IN THE APPELLATE DIVISION OF THE HIGH COURT OF THE FEDERAL CAPITAL, TERRITORY HOLDEN AT APO, ABUJA

THIS FRIDAY, THE 8TH DAY OF JULY, 2016

BEFORE THEIR LORDSHIPS:

1. HON. JUSTICE A. I. KUTIGI - PRESIDING JUDGE
2. HON. JUSTICE A. O. OTALUKA - JUDGE

SUIT NO: CV/138/2015
APPEAL NO.CVA/144/2015

BETWEEN:

MRS. EKAMA F. EMUESIRI

(Suing through his lawful Attorney**……..APPELLANT**
Barr. S. O. Abang)

AND

MR. LAWANI DANIEL ……..RESPONDENT

JUDGMENT

The facts of this interlocutory appeal are largely not in dispute. Indeed it is a straight forward appeal relating to the precise parameters for the interference by an appellate court with the exercise of discretionary powers of a court, particularly with respect to the award of cost.

By a plaint dated 18th May, 2015, before his Worship S. E. Idiahri, the Appellant sought for the following reliefs against defendant as follows:

a. **Payment of N8 333.33k as arrears of rent per month from 1st September, 2014 till 1st January, 2015.**
b. **Payment of N50, 000 as general damages for the 4 locks, doors, toilet seat and inner and outer walls of the said premises.**

c. Payment of N41, 450 as special damages for the said premises.

d. Payment of N30 000 cost of suit.

On 10th August, 2015 when the matter came up for hearing, learned counsel to the Plaintiff/Appellant moved an application orally to amend the plaint. Counsel to the defendant did not object but prayed for cost of N20, 000. Learned counsel to the Plaintiff/Appellant opposed the application for cost but the learned trial judge ruled in favour of Defendant/Respondent and awarded cost of N3, 000.

The Plaintiff/Appellant being dissatisfied with decision of the lower court on the award of cost appealed against the same. The Ruling of the lower court is at page 53 of the Record of Appeal. The notice of Appeal is dated 11th August, 2015 containing two grounds of Appeal.

The said **grounds** without particulars are as follows:

1. **The trial Judge did not exercise its discretion judiciously and judicially when it ordered plaintiff to pay cost of N3, 000 for bringing application for amendment when the matter was for hearing and thereby making hearing not to go on on 10th day of August 2015.**

2. **The trial court erred in law when it refused to grant the amendment sought on the face of the plaint note.**

In compliance with the Rules, the Appellant filed and served his Appellants brief of argument dated 14th March, 2016 and filed same date in the Court's Registry. In the said brief, three issues were raised as arising for determination as follows:

1. **Whether the trial court erred in law when it refused to grant the amendment sought on the face of the plaint note.**

2. **Whether the trial court exercised its discretion judiciously and judicially by awarding the said cost against the appellant (as plaintiff) considering the circumstances of this case.**

3. **Whether the trial court was right to have omitted vital submissions of the appellant and some decisions of the trial court from the Certified True Copies of the record of proceedings.**

The Respondent was duly served with the brief of Argument and hearing notices for the appeal but neither the Respondent or his counsel appeared in court when the appeal was heard.

At the hearing of the appeal, **S. O. Abang, Esq.,** learned counsel for the Appellant adopted the submissions in the brief of Argument filed on behalf of the Appellant and urged the court to allow the appeal.

We have carefully considered the issues as distilled by the Appellant and we cannot precisely situate issue 3 within the structure of the two grounds of appeal earlier stated above. It is settled law that an issue for determination formulated in a brief must be based on the grounds of appeal filed by parties. If the issues are not related to any ground of appeal, then they become irrelevant and go to no issue. Consequently, any argument in the brief in support of such issue or issues will be discountenanced by the court. See **Adelaja V Fanoiki (1990) 2 N.W.L.R (pt.131) 137, Momodu V Momoh (1991) 1 NWLR (pt.169) 608 and Amadi V NNPC (2000) 6 SC (pt.1) 66 at 72.**

Accordingly, **issue 3** raised by appellant and the arguments canvassed in the brief wherein learned counsel made reference to non-existent **pages 55 – 63** of the record to support his submissions, are without much ado discountenanced. It may be apposite to add that the records we have ended at page 54.

