IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

(APPELLATE DIVISION)

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

ON THE 6TH DAY OF DECEMBER 2016 APPEAL NO. FCT/HC/CVA/62/16

BEFORE THEIR LORDSHIPS:

HONOURABLE JUSTICE FOLASADE OJO (PRESIDING JUDGE)

HONOURABLE JUSTICE D. Z. SENCHI - (JUDGE)

BETWEEN:

1. AFEMAI MOTORS
2. ABU DOKPESI } APPELLANTS

AND

P. NACO (NIG.) LTD.
Suing through its Chairman &
Managing Director, P. N. Ibekie RESPONDENT

JUDGMENT

OJO, J, Delivering the Judgment of the Court.

The respondent herein took out a plaint at the District Court of FCT, Abuja wherein he sought the following reliefs:

"a) An order for immediate vacant possession of the said shop.

b) An order for the payment of arrears of rent the sum of N130,000 for 2 years.

c) An order for payment of mesne profit and rent arrears from September 2013 until the defendant vacate the said shop calculated monthly at N16,666,66.

d) An order for the payment of cost at N15,000.00."

Judgment in the suit was delivered by Mohammed T. Jibrin Kutigi, Senior District Judge II on the 10th of November 2015. Dissatisfied with the judgment the appellant who was granted leave to appeal out of time filed a notice of Appeal dated 6th of April 2016. The notice of Appeal contains four grounds. The grounds of Appeal with their particulars are as follows:

"GROUND ONE

The trial judge erred in law where it held against evidence on record that it gave defendant adequate time to enter defence.

PARTICULARS OF ERROR

i. *The appellants right to fair hearing guaranteed under Section 36 of the Constitution of the Federal Republic of Nigeria 1999 was breached.*
ii. *The said notices which the Court ordered were not served on the appellant.*
iii. *The Court failed to rely on its own record in arriving at its decision.*
iv. *The said statutory notices which the Court relied on are irregular and not in compliance with the provision of the Recovery of Premises Act.*

GROUND TWO

The District Judge misdirected itself when it held that the defendants did not have any defense at all to make in this case.

PARTICULAR OF ERROR

i. *The defendants were not properly served with notice of proceedings up to the point of judgment.*

ii. That contrary to the requirement of Order XXV of District Court Rules the defendants were not notified of the day judgment was to be delivered hence they were not given adequate opportunity to put up a defence.

iii. The defendant did not know there was a judgment against them until execution was levied against them.

iv. The judgment was given in default of appearance and though the defendant/appellant applied to be given opportunity the Court refused. Therefore it is not true that the defendant/appellant does not have any defense.

GROUND THREE

That the District Judge erred in law when it went outside the pleadings and evidence before it to arrive at its decision.

PARTICULARS OF ERROR

i. The judgment of the Court is ambiguous and subject to different interpretations.

ii. The certificate of judgment is different from the judgment on record.

iii. The judgment of the Court does reflect the record of the Court.

iv. That the judgment of the Court is not based on the pleadings and evidence before the Court.

GROUND FOUR

The decision of the District Judge is against the weight of evidence before it."

The reliefs sought by the appellants are as follows:

"i. To allow the appeal and set aside the judgment of the learned trial District judge as well as the orders thereon.

ii. An order remitting the matter to another District Court for a new trial as the Defendants/Appellants have a solid defence on the merit."

A summary of the plaintiff's case (who is the respondent herein) at the lower court is that he leased to the defendants/appellants a shop as a yearly tenant at the rate of N200,000.00 with effect from October 2011. The tenancy was renewed at its expiration in 2012. The defendant paid N120,000 out of the due rent leaving a balance of N80,000. At the expiration of the tenancy in September 2013 the defendants who were in arrears of their rent refused to give up possession despite been served the requisite statutory notices. The defendants who are the appellants did not participate at the trial.

The appellants' brief of argument is dated 11th August 2016 and filed on the same date. The respondent's brief of argument is dated 3rd October 2016 and filed on the 7th of October 2016. The appellant filed a reply brief dated and filed on the 17th October 2016. At the hearing, counsel adopted their respective briefs of argument as their oral submissions.

The appellants' counsel distilled the following issues for determination:

"1. Whether from the record which is now before this Honourable Court adequate opportunity was given to the appellant at the Lower Court in view of its constitutional right to fair hearing.

(Distilled from Grounds 1 and 2)

2. Whether the decision of the Lower Court in this case conform with the principles of law regulating proper and correct evaluation and admission of evidence.

