

# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC21/2002

**Petitioner:** Chief Ozo Nwankwo Alor & Anor

And

**Respondent:** Christopher Ngene & Ors

Date Delivered: 2007-02-16

**Judge(s):** Idris Legbo Kutigi, Umaru Atu Kalgo, Niki To Aloma Mariam Mukhtar, Francis Fedode Tabai

## Judgment Delivered

This is an appeal against the decision of the Court of Appeal Enugu Division in which it dismissed the appeal of the appellant and held that the decision of the trial court was interlocutory. The only issue to be determined by this court in this appeal is whether the decision of the trial court was final or interlocutory.

The appellants who were the plaintiffs in the action filed 2 separate actions in Awka High Court of Anambra State in suits No AA/36/87 and AA/65/88, against the defendants/respondents. In AA/36/87 filed on 6 - 4 - 87, there were 7 defendants and in AA/65/88 filed on 3 - 5 - 88, were 9 defendants. The 1st seven defendants in AA/65/88 were exactly the same persons as those in AA/36/87. And the claim against the defendants in both suits was exactly the same to wit:

- (1) Declaration that the plaintiffs in possession are entitled to customary right of occupancy in respect of 'Ofia Owele' land;
- (2) Injunction to restrain the defendants from further trespassing on the said land;
- (3) N100.00 (one hundred naira) Damages for trespass.

After service of the second writ of summons on the defendants/respondents, their counsel filed a motion on notice praying the court for-

\(i) An order striking out this suit on the ground that it is abuse of judicial process and caught by the doctrine of Lis Alibi Pendes.

Or In the Alternative

(ii) An order staying further proceedings in the above suit pending the determination of suit No. AA/36/87. Chief Alo Qzo Nwadoqbe & Ors v. Nathaniel Chinze & Ors between the same parties and on the same subject matter\.

The motion was first heard by Hon. Justice Uyanna but he retired before completing the hearing. It was then taken over by Nzeako J. who also could not finish it before her appointment to the Court of Appeal. The application was then taken over for hearing by Earnest-Egbuna J. He heard the submissions of learned counsel for the defendants/respondents on 6/5/97 and 20/5/97 and adjourned to 20/5/97 for the appellant's counsel reply. He failed to turn up and the application was further adjourned to 1/7/97. He still did not turn up in court for the reply. On that day, the learned trial judge ruled thus: -

\"On 6/5/97, 20/5/97 and again today, the plaintiffs counsel has written to be excused. It is noteworthy that the plaintiffs counsel has neither filed a counter affidavit to challenge the averments nor sent another counsel to give his reply to the application, I cannot but assure that the plaintiff and his counsel are no longer desirous of going on with this suit and the application therein. The court will therefore strike out the entire suit-with N1, 500.00 costs against the plaintiff in favour of the Defendant\.

The entire suit of the appellants was therefore struck out and they appealed to the Court of Appeal. The Court of Appeal dismissed their appeal, which was held to be incompetent.

Dissatisfied-with this decision, they further appealed to this court. The only ground of appeal without particulars reads;

\"The learned Justices of the Court of Appeal erred in law, when they dismissed the Appellant's appeal and held that the appeal is incompetent in law as it was not filed within 14 days, because their Lordships construed the order of the trial High Court as interlocutory but not final order\."

In this court, written briefs were filed and exchanged between the parties. Both the appellants and respondents in their respective brief agreed that the only issue for determination in the appeal is whether the decision of the trial High Court

to strike out the appellants' action or suit was a final or interlocutory decision.

The question whether a decision, judgment or order of a court is interlocutory or final has been well settled by this court in many decided cases. There is no clear definition or interpretation in any law, rules or the Constitution of the words "interlocutory or final" in relation to the decision, judgment or order of court in this country. But S. 318 of the 1999 Constitution defines a "decision" in relation to a court as "any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation". Therefore the only answer is in the interpretation given by the courts.