What we are therefore left with are **issues 1 and 2** which flow from the grounds of appeal and it is on the basis of the said issues that we will determine this appeal. We however start with **issue 2 as issue 1** in the consideration of this appeal.

ISSUE NUMBER ONE

Whether the trial court exercised its discretion judiciously and judicially by awarding the said cost against the appellant (as plaintiff) considering the circumstances of the case.

The substance of the contention of Appellant as evident in **paragraphs5.02 to 5.06** of the Appellant brief is that the court did not apply the principles of equity, being a court of equity in awarding cost against the Appellant.

Learned counsel submitted that the reasons given by learned counsel for the respondent for cost were that he was in court from 9.00am to 1pm and that he was not informed that there was an application to amend since no motion was filed; further that the plaintiffs witness was not in court.

He further submitted that in response, he informed the court that his witness was ready to open his case and that he was only seeing the respondent for the first time when the matter was called. Further that it was not his fault that the matter was called by 1pm and that the refusal to grant the amendment on the face of the plaint which occasioned the delay was that of the court which ordered for the amended plaint to be properly filed.

On this premise, the Appellant contends that the lower court did not exercise its discretion judicially and judiciously and the award of cost was on wrong principles and that same should be set aside. The case of **Dr. N. S. Nwawka V. Mr. Sam Adikamkwu (2014) LPELR – 22927 (CA)** was cited.

Now it is not in dispute that the award of cost is essentially a matter within the discretion of the court; a discretion to be exercised judicially and judiciously. There are no prescribed tariffs for cost and the scale adopted by the courts over time in fixing, assessing and or awarding costs varies with the peculiar circumstances of each case. See **Oyedeji V Okinyele (2001) FWLR (pt.77) 970 at 1001 A-D.**

In law, a discretion is said to be exercised judicially and judiciously where the discretion is exercised on sound principles of law based on sufficient material and giving sufficient weight to relevant considerations and the facts and circumstances of a particular case. See **Fanta Jauro Atiku & Anor V. Yola Local Govt. (2003) 1 N.W.L.R (pt.802) 487 at 498 – 499.**

It is equally settled position of the law that the award of the cost being a matter of discretion of the trial court, the appellate court does not normally interfere in the exercise of discretion by the trial court in awarding cost except where it is shown not to have been exercised judicially and judiciously. See **Ero & Anor V. Tinubu (2012) LPELR- 7869 (CA).**

The burden was on the Appellant to situate how the learned trial Judge acted outside the purview of these settled principles on award of cost.

Now from the Record of proceedings, particularly at **page 53**, the matter was for hearing on the day in question. Both parties were duly represented. Learned counsel to the appellant then indicated that he had an application to amend the plaint. Learned counsel to the respondent did not oppose but prayed for cost on grounds we had earlier stated. Learned counsel for the appellant opposed the application for cost and urged on court to grant the oral amendment on the face of the plaint so that they will proceed with hearing. The court then gave its ruling in the following terms as follows:

"Court –The application for amendment is meritonous (sic) since it will allow the Court to resolve all issues. However, the application for it to be made on the face subsisting plaint is not allowed. Rather the Court orders that an amended Plaint shall be filed within a week from today. As regards (sic), I also find the claim for cost meritonous (sic) cost of N3, 000. 00 awarded against the Plaintiff. Adjourn to 19th August, 2015 for hearing."

Now by **Order XIV Rule 1(1) of the District Court Rules, Cap 495 LFN (Abuja) 1990,** a district court judge may at all times before judgment amend all defects and errors in any proceedings in the court, whether the defect or error is that of the party applying to amend or not, and on due application been made, may make all such amendments as may be necessary for the purpose of determining the real questions in issue between parties.

Order XIV Rule 1 (2) of the Rules provides that the Amendment may be made with or without costs and on such terms as the District judge may think just.

These provisions are unambiguous and indeed self explanatory.

