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/11/5

BEFORE THEIR LORDSHIPS:

HONOURABLE JUSTICE FOLASADE OJO (PRESIDING JUDGE)

HONOURABLE JUSTICE D. Z. SENCHI - (JUDGE)

BETWEEN:

MR. ADEGOKE ADEKUNLE GABRIEL APPELLANT

AND

MR. KUNLE AJIBADE RESPONDENT

JUDGMENT

OJO, J, Delivering the Judgment of the Court.

This is an appeal against the judgment of the Senior District Judge (Coram Mohammed T. Jibrin Kutigi) delivered on 16/3/15 in SUIT NO: CV/867/2014 between the Appellant as defendant and the Respondent as plaintiff. Dissatisfied with that decision the appellant filed a notice of Appeal dated 17th of March 2015 which was filed on the same date. The grounds of the appeal without their particulars are as follows:

"GROUND I - ERROR OF LAW

That Lower Court erred in law when it held in the ruling that the appellant's preliminary objection is an attempt by the appellant to raise substantive issues at an interlocutory stage.

GROUND II - MISDIRECTION

The Lower Court misdirected itself when it held that failure of the respondent to serve quit notice on the appellant is a substantive issue.

GROUND III - MISDIRECTION

The Lower Court misdirected itself when it allowed the respondent who did not file a counter affidavit to the appellant's preliminary objection to reply on points of law.

GROUND III (SIC) - MISDIRECTION

The Lower Court misdirected itself when it prevented the appellant from cross-examining the witness of the respondent.

GROUND IV - MISDIRECTION

The Lower Court misdirected itself when it did not allow the appellant to move its motion on notice to allow the appellant cross-examine the respondent's witness notwithstanding that the said motion on notice was in the court file, served on the respondent and brought to the attention of the Court before judgment was delivered.

GROUND V - MISDIRECTION

The Lower Court misdirected itself when it did held that he respondent has proved its case without giving opportunity to the respondent to present her case."

The reliefs sought in this appeal are as follows:

"A reversal of the Lower Court's ruling upholding its jurisdiction to entertain this matter and an order setting aside the entire proceedings and overturning the judgment of the Lower Court."

Leave was granted to parties to file their respective briefs of argument out of time. The appellant's counsel adopted the appellant's brief

of argument dated 1st June 2015 and an appellant's reply brief dated 17th March 2016 as his oral arguments in support of this appeal. The respondent's counsel adopted the respondent's brief of argument dated 17th June 2016. The respondent who was the landlord at a property occupied by the appellant took out a writ of summons at the District Court holden in Kubwa where he sought the following reliefs:

> *"a) An order of this Honourable Court for the forceful ejection and removal of the defendant, his privies and any other person whomsoever from the plaintiff's three bedroom flat situate at Plot C14, Ebazango West Layout, Kubwa, Abuja, Federal Capital Territory.*
>
> *b) Mesne profit at the rate of N500,000.00 (Five Hundred Thousand Naira) that is N41,666.66 (Fourty One Thousand, Six Hundred and Sixty Six Kobo) per month computed from 6th June 2014 when the tenancy expired till the date the defendant effectually and completely yields vacant possession of the said flat to the plaintiff.*
>
> *c) Total costs of legal proceedings including filing fees, services costs etc."*

The record of proceedings of the trial Court from the 23rd of September 2014 up until the 16th of March 2015 when judgment was delivered is at page 8 - 45 of the transcript record of appeal.

Learned counsel to the Appellant in his appellant's brief of argument distilled three issues for determination to wit:

> *"1. Whether the appellant's preliminary objection raises substantive issues at an interlocutory stage (Grounds 1 and 2).*

2. *Whether the Lower Court was right to adjourn the case for defence without first giving the appellant the opportunity to cross examine the respondent's witness (Ground 3).*
3. *Whether the Lower Court was right when it ignored the appellant's motion on notice filed on 25th February 2015 (Ground 4)."*

Counsel to the respondent adopted and argued the same issues proposed by the appellant's counsel. He however raised some preliminary issues which we shall deal with before going into the substantive appeal.

