluded. The case has to be remitted to the High Court for hearing to proceed. In the meantime, information has reached this court that the learned trial Judge conducting the trial is dead. That being the case, trial has to commence de novo before another Judge of the High Court of Imo State, Aba Judicial Division. It is therefore necessary to emphasize that parties should not throw to the wind the wisdom of leaving the prosecution of issues or points that can be taken advantageously after the final decision of the High Court till the High Court has given its final decision and appeal against the decision lodged."

The above view expressed by Obaseki, J.S.C in that case clearly represents the stand of this court in respect of interlocutory appeals. In the case in question, the appellant was the plaintiff. The futility of the plaintiff pursuing such an interlocutory appeal was clearly shown in the passage quoted above from the judgment of Obaseki, J.S.C.

In the instant case, the defendant was the appellant in the interlocutory appeal. There is no doubt that his main objective was to cause an unnecessary delay and ensuring that the plaintiffs claim was not expeditiously concluded. The learned trial Chief Judge should have realized that intention of the defence Counsel in the case. He should have, therefore, refused the request for the adjournment of the case after delivering his ruling. But the learned Chief Judge granted the adjournment even when the notice of appeal was yet to be filed.

It may be mentioned too that section 241(1) of the 1999 Constitution confers right of appeal as of right in respect of final decision in any civil or criminal proceedings. The present appeal, not being a final decision, could not have been properly filed without leave of the High Court or that of the Court of Appeal.

The granting of such leave by either the trial High Court or the Court of Appeal, in my view, was improper exercise of judicial discretion having regard to the fact that the matter now on appeal could safely be taken in an appeal after the High Court had delivered its final judgment in the case. The result now is the unnecessary delay of about a decade in the conclusion of the plaintiffs claim before the court.

For the reasons I have given above, and the fuller reasons given in the lead judgment prepared by my learned brother, Niki Tobi, JSC which I adopt, I also dismiss the appeal with N10, 000 costs in favour of the respondent.

Judgment delivered by

Walter Samuel Nkannu Onnoghen. J.S.C.

This is an appeal against the judgment of the Court of Appeal Holden at Jos in appeal No CA/J/75/2000 delivered on the 18th day of March, 2002 in which the court dismissed the appeal of the appellant against the ruling of the Plateau State High Court holden at Jos in suit No PLD/J261/97 delivered on the 24th day of February, 2000 overruling the objection of learned counsel for the respondent against the admission of Exhibit 7 in evidence.

By paragraph 22 of the further amended statement of claim, the respondent, as plaintiff, claimed against the appellant, as defendant as follows:-

\22 Wherefore the plaintiff claims against the defendant as follows:

- (a) A declaration that the plaintiff is the proper person entitled to the customary right of occupancy and the statutory right of occupancy in respect of property situate at No. 2 hotel, old Motor Park. Diumi, Jos.
- (b) An order of perpetual injunction restraining the defendant, his agents, privies and assigns from further trespassing in any manner howsoever on the said property.
- (c) An order directing the payment of the sum of N 2,000.00 monthly from the month of January, 1970 till judgment, same being payment in lieu of use any occupation of the premises by the plaintiff.
- (d) General damages in the sum of N 1, 000,000.00
- (e) Cost of this action.\"

The facts of this case, which are largely undisputed have been fully stated in the lead judgment of my learned brother Tobi, J.S.C and I do not intend to repeat them here except as may be needed to emphasize the point being made.

The dispute between the parties relevant to the appeal centres on the admissibility of a letter which was pleaded in paragraph 18 of the Further Amended Statement of Claim in which it is averred that the appellant had never challenged the title of the respondent to the property in dispute. The letter was written by a lawyer in the firm of Solicitors of Amuka, Lawal & Co on the instructions of the appellant and was tendered by PW3, Samuel Lawal, Esq who was one of the solicitors in the aforesaid firm of solicitors, upon subpoena to that effect. The objection was to the effect that the admission of the document would offend the provisions of section 170(1) of the Evidence Act since at the time the letter was written; the witness was one of the members in the firm of solicitors that wrote the letter. As stated earlier in the judgment, the objection was overruled by the trial chief judge resulting in an appeal which was dismissed by the lower court. Upon further appeal to this Court, the issue for determination, as identified by learned counsel for the appellant, A.A. Sangei Esq in the appellant's brief filed on 8/10/03 and adopted in argument of the appeal is:-

\Whether it was wrong and contrary to Appellant's legal professional privilege for Mr. Samuel Lawal Esq, (sic) former counsel to the Appellant in the same dispute, to testify against the Appellant and tender exhibit 7 (Distilled from Grounds (I) and (II)).\"

It is the view of learned counsel for the appellant that having regards to the facts of the case PW3 was not competent to

tender exhibit 7 as the act of tendering the document amounts to disclosure of information that came to him in the course of his professional relationship with the appellant and therefore privileged under section 170(1) of the Evidence Act; that exhibit 7 can only be admissible by consent of the appellant, which consent was never obtained.