In plethora of decided cases, this court decided that in this country, if the order, decision or judgment of a court finally and completely determines the rights of the parties in the case, it is final. But if it does not, it is interlocutory only. And in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order. Therefore the determining factor is not whether the court has finally determine an issue but it is whether or not it has finally determined the rights of the parties in the claim before the parties.. See *Oguntimehin v. Omotoye* (1957) 2 FSC 56; *Afuwape v. Shodipe* (1957) SCNLR 265; *Omonuwa v. Qshodin* (1985) 2 NWLR (pt.10) 924. *Akinsauya v. U. B. A Ltd* (1986) 4 NWLR (pt 35) 273; *Ude v. Agu* (1961) 1 All.NLR 61 *Ebokam v. Ekwenibe & Sons Trading Co. Ltd* (1999) 10 NWLR (pt 622) 242; *Ebet v. Kassim* (1966) NMLR 123 at 124;

In the instant case, the trial court struck out the entire case of the appellants before it. The appellant's learned counsel in his brief, therefore submitted that the decision which struck off the entire suit before the court, has indeed unequivocally disposed of all the matter before it in respect of that subject matter. Therefore counsel argued, that decision is final and not interlocutory. He cited the case of *Ebokam v. Ekwenibe* (1999) 10 NWLR (pt. 622) 242 in support.

For the respondent, it was submitted in the brief that the decision of the trial court in this case is not final because it did not decide the rights of the parties over the "Offia Owelle" land dispute which was the subject matter of the case. The trial court, learned counsel argued, did not hear any evidence on the matter and made no findings thereon; it merely struck out the suit for the non-challant attitude of the plaintiffs' counsel and the dispute is still alive and unresolved. Learned counsel cited the case of *Ebet v. Kassim* (1966) NMLR 123 at 124 - 125 and since the suit was merely struck out before any evidence was taken and the dispute resolved, the trial court was not functus Qfficio and further proceedings can be initiated in respect of the matter. Counsel drew the attention of the court to the provisions of Order 24 Rule 16 of the High Court Rules of Anambra State 1988 which provides that;

"any cause or matter struck out may, by leave of the court, be relisted on such terms as the court may seem fit".

And submitted that provisions envisages that a striking out is not end of the matter as the case struck out can be revived. Therefore, learned counsel argued, the order striking out the case was only interlocutory, and the case can be relisted in the same court under the rule quoted above. He further submitted that if the striking out order of the trial court was interlocutory, then the appeal in the Court of Appeal was incompetent having been filed after the 14 days required by the relevant rule of that court and the order striking it out by the Court of Appeal was valid and correct.

For the sake of emphasis, let me repeat myself that this court has repeatedly stated and restated that the test in deciding whether any order, (decision or judgment) of court is final or interlocutory is: Does the order as made finally dispose of the rights of the parties' If it does, then it is a final order, if it does not, it is only an interlocutory order.

I have earlier referred to the decided cases relevant to this legal principle and I do not intend to recite them here again

There is no doubt that in this case, the learned trial judge merely struck out the action of the appellants without hearing any evidence or making any findings on the subject matter of the case. This distinguishes it from the case of *Ebokam v. Ekwenibe* (supra) where the two applications of the contending counsel in the matter were consolidated and heard by the trial court before it made an order striking out both applications on the grounds that there was insufficient material to determine the applications. It was not the case here and so the case of *Ebokam v. Ekwenibe* (supra) is not applicable.

A final order envisages that it is a permanent order made by the court and the parties in respect of whom or against whom the order is made cannot go back to the same court to challenge or change that order. That court, by virtue of the order, is functus officio and the only option open to the parties is by way of appeal against the order. This means that the rights of the parties have been determined to finality, and they cannot go back to the same court on those rights. But where the rights or claims of the parties in any action have not been looked into and determined by the court, they are still pending and the parties can go back to any court or indeed the court to examine and decide on those rights. Furthermore, the rules of court quoted above empower the appellant whose case was struck out to reapply to the same court to have their case relisted and determined.

