IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT BENIN CITY

ON THURSDAY, THE 17TH DAY OF SEPTEMBER, 2009

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR	-	JUDGE (PRESIDED)
MARY NEKPEN ASEMOTA (MRS)	-	JUDGE
TIMOTHY UKPEBOR OBOH	-	JUDGE
PETER AKHIMIE AKHIHIERO	-	JUDGE
OHIMAI OVBIAGELE	-	JUDGE

APPEAL NO. CCA/30A/06

BETWEEN
SAMSON AIGBE IGBINEWEKA é APPELLANT/APPLICANT

AND

MADAM MARY ERHAHON é
RESPONDENT/RESPONDENT

RULING

READ BY PETER AKHIMIE AKHIHIERO (JCCA)

On the 23rd day of July, 2009, the learned counsel for the appellant/applicant, O. M. Jamgbadi Esq., moved a motion dated and filed on the 2nd day of July, 2009, pursuant to the Customary Court of Appeal Rules, 2000 and prayed the Court for the following orders:

ñ(a) To amend the appellantôs brief of argument to take into

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recognition the additional grounds of appeal sought to be argued in the motion on notice dated 23rd December, 2006, but filed on 4th January,2007 which through inadvertence has not been formally moved; and

(b) Extension of time within which the appellant may file his Reply Brief of Argument, the time allowed by the rules of court having expired.ò

The application was supported by a 6 paragraph affidavit. The respondent filed a 34 paragraph counter-affidavit in opposition to the application.

Moving the application, the applicantôs counsel submitted that the counter ï affidavit merely gave a chronicle of the proceedings so far. He maintained that there was no substantial opposition from the counter-affidavit and he urged the court to grant his prayers.

In his reply, the learned counsel for the respondent, Dr. S. I. Urhoghide, informed the Court that he was opposed to the application and he relied on the 34 paragraphs of his counter-affidavit. He submitted that the motion was not brought under any particular law or rule of the Court and maintained that this was contrary to the provisions of the Customary Court of Appeal Rules, 2000. Furthermore, he submitted that the applicant was trying to bring in extraneous matters which were never considered by the lower court. According to him, the applicant was trying to bring back the

issues which were raised in Suit No. CCA/13A/94, which was previously struck out by this Court.

The respondentôs counsel further submitted that a counter-claim is a separate suit and that where it was not considered by the lower court, such a counter claim cannot be an issue to be considered on appeal. He maintained that it is not the duty of the court to tell a litigant or his counsel how to prosecute his case. He argued that an appellant has 30 days to file his appeal and 14 days to file a reply to the respondentôs brief and that these are statutory provisions which are mandatory. He referred to Order 4 rule 2(2) and Order 5 rule 4. of the CCAR, 2000. Counsel submitted that the applicant, having elected to ignore the rules of this Court, the court cannot indulge him unless he has disclosed some substantial reasons in his supporting affidavit. He referred to Ord 7 rule 5(1) of the CCAR, 2000, and maintained that no substantial reasons have been disclosed in the affidavit in support of this motion.

He argued that where it is apparent that the appellant is employing some delay tactics to abort the substantive case, the court should not grant leave to an applicant whose manifest intention is to delay the substantive suit. He cited in support, the case of Baicon Agro Chemicals & 3 Ors v

Kudu Holdings Industries Ltd. (2000) 82 LRCN 3332 ï 3366 at 3336 ratio 5, and urged the court to refuse the application.

Counsel submitted that for an issue for determination to be sustained, it must satisfy these two conditions:

(i) It must be formulated within the parameters of a ground of appeal; and

(ii) The ground of appeal must be against the judgment of the lower court.

He argued that the additional grounds of appeal are based on extraneous matters and that there is no nexus between them and the judgment appealed against.

