IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

(APPELLATE DIVISION)

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

ON THE 16TH DAY OF JANUARY 2017 APPEAL NO. FCT/HC/CVA/45/15

BEFORE THEIR LORDSHIPS:

HONOURABLE JUSTICE FOLASADE OJO (PRESIDING JUDGE)

HONOURABLE JUSTICE D. Z. SENCHI - (JUDGE)

BETWEEN:

1. MR. DAVID AGUNBIADE
2. MRS. GLORY AGUNBIADE } APPELLANTS

AND

1. CFI (NIGERIA) LTD.
   Suing through its Property Manager,
   Mr. Nelson Alika
2. HIS WORSHIP, HON. NWECHEONWU CHINYERE ELEWE (CHIEF DISTRICT JUDGE 3, WUSE ZONE 2.
3. MR. TUME SAMUEL, (REGISTRAR OF CHIEF DISTRICT II, WUSE ZONE 2. } RESPONDENTS

JUDGMENT

OJO, J, Delivering the Judgment of the Court.

This is an interlocutory appeal against the ruling of the Chief District Court 3 Coram: Nwecheonwu Chinyere in Suit No: CV/11/15 delivered on the 26th of May 2015. The notice of appeal dated 8/6/15 contains seven

grounds of appeal. The grounds of appeal without the particulars are as follows:

"GROUND ONE:

Lack of jurisdiction of the trial court to entertain this suit.

GROUND TWO:

Lack of jurisdiction.

GROUND THREE:

Lack of jurisdiction to hear this suit.

GROUND FOUR:

Lack of jurisdiction.

GROUND FIVE:

Error in law.

GROUND SIX:

Error in the record of proceedings.

GROUND SEVEN:

Denial of fair hearing.

The appellants seek the following reliefs:

1. *To allow the appeal and set aside the trial court ruling of 26th May, 2015 granting plaintiff leave to amend the defendant name on the plaint note from DAVID & GLORY AGUNBIADE*

to MR. DAVID AGUNBIADE (as 1st defendant) and MRS. GLORY AGUNBIADE (as 2nd defendant).

2. *To allow the appeal and set aside the trial court ruling of 26th May, 2015 that granted plaintiff leave to amend its name from 'suing through its agent Modalah Nig. Ltd' to 'suing through its property manager, Mr. Nelson Alika'.*
3. *To allow the appeal and set aside the trial court ruling of 26th May, 2015 that granted plaintiff leave to amend claim no. 1 on the plaint note from the sum of N250,000 only per month as mesne profit for the use and occupation of the premises from 01-01-14 to date to the sum of N250,000 only per month as arrears of rent from 01-01-14 till judgment is given.*
4. *To allow the appeal and order the trial court to first resolve the issue of jurisdiction raised by defendant counsel on 19th May, 2015.*
5. *Alternatively, to allow the appeal and order a striking out of the suit for want of jurisdiction.*

The 2nd and 3rd Respondents' with leave of Court filed a Supplementary Record of appeal

The appellants brief of argument is dated 5/8/15 while that of the 2nd and 3rd respondents is dated 12/10/16. The 1st respondent did not file any brief of argument and was absent and not represented at the hearing of the appeal. At the hearing appellants counsel and that of the 2nd and 3rd respondents adopted their respective briefs as their oral submissions.

Appellants counsel in his brief of argument distilled the following issues for determination:

1. *Whether the trial court had jurisdiction to entertain this suit by virtue of a non-juristic defendants (DAVID & GLORY AGUNBIADE) on the plaint note.*
2. *Whether the trial court was right in law to have omitted most of the vital submissions of the Appellants counsel on 19/5/15 from the certified true copies of the record of proceedings given on the 28th day of May, 2015 and the 5th day of June, 2015 while it recorded all of the 1st Respondent counsel submission in the record of proceedings of its ruling of 26/5/15.*
3. *Whether the omission of most of the vital submissions of the Appellants counsel from the certified true copies of the record of proceedings given on the 28th day of May, 2015 and the 5th day of June, 2015 while it recorded all of the 1st Respondent counsel submission in the record of proceedings of its ruling of 26/5/15 amounts to denial of fair hearing against the Appellants.*
4. *Whether the trial court was right in its ruling of 26th May 2015 in favour of the 1st Respondent to amend the defendants' name from DAVID & GLORY AGUNBIADE to DAVID AGUNBIADE (1st defendant), GLORY AGUNBIADE (2nd defendant).*

Learned counsel to the 2nd and 3rd respondents for her part identified the following issues:

1. *Whether joining the 2nd and 3rd respondents on appeal even though they were not parties at the trial court is valid.*
2. *Whether there is any suit or plaint still pending before the trial court after notice of discontinuance had been filed in the court.*
3. *Whether the 2nd respondent is liable in tort or criminal for any action she presided over as a judge and whether the 3rd respondent is liable for causes filed in his court as a registrar.*
4. *Whether or not the appeal as presently constituted does not disclose any cause of action against the 3rd respondent, the registrar of the court.*

To our mind all issues raised by counsel to the 2nd and 3rd respondents counsel relate to the competence of this appeal to wit:

Whether the 2nd and 3rd respondents are proper parties. The law is that such issue should be dealt with first and we shall so do.

Learned counsel to the 2nd and 3rd respondents submitted that the 2nd and 3rd respondents have no interest whatsoever in this appeal and as such should not be joined as parties. He submitted further that the 2nd respondent who was the presiding magistrate in the suit at the trial enjoy judicial immunity in respect of same. He craved in aid of his submission the provision of Section 7 and Section 83 of the District Court law (Cap. 33) Laws of Northern Nigeria as well as the case of ADEYEMI CANDIDO-JOHNSON VS. MRS. ESTHER EDIGIN (1990) NWLR Pt. 659. With respect to the 3rd respondent it is the contention of counsel that the

appeal discloses no reasonable cause of action against him. He submitted further that there is no valid suit pending at the lower court as the 1st respondent filed a notice of discontinuance against the appellants in the court. She therefore urged us to strike out this appeal.

Learned counsel to the appellant in his reply brief submitted that having put the correctness of the record of proceedings of the lower court in issue in grounds 5, 6 and 7 and by an affidavit, it is only fair and proper that the trial judge and registrar of the lower court be joined as parties in this appeal. He relied on the case of DARAMOLA VS. A.G., ONDO STATE (2000) 7 NWLR Pt. 665 Pg. 462.

From the record it is clear that the 2nd and 3rd respondents were not parties in the suit from which this appeal emanated. The 2nd respondent is the District Court Judge whose decision is appealed against while the 3rd respondent is the registrar of the court. The reason given by the appellant for joining the two of them is to give them the opportunity to respond to the allegation of incompetent record of proceedings made against them.

The procedure for the challenge of the correctness of a record of appeal/proceedings is that the party raising the challenge files an affidavit which is served on the trial judge and registrar who in response is required to file a counter affidavit affirming the correctness of the record or otherwise. The joinder of such trial judge is however not a requirement. See the cases of DARAMOLA VS. A.G., ONDO STATE (2000) 7 NWLR Pt. 665 P. 440, O.O.M.F. LTD. VS. N.A.C.B. LTD. (2008) 12 NWLR Pt. 1098 Pg. 412, MOKWE VS. WILLIAMS (1997) 11 NWLR Pt. 528 Pg. 309

The law is that in any legal proceedings, the parties generally speaking are the persons whose names appear on the records of appeal

as plaintiff and defendant. See SANUSI VS MODU (1994) 5 NWLR Pt. 347 Pg. 732. The 2nd and 3rd respondents were not parties at the trial court. They cannot therefore be joined as parties on appeal without leave of court sought and obtained. An appeal is a continuation of the case put forward at the lower court. We find the joinder of the 2nd and 3rd respondents as parties without leave of court to be a gross abuse of Court process and we so hold.

Counsel to the 2nd and 3rd respondents urged us to strike out this appeal on grounds of misjoinder. The 2nd and 3rd respondents are not the only respondents. There is a first respondent. It is a well settled principle of law that non joinder or misjoinder of parties will not be fatal to an action and no proceedings shall be rendered null and void for lack of competence or jurisdiction simply because a plaintiff joins a party who ought not to have been joined. See CROSS RIVER STATE NEWSPAPER CORPORATION VS ONI (1995) 1 NWLR Pt. 371 Pg. 270. The 1st respondent is a competent party. We are therefore of the view that the proper order to make in the circumstance is that striking out the names of the 2nd and 3rd respondents and we so do.

Counsel further raised the issue of the notice of discontinuance filed by the 1st respondent at the trial court. He argued that the appeal is incompetent by virtue of the said notice as same has put an end to the suit before the trial court.

The law is that the wordings or provision of each particular rules of the trial court governing discontinuance or withdrawal of an action is the determinating factor for the discontinuance. See BABATUNDE VS. PAN ATLANTIC SHIPPING AND TRANSPORT AGENCIES LTD. (2007) 12 NWLR Pt. 1050 Pg. 113.

