**CHRISTOPHER OKOYE & ANOR**

**v.**

**MARKUS ELISHA MBAYA**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 10TH DAY OF JANUARY, 2020

CA/YL/150/2017

**LEX (2020) - CA/YL/150/2017**

**OTHER CITATIONS**

3PLR/2020/8 (CA)

(2020) LPELR-49161(CA)

**BEFORE THEIR LORDSHIPS**

CHIDI NWAOMA UWA, JCA

JAMES SHEHU ABIRIYI, JCA

ABDULLAHI MAHMUD BAYERO, JCA-end!

**BETWEEN**

1) CHRISTOPHER OKOYE

2) MOSLAC NIG. LTD. - Appellant(s)

AND

MARKUS ELISHA MBAYA - Respondent(s)-end!

**ORIGINATING COURT(S)**

1. ADAMAWA STATE UPPER AREA COURT

2. ADAMAWA STATE UPPER AREA COURT NO. 2-end!

**REPRESENTATION**

M.J. IFEGWU, ESQ. - For Appellant

AND

C.K. ATIMAN, Esq. - For Respondent-end!

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

COMMERCIAL LAW – CONTRACT:- Recovery of sum and unpaid on a contract for hire and use of construction machines and claim for interest on the judgment sum – Case brought before an Upper Area Court – Whether Court has jurisdiction over a corporate person - -Section 12 (1)(a)(b)(c) of the Area Court Law (Cap 11) Laws of Adamawa State 1987 in review

CONSTITUTIONAL LAW - BREACH OF RIGHT TO FAIR HEARING: Party who was afforded an opportunity to be heard but failed to utilize it - Whether can bring an action for breach of fair hearing-end!

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - CONTRADICTION IN EVIDENCE: Contradictions in evidence of witness – Where court did not advertise its mind to the contradictions – Legal effect

JUDGMENT AND ORDER - DELIVERY OF JUDGMENT: Judgment of the Court delivered earlier or after the scheduled date without notice to one of the parties –When will not nullify the judgment – What party complaining of denial of fair hearing must prove to succeed

JURISDICTION - JURISDICTION OF AREA COURT: Whether Area Courts can exercise jurisdiction over non-natural persons -Section 12 (1)(a)(b)(c) of the Area Court Law (Cap 11) Laws of Adamawa State 1987 in review-end!

**CASE SUMMARY**

FACTS AND CLAIMS

The claims of the Respondent/Plaintiff before the trial Upper Area Court were for:-

“a) The sum of N1,670,000 being the outstanding balance remaining unpaid from the hire and use of the Plaintiffs two (2) construction machines.

b) 10% interest on the judgment sum.

The evidence of the Respondent/Plaintiff showed that the 1st Appellant went to the Respondent and hired an excavator and a grader. The grader was hired for 12 days at N80,000 per day bringing the total money payable to N960,000. The excavator was hired at N110,000 per day for 11 days which totaled N1,120,000. The total sum, therefore payable, was N2,170,000.00. The 1st Appellant paid to the Respondent N500,000, leaving the unpaid balance of N1,670,000.00. The other complain of the Appellant is that while the Respondent as PW1 stated that the name of the site engineer is Isaac, he called one Engineer Robinson Isaiah (page 14-15 of the record) with no explanation as to the two names. That PW1 also stated at pages 12-13 of the printed record that “besides this work which we did on credit there are other previous works which we did. I can’t remember how much was paid for the previous work we did for him. This was in 2012 but I can’t remember the money paid”. According to Counsel, these are material contradictions that go to the root of the Respondents' claim before the trial of the Upper Area Court which it did not advert its mind to. The claim of the Plaintiff/Respondent was for services of machinery hired by the Defendant/Appellant which has not been settled for and it was argued that evidence was led as to the claims of the Respondent upon which the trial Court entered judgment in favour of the Respondent.-end!