He referred to the Baicon case supra at ratio 2 and submitted that where a party is praying an appellate court to resolve a question decided by the lower court in his favour, he must formulate grounds of appeal that are germane to the questions and issues properly raised thereon to justify the consideration of the appellate court. He cited in support, the case of Alhaji Saratu Adeleke v Alhaji Murinatu Raji & anor (2002) 12 MJSC 139 ï 149 at 141 ratio 1. He further submitted that a court of law can exercise its discretion in favour of an applicant where the delay was due to pardonable inadvertence caused by the negligence of counsel. For this proposition, he cited the case of Ogundimu v Kasumu (2006) 8 MJSC 19 ï 33, ratio 3.

Counsel submitted that it is settled law that for an application for extension of time to succeed, the applicant must show:

(i) Good and substantial reasons for failure to do certain things within the prescribed period;

(ii) That the grounds of appeal will prima facie show good cause why the application should be heard.

He maintained that the two conditions must be satisfied for the application to succeed. He cited the case of Saidi Ogundimu & 3 ors v Bello Kasumu supra ratio 1, in support.

Arguing further, the respondentôs counsel maintained that where as in the instant case, the lower court formulated its own issues and based its decision on issues not raised by the parties, such a decision should be set aside. According to him, the subject matter of the additional grounds of appeal was never canvassed before the lower court and for this proposition, he cited the case of Olatunji v Adisa (1995) 28 LRCN 297 ratio II. He further submitted that it is improper for a court to decide on an issue which was not raised by the parties and cited in support, the case of Stirling v Yahaya (2005) 11 MJSC 146 ratio 7.

The respondentôs counsel submitted that the findings of fact made by a trial court should be respected by the appellate court when it is clear that the trial court has adequately performed its primary duty of ascribing probative

value to the evidence before it. He maintained that such findings should be approached with caution and not on the basis that the appellate court might have decided the matter otherwise. He maintained that the essential consideration is whether there was sufficient evidence on record to support the findings of the trial court. He cited the case of Joe v Cooperative Bank (2003) 4 MJSC 173 ratio I and urged the Court to hold that the lower courtôs findings can be supported by the evidence on record.

On the attitude of the appellant who is raising fresh issues which were not canvassed at the trial, the respondentôs counsel submitted that an appellate court would not grant leave to a party to urge new issues except there is a substantial point. For this proposition, he cited the case of Eze v A.G. Rivers State (2002) 1 MJSC 91 rr. I and II.

Counsel submitted that in Exhibit ñAò, which is the document of sharing, the name of the appellant was excluded because he was not a biological child of the deceased and that under Benin custom, a child who did not bury his father cannot inherit his fatherôs property. He maintained that the issue of the judgment of the earlier court not being tendered is immaterial because the court took judicial notice of the said judgment. Furthermore, he maintained that the argument that since the solicitor who

prepared the document of sharing was the respondentôs solicitor, he was biased, is not tenable and that no one complained about the sharing.

He finally urged the Court to dismiss the application with costs of N10,000.00 in favour of the respondent.

Replying on point of law, the applicantôs counsel referred to the motion before the Court and submitted that the applicant only requested for extension of time in respect of relief 2 and not relief 1. He maintained that all the authorities cited by the respondentôs counsel are irrelevant and that the Court should refuse to rule on a substantive matter at an interlocutory stage.

Finally, he submitted that the current trend is that technicalities are not allowed to becloud substantial justice. He therefore urged the Court to grant the application.

We have considered the submissions of both counsel in this application.

The application is for leave to amend the appellantôs brief of argument to incorporate the additional grounds of appeal attached to the motion on notice dated 23rd December, 2006, but which was not formally moved by the applicantôs counsel until the last hearing date of this case (23/07/09), and for extension of time to file the appellantôs Reply Brief of Argument.

It is pertinent to observe at this juncture that on the 23rd day of July, 2009, upon the application of the appellant, which was not opposed by the respondent, this court granted the appellant extension of time to file the said additional grounds of appeal, leave to file and argue same, and deemed the said additional grounds of appeal marked as Exhibit óAô as being properly filed and served, the appropriate filing fees having been paid.