(Distilled from Grounds 3 and 4)"

For his part learned counsel to the respondents in the respondent's brief of argument formulated the following issues:

> *"1. At what time can a Court set aside its judgment having given an appellant adequate opportunity in view of its constitutional right of fair hearing.*
>
> *2. Whether the decision of the Lower Court in this case conform with the principles of law regulating proper and correct evaluation and admission of evidence."*

Learned counsel to the appellant arguing his first issue submitted that the Lower Court failed to ensure service of hearing notices on the appellants in compliance with relevant laws and rules of Court and which failure he said occasioned miscarriage of justice and a violation of the appellants' right to fair hearing. He referred to several pages of the record of proceedings to buttress his position and craved in aid of his submission the cases of SALU VS. EGEIBON (1994) 6 NWLR (Pt. 348) Pg. 23, GAMBARI VS. GAMBARI (1990) 5 NWLR (Pt. 152) Pg. 572 and INAKOJU VS. ADELEKE (2007) ALL FWLR (Pt. 353) Pg. 115 Paragraphs E - F.

Arguing further on this issue counsel submitted it was wrong for the Court to proceed with the hearing of the case on a date it was fixed for mention. He said the Court on the 6th of July 2015 adjourned the case to 23/7/2015 for further mention but proceeded to hear the matter on that day against its own order. He referred to page 7 of the record and urged us to hold that the judgment delivered in such circumstance was a nullity. He referred to the case of NIGERIAN NEWSPAPER LTD. VS. OTTEH (1992) 4 NWLR Pt. 237 Pg. 626.

On the second issue, Appellants' counsel submitted that it is settled law that a party cannot lead evidence on an upleaded issue and where such evidence is given the Court has a duty to expunge it from the record. He said there was nowhere in the pleadings the respondent

claimed the sum of N1,765,000 awarded by the Court. He relied on the cases of NATIONAL INVESTMENT & PROPERTIES & CO. LTD. VS. THOMPSON ORGANISATION LTD. & ORS. (1969) NMLR 99 at 104, NSIRIM VS. NSIRIM (2002) 2 SCNJ 46 at 57, SALIBA VS. YASSIN (2002) 2 SCN 314 at 29 - 30, EMEGOKWE VS. OKADIGBO (1973) 4 SC 113 at 117.

He urged us to allow this appeal and set aside the judgment of the Lower Court.

Learned counsel to the respondent arguing the issues formulated by him, submitted that the Lower Court ensured hearing notices were served on the appellants and this being so there was no breach of appellants' right to fair hearing. He submitted that the appellants who were aware of the suit and deliberately absented themselves from Court can no longer complain of lack of fair hearing. He craved in aid of his submission the case of MARITIME LTD. VS. OTEJU (2005) NSCQR Vol. 22 Pt. 1 page 295. He urged us to resolve the two issues against the appellant and dismiss this appeal.

The two issues formulated by appellants' counsel cover the grounds. They are distilled from the grounds of appeal.

ISSUE NO. 1

Whether from the record which is now before this Honourable Court adequate opportunity was given to the appellants at the Lower Court in view of its constitutional right to fair hearing.

The complaint of the appellants in grounds 1 and 2 is that they were not given fair hearing. They say they were not served with hearing notice. The law is settled that service of processes is very fundamental and it goes to the very foundation of a trial. It is a condition precedent to the exercise of jurisdiction of a Court. It is trite that proceedings of a

Court conducted without jurisdiction is a nullity. In the case of AJIBOLA VS. SOGEKE (2003) 9 NWLR Pt. 826 Pg. 494 it was held at page 524 paragraphs B - E as follows:

> *"The essence of service of process whether personal or substituted is to give notice to the other party on whom service is to be effected so that he may be aware of and be able to resist if he may that which is sought against him. Service of process is sine qua non for any party who has not been served unless he otherwise submits to the Court's jurisdiction. The requirement of putting the other party on notice underscores a party's right to be heard or to be given opportunity to be heard, a principle deriving its source from natural justice…*
>
> *The issue of service of Court process is basic and fundamental as it is the foundation of civil action. If there is no proper service it follows that the action is improperly constituted and the Court is without jurisdiction."*

The proceedings of trial at the Lower Court is at pages 36 - 43 of the record of Appeal. The appellants were absent throughout the proceedings. On 9/6/2015 when the case came up for mention the appellants as defendants were absent. The case was adjourned to 22/6/2015 for hearing. They were also not in Court on 22/6/2015.

The proceeding of 22/6/2015 is as follows:

Plaintiff's counsel: *"The case is for hearing and the defendants are duly served and therefore we shall be asking for another date for definite hearing.*

Court: Case is adjourned to 6/7/2015 for definite hearing."

On the 6th of July 2015 the defendants were again absent.

Plaintiff counsel: The case is for definite hearing but the amended plaint note cannot be served on the defendants personally therefore we are applying for an order of substituted service of process on the defendant.

The record at page 37 shows a Court ruling.

