**ALIMS NIGERIA LIMITED**

**v.**

**UNITED BANK FOR AFRICA PLC**

IN THE COURT OF APPEAL OF NIGERIA

ON THURSDAY, THE 28TH DAY OF NOVEMBER, 2013

CA/B/25/2004

**LEX (2013) - CA/B/25/2004**

**OTHER CITATIONS**

2PLR/2013/13 (CA)

**BEFORE THEIR LORDSHIPS**

HELEN MORONKEJI OGUNWUMIJU, JCA

IBRAHIM MOHAMMED MUSA SAULAWA, JCA

TOM SHAIBU YAKUBU, JCA

**BETWEEN**

ALIMS NIGERIA LIMITED - Appellants

AND

UNITED BANK FOR AFRICA PLC. - Respondents

**ORIGINATING STATE**

HIGH COURT OF EDO STATE (C. Idahosa J., Presiding)

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

REAL ESTATE/LAND LAW:- Claim for release of title deed – Relevant considerations

BANKING AND FINANCE LAW:- Banking practices – recovery of debt –Refusal to release title deed of property used as security for loan after satisfaction of same – Attitude of court thereto

DEBTOR AND CREDITOR: Banking facility and practices - Floating Debenture executed between the debtor and bank registered in Lands Registry – whether can be unilaterally altered from the status loan to overdraft thus attracting higher interest - Computation of interest on granted facilities alleged to be arbitrary and without any legal basis - How treated

**PRACTICE AND PROCEDURE ISSUES**

JURISDICTION:- Fundamental nature of - When can be raised - Whether can be raised by court suo motu- Whether failure to invite learned counsel to address the court automatically renders a decision on the question of jurisdiction a nullity

JUDGMENT:- Declaratory judgments or orders - Whether can be stayed

**MAIN JUDGMENT**

**TOM SHAIBU YAKUBU, J.C.A. (Delivering the Leading Judgment):**

This appeal is against the judgment of the Edo State High Court, sitting at Auchi in respect of suit No. HAU/15/2003, delivered on 1st August, 2003.

The appellant was the plaintiff at the court below, where vide an originating summons, the following reliefs were prayed for, to wit:

"(i) A declaration that the plaintiff is entitled to a release of its property registered as No. 25 at page 25 in volume 714 of the Lands Registry in the office at Benin City which was a subject of litigation at the High Court of Justice, Auchi in Suit No. HAU/72/95 ALIMS NIGERIA LTD. V. UNITED BANK FOR AFRICA PLC decided by Hon. Justice Aliu Okunega on 24th day of November, 2000 and presently being retained in the custody of the defendant.

(ii) An order of this Honourable Court directing the defendant to release to the plaintiff forthwith the aforementioned title deed."

There is an affidavit of 12 paragraphs filed by the appellant in support of the originating summons. The depositions in the said affidavit are that:

"I, Alhaji Idris Momodu Nigerian and Chairman/Managing Director of ALIMS NIGERIA LIMITED of kilometer 124, Benin/Okene Road, Aviele do hereby make oath and state as follows:

1. That I am the Chairman/Managing Director of the Plaintiff in the aforementioned civil matter and therefore I am very conversant with the facts of the case.

2. That I have the consent of the plaintiff to depose to this affidavit.

3. That the plaintiff instituted an action against the defendant sometime in 1995 at the High Court of Justice, Auchi.

4. That the defendant raised a counter claim against the plaintiff at the hearing of the said civil suit.

5. The learned trial judge in a considered judgment granted the plaintiff's claims and dismissed the counter claim of the defendant but held that the plaintiff was liable to the defendant in the sum of N298, 745.00k.

6. That a copy of the said judgment is herewith attached and marked as Exhibit "A".

7. That the Plaintiff in obedience to the said court judgment immediately paid to the defendant the aforesaid sum of money.

8. That a copy of the letter forwarding the cheque to the defendant is herewith attached and marked as Exhibit "B".

9. The defendant has since failed, refused and/or neglected to release the plaintiff's said title documents in spite of repeated demands.

10. That the defendant would continue to hold the plaintiff's title deed in its custody unless this Honourable Court directs it to effect its release to the plaintiff.

11. That it is in the interest of justice for the defendant to release the aforesaid title deed.

12. That I make this solemn declaration conscientiously believing the same to be true and in accordance with the provisions of the Oaths Act, 1990."