DECISIONS HISTORY

1. TRIAL COURT [Adamawa State Upper Area Court] - The trial Court entered judgment in favour of the Respondent.

2. LOWER COURT [Adamawa State Upper Area Court No. 2] - The lower Court delivered its judgment on 19th December, 2016, finding in favour of the Respondent and upholding the decisions of the trial Court-end!

ISSUE(S) DISTILLED FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

1) Whether the Lower Court sitting on appeal was right when considering the provision of Section 12(a) of the Area Court Law of Adamawa State it held that the trial Upper Area Court had the jurisdiction to determine the Suit before it having regard to the status of the 2nd Appellant, a non-natural person under the law? (Distilled from Ground 1 of the Grounds of Appeal)

2) Whether the lower Court sitting on appeal was right when it held that the subsequent proceedings of the trial Upper Area Court conducted without notice to the Appellants were not in breach of the Appellants right to fair hearing under Section 36 of the Constitution of Nigeria? (Distilled from Ground 2 and 3 of the Grounds of Appeal).

3). Whether the lower Court was right when it dismissed the Appellants Issue four submitted before it while holding that the Respondent proved his case before the trial Area Court despite the material contradictions in the evidence of the two witnesses? (Distilled from Ground 4 of the Grounds of Appeal).-end!

*BY RESPONDENTS*

1. Whether lower court was right to hold the trial court had jurisdiction over the 2nd Appellant and whether the the judgment of the court can stand without him.

2. Whether the lower court was not right to hold that the appellants were accorded fair hearing at the trial court.

3. Whether the lower court was not right when it held that the respondent was able to prove his case at the trial court.-end!

*AS ADOPTED BY COURT*

The Court determined the Appeal based on the three issues formulated by the Appellant which the Court deemed similar and on all fours with those formulated by the Respondent.-end!

*RESOLUTION OF APPEAL/DECISIONS OF COURT*

1. Section 12 (1)(c) Area Court Law (Cap 11) Laws of Adamawa State ,1987 allows for any person – natural or corporate – to participate in proceedings of the Upper Area Court if they consent and submit to its jurisdiction. The appellant having submitted to the jurisdiction of the Court, can never contest its jurisdiction.

2. A Court has the duty to give parties reasonable time to present their case before it but if the Court affords parties the opportunity to present their case before it, any party that fails to utilize such opportunity cannot complain of lack of hearing. The lower Court was therefore on a sound footing when it held that the trial Court was right to foreclose the Appellants/Defendants after giving them several adjournments to enter their defence but they failed to do so.

3. The Appellants after proving that the Court failed to serve them notice of the new date for the delivery of judgment failed to subsequently show how that the delivery of the judgment on a later date rather than the earlier date of 18/11/14 without hearing notice to them occasioned any miscarriage of justice to them; or that the judgment which was delivered in open Court could have been otherwise if the Appellants or their counsel had listened to it. -end!

**MAIN JUDGMENT**

**ABDULLAHI MAHMUD BAYERO, J.C.A. (Delivering the Leading Judgment):**

This Appeal originated from the Adamawa State Upper Area Court No. 2 in case number UAC/24/CV/F1/23/2013 wherein the Respondent as Plaintiff before the trial Upper Area Court sued the 1st Appellant. On 6/11/2013, the Respondent/Plaintiff through his Counsel C. K. Atiman Esq., applied orally to join the 2nd Appellant. The application was granted. Two witnesses PW1 and PW2 testified for the Respondent/Plaintiff. The Appellant/Defendant did not present any witness. The trial Court entered judgment in favour of the Respondent. Dissatisfied, the Appellants appealed to the lower Court. The lower Court delivered its judgment on 19th December, 2016 in favour of the Respondent. Miffed with the judgment, the Appellants appealed to this Court by leave granted on 5th July, 2017. Notice of Appeal was filed on 12th July, 2017. The original Record of Appeal was compiled and transmitted on 8th September, 2017. It was re-compiled and transmitted on 4th October, 2019 but deemed properly transmitted on 14th October, 2019. The Appellants Brief was filed on 29th September, 2017 but deemed properly filed and served on 14th October, 2019. The Respondents Brief was filed on 23rd November, 2017 but deemed properly filed and served on 14th October, 2019.