Court Ruling:

"This Honourable Court ordered that the defendants shall be served all Court process by pasting same on the defendants' door premises at Lagos Park, Zuba, Abuja with proof of service filed in the case file on or before the next adjourned date.

Case is adjourned to 31/8/2015 for mention."

The enrolled order of substituted service is at page 7 of the record. The order which is dated 22nd of July 2015 reads thus:

"2. The case is adjourned to 23rd of July 2015 for further mention."

The case came up again on the 23rd of July 2015. The defendants were absent. P.W.1 gave his evidence on that day.

The case was adjourned to 12/8/2015 for continuation of hearing. The Court ordered hearing notice to be served on the defendants and proof of service filed accordingly.

On 12/8/2015, P.W.1 concluded his testimony and the case was adjourned to 7/9/2015 for cross examination and defence. The Court ordered that hearing notice be served on the defendants.

On 7/9/2015 the defendants were absent. The defendants' right to cross examine P.W.1 and defend the suit was foreclosed. The case was subsequently adjourned to 28/9/2015 for adoption of final written address.

On 28/9/2015 the plaintiff's counsel adopted the plaintiff's final written address and the case was adjourned to 28/10/2015 for judgment.

Judgment of the Court which was delivered on 3rd November 2015 is at pages 41 - 43 of the record. The Court on the 23rd of July 2015 while adjourning to 12th August 2015 for hearing ordered hearing notice to be served on the defendants. The Court again on the 12th of August, 2015 while adjourning the case to 7/9/2015, ordered that hearing notice be served on the defendants and proof of service filed.

At page 18 of the record is a certificate of service of the bailiff. It is dated 29th of June 2015. The bailiff stated therein that he could not effect the service of the amended plaint on the defendants. There is a notice for a hearing of 22nd of June 2015 at page 19 of the record. The said hearing notice was served on one Dokpesi Jude on the 16th of June 2015. There is another hearing notice for a hearing of 12th August 2015 which was also served on Dokpesi Jude on the 24th of July 2015. The order of substituted service granted is that all the processes be served on the defendants by pasting same on the defendants' door at Lagos Park, Zuba, Abuja. The two hearing notices meant for the defendants which are at pages 19 and 20 of the record were served on one Jude Dokpesi who is not a party to the suit. The address of Jude Dokpesi on the proof is Zuba. There is no record of who Jude Dokpesi is. The order for substituted service is very clear. It is as follows:

> *"1. Leave of the Honourable Court is hereby granted for the plaintiff/applicant to effect the service of all the processes in this suit by substituted means i.e. by serving them on the defendants' door at Zuba Lagos Park, FCT Abuja and Photograph be attached as proof of such service shall be deem proper in the circumstances."*

There is no affidavit of service of the bailiff of Court that the service on the defendants was carried out in compliance with the order of Court. The appellants who were the defendants at the Lower Court are

1. Afemai Motors
2. Abu Dokpesi

We have gone through the entire record of Appeal and we cannot find any evidence of the service of the originating processes on the defendants. Service of hearing notices meant for the defendants on one Jude Dokpesi, who is not a party to the suit and whose designation is unknown is not proper service in accordance with the law. The Court ordered that hearing notices be served on the defendants. See pages 39 - 40 of the record. There is nothing in the record to show that the hearing notices were served in compliance with the order of Court.

The case was on the 6th of July 2015 adjourned to the 23rd of July 2015 for further mention. See page 37 of the record of appeal and the Court order for substituted service at page 7 of the record. The Court however on the 23rd of July 2015 proceeded to hear the case which was a day fixed for mention. P.W.1 gave his evidence on that day. In the case of NEW NIGERIAN NEWSPAPERS LTD. VS. OTEH (1992) 4 NWLR Pt. 237 Pg. 626, Kutigi JCA at page 63 paragraph G held as follows:

> *"It is clearly wrong for the trial Court to have treated the date which was for mention as a hearing date and any judgment consequently obtained would be a nullity... In short I hold the view that the appellants were not afforded sufficient opportunity of presenting their defence at the trial. The appeal therefore succeeds on this ground alone."*

The trial Judge was therefore in error when he proceeded to take the evidence of P.W.1 on 23rd of July 2015 and we so hold. The subsequent judgment given is a nullity.

The trial District Court judge in his judgment at page 42 of the record stated as follows:

> *"It should be noted this case is adjourned to several times for the defendants to enter their appearance and defence i.e. eleven times (11X) (sic) and all proved abortive, despite being served with a hearing notice through substituted service processes in accordance with the provision of Order 24 Rule 4(2) District Court Rules Cap. 33 LFN 1990."*

The above finding of the trial Court is not supported by the record of Court and we so hold.