In response to the appellant's claim, the respondent filed a 10 paragraph counter-affidavit, to wit:

"I, Junji Badru, Male Christian, a member of staff of United Bank for Africa Plc, Benin City Branch, a citizen of the Federal Republic of Nigeria residing at 36 Ogbehon Street, Benin City, do hereby make oath and state as follows:

1. That I am Loan Recovery Manager in the service of the Defendant.

2. That I have the authority and consent of the Defendant to make this affidavit.

3. That I am conversant with the facts of this case by virtue of my position as a Loan Recovery Manager.

4. That I have read the summons filed by the plaintiff together with the supporting affidavit.

5. That paragraphs 1, 2, 3, 4, 6, 7 and 8 of the affidavit in support of the summons are admitted.

6. That paragraph 5 of the supporting affidavit is admitted to the extent that Defendant's Counter claim was dismissed in part by the award of N298,745.00 against the Plaintiff.

7. Further to paragraph 7 of the supporting affidavit, the Defendant in a letter to Plaintiff's Solicitor, dated 26th January, 2001, acknowledged and accepted in protest the cheque for the N298,745.00.

8. That a copy of the said letter is hereby exhibited and marked as Exhibit 'A'.

9. With reference to paragraph 9, 10 and 11 of the supporting affidavit, I state as follows:

(i) That in the Counter claim referred to by the Plaintiff, the Defendant claimed an amount of N13,370,187.75.

(ii) That the Plaintiff did not say, in its Writ of Summons and Statement of Claim hereby exhibited and marked as Exhibits 'B' and 'C' respectively that it owed the Defendant the sum of N298,745k only - the amount of money the trial court asked the Defendant to pay the Plaintiff.

(iii) That the Defendant lodged an appeal against the judgment of the Auchi High Court and the Plaintiff is aware or knows of that fact.

(iv) That the Defendant knows also that the appeal is still pending; in other words, the appeal has not been heard and determined.

(v) That a copy of the Notice and Grounds of Appeal is hereby exhibited and marked as Exhibit 'D'.

(vi) That it will not be just and equitable to release Plaintiff's said title documents when the appeal lodged by the Defendant is still pending.

(vii) That the Plaintiff's title documents are the only security held by the Defendant in respect of the debt the Plaintiff is owing.

(viii) That the said title documents will be released to Plaintiff if in the end the Plaintiff wins the appeal.

(ix) That it will be difficult to retrieve the title documents from the Plaintiff if released now and the Defendant later wins the appeal.

10. That I make this solemn declaration conscientiously believing the same to be true and in accordance with the provisions of the Oaths Act, 1990."

Both parties attached some documentary exhibits to their respective affidavit evidence. Learned counsel to the appellant addressed the court. Learned counsel to the respondent, though served with a hearing notice did not turn up to address the court below.

In a considered judgment delivered on 1st August, 2003, the learned trial judge declined jurisdiction to pronounce on an earlier judgment of the court, which was subject of an appeal to this court.

It is noteworthy that the appellant had earlier in a suit No. HAU/72/1995 at the court below, vide a writ of summons claimed:

"(1) A declaration that the Deed of floating Debenture executed between the Plaintiff and the Defendant dated the 25th day of November, 1986 and registered as Instrument No. 25 at page 25 in volume 714 of the Lands Registry in the office at Benin city, do not allow the Defendant to unilaterally alter the status of the debt from loan to overdraft thus attracting higher interest.

(2) A declaration that the defendant's computation of interest on the facilities granted to the Plaintiff, is arbitrary and without any legal basis.

(3) Injunction restraining the Defendant, its servants and/or agents from carrying out its threats to enforce its rights in the deed of floating Debenture and Legal Mortgage."

In the action, judgment was entered for the appellant. The respondent was not satisfied with the said judgment and consequently appealed against it to this court. It was while the appeal was still pending in this court, that the appellant herein, subsequently filed another action - HAU/15/2003, demanding for the release to it of its title documents with respect to the property registered as No. 25 at page 25 in volume 714 of the Lands Registry in the office at Benin City; which had been declared for it by Okunega, J., in Suit No. HAU/72/95 of 24th November, 2000. The said judgment was attached to the affidavit in support of the originating summons and it is marked Exhibit A.

The appellant was not unnaturally satisfied with the judgment of the court below, which declined jurisdiction to pronounce on its earlier judgment in the aforementioned Exhibit A. Hence the appellant filed this appeal which was anchored on two grounds of appeal. It is expedient and for ease of appreciation, I reproduce the said grounds of appeal, inter alia:

"(1) The learned trial judge erred in law when he dismissed and/or struck out the Plaintiff's reliefs contained in its originating summons on the ground that the judgment in issue is a subject of appeal.