In the Appellants Brief, three issues are distilled for determination thus:

1) Whether the Lower Court sitting on appeal was right when considering the provision of Section 12(a) of the Area Court Law of Adamawa State it held that the trial Upper Area Court had the jurisdiction to determine the Suit before it having regard to the status of the 2nd Appellant, a non natural person under the law? (Distilled from Ground 1 of the Grounds of Appeal)

2) Whether the lower Court sitting on appeal was right when it held that the subsequent proceedings of the trial Upper Area Court conducted without notice to the Appellants were not in breach of the Appellants right to fair hearing under Section 36 of the Constitution of Nigeria? (Distilled from Ground 2 and 3 of the Grounds of Appeal).

3). Whether the lower Court was right when it dismissed the Appellants Issue four submitted before it while holding that the Respondent proved his case before the trial Area Court despite the material contradictions in the evidence of the two witnesses? (Distilled from Ground 4 of the Grounds of Appeal).

On issue one, Counsel submitted that by the provisions Section 12(1) (a) (b) of the Area Court Law (Cap 11) Laws of Adamawa State 1987, an Area Court can only exercise jurisdiction over a natural person. Thus, the trial Upper Area Court had no jurisdiction to hear and determine the claim of the Respondent before it as against the 2nd Appellant which is a Company incorporated under Nigerian laws and thus a non natural person. Section 12(1)(a) (b) is reproduced as follows:

12(1) Subject to the provisions of this Edict and any other written Law, the following persons shall be subject to the jurisdiction of Area Courts:

a) any person whose parents were members of any tribe of tribes indigenous to some part of Africa and the descendants of any such person;

b) any person one whose parents was a member of such tribe;

c) any other person in a cause or matter in which he consents to the exercise of the jurisdiction of the Area Court.

He placed reliance on Uwazurike & 6 Ors. v. AG Federation (2007) 2 S.C. 169 at 179, Gafar v. Government of Kwara State (2007) 1-2 S.C. 189 at 216-217; Mobil Producing Nig. Unlimited v. Monokpo (2004) 9 WRN 84-85 and submitted that the jurisdiction of the Area Court is limited to natural persons.

That the lower Court was referred to and ignored completely the decision of the same lower Court in the case of Union Bank of Nigeria Plc. v. Dr. Musa Dahiru & 1 Or. Suit No. ADSY/18M/2010 unreported judgment of the High Court of Justice of Adamawa State delivered on the 21st of July, 2010, where the lower Court per Hon. Justice Hafsat Abdulrahman held that an Area Court has no jurisdiction over an incorporated company and the case of Fouad Shour v. Fauzija 1971 N.N.L.R Page 133. That the lower Court in its judgment did not even make any reference to the said decisions as to their applicability in the matter.

According to counsel, since the area Court lacks jurisdiction over a non natural person any exercise of such jurisdiction will be ultra vires, null and void and any proceedings thereto will amount to a nullity; relying on Madukolu v. Nkemdilim(1962) 2 SCNLR 341 348. That it is the claims of the parties that give the Court/Tribunal jurisdiction.

He further submitted that since the 2nd Appellant is an artificial person, the lower Court lacks the jurisdiction to hear and determine the matter before it going by the provisions of the Area Court Law Section 12(1) and relying on Mobil Producing Nig. Unlimited v. Monokpo [2004] ALL FWLR (Pt. 195) 575 at 657 paragraph H.

According to counsel, the claim of the Respondent is principally against the 2nd Appellant which necessitated joining the 2nd Defendant on the application of the Respondent. That the suit was incompetent and all proceedings conducted thereto is a nullity.

He urged the Court to resolve issue one in favour of the Appellant.