Learned counsel to the respondent in his brief of argument contend that this appeal is incompetent. He submitted that the appeal which is also an appeal against an interlocutory decision was filed without leave of Court as the time allowed for filing an appeal against the interlocutory decision had lapsed at the time the notice of appeal was filed. He relied on the provisions of Order 43 Rule 1 of the FCT High Court Civil Procedure Rules which stipulates that any appeal against an interlocutory decision must be filed within 15-days. The instant appeal came up before the High Court of Appeal on the 27th of September 2016. The record of Court shows that a motion filed by the appellant wherein he sought for an extension to file an appeal against the interlocutory decision of the trial Court and deeming the already filed notice of Appeal dated 17th March 2015 challenging the interlocutory decision/ruling of the trial Court delivered on 9/2/15 as duly filed and served was moved. The Appeal Court, Coram: Kekemeke J, Venda J. granted the appellant leave to appeal against the interlocutory decision out of time and deemed the notice of Appeal as duly filed and served. In view of the leave so granted, we find no merit in the respondent's counsel's objection to the competence of this appeal

on the ground that leave of Court was not sought to appeal against the interlocutory decision of the trial Court.

Learned counsel to the respondent further contend that the notice of Appeal dated 17th of March 2015 does not bear the seal and stamp of the appellant's counsel issued by the Nigerian Bar Association. The Supreme Court has held that the failure to affix the NBA seal would not render a process void ab initio. See the cases of GEN. BELLO SARKIN YAKI (RTD.) & ANOR VS. SENATOR ATIKU ABUBAKAR BAGUDU & ORS. (Unreported decision of the Supreme Court of Nigeria) in SUIT NO: SC/722/2015 delivered on the 13th of November 2015 and MEGA PROGRESSIVE PEOPLES PARTY VS. INDEPENDENT NATIONAL ELECTORIAL COMMISSION & ORS (Unreported decision of the Supreme Court of Nigeria) in SUIT NO: SC/665/2015 delivered on the 12th of October 2015.

The Notice of Appeal complained about was filed on the 17th of March 2015 before the NBA directive. The Respondent's counsel who raised a similar objection to the Appellant's brief of argument at the proceedings of 21st of March 2016 did not say anything on the alleged defect in the Notice of Appeal. The failure to affix the stamp and seal is not an incurable defect. We have considered the stage of this proceedings as well as the fact that the notice of appeal admittedly was filed before the directive of the NBA and we are of the firm view that it would not be in the interest of justice to hold the notice of appeal incompetent on this ground. There is no evidence that the signatory on the notice is not a legal practitioner competent to practice in Nigeria.

It is further the contention of respondent's counsel that the appellant's counsel failed to distill any issue in respect of grounds 3 and 4 of the appeal. Relying on the cases of VICTOR ADELEKAN VS.

ECU-LINENU (2006) VOL. 8 M JSC 142 at 158, UNITY BANK PLC & ANOR VS. EDWARD BOUARI (2008) VOL. 14 SCLR Pg. 81 at 108 and ADEJUMO VS. OLANAIYE (2015) E JSC VOL. 2 Page 100 at 119, counsel submitted that Grounds 3 and 4 are deemed abandoned and urged us to strike them out.

The law is trite that any ground of appeal from which no issue is distilled is deemed abandoned and no argument on such ground should be countenanced by the Court. An appeal is decided on the issues formulated from the grounds of appeal. See WEST AFRICAN EXAMINATION COUNCIL (WAEC) VS. ADEYANJU (2008) 9 NWLR Pt. 1092 Pg. 290 and AFEGBAI VS. A.G. EDO STATE & ORS. (2001) 14 NWLR Pt. 733 Pg. 425. It appears that the Notice of Appeal contain two grounds of Appeal numbered GROUND III. They read thus:

"*GROUND III - MISDIRECTION*

The Lower Court misdirected itself when it allowed the respondent who did not file a counter affidavit to the appellant's preliminary objection to reply on points of law."

The complaint of the respondent is on the first ground III which is quoted above. The particulars of the said ground are as follows:

"PARTICULARS OF ERROR

1. *A respondent who intends to challenge averment in an affidavit must file a counter affidavit.*
2. *The respondent has enough time to have responded to the applicant's motion on notice.*
3. *The appellant was not put on notice for the respondent's reply on points of law.*
4. *The appellant was not given opportunity to respond to the respondent's reply on point of law."*

We have gone through the appellant's brief of argument and particularly the issues argued therein and we find no issue formulated in respect of the first ground III. No argument was canvassed in respect of the particulars thereof. The said ground is thus deemed abandoned and it is accordingly struck out.

The complaint in Ground V of the appeal is on the denial of the appellant's right to cross examine the respondent's witness. This issue was addressed extensively under the second issue distilled by the appellant in his brief of Argument. This ground of Appeal cannot therefore be deemed abandoned and we so hold. We find no merit in the respondent's complaint on ground 5 and same is overruled.

We shall now proceed to consider the substantive issues distilled from the grounds of appeal.