I entirely agree with the submissions of the respondents' counsel on this point and accordingly find, in the

circumstances of this case that the order striking out the suit by the trial court and confirmed by the Court of Appeal is only interlocutory and not final. I therefore also agree with the decision of the Court of Appeal that the appeal of the appellant having been filed in that court more than 14 days after the order striking out the suit was made, without leave was out of time and incompetent. (See s. 221(1) of the 1979 Constitution and Section 25(2)(a) of Court of Appeal Act 1976). I therefore resolve the only issue for determination in this appeal against the appellant.

For the reasons stated above, I find no merit in this appeal. I accordingly dismiss the appeal and affirm the decision of the Court of Appeal. I award N10, 000.00 costs against the appellant in favour of the respondents.

#### Judgment Delivered By

Idris Legbo Kutigi CJN.

I read in advance the judgment just delivered by my learned brother Kalgo, J.S.C. I agree with him that the appeal has no merit. It is dismissed with N10, 000.00 costs against the Appellants in favour of the Respondents.

#### Judgment Delivered By

Niki Tobi, J.S.C.

I have read in draft the judgment of my learned brother, Kalgo, J.S.C, and I agree with him, This appeal once again resurrects the old matter whether a decision of a court is interlocutory or final. A decision is interlocutory if it is not final. A decision is final if it is final. I do not think I have done much by way of definition. I think I should go further.

Two tests have been laid down for determining whether or not an order of court is final or interlocutory: (a) The first is to see the nature of the order is final or interlocutory; (b) The second is to consider .the nature of the order made. In Nigeria, it is the \"nature-of-order\" test that has been constantly applied. If the order made finally disposes of the rights of the parties, then the order is final. If the order made does not, then it is interlocutory. An order is also regarded as final if it at once affects the status of the parties for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant and if it is given for the defendant, it is conclusive against the plaintiff In order to determine whether or not the decision of a court is final or interlocutory, the decision must relate to the subject matter in dispute between the parties, and not the function of the court making the order. See *Omonuwa v. Oshodin* (1985) 2 NWLR (Pt. 10) 924.

The real test for determining whether the decision of a court is final or interlocutory ought to be by answering the question: does the judgment, or order as made finally dispose of the rights of the parties' If it does, it ought to be treated as a final order; but if it does not, it is an interlocutory order. Where a decision of a court clearly and wholly disposes of all the rights of the parties in the case, that decision is final. But where the decision only disposes of an issue or issues in the case leaving the parties to go back to claim other rights in the court, then the decision is interlocutory. See *Ebokam v. Ekwenibe and Sons Trading Company Ltd.* (1999) 10 NWLR (Pt. 622) 242. See also *Akinsanya v. DBA Ltd.* (1986) 4 NWLR (Pt. 35) 273. The rights of the parties are determined in the light of the claim or relief sought in the case.

In this case, the learned trial Judge struck out the case of the appellants. The appellants appealed against the decision of striking out after a period of thirty days. The respondents raised a preliminary objection that the order of the trial court striking out the suit was interlocutory in nature and the appeal filed after fourteen days was incompetent. The Court of Appeal upheld the preliminary objection and struck out the appeal.

The Court of Appeal said at page 12 of the Record:

\"Thus, as I had observed earlier, if a proceeding can still be taken on a matter that is struck out, the striking out order is interlocutory, but if the striking out order has put an end to the suit in the same court, the order is final.'

I cannot agree less with the Court of Appeal. I cannot agree more with the court too. The law is very adequately and properly stated. The functional words are \"in the same court\". The mere fact that the action could be instituted in another court does not detract from the final nature of the order in the first court that made the striking out order.

Although there could be instances (and they are few) where a striking out order may have or wear a garb of finality, it is in most cases interlocutory in nature and content. Where a suit is struck out, the plaintiff, in most cases, had another opportunity to commence the action after curing the deficiency, which resulted in the striking out of the action. For instance, where, an action is struck out for want of prosecution, it can be relisted by a motion on notice. In such a situation, the matter has not totally left the cause list because by the order of striking out, the plaintiff is at liberty to file a motion to relist the cause.