On the other hand, learned counsel for the respondent, Solomon E. Umoh Esq, in the respondent's brief of argument filed on 26/11/03 and adopted in argument of the appeal submitted that exhibit 7 is admissible in evidence since the test for admissibility is relevance; that PW3 merely identified exhibit 7 as emanating from his chambers and no questions were put to PW3 in relation to the contents of exhibit 7.

It is not in dispute that exhibit 7 was duly pleaded by the respondent in paragraph 18 of the Further Amended Statement of Claim. From the facts pleaded in that paragraph, it is very clear that the document, exhibit 7, is very relevant to the determination of the main issue in controversy between the parties at the trial. Equally very important is the fact that the objection against exhibit 7 is based on admissibility thereby bringing into sharp focus the conditions/circumstances/principles guiding and/or regulating admissibility of documents in evidence. I hold the considered view that it is with the above background facts in view that the issue under consideration should be considered and resolved having regard to the provisions of section 170(1) of the Evidence Act being the pivot of the objection giving rise to the appeal.

The said section 170(1) of the Evidence Act provides as follows:-

"170 (1) No legal practitioner shall at anytime be permitted unless with his client's express consent to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure '

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment."

It is very clear from the above provisions that a legal practitioner is by law not permitted to disclose any communication made to him in the course and for the purpose of his employment by his client or to state or disclose the contents or condition of any document with which he had become acquainted or disclose any advice given to his client all, in the course of and for the purpose of his said professional engagement, except with the express consent of his client, the employer. The above general principle is however subject to two exceptions as listed under proviso (a) and (b) of

section 170(1) of the said Evidence Act.

The general principle on which the above statutory provision is grounded is as stated by Holden J in the case of *Iris Winifred Horn vs Robert Richard* (1963) NCLR 67 at 68 or (1963) 2 All NLR 40 at 41 as follows:-

"Every client is entitled to feel safe when making disclosures to his solicitor or counsel, and there are cases establishing firmly that counsel cannot be called to give any evidence which would infringe the client's privilege of secrecy."

It is very clear that the principle of client privilege is based on secrecy of the information disclosed by the client to his solicitor or advice given by the solicitor to the client to the effect that what is done in secret must remain secret. However, the question is whether the facts of the instant case fall within the purview or contemplation of the principle of client privilege of secrecy as enacted in section 170(1) of the Evidence Act.

In answer to the above question, I hold the considered view that the facts of this case, as relevant to the issue in contention between the parties do not fall within the provisions of section 170(1) of the Evidence Act. I had earlier held that the principle of admissibility of evidence is based on relevance. In the instant case, exhibit 7 is relevant and was duly pleaded by the respondent.

Secondly exhibit 7 was written by the firm of solicitors retained by the appellant for that purpose and upon, appellant's instructions in reply to a letter written to the appellant by Jos Local Government Council and was copied to the respondent, by the said firm of solicitors. In short the contents of exhibit 7 is no longer secret or privileged as it had, upon appellant's instructions been published to third parties the Jos Local Government and the respondent. In other words, the contents of exhibit 7 had long been disclosed upon the instructions or consent of the appellant to third parties before the institution of the action.

Again from the facts, PW3 was under subpoena to tender exhibit 7, not to give evidence of the contents of exhibit 7. He did just as he was commended by the subpoena to do tender the document, exhibit 7, and I hold the view that PW3 is very competent to do so.

The above notwithstanding, it should be noted that exhibit 7 is a copy of the letter which was copied to the respondent by the firm of solicitors upon the instructions of the appellant. See paragraph 18 of the Further Amended Statement of Claim at pages 5 - 7 of the record particularly at page 6 thereof. That being the case, it is settled law that the document in the circumstance is an original, not a copy and can legally be tendered by the respondent in person; it does not really need PW3 to tender it. In whatever angle one looks at the issue, exhibit 7 is admissible in law and the lower courts were right in so holding. I therefore resolve the issue in favour of the respondent.