PARTICULARS OF ERROR

(a) The judgment in issue is an existing judgment and has the force of law.

(b) There is no motion for a stay of execution against the said judgment.

(c) The said judgment was not stayed by the court in issue.

(d) A notice of appeal does not act as a stay of execution.

(2) The learned trial judge erred in law when he declined to exercise jurisdiction in respect of the plaintiff's originating summons.

PARTICULARS OF ERROR

(a) Jurisdiction of court was not raised by the defendant.

(b) Originating summons is used to interpret contents of judgments of courts.

(c) Jurisdiction of court was not ousted by any statute known to court."

The appellant in order to prosecute the appeal, filed the appellant's brief of argument, which was settled by Chief Charles Adogah. Two issues were distilled from the grounds of appeal for determination therein. They each say:

"(i) Whether an appeal operates as a stay of execution.

(ii) Whether the lower court lacked jurisdiction in the circumstance to interpret the earlier judgment of the court."

On behalf of the respondent, her brief of argument, settled by Sir Alfred O. Eghobamien, SAN, adopted the two issues formulated for determination of the appeal, by the appellant.

At the hearing of the appeal on 5th November, 2013; O. James Esq., for the appellant and Sir Alfred Eghobamien, SAN, each adopted their respective briefs of argument.

Learned appellant's counsel, argued the two issues for determination, together. It is his submission that the judgment in the suit No. HAU/75/95 is an existing judgment having the force of law, pending the determination of the appeal on it by this court. He referred to Halsbury's Laws of England, 3rd Edition, Vol. 22, page 780 at paragraph 1660 where the learned authors in defining conclusiveness of judgments opined, inter alia:

"Subject to appeal and to being amended or set aside a judgment is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences."

Learned appellant's counsel furthermore submitted that an appeal does not operate as a stay of execution of a judgment or of proceedings. He relied on Josiah Cornelius Ltd & Ors. V. Chief Cornelius Okeke Ezenwa (1996) 37 LRCN 618 at 640. He contended that since the respondent did not apply for a stay of execution of the judgment in HAU/72/95, it cannot complain and that the said judgment should remain inoperative until the appeal on it is determined.

With respect to the issue of jurisdiction, learned appellant's counsel submitted that since the respondent did not raise it, it was an error on the part of the learned trial judge to have declined jurisdiction by not adjudicating on the appellant's originating summons.

On the part of the respondent, there is a Notice of Preliminary objection filed pursuant to Order 3 Rule 15 of the Court of Appeal Rules 2002 and under the Inherent jurisdiction of the court, on 7th June, 2004. The grounds of the said objection are that ground 1 of the notice of appeal, is incompetent; that the said ground 1 is not based on the judgment of the learned trial judge and that issue 1 distilled from ground 1 is incompetent, therefore both ground 1 and issue 1 should be struck out.

However, no argument was canvassed in support of the said preliminary objection nor in the respondent's brief of argument.

And at the hearing of the appeal, learned senior counsel to the respondent did not say anything at all with respect to it. I take it therefore that the preliminary objection stands abandoned, hence it is discountenanced by me.

Arguing the appeal on its merits, respondent's learned senior counsel submitted that the court below was not in error when it perused the processes before it and found that it had no jurisdiction to entertain the appellant's action and therefore suo motu declined jurisdiction to entertain it. He relied on Akagbejo V. Ataga (1998) 1 NWLR (pt. 534) 459 at 468 - 469; Petrojessica Enterprises Ltd. V. Leventis Trading Co. Ltd. (1992) 2 NWLR (pt. 244) 675 at 693 & 696.

Furthermore, he submitted that since the earlier judgment of the court below was what the appellant wanted to enforce in a later action vide an originating summons, that was a subject matter of an appeal before this court, the court below, rightly declined jurisdiction. He placed reliance on Ogundipe V. Akinloye (2002) 10 NWLR (pt. 775) 312 at 333.

With respect to the contention of the appellant that since the respondent did not apply for a stay of execution of the judgment in HAU/72/95, the said judgment remains conclusive and binding on the parties, learned senior counsel to the respondent submitted that the respondent needed not to have applied for a stay of execution of the judgment aforementioned because it was a declaratory judgment. Respondent's learned senior counsel also submitted that the respondent timeously exercised its right of appeal against the said judgment. He relied on Okoya V. Santili (1990) 2 NWLR (pt. 131) 172 at 199.

Learned senior counsel to the respondent, conceded that generally an appeal does not operate as a stay of execution of a judgment. He, however contended that in the circumstances of the judgment in HAU/72/95 being a declaratory judgment, an application to stay its execution was irrelevant.