A decision is said to be final when the court that gave the decision has nothing else or nothing more to do with the case;

to the extent that the court becomes *functus officio*, a Latinism, which literally means, "having performed his or her office". In the context of the Judge, it means that the duty or function that the Judge was legally empowered and charged to perform has been wholly accomplished and that the Judge has no further authority or legal competence to revisit the matter.

I entirely agree with the decision of the Court of Appeal that the order striking out the suit was an interlocutory order, which required fourteen days to appeal. As the appeal was filed outside fourteen days without leave of court, it is incompetent. It is for this reason and the fuller reasons given by Kalgo, J.S.C. that I also dismiss the appeal. I award N10, 000.00 costs in favour of the respondents.

Judgment Delivered By

Aloma Mariam Mukhtar, J.S.C

I have had the advantage of reading in advance the lead judgment delivered by my learned brother Kalgo, J.S.C. I would however want to add some points by way of emphasis. A single issue for determination was formulated by learned counsel in their respective briefs of argument, and even though both issues are virtually the same in content, the issue in the respondents' brief of argument is apt and more straightforward. This issue is "Was the Court of Appeal correct when it terminated the appellants' appeal before it on the ground that the decision of the trial court in the suit being interlocutory in nature, the said appeal (which was filed more than 14 days from the decision of the trial court) was filed out of time"

The provisions that stipulate the period within which an appellant may appeal are as set out in section 25 of the Court of Appeal Act Cap, 75, Laws of the Federation of Nigeria 1990 which read: -

"25(1) Where a person desires to appeal to the Court of Appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this section that is applicable to the case.

(2) The periods for the giving of notice of appeal or notice of application for leave to appeal are: -

(a) in an appeal in a civil case or matter, fourteen days where the appeal is against an interlocutory decision, and three months where the appeal is against a final decision."

The above provisions are clear on the period allowed for the two categories of appeal i. e. interlocutory and final decisions. The appeal here before this court took its origin from the striking out of a suit for want of prosecution, by the High Court which the appellants have contended and are still contending was a final decision that could have been appealed against within three months. Whether the striking out of the suit by the learned trial court completely foreclosed the parties from taking further action on the suit is an important point to be considered in this discussion. I will at this juncture determine what an Interlocutory decision is, and in the process resort to its definition. In Black's Law Dictionary 7th Edition on pages 819, and 1123, in defining 'Interlocutory decision' on page 819, the author referred to page 1123 for the definition of Interlocutory order, which defines the phrase as-

"An order that relates to some intermediate matter in the case; any order other than a final order."

The question now is, applying the above definition to the "instant" matter can it be said that the order of the trial court in striking out the suit was a final order' I certainly don't think so because by striking out a suit a party is usually at liberty to seek to relist, and invariably his application is granted, to relist the suit and the case is resurrected. In this wise, the suit cannot be said to have been disposed off completely, without any recourse to any likely future step or action by the plaintiff or the court. The lower court as per Ubaezeonu was therefore right when it concluded and held thus: -

"..... I have come to the irresistible conclusion that the order made on 1/7/97 striking out the suit at the lower court was an Interlocutory Order. The appellants were at liberty to seek to relist the suit or to appeal to this court as they have done. If they choose to appeal to this court as they have done and as they are entitled to do, they have to observe the provisions of section 221 (1) of the 1979 Constitution of Nigeria (since the matter was struck out in 1997) and section 25 (2) (a) of the Court of Appeal Act 1976. The appellants not having observed the above provisions of the, constitution and the law, the appeal, in my view is incompetent."

I entirely agree, and I also agree with my learned brother Kalgo, J.S.C. that the appeal was incompetent, and so the appeal before us here lacks merit, and deserves to be dismissed. The consequential orders made in the lead judgment are in order.