The facts of this case once more bring to the front burner the vexed issue of interlocutory appeals making their way right

up to this Court at the expense of speedy trials and determination of matters before the court. The present journey by the appellant to the Supreme Court is not only wasteful to both parties' and the judicial system but totally avoidable particularly as the issue could be taken up in an appeal against the judgment at the conclusion of trial. The instant appeal is not only frivolous but vexatious - crafted to frustrate and continue to oppress the respondent in his efforts at attaining justice under the rule of law, which should not be encouraged at all by any right thinking judicial system.

In conclusion, I agree with the reasoning and conclusion of my learned brother Tobi, JSC that the appeal is totally without merit and deserves to be dismissed. I order accordingly and abide by other consequential orders contained in the said lead judgment including the order as to costs.

Appeal dismissed.

Judgment Delivered by

Ibrahim Tanko Muhammad. J.S.C.

This is an interlocutory appeal which was filed since 16th of April. 2002. The substantive suit is still pending at the trial court, it is unfortunate that almost five years have been wasted at interlocutory stage in fact the appeal was very unnecessary as it borders on an issue that could have been taken together in one appeal (if necessary) after the whole suit had been determined finally by the trial court, what always matters in admitting an exhibit/document in evidence is its relevancy. Section 6 of the Evidence Act. Granted that what was tendered through PW3 i.e Exhibit 7 was irrelevant or same was wrongly admitted, or where it was relevant and admissible, but wrongly rejected, the law as per section 227 of the Evidence Act is very clear:

"227 (1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.

(2) The wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to the court on appeal that had the evidence so excluded been admitted it may reasonably be held that the decision would have been the same."

Thus, where such evidence is by error or otherwise admitted, then it is the duty of the trial court to expunge it in giving its judgment. If it fails to do so, the appeal court will reject such evidence and consider the case in the light of the legally admitted evidence. See: Owoyin v. Omotosho (1961) All NLR 304; Alase v. Ilu (1964) 1 All NLR 390.

In any event, it is trite that wrongful admission of inadmissible evidence is not of itself a ground for the reversal of any decision similarly, the wrongful exclusion of admissible evidence is not of itself a ground for the reversal of any decision. All these are however dependent on the view held by the appeal court on whether the evidence wrongly admitted or wrongly excluded would have the effect of changing the decision even if admitted or excluded. See: Lawal v. the State (1966) 1 All NLR 107; Yassin v. Barclays Bank DCO (1968) 1 All NLR 171. That of course was the more reason why the appellant would have allowed the trial court to finish the suit to its logical conclusion.

Secondly, PW3 could not have violated the provision of section 170 of the Evidence Act as he was only subpoenaed to come and identify a document (which was later admitted as Exhibit 7) that it emanated from their firm That only, was what PW3 did, rightly, in my view.

For the fuller reasons given by my learned brother, Tobi, J.S.C.; I too find no merit in this appeal. I dismiss the appeal and abide by all orders made by my learned brother including order as to costs.

Judgment Delivered by

Pius Olayiwola Aderemi. J.S.C.

The appeal here is against the judgment of the court below (Court of Appeal, Jos Division) which had dismissed the appeal to it by the present appellant against the ruling of the High Court of Plateau State sitting in Jos in Suit No. PLD/J261/97; E.I. Chuks v. Musa Abubakar delivered on the 24th February 2000 in which a document dated 30th June 1992 was tendered through one Samuel Lawal Esq (PW3) as Exhibit 7. The said document (Exhibit 7) emanated from the firm of Solicitors of AMUKA, LAWAL & CO. Suffice it to say that Samuel Lawal Esq. (the witness) was a solicitor in that firm of solicitors. The author of the said document (Exhibit 7) was one B.B.S. Hassan Esq. Perhaps I should here say that the said document was not admitted in evidence as Exhibit 7 until after the trial judge had ruled on the objection to its admissibility. It was the admissibility of Exhibit 7 that led to this appeal.

By the endorsement in paragraph 22 of the further amended statement of claim of the plaintiff (hereinafter referred to as the respondent) the following reliefs were claimed against the defendant (hereinafter referred to as the appellant): -

(1) A declaration that the plaintiff is the proper person entitled to the customary right of occupancy and the statutory right of occupancy in respect of property situate at No. 2 Hotel, Old Motor Park, Diliun, Jos.

(2) An order of perpetual injunction restraining the defendant, his agents, privies and assigns from further trespassing in any manner howsoever on the said property.

(3) An order directing the payment of the sum of N2, 000.00 from the month of January, 1970 till judgment.

In the Notice of Appeal dated 1st March 2000 but filed on the 3rd of March 2000, the appellant incorporated therein three grounds of appeal. Distilled therefrom is a single issue, which, as set out in his brief of argument filed on 8th October 2003, is in the following terms; -

"Whether it was wrong - contrary to appellant's Legal Professional Privilege for Mr. Samuel Lawal, former counsel to the appellant in the same dispute, to testify against the appellant and tender Exhibit 7."

