**ISIAH OKUMADE AINA**

**v.**

**THE TRUSTEES OF THE NIGERIA RAILWAY CORPORATION PENSIONS FUND**

SUPREME COURT OF NIGERIA

1ST JULY, 1970.

SC 105/1968.

**LEX (1970) - SC 105/1968.**

OTHER CITATIONS

2PLR/1968/12 (SC)

**BEFORE THEIR LORDSHIPS:**

GEORGE BAPTIST AYODOLA COKER, J.S.C.

IAN LEWIS, J.S.C.

SODEINDE SOWEMIMO, J.S.C.

**BETWEEN**

ISIAH OKUMADE AINA – Appellant

AND

THE TRUSTEES OF THE NIGERIA RAILWAY CORPORATION PENSIONS FUND – Respondent

**ORIGINATING COURT**

LAGOS HIGH COURT (Kazeem, Ag. J., Presiding)

**REPRESENTATION**

OSHISANYA - For the Appellant

AJIBADE (with him, OLAMOSU), - For the Respondent

**ISSUES FROM A CAUSE(S) OF ACTION**

EMPLOYMENT AND LABOUR LAW:- Compulsory retirement subject to the employer’s right to extend service of employee on a prescribed basis – Claim relating thereto – How treated

ALTERNATIVE DISPUTE RESOLUTION – ARBITRAL AWARDS:- Application to set same aside – How treated

**PRACTICE AND PROCEDURE ISSUES**

PLEADINGS - Defendant after filing defence raising preliminary objection why action should not be heard - Judge rejecting preliminary objection and treating objection as demurrer - Whether proper - High Court of Lagos (Civil Procedure) Rules Order 28 Rules 1, 2, 3. In review

**MAIN JUDGEMENT**

**IAN LEWIS, J.S.C. (Delivering the Judgment of the Court**):

On the 17th of June, 1970 we dismissed with 66 guineas costs the defendant’s appeal from the ruling by Kazeem, Ag. J. (as he then was) of the 10th of May, 1967 in suit No. LD/498/66 in the Lagos High Court, and we now give our reasons for so doing.

The plaintiffs’ writ originally claimed a declaration that:

“(a) By virtue of the provisions in the Nigerian Railway Corporation Standard Conditions of Service Officers 1957 and subsequent amendments thereto the compulsory retiring age of the defendant remained 55 years subject only to the discretionary right of the Corporation to extend the said retiring age annually until the defendant attained the age of 60.

(b) The grant of any extension of time does not confer a legal right upon the defendant nor a duty upon the Corporation to keep the defendant in their service should any event arise that would justify relinquishing the defendant of his services to the Corporation.

(c) The defendant was not entitled to claim under abolition of office terms as provided for by the provisions of the Pensions Fund as he did not come within the category of officers who could be so entitled.

(d) Since the post of the defendant was not abolished nor deemed in law to be abolished that defendant is not entitled to the Oyero Arbitration award, and or any compensation, the calculation of which is based upon the strange principle of ‘Abolition in Spirit’ as contained in the arbitration award made in favour of the defendant.

(e) If the arbitrator in the said award is right in holding, as he in fact did hold, that the defendant's employment was wrongly terminated by giving him an inadequate notice of three months instead of six, then what the defendant is entitled to claim will be a part of six months salary or a fair assessment of the loss occasioned by the inadequate notice.”

The defendant then filed a motion asking the High Court to strike out the case “on the ground that the matter had been decided by arbitration on the 29th of June, 1966,” but this never seems to have been dealt with as the plaintiffs then applied by motion to set aside the arbitration and to amend their writ to add -

That the Plaintiffs’ claim against the defendant is for a declaration setting aside the arbitration award of Kunle Oyero, Barrister-at-Law, given on 31st May, 1966 to 29th June, 1966 in the dispute between the parties.”

This application by the plaintiffs was granted by Taylor, C.J. on the 30th of January, 1967 and an amended writ incorporating the additional prayer was filed. Pleadings were then filed and the defendant in his statement of defence in answer to the statement of claim pleaded in paragraphs 40 to 43 as follows:

“40. The defendant will raise as a preliminary objection that the application to set aside this award was made out of time and hence the application should be struck out with costs.

41. The defendant will also raise a preliminary objection that the reliefs claimed in paragraph (i) a-e of the writ cannot be looked into by the court until the application to set aside the arbitration award has been dealt with

42. The defendant will also contend that the court cannot entertain any of the grounds put forward by the plaintiffs for setting aside the arbitration award.

43. On the whole of the plaintiffs’ claim their application to set aside the arbitration award constitutes a violent abuse of court procedure and should therefore be dismissed with substantial costs.”

When the matter came before Kazeem, Ag. J. on the 10th of May, 1967, Mr. Oshinsanya for the defendant raised a “preliminary objection” on the basis of paragraphs 40 and 41 of the statement of defence which we have quoted. Mr. Omotosho for the plaintiffs submitted that Mr. Oshinsanya was raising what amounted to a demurrer and on that basis had not complied with the rules of court, and the learned trial Judge then ruled as follows –

Court: The points raised in paragraphs 40 and 41 of the statement of defence on which the preliminary objection is being made are points of law which cannot be pleaded under our rules of court or raised for the purpose of getting the action dismissed on grounds of law without a proper application being made under Order 28 of the High Court of Lagos (Civil Procedure) Rules. There is no such application before me now and, for that reason alone, I cannot entertain the preliminary objection of the ground of law.