The complaint of the appellants in grounds 1 and 2 of this appeal is that they were not given fair hearing. The expression "fair hearing" has been held to mean trial of a case or conduct of proceedings according to all relevant rules for ensuring justice. See SALU VS. EGEIBON (1994) 6 NWLR Pt. 348 Pg. 23 at 40 Para E.

From the entire gamut of the record of proceedings as contained in the transcript record of appeal we are of the view that the appellants who were defendants in the Lower Court were not served with the processes of Court at the trial in the suit instituted against them by the respondent. They were not served with the originating processes and no hearing notices were served on them. They were therefore not aware of the case against them. It is the judgment given against them at that trial in which they did not participate because they had no notice of the suit that is the subject of this appeal.

Considering the entire circumstance of the instant case as narrated earlier can it be said that the appellants were accorded fair hearing by the Lower Court? We have no hesitation in answering this question in the negative and we so do.

The law is settled that the right to fair hearing is a fundamental constitutional right guaranteed by the Constitution of the Federal Republic of Nigeria and a breach of it in trials vitiates proceedings and renders same null and void and of no effect. See A. G. RIVERS STATE VS. UDE (2006) 17 NWLR Pt. 1008 Pg. 436, CEEKAY TRADERS LTD. VS. GENERAL MOTORS CO. LTD. (1992) 2 NWLR Pt. 222 Pg. 132 and EKUFOR VS. BOMOR (1997) 9 NWLR Pt. 519 Pg. 10.

In SALU VS. EGEIBON (SUPRA) Adio JSC at page 44 Paragraphs F-G held as follows:

> *"Consequence of a breach of the rule of natural justice of fair hearing is that the proceedings in the case are null and void. See ADIGUN VS. A. G. OYO STATE (1987) 1 NWLR Pt. 53 Pg. 678. If a principle of natural justice is violated it does not matter whether if the proper thing had been done the decision would have been the same. The proceeding will still be null and void…… The decision must be declared to be no decision. See Adigun's case (Supra). In effect, the proceedings in this case before the learned trial judge are null and void."*

The consequence of all of the above is that issue No. one is resolved in favour of the appellants. We agree with the appellants' counsel that the proceedings in the Lower Court as contained in the transcript record of appeal were conducted in violation of the appellants' right to fair hearing. We find merit in Grounds 1 and 2 of the appeal and the said grounds succeed.

ISSUE NO. 2

Whether the decision of the Lower Court in this case conforms with the principles of law regulating proper and correct evaluation and admission of evidence.

The judgment of the trial District Court is at pages 41 to 43 of the record. The trial judge after a summary of the evidence of P.W.1 went on to say that the defendants did not show up at the trial. He came to the conclusion that the defendants had no defence to the action and held as follows:

> *"Judgment is entered in favour of the plaintiffs against the defendants as follows:*
>
> 1. *The defendants shall vacate the plaintiffs shop immediately.*
> 2. *The defendants shall pay to the plaintiff all arrears of rent including mesne profit as at when due before vacating the premises.*
> 3. *I award N15,000 as cost of action against the defendants.*
> 4. *That is the judgment of this Honourable Court with a right of appeal to the High Court within 30 days."*

It is evident from the judgment that the trial Court did not make any findings on the fact presented by the plaintiff/respondent before making its orders. The claim of the plaintiff was for recovery of premises. It is trite that service of statutory notices is a sine qua non for recovery of premises. See AYINKE STORES LTD. VS. ADEBOGUN (2008) 10 NWLR (Pt. 1096) Pg. 612 at 629.

The trial judge did not make any findings on the issue of service of statutory notices on the defendants. He did not evaluate the evidence before taking his decision. The law is trite that it is the duty of the Court to evaluate the evidence adduced before it at a trial and make appropriate findings. The trial judge in making its orders did not make any

pronouncement on when the tenancy of the defendants expired, the period the defendants were in arrears and when the mesne profit began to run.

What is the meaning of the order of the trial Judge that "The defendants shall pay to the plaintiffs all arrears of rent including mesne profit as at when due before vacating the premises"? It has no meaning. It is vague, ambiguous and capable of several interpretations. These are patently not the characters of a good judgment. A judgment that is vague and capable of different interpretations should not be allowed to stand. We also resolve Issue No. 2 in favour of the appellant and we find merit in grounds 3 and 4.

In conclusion, we find merit in all the grounds of appeal and allow this appeal. We hereby set aside the Judgment of the District Court delivered in SUIT NO. CV/130/15 and order a retrial of the said suit before another district judge within the Federal Capital Territory.

HON. JUSTICE FOLASADE OJO
PRESIDING JUDGE
6/12/2016

HON. JUSTICE D. Z. SENCHI
HON. JUDGE
6/12/2016

Ibrahim Okpe with Andrew Osibemhe, Victor Osigbe and M. M. Yusuf for the Appellants.

Peter Uche Udoku for the Respondent.