On issue two, it was the submission of learned counsel that by the combined effect of Sections 36(1), (2) (3) and (4) and 294 of the Constitution of the Federal Republic of Nigeria 1999 as amended, a Court vested with judicial authority must deliver its judgment in the presence of the parties to the suit, in public and afford the parties the opportunity of appealing against the judgment.

According to counsel, on 4th November, 2014 the Respondents counsel applied for the Appellants to be foreclosed from making any defence as shown at page 20 of the Record. That the Upper Area Court adjourned the matter to 18/11/2014 for judgment (page 21 of the Record). That the Appellants were entitled to be served with hearing notice for the adjourned date of 18/11/2014. More so that the Court failed to deliver the judgment on the 18/11/2014 and chose the 23/12/2014 when it delivered same.

That no hearing notice was served on the Appellants of the judgment of the 23/12/2014 as reflected on pages 21-22 of the Record. This counsel submitted is a breach of the right of fair hearing of the Appellant. He referred to Achuzia v. Ogbomah 2016 Vol. 262 LRCN 91 at 103-105 where it was held that in the process of adjudication in a Court of law, service of processes and hearing notice on the defendant is sine qua non to the assumption of jurisdiction by a Court except in matters which the law permit to be heard ex-parte. Thus the Court must satisfy itself of proof of notice of hearing before it proceeds to hear the matter and give judgment on the evidence adduced before it. Where a Court fails to do so, and proceeds to hear the case, the proceeding, no matter how well conducted is a nullity. A Court of law must satisfy itself that all parties had notice of hearing of a matter before it assumes jurisdiction to hear and determine the case. Failure to do so renders the entire proceedings a nullity. That the Court further held that the service of hearing notice on the defendant is a Constitutional matter as provided under Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999.

On issue three, counsel submitted that the trial Court was wrong to have granted the claims of the Respondent/Plaintiff when he has not proved same. That the law is settled that a Plaintiff must succeed on the strength of his own case not on the weakness of the defence. He cited the case of Nwavu v. Okoye (2009) ALL FWLR(Part 451) page 815 at page 840 paragraphs E-G.

That there was material contradiction in the name of PW2 whether it was Engineer Robinson Isaac or Robinson Isiah. Yet the lower Court relied on the testimony from the witness to give judgment against the defendants. According to counsel, PW1 could not prove his claims before the lower Court because the witness under cross examination did not state the exact amount he claimed from the Appellant; nor was he able to state the extent of the work he did for the Appellant and the amount due. All these according to counsel go to show that the Respondent did not prove his case before the lower Court to be entitled to judgment. He placed reliance on the case of Victabio Ventures Ltd. v. W. Van Der Rwan Z.N.B.V (2009) ALL FWLR (Part 490) page 56 at page 80 and urged this Court to resolve issue three in favour of the Appellant, allow the Appeal and set aside the judgment of the lower Court.

In his response, learned counsel for the Respondent submitted that they have formulated three issues for determination thus:-

1. WHETHER LOWER COURT WAS RIGHT TO HOLD THE TRIAL COURT HAD JURISDICTION OVER THE 2ND APPELLANT AND WHETHER THE JUDGMENT OF THE COURT CAN STAND WITHOUT HIM.

2. WHETHER THE LOWER COURT WAS NOT RIGHT TO HOLD THAT THE APPELLANTS WERE ACCORDED FAIR HEARING AT THE TRIAL COURT.

3. WHETHER THE LOWER COURT WAS NOT RIGHT WHEN IT HELD THAT THE RESPONDENT WAS ABLE TO PROVE HIS CASE AT THE TRIAL COURT.

On issue one, it is submitted that there is no place in the entire Area Court Civil Procedure Rules or Area Court Edict that states that Area Court can only adjudicate on natural persons. That Section 12(1)(a)(b) is meant to take care of a situation where the parties are natural persons in order to protect foreigners so that native laws are not applied against them unless they surrender themselves to the jurisdiction of the Court. That there is no ambiguity in the wordings of the section.