It is true there is a notice of discontinuance filed at the trial court. There is however no indication on the record that the suit was struck out.

The district court Act and the District Court Rules which govern proceedings at the trial court do not provide for the filing of a "notice of discontinuance" for the purpose of discontinuing a suit before the court. We are therefore of the view that the proper procedure for the determination of the suit where the party wishes to discontinue is to notify the court which then makes the appropriate order. The filing of a notice of discontinuance does not automatically terminate the suit and we so hold. There must be an order of the District Court striking out same. We have gone through the transcript record of appeal and there is no such order. We find no merit in the argument of counsel that there is no substantive suit upon which the instant appeal is predicated. The names of the 2nd and 3rd respondents are struck out from this appeal and we shall proceed to consider the issues formulated by the appellant's counsel. We shall take issues No. 1 and 4 together and then go on to consider issues No. 2 ad 3 in one fell swoop.

ISSUES NO. 1 and 4:

1. *Whether the trial court had jurisdiction to entertain this suit by virtue of a non-juristic defendants (DAVID & GLORY AGUNBIADE) on the plaint note.*

2. *Whether the trial court was right in its ruling of 26th May 2015 in favour of the 1st Respondent to amend the defendants' name from DAVID & GLORY AGUNBIADE to DAVID AGUNBIADE (1st defendant), GLORY AGUNBIADE (2nd defendant).*

Arguing the foregoing issues learned counsel to the appellants submitted that the appellants were sued in the names of non-natural persons and this being so the trial court had no jurisdiction to entertain the suit ab initio. He urged us to hold that the trial court erred when it granted the oral application of the 1st respondent to amend the plaint. He craved in aid of his submission the cases of GSS KACHI VS. KIBUDU (2005) 12 NWLR Pt. 940 and KOTOYE VS. SARAKI (1993) 5 NWLR Pt. 296 Pg. 710 amongst others.

The names of the defendant on the plaint filed at the lower court are David & Glory Agunbiade. The 1st respondent as plaintiff through his counsel made an oral application on the 19th of May 2015 to amend the names of the defendants to read:

1. Mr. David Agunbiade as 1st defendant and
2. Mrs. Glory Agunbiade as 2nd defendant. See pages 48 - 49 of the record of appeal.

The court adjourned for ruling and in a considered ruling delivered on the 26th of May 2015 overruled the objection of the appellant's counsel to the application for amendment and granted all the reliefs sought by the plaintiff's counsel. The names of the appellants were changed as prayed. See pages 50-52 of the transcript record of appeal. The appellants were dissatisfied with the decision hence this appeal.

Order III Rule 5 of the District Court Rules provides as follows:

"5. No misnormer or inaccurate description of a person or place in a plaint or summons shall vitiate the plaint or summons, if the person or place is therein described so as to be commonly known provided that if any misnormer or inaccurate description appears to the court at the hearing to

be such that the defendant has thereby been deceived or misled, the court may make a necessary amendment, and, if it is expedient to do so, adjourn the further hearing of the case, upon such terms as it may think fit."

A misnormer is a mistake in naming a person, place or thing, especially in a legal instrument. The general position of the law is that where the correct person is taken to Court under a wrong name or an incorrect name is given to a party, an amendment may be sought to correct the mistake and the Court is obliged to allow it. See OLU OF WARRI & ORS. VS. ESI & ANOR. (1958) VOL. 1 NSCC 87, NJOKU VS. UAC FOODS (1999) 12 NWLR Pt. 632 Pg. 557 and NKWOCHA VS. FEDERAL UNIVERSITY OF TECHNOLOGY (1996) 1 NWLR Pt. 422 Pg. 112.

From the record it appears to us that the 1st and 2nd appellants were initially named together as one party. Our view is that there was no confusion as to who the 1st respondent intended to sue. He intended to sue the 1st and 2nd appellants. We find the amendment sought to be a case of misnomer and we so hold. The issue of non-juristic persons does not arise. The trial court had the authority under Order III Rule 5 of it's rules to treat the application to amend the names of the defendants as a non vitiating irregularity and allow the amendment. It was an exercise of it's discretion which was judicially exercised. We cannot fault the decision of the trial judge when he allowed the amendment of the names of the appellants to read Mr. David Agunbiade as 1st defendant and Mrs. Glory Agunbiade as the 2nd defendant. Issues No. 1 and 4 are thus resolved against the appellants.

ISSUES NO. 2 and 3:

2. Whether the trial court was right in law to have omitted most of the vital submissions of the Appellants counsel on 19/5/15 from the certified true copies of the record of proceedings given on the 28th day of May, 2015 and the 5th day of June, 2015 while it recorded all of the 1st Respondent counsel submission in the record of proceedings of its ruling of 26/5/15.