It is no longer disputable that jurisdiction is critical to any adjudication in the court, hence it is a threshold issue. Therefore because of its prime importance, it can be raised at any time in the course of proceedings in any court, even at the appellate court by any of the parties or by the court suo motu. This is because, jurisdiction is the soul of any action in court. The paramountcy of jurisdiction to an action in court can be likened to the critical importance of blood, to the survival of an animal. For, where an animal is drained of its blood, it dies automatically, because the life of the flesh is in the blood. In the same vein, where an action in court is bereft of jurisdiction, it dies automatically. E.F.C.C. V. Philip Odigie (2013) All FWLR (pt. 692) 1797 at 1809; Attorney General, Anambra State V. Attorney General of the Federation (1993) 6 NWLR (pt. 302) 692; (1993) 7 SCNJ (pt. II) 245; Okoye V. Nigerian Construction and Furniture Co. Ltd. (1991) 7 SCNJ (pt. II) 365;(1991) 6 NWLR (pt. 199) 501; Utih V. Onoyivwe (1991) 1 NWLR (pt. 166) 166; (1991) 1 SCNJ 25.

In the circumstances of this case, the learned trial judge found that the action before him at the instance of the appellant's originating summons, was an invitation to him, to pronounce on an earlier judgment of the same court albeit, differently constituted which is on appeal in this court and he avoided or declined the temptation or invitation to do so. He said at page 40 of the cold record of appeal, inter alia:

"I have carefully considered the originating summons and the submissions of learned Counsel. I have also considered the supporting affidavit as well as the counter affidavit.

Clearly this Court has no jurisdiction to pronounce on the judgment, i.e. exhibit A of the supporting 14 affidavit. The judgment is now the subject of an appeal.

I have read and considered the grounds of appeal attached as exhibit D to the counter affidavit and I am of the view that they are quite weighty.

In the interest of justice, it is my view that the parties should remain where they are pending the hearing and determination of the pending appeal. To order the release of Plaintiff's title documents at this stage, will render nugatory the decision of the Court of Appeal in the event that Defendant's appeal succeeds.

On the other hand, if the appeal fails, the title documents could always be released.

In the circumstances it is my considered opinion that the reliefs sought are premature and cannot be granted at this stage. Since they do not lack merit per se, they will not be dismissed rather they will be and are hereby struck out."

Undisputably, the judgment in HAU/72/95 by Okunega, J., was appealed against to this court by the respondent and it is during its pendency that the appellant filed its originating summons vide HAU/15/2013, in order to enforce the earlier judgment he had obtained, from the same trial court. That being the position of things, before the learned trial judge in the latter case, could he be said to have erred in law when he declined jurisdiction to pronounce on the earlier judgment being a subject matter of an appeal pending in this court? I do not think so.

I am of the considered and firm opinion and in agreement with the submission of learned senior counsel to the respondent that the learned trial judge was quite on firma terra and on a strong wicket when he so declined jurisdiction to determine the appellant's originating summons. He found from the processes before him that he had no vires or competence to pronounce on a matter which is on appeal before this court and so refused the appellant's invitation for him to do so. To my mind, the learned trial judge deserved a commendation and not condemnation. He was indeed prudent and astute. Ogundipe V. Akinloye (2002) 10 NWLR (pt. 775); (2002) 24 WRN 18 CA; Adebayo Owoyemi V. The Gov. of Ogun State & Ors. (1993) 2 NWLR (pt. 278) 702, CA.

Generally, where as in this case, the court suo motu suspects that it has no jurisdiction to determine an action before him, it is expedient that learned counsel in the proceedings, be invited to address it with respect to the question of its jurisdiction to determine the action, before coming to a decision on the said question of jurisdiction. However, the failure to invite learned counsel to so address the court, does not automatically render such a decision on the question of jurisdiction a nullity, unless it is shown or demonstrated that the decision is not correct or it had occasioned a miscarriage of justice. Olutola V. University of Ilorin (2005) All FWLR (pt. 245) 1151; Imah V. Okugbe (1993) 12 SCNJ 57; (1993) 9 NWLR (pt. 316) 159 at 178; Kate V. Central Bank of Nigeria (1991) 9 NWLR (pt. 214) 126; Ejowhomu V. Edok-Eter Mandilas Ltd. (1986) 5 NWLR (pt. 39) 1.