It may be apposite to also add that by**Order XV Rule 1** of the same Rules, applications of this variant may be made orally or reduced to writing if so directed by the judge.

In this case, the Appellant having realized defects on his processes applied to amend same on the day fixed for hearing. The learned trial judge acting

within his powers granted the application but refused to allow the amendment to be made on the face of the subsisting plaint but ordered that the amended plaint be filed within a week. Learned counsel for Appellant has contended that the amendment or correction should have been effected on the plaint in court without the need for him to file an amended plaint.

It is clear with respect to learned counsel that he misconceived the decision of the court particularly the import of the provision of **Order XIV Rule 1 (2)** which provides that **"An amendment may be with or without cost and on such terms as the District Judge may think just".**

An amendment of process is therefore not granted on the direction of counsel as erroneously canvassed before us that the amendment ought to have been granted on the face of the plaint.The phrase on **"such terms as the District Court may think just"**used above limits the exercise on how the amendment is to be granted exclusively within the domain of the learned trial judge. It is therefore within his right to grant the amendment with or without costs on terms he thinks just, except of course it is established that those terms run counter to any legal principle or the justice of the case.

In this case, the learned trial judge rightly granted the amendment but elected to award cost and ordered for the amended plaint to be filed within one week all within the purview of **Order XIV Rule 1(2)**. We cannot situate how the directive can be said not to be a judicial and judicious use of discretion. If the amendment had not been applied for, trial will in all probability have commenced. The suggestion that the amendment should have been manually done or effected on the face of the existing plaint is a practice that should neither be encouraged or allowed. It is not only untidy but creates the indelible impression of un-seriousness and or sloppiness. Such manual amendments sometimes give room for unscrupulous elements to tamper with the Records and make further unauthorized alterations. There is therefore no dispute that the delay in commencing hearing on the date in question was due to the application to amend. The court rightly ordered that the amended plaint be filed in one week. The implication is that as a result of the application to amend, which led to the court order, the defendants counsel invariably has been denied the

opportunity to have the case of plaintiff ventilated on the hearing date.The award of N3, 000 as**"cost"**for the day cannot under the circumstances be said to be too high or unreasonable.

On the whole, we cannot but resolve this issue against the Appellant.

ISSUE TWO

Whether the learned trial judge erred in law when it refused to grant the amendment sought on the face of the plaint.

The argument of counsel here is that by the provision of **Section 24(1) of the District Court Law,**every court constituted by this law will administer both the law and equity concurrently. That the district court being an inferior court of summary jurisdiction, the practice and procedure is less cumbersome.

It was contended that the **"simple"** amendment sought could have been done on the face of the plaint without the need for an adjournment and that there is no law which precludes the grant of such amendment on the face of the plaint.

Now the law is settled that in the consideration of any issue for determination, both the appellate court and the parties are bound by the cold printed records. See **NDIC V Vibeeko Nig. Ltd. (2006) All FWLR (pt.336) 386 at 398.**

In this case, from **page 53** of the Record and also flowing from our consideration of issue 1, the application to amend was without any shadow of doubt granted in compliance with the clear provisions of the district court rules vide **Order XIV Rule 1(1).**

The application may have been termed as **"simple"** by learned counsel but this does not fetter in any manner the powers of the trial judge to grant the amendment on terms with or without cost as the district court may deem fit within the purview of **Order XIV Rule 1(2).** This was what happened here. The trial judge ordered for the amended plaint to be filed within one week and awarded cost. We have not been referred to any law, Rules of court or case law which the learned trial judge may have violated in making the

orders he made. The said **issue 2** is also consequently resolved against the Appellant.

On the whole, having carefully considered the Record of Appeal, we see no justifiable reason(s) to interfere with the decision of the Learned Trial Magistrate. The issues for determination having been resolved against Appellant, there is no merit whatsoever in the appeal. The appeal is accordingly hereby dismissed.

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HON. JUSTICE A. I. KUTIGI	**HON. JUSTICE A. O. OTALUKA**
(PRESIDING JUDGE)	**(JUDGE)**

Appearances:

1. **S. O. Abang, Esq., for the Appellant.**