ISSUE 1

Whether the appellant's preliminary objection raises substantive issues at an interlocutory stage.

In the course of hearing at the trial Court the appellant as defendant filed a motion on notice wherein he sought the following reliefs:

"1. An order dismissing the suit of the Plaintiff/Respondent for being fundamentally defective and incompetent.

2. And for such further or other orders as this Honourable Court may deem fit to make in the circumstances."

The grounds for the application are as follows:

"1. The Defendant/Applicant is a statutory tenant of the plaintiff.

2. Statutory Notice (particularly notice to quit) which is a condition precedent for the commencement of this suit against the Defendant/Applicant was not served on her.

3. This Court cannot exercise jurisdiction over a suit that is incompetent.

4. This suit is an abuse of Court process."

The motion is at pages 9 - 23 of the record of appeal, while the ruling is at pages 26 - 27. The Court dismissed the motion on the ground that the reason for the application was a matter to be decided in the substantive suit and not at the interlocutory stage.

Learned counsel to the appellant argued that the trial Court was in error when it failed to decide the issue of service of statutory notice which is fundamental to its jurisdiction at the point it was raised. He submitted that the appellant was right in raising the issue at the preliminary stage of the proceedings since service of statutory notices is a condition precedent for the assumption of jurisdiction in recovery of premises matters. He relied on the cases of ELIJAH VS. BANGUDU (1994) 3 NWLR Pt. 334 Pg. 534, UMAWALL VS. ATTAH (2006) 17 NWLR (Pt. 1009) Pg. 503 and NNONYO VS. ANYICHIE (2005) 2 NWLR (Pt. 910) Pg. 623.

He urged us to resolve this issue in favour of the appellant.

The position of the respondent's counsel is that the issues raised in the motion are not such that could be dealt with at the preliminary stage as they clearly involve substantive issues. He submitted that it is a well settled principle of law that Courts should not delve into substantive issues at the interlocutory stage and craved in aid of his submission the case of UPL VS. MARTINS (2000) 2 SC 125.

Trial at the Lower Court commenced with the respondent opening his case on the 23rd of September 2014. The matter was adjourned for the cross examination of the respondent's witness. The appellant filed a motion on notice dated 8th October 2014 before the date fixed for the cross

examination of the respondent's witness. The application was argued and ruling delivered.

The cause of action in the suit before the Lower Court is one predicated on recovery of premises. This is manifest from the application for plaint and the reliefs sought. By virtue of Section 7 of the Recovery of Premises Act Cap. 544 Laws of the FCT Nigeria 2006, a tenant is entitled to be served with a 7day notice of owners intention to recover possession of the demised premises at the end or determination by notice to quit of a tenancy. It is after the proper service of these notices that a landlord may proceed to institute an action for recovery of possession of his premises under Section 10 of the Recovery of Premises Act. See IWUAGOLU VS. AZYKA (2007) 5 NWLR Pt. 1028 Pg. 613 at 630 Paras. C - F, AYINKE STORES LTD. VS. ADEBOGUN (2008) 10 NWLR Pt. 1096 Pg. 612 at 630 and IHENACHO VS. UZOCHUKWU (1972) 2 NWLR Pt. 487 Pg. 257.

It is based on the alleged failure of the respondent to serve the appellant the statutory notices that he (the appellant) sought a dismissal of the suit before the Lower Court in limine. The Court of appeal in the case of IWUAGOLU VS. AZYKA (Supra) dealt extensively with the issue of adequacy or competency of statutory notice and when such could be raised. The Court at page 630 paragraphs C - F held as follows:

> *"The service of statutory notices is a condition precedent to a landlord's right of action in recovery of possession. See SOVCCHI M & F CO. LTD. VS. ALABI (1996) 7 NWLR (Pt. 462) Pg. 627, SULE VS. NIG. COTTON BOARD (1985) 2 NSCC VOL. 16 Pg. 809.*
>
> *The above simply means that before a landlord commences an action for recovery of possession the requisite notices i.e.*

notice to quit and notice of owner's intention to apply to recover possession must be properly served on the tenant.

In the District Court and the High Court learned counsel for the appellant made it an issue on affidavit evidence that quit notices were not properly served on the tenant.

My lord, the issue of service of relevant notices in suit of landlord and tenant for possession of premises can only be resolved at trial after hearing evidence."