I have considered the contention of the appellant that the respondent ought to have applied for a stay of execution against the earlier judgment in HAU/72/95. I am satisfied that the said judgment in HAU/72/95 is clearly declaratory. So, it has nothing in it to be stayed vide an application to do so. It is elementary and well settled that declaratory judgments or orders cannot be stayed. Govt. of Gongola State V. Tukur (1989) 4 NWLR (pt. 117) 592; Okoya V. Santili (1990) 2 NWLR (pt. 131) 172 at 199 & 213; David Oguntade V. Ezekiel Adeleye (1992) 10 SCNJ 58 at 65; Awoniyi V. Registered Trustees, Amorc (2000) FWLR (pt. 25) 1592.

Therefore, since the respondent rightly and timeously exercised his right of appeal against the judgment in HAU/72/95, to this court, he was not under any obligation to apply for a stay of execution of the said judgment.

The appellant having won and secured judgment in the earlier Suit No. HAU/72/95 which is declaratory and having been appealed against by the respondent, ought to have awaited the outcome of the appeal instead of filing action in the manner of HAU/15/2003, ostensibly intended to enforce the earlier judgment in his favour, in the same court below. Learned counsel to the appellant, with respect, ought to have known better.

This appeal is bereft of merits and liable to dismissal. I dismiss it accordingly.

The judgment of C. Idahosa J., (as he then was) dated 1st August, 2003 is affirmed.

Costs of N50,000.00 is awarded against the appellant, in favour of the respondent.

**HELEN MORONKEJI OGUNWUMIJU, J.C.A:**

I have read in draft the judgment just delivered by Tom Shaibu Yakubu, JCA. I am in complete agreement with his Lordship's reasoning and conclusion and I agree that the appeal should be dismissed for lack of merit. I abide by the order as to costs.

**IBRAHIM MOHAMMED MUSA SAULAWA, J.C.A:**

Arguably, of the two issues formulated by the Appellant in the brief thereof, issue No. (ii) is most instructive. The said issue raises the very vexed fundamental question of-

"(ii) Whether the lower court lacked jurisdiction in the circumstance to interprete the earlier Judgment of the court."

In the instant appeal, the respective parties are ad idem that the judgment the Appellant sought to enforce before the High Court of Justice of Edo State, Auchi Judicial Division in Suit No. HAU/72/95: ALIMS NIGERIA LTD V. UNITED BANK FOR AFRICA PLC, was the subject matter of an appeal pending in the Court of Appeal. Having carefully considered the original summons, the supporting and counter affidavits vis-a-vis the submissions of the respective learned counsel thereupon, the lower court came to the conclusion, inter alia, thus-

Clearly, this court has no jurisdiction to pronounce on the judgment - i.e. Exhibit A of the supporting affidavit. That Judgment is now the subject of an appeal...

In the circumstances, it is considered opinion that the reliefs sought are premature and cannot be granted at this stage. Since they do not lack merit per se, they will not be dismissed rather they will be and are hereby struck out.

There shall be no order as to costs.

See page 40 of the Record of Appeal.

In my considered view, the above decision of the court is unassailable, and rather in accord with the well laid down principles of law. The trite issue of jurisdiction of a court is not merely important, but vary fundamental in adjudication process. It was recently aptly reiterated by this court that-

"The issue of jurisdiction can be raised at any stage of the trial (of and action) and at any point in time, either at the trial or on appeal in the Court of Appeal or Supreme Court. Because of the crucial and fundamental nature thereof, the issue need not necessarily be raised suo motu by parties alone. It can be raised (suo motu) even by the trial or appellate court itself.

See OKEKE V. SECURITIES AND EXCHANGE COMMISSION (2013 ALL FWLR (PT. 689) 731 @ 758 - 759 paragraphs E-B, per Saulawa, JCA. See also LABIYI V. ANRETIOLA (1992) 2 NWLR (PT. 258) 139; MADUKOLU V. NKEMDILIM (1962) 2 SCNLR 341; MANDARA V. AG FEDERATION (1984).

In the instant case, as alluded to above, the lower court was absolutely right when it raised the issue of jurisdiction, and accordingly declined to entertain the action. (See OGUNDIPE V. AKINLOYE (2002) 10 NWLR (PT. 775) 315 @ 333 paragraphs B-E.

Hence, in the light of the above postulations, I concur with the far-reaching reasoning and conclusion reached in the judgment just delivered by my learned brother, the Hon. Justice T.S. Yakubu, JCA, to the effect that the instant case is bereft of merits. Thus, the appeal fails, and it's equally dismissed by me.

I abide by the consequential order of costs of N50,000.00 awarded in favour of the Respondent, against the Appellant.