3. *Whether the omission of most of the vital submissions of the Appellants counsel from the certified true copies of the record of proceedings given on the 28th day of May, 2015 and the 5th day of June, 2015 while it recorded all of the 1st Respondent counsel submission in the record of proceedings of its ruling of 26/5/15 amounts to denial of fair hearing against the Appellants.*

The above two issues border on the accuracy of the record of appeal. The contention of the appellant's counsel is that the record of appeal is incomplete. It is trite that the record of appeal is the final reference of events step by step that took place in the court. An appellate court is therefore bound by the record of appeal and cannot in hearing and determination of the appeal go outside it. The record is presumed by law to be correct until the contrary is proved. See the cases of NDAYAKO VS MOHAMMED (2006) 17 NWLR Pt. 1009 Pg. 655 and ADEYIGA VS MILITARY GOVERNOR, LAGOS STATE (1999) 11 NWLR Pt. 628 Pg. 616.

The onus is on the party contending that the record of proceedings before an appellate court is not a fair record of what transpired to

formally impeach same. The procedure to be followed is for the party challenging the correctness of the record of proceedings to swear to an affidavit setting out the facts or part of the proceedings wrongfully stated, missing or exchanged. This affidavit will then be served on the trial judge and/or registrar of the court as well as the counsel on the other side. Upon being served it is entirely up to them to file a counter affirming the record. Where however the accuracy of the record of proceedings is successfully impeached the appellate court can in the interest of justice amend the record of the proceedings in question. The record of appeal must be amended to include the new facts before such facts can be relied upon.

The appellants have filed an affidavit challenging the correctness of the proceedings of 19/5/2015 as contained in the record of appeal. Appellants counsel contend that part of the events of the proceedings at the trial court on the 19th of May 2015 are not contained in the record. He set out the submissions of the counsel that were omitted. There is proof that the affidavit was served on the registrar of the trial court and on the trial judge through the registrar. Neither the trial judge nor the registrar filed a counter affidavit. There is also no response from the 1st respondent.

The appellants have however not taken any step to amend the record of appeal to reflect the facts which they say is not contained therein. Issues No. 2 and 3 are based on the alleged omitted facts.

Can we in the circumstance rely on the facts in the affidavit without an amendment of the record? The Supreme Court dealt extensively on this kind of situation in the case of GARUBA VS. OMOKHODION (2011) 14 NWLR Pt. 1269 Pg. 145.

Chukwuma-Eneh JSC who delivered the lead Ruling held as follows:

"The record/proceeding of 26/4/2010 of the trial Court as affirmed by the lower court has been challenged by the appellants who have filed an affidavit to that effect contending that the citation of the two cases viz: DIAPALONG VS. DARIYE (SUPRA) and INAKOJU VS. ADELEKE (supra) as well as their submission thereon has been left out of the record/proceeding of the trial Court on 26/4/2010 and that the same be made part of the record of appeal/proceeding of 26/4/2010 in this matter particularly as the said affidavit has not been countered by the other parties. The said affidavit has been served on the parties and the court and not having been countered the appellants have contended that the record of appeal/proceeding of 26/4/2010 has ***ipso facto*** *been accordingly amended without more. With the greatest respect, I must say that to amend the record of appeal in any proceeding including the instant one is much more than simply filing an affidavit challenging the record/proceeding as here without more. All the parties to this suit although served the affidavit challenging the record, it must be followed by a formal application to court to amend the record for the court to sanction the amendment as the whole essence of filing an affidavit in that respect is to bring about an amendment of the record of appeal/proceeding of 26/4/2010. A record of appeal therefore cannot be amended without the court's approval in exercise of its discretionary power to grant or refuse to sanction an amendment of the record of appeal.*

See: THYNNE VS. THYNNE (1955) 2 WLR 272 as approved by this court. In case of AKINYEDE VS. OPERE (1967) 5 NSCC 299 at 301, also see BLAY VS. POLLARD (1930) 1 KB.628 and LONDON PASS. TRANSPORT BD. VS. ABOSCROP (1942) 1 KB. 347.