While we agree that service of statutory notices goes to the jurisdiction of a Court to entertain a suit for recovery of premises, we are however of the view that the issue is not one that can be determined by way of objection to the competence of the suit in limine as done by the appellant at the Lower Court. A determination of whether notices were served requires proof by evidence which may only be done after evidence is taken. In other words it is a matter for determination in the substantive suit. Taking a decision on whether the statutory notices were served would have the effect of determining issues meant for trial at an interlocutory stage which a Court should not do. See ADENUGA VS. ODUMERU (2002) 8 NWLR Pt. 821 Pg. 163 at 188 Paras. E - FG.

We are therefore of the firm view that the Lower Court was on a strong wicket when it refrained from determining the issue of service of the statutory notices at the stage it was called upon to do so by the appellant. The motion on notice of the appellant which was in the form of preliminary objection raised substantive issues which the Lower Court could not determine at an interlocutory stage. We answer the first issue in the affirmative and resolve same against the appellant.

ISSUES NO. 2 AND 3:

2. Whether the Lower Court was right to adjourn the case for defence without first giving the appellant the opportunity to cross-examine the respondent's witness.
3. Whether the Lower Court was right when it ignored and refused to rule on the appellant's motion on notice filed on 25th February 2015.

Learned counsel to the appellant posited that the Lower Court did not give the appellant the opportunity to cross examine the respondent's witness before adjourning for defence. He said the appellant was not served with a hearing notice for the ruling delivered on 16/2/15 after which the suit was adjourned for defence. This according to him is a denial of the appellant's right to fair hearing which vitiates the entire proceedings. He submitted that a party's right of cross examination is a fundamental right to fair hearing and relied on the case of OGOLO VS. FUBARA (2003) 11 NWLR Pt. 831 Pg. 231. He argued further that as at the date judgment was delivered the appellant had a pending motion which the Court failed to dispose before delivering its judgment. This he said also constitute a denial of the appellant's right to fair hearing and relied on the cases of SALEH VS. B.O.N LTD. (2006) 6 NWLR Pt. 976 Pg. 316 and NWANKUDU VS. IBETO (2011) 2 NWLR (Pt. 1231) Pg. 209.

The respondent's counsel's position is that the appellant failed to utilize the opportunity afforded him to cross examine the respondent's witness and put in his defence. He cannot therefore complain of denial of fair hearing. He relied on the cases of OGUNTAYO VS. ADELAJA (2009) 39 NSCQR 639 at 674 and EKE VS. OGBONDA (2007) 1 M JSC 160 at 181.

On the complaint that a motion was pending and not disposed before judgment he submitted that there is nothing on record to show that the motion was served on the respondent's counsel or forwarded to the trial judge before 16th March 2015 when judgment was delivered. He urged us to resolve this issue against the appellant.

It is necessary to go through the entire proceedings as contained in the transcript record of appeal in coming to a decision on these two issues. The respondent as plaintiff opened his case on 23/9/2014. He testified as P.W.1. The appellant as defendant was absent and not represented. The case was adjourned to 15/10/14 for cross examination of P.W.1 and defence. See page 8 of the record of Appeal. There is no record of what transpired on 15/10/14. The case however came up again on 28th October 2014. On 28/10/2014 the defendant who is the appellant was present and was represented by a counsel. The plaintiff's counsel on that day stated thus:

> *"The case today is for cross examination of P.W.1 but we were served with a motion on notice."*

The defendant/appellant moved his motion wherein he prayed the Court to dismiss the suit in limine. The case was adjourned to 2/12/2014 for ruling on the motion. There is no record of what transpired on 2/12/2014. The case however came up again on the 9th December 2014. That day both parties were absent and not represented. Ruling in the motion was delivered and case adjourned to 16/2/2015 for defence. There is no record of what transpired on the 16th of February 2015. The case came up again on the 16th of March 2015. The plaintiff was in Court and Judgment was delivered. See pages 43 - 45 of the transcript record of Appeal.

The plaintiff as P.W.1 gave his evidence on the 23rd of September 2014, after which the case was adjourned for cross examination and defence. On the 28th of October 2014 when the case was to be for cross examination of P.W.1 and defence, the appellant's counsel moved his motion for dismissal of the suit which was adjourned to 2nd of December 2014 for ruling. The ruling was however not delivered until the 9th of February 2015.

The complaint of the appellant is that he was not served with notice of the hearing of the 9th of February the day the ruling was delivered. The ruling was in respect of an application in which both parties were heard. All that transpired on the 9th of February was that the Court delivered its ruling. Nothing more. The question we ask ourselves is whether the appellant's right to fair hearing was breached by the failure to notify him of the date of ruling? His complaint is not that the ruling denied him the opportunity to cross examine P.W.1 and enter his defence. We are of the view that the proceedings of 9/2/15 was not in any way inimical to the interest of the Appellant and we so hold. He was not overreached in any way by the proceedings. The absence of the appellant at the proceedings of 9/2/15 when the ruling on his motion was delivered is not a breach of his right to fair hearing and we so hold.