That the case of Union Bank of Nigeria Plc. v. Musa Dahiru & 1 Or. (Supra) which the Appellant refers to is a decision of Adamawa State High Court which is a Court of coordinate jurisdiction with the lower Court, as such that decision is of persuasive and not binding authority. That the Appellant's counsel is limiting his argument to Section 12(1)(a)(b) of the Area Court Law ignoring sub Section (c) of the same law which provides:

"...and other person in a cause or matter in which he consents to the exercise of the jurisdiction of the Area Court."

According to Counsel, since the 2nd Appellant participated in the proceedings at the lower Court with his Counsel, he is estopped from complaining now. He further referred to Sections 13 (1) of the Area Court Rules Cap. 11 Laws of Adamawa State 1987 which provides:-

"where at any stage of the proceedings before final Judgment in any cause or matter (whether Civil or Criminal) in an Area Court a person alleges that he is not subject to the Jurisdiction of Area Court, such proceedings shall on the application of such person to the High Court be transferred to the High Court that shall inquire into and determine the truth of such person's allegation."

That Order 3 Rule 3 of the Area Court Civil Procedure Rules, 1971 which provides:-

"Service on a Local Authority shall be effected by the provision of Section 117 of Local Authority Law."

According to counsel, from the above provisions, the Area Court has jurisdiction to try the 2nd Appellant. Counsel further submitted that the Respondent before the trial Court on page 6 of the Record lines 9-10 told the Court that:-

"I informed the 1st Defendant of my intention to sue. That is why I am before the Court to seek my money from the 1st Defendant."

That the lower Court in its judgment contained on pages 19-25 especially paragraph 2 of the judgment held:

Consequently, I hereby enter Judgment for the Plaintiff and further ordered as follows:

1. That the 1st Defendant who is the owner of the 2nd Defendant pay the Plaintiff the sum of N1,670,000.00 being outstanding balance due to the Plaintiff from the 1st Defendant for the hire of the Plaintiff constructions vehicle of a grader and an excavator.

2. The Defendants are to pay the Plaintiff 10% interest on the Judgment sum of N1, 670,000.00.

That from the above, it is clear that the Respondent asked for his balance from the 1st Defendant who is a natural person. That with or without the 2nd Defendant/2nd Appellant being a party, the Plaintiff/Respondents claim can still stand against the 1st Appellant. He urged the Court to resolve issue one in favour of the Respondent.

As to issue two, Counsel submitted that contrary to the submissions of the Appellants Counsel, there is nowhere in the 1999 Constitution that states that judgment of Court must be delivered in the presence of parties.

That Section 36(1) talks about fair hearing within a reasonable time, Section 36(1) talks about person whose right has been violated to be represented which of course the Appellants were represented, Section 36(3) talks of delivering Judgment in an open Court which the trial Court did and Section 36(4) talks of reasonable time in criminal cases, strange enough, this is a civil matter.

It is submitted that when the case came up on 15/10/2014 both counsel were in Court and the matter was adjourned for the last time to 4/11/2014. That still on the said date both the Defendant and his Counsel were absent. That judgment was not delivered on that day until 23/12/2014. That the question to be answered is whether a judgment of a Court can be set aside because it was delivered without notice to the other party? He referred to the case of Cotecna International Ltd. v. Church gate (Nig.) Ltd. (2011) ALL FWLR (Pt. 575) 261 at 262 where the Supreme Court held that:-

.. it would appear to me and I am of the view that the delivery of Judgment earlier than scheduled date without notice to the Appellant will not nullify the Judgment unless the Appellant show that it has resulted in miscarriage of justice, the Appellant has not shown that any miscarriage of justice has occasioned because its counsel was not present when the Judgment was read. It is not shown that if the Appellants counsel had listen to the Judgment which was in open Court, the decision could have been otherwise.

According to Counsel, it was not shown how the delivery of the judgment in Appellants Counsel absence occasioned any miscarriage of justice or that the judgment would have been in his favour for the simple fact that he was around.