In the present application, the appellant/applicant is seeking leave to amend the appellantôs brief of argument to take cognisance of the said additional grounds of appeal already filed. According to the applicantôs counsel, the lapse was as a result of the inadvertence of counsel.

The general principle is that an appellate court should be liberal to grant an amendment unless the amendment will cause undue delay and/or occasion a miscarriage of justice. The test as to whether a proposed amendment should be allowed is whether the respondent can be compensated with costs if the application for amendment is granted. See the following cases: Shanu v Afribank (Nig) Plc. (2000) 13 NWLR (Pt. 684) 392; Adekeye v Akin-Olugbade (1987) 3 NWLR (Pt. 1060) 214; and Gambari v Mahmud (2008) 14 NWLR (Pt. 1107) 209 at 212. Furthermore, where a consequential amendment can be made by the respondent, it is

proper to grant the application for amendment. See the case of Gambari v Mahmud (supra) at p. 213.

In the instant case, since the additional grounds of appeal have been incorporated into the proceedings, it is expedient for the appellant to amend his brief of argument to canvass arguments on the additional grounds. Moreover, the respondent is at liberty to file a consequential amendment, and can be indemnified in costs.

We observed that the application for amendment is predicated on the inadvertence of the applicantôs counsel. The authorities are now settled that the mistake of the counsel should not be visited on the client.

See the following cases: Doherty v Doherty (1964) 1 All N.L.R. 299; Yesufu v Co-operative Bank Ltd. (1991) 3 NWLR (Pt. 110) 483; and Megwalu v Megwalu (1996) 2 NWLR (Pt. 428) 104 at 116.

In the course of his vehement opposition to the application, the learned counsel for the respondent made a marathon submission on several issues which relate to the substantive appeal before us. It is settled law that in dealing with an interlocutory application, a court must be wary not to decide the main question or issue in the substantive suit.

See the following cases on the point: Nigerian Civil Service Union v Essien (1985) 3 N.W.L.R. (Pt. 12) 306 at 316; University Press Ltd v Martins

(2000)4 NWLR (Pt. 654) 584 at 600; and Kotoye v Saraki (1993) 5 NWLR (Pt. 296) 710 at 721.

On the authorities cited above, we cannot at this stage, adjudicate on the substantive issues raised by the respondentôs counsel in the course of his argument. The issues can be raised in the substantive appeal where they can be resolved.

In the event, we grant the first limb of the application.

The appellant/applicant is granted leave to amend his brief of argument to take cognizance of the additional grounds of appeal already filed and served on the respondent.

The second prayer is for extension of time to file a Reply Brief of Argument, the time allowed by the rules of court having expired. The issue of extension of time to take any procedural step is guided by the rules of court and it must be borne in mind that an application for extension of time is not granted as a matter of course. In considering the application, the court must exercise its discretion judicially and judiciously. See the case of Odutola v Lawal & Ors. (2002) 1 NWLR (Pt. 749) 633 at 660.

In paragraph 4 of the affidavit in support of this application, the applicant deposed to the fact that the Reply Brief is ready, but because of his inability to meet his obligations to his solicitor, regarding professional fees

and expenses, it has not been possible to file same. He, however, promised to file the brief within seven days if the application is granted.

Although inability to pay solicitorôs fees does not appear to be a very cogent reason, we will exercise our discretion in favour of the applicant, in view of his undertaking to file the brief within seven days of the grant of this application.

In the event, the second prayer succeeds. Accordingly, the applicant is granted extension of time to file the Reply Brief within seven days from today.

On the whole this application succeeds. The two prayers are granted according to the terms already stated.

Ordinarily, we ought to award some costs in favour of the respondent, but in view of the vehement opposition to this application we make no order as to costs.

HON. JUSTICE PETER OSARETINMWEN ISIBOR

HON. JUSTICE MARY NEKPEN ASEMOTA (MRS)

HON. JUSTICE TIMOTHY UKPEBOR OBOH

HON. JUSTICE PETER AKHIMIE AKHIHIERO

HON. JUSTICE OHIMAI OVBIAGELE

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