It is of course open to the defendant either to adopt the procedure prescribed under Order 28 of the Civil Procedure Rules, or proceed with the hearing of the action and raise his point of law for the consideration of the court after the conclusion of the trial. The choice is entirely his.”

The defendant being dissatisfied with that ruling appealed to this Court complaining that the learned trial Judge was wrong to treat his objection as a demurrer.

Mr. Oshinsanya’s sole argument was that as he had filed on behalf of the defendant a statement of defence the time for a demurrer was passed and he submitted that he was nonetheless entitled to make an oral preliminary objection to the hearing of the action on the grounds that he had pleaded in the statement of defence. He was unable to show us any rule of court that specifically permitted such a procedure but he relied on Order 52, rule 2 of the Laos High Court Rules which reads:

“2. Subject to particular rules, the court may in all causes and matters make any order which it considers necessary for doing justice, whether such order has been expressly asked for by the person entitled to the benefit of the order or not.”

He further submitted that having regard to that provision the High Court could act as in England Under Order 18, rule 11 and Order 34, rule 2 of the Rules of the Supreme Court in England in the 1966 Annual Practice.

We agree with Mr. Oshinsanya that the time to take a demurrer under Order 28, rules 1-3 of the Lagos High Court Rules which read:

“Order XXXVIII

Dismissal of Suit on Grounds of Law

1. Where a defendant conceives that he has a good legal or equitable defence to the suit, so that even ff the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him.

2. For the purposes of such application, the defendant shall be taken as admitting the truth of the plaintiff’s allegations, and no evidence respecting matters of fact, and no discussion of questions of fact, shall be allowed.

3. The court, on hearing the application shall either dismiss the suit, or order the defendant to answer the plaintiff’s allegation of fact, and shall make such order as to costs as shall be just.”

is before the defendant pleads, but we do not agree with him, as he further submitted, that to take a demurrer means that the defendant must for all time admit the facts as pleaded by the plaintiff. By virtue of Order 28, rule 2 he has to admit the facts ‘for the purposes of such application,” but If that application is overruled he is perfectly entitled then so to plead as to deny the facts that for the purposes of the demurrer he was obliged to admit. The whole basis of a demurrer is in effect to short circuit the action and by a preliminary point of law to show that the action founded on the writ and statement of claim cannot be maintained. Once a person has pleaded however the time for demurrer is passed and he cannot then, in our view, under the rules of court seek to raise by way of a preliminary objection what he should have done earlier under the rules of Court by demurrer. Bairamian, F.J. said in Martins v. Federal Administrator-General (1962) 1 All N.M.LR. 120 at page 123 in regard to Order 28:

“It is plain that those rules contemplate that the plaintiff has made allegations of fact, and the defendant raises a defence In law or equity that, even though the facts alleged were to be taken as true, the plaintiff cannot have judgment, and he, the defendant, should not be required to answer upon the facts. In other schemes of procedure, the defendant puts in his defence and includes that objection in it, and then the parties agree to have that objection heard first, or it is so ordered. In the rules quoted above, the defendant can move the court, before putting in his statement of defence, in the hope that he may be saved the trouble of answering on the facts. But under either scheme, there has been a statement of the facts on which the plaintiff relies for his claim If a defendant chooses to move under Order XXVIII, rules 1, the Court cannot deal with such a motion without first giving the plaintiff an opportunity of making his allegations of fact in support of his claim.”

One cannot therefore in Lagos which has its own specific rules providing for demurrer rely on other English practice where demurrer no longer exists and when the English rules concerned are not to be found in the rules of court here.

A defendant is however perfectly entitled to rely upon any legal point in his defence and if he can persuade the court to hear a preliminary point at issue between the parties on the basis that to do so will dispose of the action then in the discretion of the trial judge it could be done. We have however on a number of occasions indicated the danger of hearing preliminary issues, particularly of facts, as Brett, F.J. said in Atugbue v. Chime (1963) 1 All N.L.R. 208 at page 211:

“What the Judge should not do except with the agreement of the parties, and then only if good cause for it is shown is to isolate a single issue of fact and try it apart from the rest of the case.”

It is only in exceptional cases and when it is absolutely clear that it is likely to dispose of the action that a Judge should consent to a hearing of a preliminary Issue even on a point of law before the action is heard in full - such points could always be taken in the course of the hearing of the action if there is any doubt whether hearing a preliminary issue will dispose of the matter. We agree with the words of Lord Evershed M.R. In Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd. (1961) Ch. 376 when he said at page 396:

“I repeat what I said at the beginning, that the course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom - save in very exceptional cases - of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round.” (Emphasis ours)

and when he earlier at page 382 said:

‘The procedure by a preliminary point of law is in general only satisfactory when whichever way it is decided it is conclusive of the whole matter.”

Be that as it may Mr. Oshinsanya was not asking the High Court here to try a preliminary issue raised on the pleading but to hear a preliminary objection why the action should not be heard at all, and put that way it was a quite different submission which could only be raised by demurrer under the Rules of Court In force and within the appropriate time, and it was not. We accordingly were of the view that the learned trial Judge was quite right to reject the preliminary objection as he did on the 10th of May, 1967 and we accordingly dismissed the appeal on the 17th of June, 1970.

Appeal dismissed.