For his part, the respondent identified two issues arising for determination and as contained in his brief of argument, they are as follows:

(1) Whether Exhibit 7 that was tendered through PW3 is admissible in evidence having regard to the Provisions or (sic) Section 170 (1) of the Evidence Act Cap 112 laws of the Federation of Nigeria 1990.

(2) Whether the trial judge in admitting Exhibit 7 had exercised his discretion judiciously and judicially"

When this appeal came before us on the 8th of October 2007, Mr. Sangei, learned counsel for the appellant referred to, adopted and relied on the brief of argument of his client filed on 8th October 2003 and urged us to allow the appeal. For his part, Mr. Umoh, learned counsel for the respondent referred to, adopted and relied on the brief of his client filed on 26th November 2003 and urged us to dismiss the appeal.

On the only issue raised by the appellant, it was submitted in his brief of argument that the court below was wrong to have held that PW3 - Samuel Lawal Esq - who tendered in evidence Exhibit 7 - a document dated 30th June 1992 which emanated from the firm of Solicitors of Amuka, Lawal & Co, was on a firma terra. PW3 was a solicitor in that firm but one B.B.S Hassan Esq. was the author of the said letter - Exhibit 7. Continuing the submission, it was his contention that Sections 170 and 171 of the Evidence Act prevent a legal practitioner, his agent, clerk and interpreters from testifying against the clients of his Chambers even when the services of the Chambers were no longer retained so long as the services of the Chambers had once been retained in the subject matter of the dispute. Exhibit 7, it was further argued, was not admissible through PW3, a partner in Amuka, Lawal & Co which acted for the appellant as according to him, this would violate the legal professional privilege of the appellant who is the only person to waive it. That privilege, it was finally submitted, had not been waived while finally urged that the appeal be allowed.

On issue No. 1 raised by the respondent, it was argued that the test for admissibility was relevancy and that it is the surrounding circumstances that will determine the relevancy, reliance was placed on the decision in Okonji v. Niokanma

(1999) 14 NWLR (pt.638) 250, reference was made to paragraph 18 of the plaintiffs further amended statement of claim in which it was averred that the defendant had not challenged the title of the plaintiff rather all that the defendant demanded was that he be recouped for the sum of money he had spent on the property. It was further argued that paragraph 18 had not been denied. The provisions of Section 170 (1) of the Evidence Act were never violated by PW3 who, according to the argument, only identified Exhibit 7 and admitted that it emanated from his Chambers. It was urged on this court to hold that Exhibit 7 was admissible in evidence and that the appeal be allowed. On the second issue, it was submitted that the trial judge exercised his discretion judiciously and judicially in admitting Exhibit 7 in evidence. Even if, without necessarily conceding that the trial judge was wrong in admitting Exhibit 7 in evidence, that in itself, is not a sufficient ground to allow this appeal, it was further argued while placing reliance on Section 227 of the Evidence Act and the decision in *Yongbishi v. Bulus* (1997) 2 NWLR (pt.489) 624; it was finally urged that the appeal be dismissed.

The resolution of this appeal revolves on a narrow compass i.e. whether Exhibit 7 - a document dated 30th June 1992 emanating from the firm of Solicitors of Amuka, Lawal & Co. of which PW3 - Samuel Eawal was a part as solicitor was admissible in evidence through PW3 even though he was not the author ' one B.B.S. Hassan Esq was the author. Suffice it to say that the defendant/appellant - Musa Abubakar - retained the services of the firm of solicitors. This calls for the construction of the provisions of Section 170 of the Evidence Act which provide: -

170 (1) No legal practitioner shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Provided that nothing in this section shall protect from disclosure '

(a) any such communication made in furtherance of any illegal purposes

(b) any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since since the commencement of his employment.

(2) It is immaterial whether the attention of such legal practitioner was or was not directed to such fact by or on behalf of his client.

(3) The obligation stated in this section continues after the employment has ceased."

It has now become a well-entrenched principle that no counsel or solicitor shall accept a brief where it is clear that the

services to be, rendered flow out of or are closely connected with the previous services he had rendered to the opposing side. So also is it that a solicitor is not permitted to disclose the contents or the condition of any document with which he has become acquainted in the course of and for the purpose of such employment. This privilege is that of the client and not of the legal practitioner and as such, it can only be waived by the client. The right of confidentiality guaranteed by this provision is absolute. This is so, because even the courts cannot generally, compel counsel to disclose information given to him by his client in confidence. But has PW3 breached any oath of confidentiality? In answering this all-important question, one has to examine very carefully the facts relating to the conduct of PW3. The witness (PW3) came to court as a witness to tender a document recognised by him as one which emanated from the Chambers in which he was employed as a solicitor. As I have said, he was not the author of the said document - Exhibit 7 and there was no evidence that he knew the contents of Exhibit 7 which was prepared by one B.B.S. Hassan at the instructions of the appellant.