Judgment Delivered By

Francis Fedode Tabai

I had the benefit of reading, in draft, the leading judgment of my learned brother, Kalgo J.S.C. I entirely agree with his reasoning and conclusion that the appeal lacks merit. The facts of the case are very clearly elucidated in the lead

judgment and need not be repeated. I shall, by way of emphasis, also comment on the single issue for determination in the course of which I shall only repeat such facts and references as may be necessary to make my contribution comprehensible.

The suit No AA/65/88 was filed at the Amawbia/Akwa Judicial Division of the High Court of Anambra State on the 3/5/88. The plaintiffs sued for themselves and on behalf of the members of Obununo Village of Ebenebe excluding the 4th '9th of the 9 Defendants. Earlier in Suit No. AA/36/87 filed on the 6/4/87 in the same High Court the Plaintiffs sued for themselves and on behalf of the members of the same Obununo Village of Ebenebe. And learned leading counsel for the Plaintiffs in both suits are the Appellants herein while the Defendants are the Respondents herein.

By a motion dated 18/7/88 the Defendants/Respondents sought the following reliefs;

\"(i) An Order striking out this suit on the ground that it is an abuse of judicial process and is caught by the doctrine of Lis Alibi Pendens.\"

or in the alternative

(ii) An Order staying further proceedings in the above suit pending the determination of Suit No. AA/36/87 Chief Alo Ozo Nwadogbu & ors v Nathaniel Chinze & Ors between the same parties and on the same subject-matter.\"

This motion suffered numerous adjournments at the instance of both parties and could not be argued until some dates in 1995 when it was extensively argued before Ifeyinwa Nzeako J (as she then was). On the 5/12/95 Plaintiffs counsel concluded his argument and the motion was further adjourned to enable Defendants/Appellants' counsel to reply. The motion then suffered several other adjournments and could not be determined by Ifeyinwa J until J.O. Ernest Egbuna J took over the proceedings in the case. The case still suffered several adjournments. On the 6/5/97 counsel for the Defendants/Appellants argued the motion and it was adjourned to the 20/5/97 for reply by the counsel for the 20/5/97 although the parties were present and Plaintiffs/Respondents were represented by M.O.Z. Alor he was not prepared to argue the motion. The learned trial judge noted both parties' penchant for adjournments and at page 34 of the record remarked as follows: -

\"The Court has taken cognisance of the letter from Dr. F.N. Obi who is sitting in a tribunal at the moment. The Court has also taken cognisance of the absence in court of the Applicants' counsel. The matter before the court is merely the disposal of a preliminary objection It is not the hearing of the substantive suit. Such an application can be handled by any counsel apart from Dr. F.N. Obi have taken note of the fact that this is a 1988 case and not much has been made by the parties to prosecute same. The number of letters in the court's file suggests that both parties have been competing in writing of letters for adjournment.

In view of the above, Court will adjourn the reply to Tuesday 1st July 1997. The reply must be taken in that said date. The Plaintiffs should arrange for another counsel to attend court and give their reply if on that date, their counsel finds himself unable to attend.\"

On the 1/7/97 the parties were present and Defendants/Applicants were represented by counsel. Plaintiffs were not represented by counsel. At page 35 of the record the learned trial judge ruled as follows: -

\"On the 18th July 1988, the Defendants filed an application to strike out this suit. No counter affidavit was filed by the by the Plaintiffs. The application suffered inexplicable adjournments until 9 years later when on 6th May 1991, I elected and insisted that it be heard. The defendant argued his application from 6/5/97 till date, after 3 adjournments the Plaintiff has shown a marked reluctance to reply to the said application.