The appellant's further complaint is that the Court by adjourning the case for defence and not cross examination and defence was a breach of his right to fair hearing. We do not find merit in this complaint. The Lower Court did not at the proceedings of 9/2/15 foreclose the appellant's right to cross examine P.W.1.

Ground III of the appeal and its particulars are as follows:

"GROUND III - MISDIRECTION

The Lower Court misdirected itself when it prevented the appellant from cross examining the witness of the respondent.

PARTICULARS OF ERROR

1. *The Lower Court unilaterally fixed the case for ruling and cross examination of the respondent's witness after several adjournments at the instance of the Court.*
2. *The appellant was not aware of the proceedings of 9th February 2015.*
3. *The appellant was not served with the hearing notice of the proceedings of 9th February 2015.*
4. *The Lower Court foreclosed the appellant from cross examining the respondent's witness notwithstanding failure to serve hearing notice on the appellant.*
5. *Service of hearing notice is fundamental to a Court's jurisdiction."*

There is nowhere in the entire record of proceedings where the appellant was foreclosed from cross examining P.W.1. The complaint on ground III is not borne out of the record of appeal and we so hold.

The third issue formulated by the appellant is from Ground 4 of the appeal. The complaint is that the Court went on to deliver its judgment without disposing of a motion filed by the appellant.

The particulars of Ground IV are as follows:

"PARTICULARS OF ERROR

1. *The appellant's motion on notice was fixed for hearing on 16th March 2015.*

2. *The Court ignored the appellant's motion on notice before delivering judgment.*
3. *The law is that all application in the Court file must be heard and disposed of one way or the other before judgment is delivered."*

The motion referred to in ground 4 is a motion dated 23rd of February 2015 and filed on the 25th February 2015. It is at pages 29-35 of the record of Appeal. Judgment was delivered in the case on 16th of March 2015. The motion was not heard and determined before the judgment was delivered. There is however nothing from the record to suggest that the motion was brought to the attention of the trial judge before judgment was delivered. The appellant's counsel who was present in Court on the day of judgment did not draw the attention of the judge to the pendency of the motion. There is nothing in the record of appeal to prove that the motion was fixed for 16th of March 2015 as stated in the particulars of error of ground IV. This Court cannot read into the record of proceedings what is not contained therein. There is no challenge to the record of Appeal transmitted to this Court. We are therefore bound by it. See the cases of NDAYAKO VS. MOHAMMED (2006) 17 NWLR Pt. 1009 Pg. 655, ADEYIGA VS. MILITARY GOV. OF LAGOS STATE (1999) 11 NWLR Pt. 628 Pg. 616 and GARUBA VS. OMOKHODION (2011) 14 NWRL Pt. 1269 Pg. 145.

In the case of OLANREWAJU ASAMU VS. ISMAILA LAWANSON & ORS. (Unreported) decision of the Court of Appeal (Ibadan Judicial Division) SUIT NO: CA/1/93/2013 delivered on the 5th day of December 2014, the Court held that failure to hear and determine pending applications before the Court's final decision in an action was wrong. The Court however held further that such failure must be a deliberate act of

the Court and not a mere oversight. It went on further to hold that a counsel had the duty to draw the attention of the Court to any pending application before a final decision and it is only when such attention has been drawn and the Court refuses to consider the application that the action of the Court can be justly deprecated.

In the instant case, there is nothing in the record to show that the motion was brought to the attention of the trial Court. The appellant and his Counsel were in Court on the 16th of March 2015 when the judgment was delivered. There is nothing in the record to suggest that the attention of the judge was drawn to the pending motion before judgment was delivered. Furthermore there is no record of the service of the motion on the respondent. In the circumstance we are of the candid view that failure of the trial Judge to hear the motion was not deliberate and premeditated. He cannot therefore be blamed for the failure.

Issues No. 2 and 3 are resolved against the appellant.

Having resolved the three issues in this appeal against the appellant, we find all the grounds of appeal unmeritorious. Accordingly we do not have any reason to set aside the proceedings and overturn the judgment of the Lower Court as prayed by the appellant. This appeal lacks merit and it is hereby dismissed.

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

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

N. R. Ozoemena (Miss.) holding the brief of Adetola Olulenu for the Appellant.
Ikechukwu Ikogwe for the Respondent.