I have carefully gone through the record of proceedings, nothing therein to suggest that PW3 gave evidence of the contents of the said document or the communication between him and the appellant, indeed, there was none. What more, interest of justice demands that one must not shut one's eyes to the averment in paragraph 18 of the further amended statement of claim which was not denied and which, put side by side with Exhibit 7; that exhibit is a further confirmation of the averment. The averment in the said paragraph 8 reads: -

"The plaintiff avers that the defendant herein has never challenged his title to the property but rather has only been insisting that he should be paid some amount of money which he spent on the property. The plaintiff shall rely on the letter issuing from the office of Amuka, Lawal & Co, who acted as defendant's solicitors when the Local Government directed the defendant to vacate the plaintiffs premises. The letter which was copied to the plaintiff by the defendant's solicitor is hereby pleaded'

As was rightly submitted by the respondent on his issue No. 1, the test for admissibility is relevance. The source by which a document has been obtained is immaterial, it is the relevance of it that will make such document admissible. See *Dr. Torti v. Ukpabi* (1984) 1 S.C. 370; *Agbahomoyo v. Eduyegbe & Ors* (1999) 3 NWLR (pt.594) 170 and *Ikolaba v. Ojosipe* (1988) 4 NWLR (pt.502) 630. Exhibit 7, with which PW3 had nothing to do, establishes the averment of paragraph 18 of the further amended statement of claim. Its being tendered in evidence by PW3 is not caught by the provisions of Section 170 of the Evidence Act. The only issue raised by the appellant must be resolved against him and 1 so do. Issue No1 raised by the respondent is, materially, the same thing with the appellant's only issue, my answer remains the same. Issue No 2 raised in the respondent's brief poses the question whether the trial judge, in admitting Exhibit 7 had exercised his discretion judicially and judiciously. I would have refrained from treating this issue, having regard to what I have said on Issue No 1 in each of the briefs. Since this court has enjoined courts in a number of its decisions, that all issues raised before them must be pronounced upon, I cannot, in good conscience, go against that fundamental practice direction of the apex court of the land. I shall, in treating this issue, begin by saying that the line between a proper exercise of judicial discretion and an abuse of that discretion is not readily definable and it may be, that the term "abuse of discretion" means no more than that the decision below fell outside the permissible limits as viewed by the appellate court or that the court of appeal is of the opinion that the trial court should have decided otherwise. The resort to "Discretion" at all times could turn to be an unruly horse. As Justice William Douglas in *State of New York v. United States* (1951) 342 US 822, opined at page 884 and I quote: -

"Absolute discretion, like corruption marks the beginning of the end of liberty."

Lord Simon of Glaisdale expressing the traditional view on the exercise of judicial discretion by a judge said in D. v. NSPCC (1978) A.C. 171 at page 239 and I quote: -

"And if it comes to the forensic crunch it must be law, not discretion, which is in command."

Summing up the above dicta, in my own words of definition, I will say that an issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment of what is fair and just to do in the particular case. A judge has no discretion in making his findings of fact, he has no discretion in his rulings on the law. If a judge, having made any necessary finding of fact and any necessary ruling on law, it seems to me clear that he has to choose between different courses of action, orders, penalties or remedies he then exercises a discretion. Let me reiterate that it is only when a trial judge reaches a stage at which he asks himself, what is the fair and just thing to do or order in the instant case that he embarks on the exercise of a discretion. However, where the situation is governed by the rule of law, as in the instant case which touches on admissibility of a document where the provisions of the Evidence Act come into play, although the court may have its own discretion, such discretion must be exercised according to the ordinary principles laid down in the Evidence Act as set out above.

Its judicial discretion is founded upon those principles. And if a trial judge refuses to do so, then the appellate court will set the matter right. See R. v. Stafford Justices (1940) 2 K.B. 33 at 43. Following all I have said, I shall answer Issue No2 raised by the respondent in the affirmative.

For all I have said supra but most especially for the detailed reasoning contained in the lead judgment of my learned brother Niki Tobi, J.S.C., I also hold that this appeal fails and it is hereby dismissed. I abide by all consequential orders contained in the lead judgment including the order as to costs.

Counsel

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with him

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