On the 6/5/97, 20/5/97 and again today, the Plaintiffs' counsel has written to be excused. It is noteworthy that the plaintiffs' counsel has neither filed a counter affidavit to challenge the averments nor sent in another counsel to give his reply to the application. I cannot but assure that the Plaintiff and his counsel are no longer desirous of going on with this suit and the application therein. The Court will therefore strike out the entire suit with N1, 500.00 costs against the Plaintiff in favour of the Defendant. Counsel who brought he suit in 1988 should have shown a marked anxiety to prosecute his case after 9 years. It is unfortunate that Plaintiff and his counsel have not shown such inclination'.

Learned counsel for the Appellants argued that the above ruling is a final decision from which no leave to appeal is required. He relied on Clement Ebokam, v. Ekwenibe & Sons Trading Co. Ltd (1999) 10 NWLR (Part 622) 242; (1999) 7 SCNJ 77 at 78-79. Learned counsel for the Respondents on his part argued that the decision was not a final one since it did not finally determine the rights of the parties in the dispute over .the ownership of the \"Ofia Owelle\" land. He relied on Ude v. Agu (1961)1 SCNLR 98; Omonuwa v. Oshodin (1985) 2 NWLR (Part 10) 924; Ebet v Kassim (1966) NMLR 123 at 124-125 and Order 24 Rule 16 of the High Court Rule, of Anambra State 1988. He also distinguished Ebokam v. Ekwenibe supra, which, he submitted, does not apply in this case.

There is plethora of authorities on the distinction between final and interlocutory decisions/ A decision is said to be final where it determines the rights of the parties respecting the subject matter in dispute and without leaving any option to either party to relitigate over the same subject matter. Thus a decision or order of court which does not finally dispose of the rights of the parties in the substantive subject-matter in dispute such as a decision in an issue or issues or which does not foreclose the parties from litigating over the same subject-matter such as an order striking out a suit is interlocutory. See *Omonuwa v. Oshodin* (1985) 2 NWLR (Part 10) 924, *Mrs R.A. Idakalu v. Alhaji Mohammed Adamu* (2001) 1 NWLR (Part 694)322, *Ebokam v. Ekwenibe supra*

On this question of whether the ruling of the trial Court of the 1st of July 1997 is a final or interlocutory decision the court below per *Obaezonu J.C.A* after a detailed review of local and foreign authorities including, *Ebokam v. Ekwenibe supra* stated at pages 11 - 12 of its judgment;

'It is my considered view that so long as there exists the option to relist the case for hearing in the same court the order striking out the suit is interlocutory. It is interlocutory because the case can still be proceeded with in the same court since unlike the *Ebokam* case where there was nothing to relist in the same in the same court'

In coming to this conclusion the Court below also relied on Order 24 Rule 16 of the High Court Rules of Anambra State 1988 which provides: -

'Any cause or matter struck out may, by leave of the court, be relisted on such terms as the court may deem fit'.

The court below went on and concluded with the following not;

'Thus as I had observed earlier, if a proceeding can still be taken on a matter that is struck out, the striking out order is interlocutory but if the striking out order has put an end to the suit that no proceeding can be taken any more on the suit in the same court, the order is final.

In the light of all the above, I have come to the irresistible conclusion that the order made on he 1/7/97 striking out the suit at the lower court was an interlocutory order. The parties were at liberty to seek to relist the suit or to appeal to this court as they have done'.

I agree entirely with this view of the court below. I do not think it can be faulted in any way. The trial court even alluded to this interlocutory nature of the application sequel to which the ruling was given when it remarked at page 34 of the record:

'The matter before the Court is merely the disposal of a preliminary objection. It is not the hearing of the substantive suit.'

And since it is an interlocutory as distinct from a final decision, the Appellant was required to comply with the constitutional and legal provisions in respect thereto. Having failed so to comply, the appeal before the court below was incompetent and was rightly struck out.

In view of the above and the fuller reasons contained in the lead judgment I also dismiss this appeal for lack of merit. I abide by the order on costs in the lead judgment.

Counsel

No Appearance ..... For the Appellants

Mrs. E.N. Obi-Akpudo

with her

Mrs. Ebele Ikwuagwu ..... For the Respondents