At this juncture, I have to observe that the importance of record of appeal/proceeding in our appeal system cannot be overestimated as cases have to be decided based on the record of appeal and without it hearing of appeals will be difficult to undertake. A record of appeal/proceeding has to be duly and properly compiled to guarantee as to its correctness; and it must be meticulously checked and compared with vis-a-vis the original processes/documents filed in the matter as well as the proceedings of court. A record of appeal/proceeding having been duly compiled has to be authenticated and certified as prescribed by law. It is settled law that the record of appeal is binding on the court, the parties and their counsel. The instant purported amendment of the record of appeal/proceeding of 26/4/2010 as the appellants have undertaken by filing the said affidavit has recognized of the fact that to raise and discuss the questions on the citation of the said two cases in the lower court and this court in the context of their not having formed part of record of appeal/proceeding of 26/4/2010 at the trial Court the said citation and their consideration thereof of the said two cases must be placed on record of appeal/proceeding of 26/4/2010 by amending the same before they will be considered and relied on in any legal argument in this matter in this court.

The purported amendment of the record of appeal/proceeding as claimed by the appellants has no sanction of the court either by granting or refusing the amendment and so it is a non-starter. Meaning that the mere filing of an affidavit challenging the instant record/proceeding of 26/4/2010 without more cannot by that fact alone (i.e. without more) effectively and effectually amend the record of appeal. And I so hold.

What are the consequences for so holding as per the foregoing? They are far reaching. I have already set out the grounds of appeal and the four issues particularly issues 1 and 2 raised therefrom for determination in this matter as above. The appellants have made no bones as to the common basis of the said four issues and even the 10 grounds of appeal in this matter. The four issues so also grounds 3, 4, 6, 8, 9 and 10 of the grounds of appeal by the nature of the questions they have raised respectively have to stand or fall based on whether or not the record of appeal/proceeding of 26/4/2010 has been duly amended by the affidavit filed by the appellants challenging the record. These issues and the grounds as argued by the appellants have been premised on the unfounded basis that the record/proceeding of 26/4/2010 has been so amended hence the complaint as per issue one that the lower court has subtracted or read out of the record, "what is there" and on issue two of not having taken judicial notice of the judgments of this court cited in ground one. That the appellants have laboured under a misconception and misapprehension as to

the amendment of the record of appeal/proceeding of 26/4/2010 is borne out from their submission as per paragraph 4.05 page 13 of their brief and I quote:

> *"The lower court... was in grave error when it stated that no case was cited or referred to in the record of appeal. The court did not advert its mind to the affidavit challenging the record of court dated 26/4/2010 on the omission of the cited authorities... we submit that the conclusion of the Court of Appeal ... that the cases were not cited or referred to in the proceedings of the trial Court for 26/4/2010 is not borne out of the record of appeal at pages 250, 251, 252, 253, 257, 258, 259 260 -263A of the Record of Appeal ... The conclusion of the Court of Appeal ... that no case was cited or referred to is not borne out of the record..."*

Their misconception with respect is profound. It is settled law that courts, the parties and their counsel are bound by the record of appeal. And so no court has the jurisdiction to go outside the record to draw conclusions which are not supported by the record. I find that the four issues and grounds 3, 4, 6, 8, 9 and 10 also have been raised on the basis that the said record of appeal/proceeding of 26/4/2010 has been duly amended by the affidavit challenging the record of appeal to include the proceedings of 26/4/2010. This is not so as per my findings above.

In the result having pulled the rug as it were from underneath the appellants submissions as to the competency with regard to the four issues raised for resolution here and the said grounds above mentioned they become baseless and utterly without foundation and therefore incompetent and should be struck out. It is trite that you cannot stand something on nothing and expect it to stand and in the same way issues for determination must spring from grounds of appeal which in turn must have arisen from the court's decision."

Flowing from above it is clear that the failure of the appellant to formally apply to amend the records to reflect the omission is very fatal. Having not made an application to amend the record of appeal and no amended record having been filed, this court cannot go outside the record of appeal before it and rely on the facts contained in the affidavit of challenge as constituting what transpired in the lower court. This is our view and we so hold.

Issues number 2 and 3 which are borne out of facts not included in the record of appeal must therefore be resolved against the appellants. Grounds 5, 6 and 7 of the notice of appeal which are predicated on these facts are also incompetent. We resolve issues No. 2 and 3 against the appellants.

Having resolved all issues raised by the appellants against them, we find no merit in this appeal and it is accordingly dismissed. In the absence of an order of court striking out the substantive suit

we order that the trial court continue with the hearing of the substantive suit.

HON. JUSTICE FOLASADE OJO
PRESIDING JUDGE
16/1/2017

HON. JUSTICE D. Z. SENCHI
HON. JUDGE
16/1/2017

S. O. Abang for the Appellant.

D. L. Tarbo (Mrs.) for the 2nd and 3rd Respondents.