On the complaint that the Appellants were foreclosed from their defence as shown at page 8 paragraph 4:04 of the Appellants Brief, it is submitted that after the Plaintiff/Respondent closed his case on 17/12/2013 as contained on page 16 of the record, the matter was adjourned to 29/1/2014 for defence. The case came up on 29/4/2014 where it was adjourned at the instance of the Defendant/Appellant to 5/6/2014. That on the said date, both Defendants/Appellants and their Counsel were absent and the matter was adjourned to a date both counsel agreed on. That Counsel agreed to go back on 29/9/2014 for defence. That on the said date, the Defendants/Appellants and their Counsel were absent and the matter was further adjourned to 15/10/2014 and hearing notice was served on their Counsel.

It is submitted that on the said 15/10/2014, Defence Counsel appeared and told the Court that his client (not witness) was unable to make it, the matter was adjourned to 4/11/2014 for the last time for defence.

That on 4/11/2014, both the Defendants/Appellants and their Counsel were absent, the Court foreclosed them.

It is submitted that the Appellants were given reasonable opportunity to enter their defence but failed to do so. He referred to Umaru v. Tunga (2012) ALL FWLR Pt. 607 726 at 740 paragraph E where it was held:

“Where a Court created the enabling environment for fair hearing to all and a party did not take advantage of the environment, the fault is his and not that of the Court. In instance case, where the Defendant failed to take the opportunity created by the trial Court to present his case the allegation of breach of fair hearing was discountenanced by the Court."

On the complaint in respect of the mode of execution of the judgment by the trial Area Court, it is submitted that the Appellant had the right to Appeal within 30 days but did not do that. That there is no law that says the judgment creditor must wait until 30 days for the aggrieved party to Appeal before the judgment is executed.

That Order 17 Rule 2 of the Area Court (Civil Procedure) Rules, 1971 permits the Judge to make a special order for immediate execution; and that was what the trial judge did based on the application of the Judgment Creditor/Respondents contained on page 29 of the Record. That Order 19 Rule 4 provides for a five day window period between execution of a judgment and auction sale. It is submitted that while execution was levied on 24/12/14, auction sale was conducted on 31/12/14 a period of seven days over and above the statutory requirement of five days minimum.

On issue three, it was submitted that the trial Court was right to have granted the Plaintiff/Respondents reliefs sought, as he led evidence through PW1 and PW2 in support of his claims. That evidence was led on the grader hired at N80, 000 per day for 12 days totaling N690, 000, that evidence was led on the hiring of excavator at N110,000 per day times 11 days totaling N1,210,000.00. That evidence was led on the payment made to the Plaintiff totaling N500,000 leaving an unpaid balance of N1,670,000 which is the amount in respect of which judgment was entered. According to Counsel, cases are decided on preponderance of evidence and balance of probabilities relying on Sterling Bank Plc. v. Falola (2015) ALL FWLR (Pt. 774) 5.

That the Respondent has discharged the burden as expected of him before the trial Upper Area Court. According to Counsel, there is no material contradiction in the names of Isiah and Isaac. That Robinson Isiah is the project manager of the 2nd Appellant while Isiah is the site manager. He referred to the case of Taiwo v. Ogundele (2012) ALL FWLR Pt. 639 Page 1033 at 1048 Paragraphs F-G and urged the Court to resolve the third issue in favour of the Respondent and dismiss the Appeal.

RESOLUTION OF THE APPEAL

I will determine this Appeal based on the three issues formulated by the Appellant which are similar on all fours with those formulated by the Respondent.

On issue one - whether the lower Court was right when it held that the trial Upper Area Court had jurisdiction over the second Appellant a non natural person, it is important to refer to Section 12 (1)(a)(b)(c) of the Area Court Law (Cap 11) Laws of Adamawa State 1987 which provides:-

12(1) Subject to the provision of this Edict and any other written Law, the following persons shall be subject to the jurisdiction of Area Courts:

a) Any person whose parents were members of any tribe or tribes indigenous to some part of Africa and the descendants of any such person;

b) Any person one of whose parents was a member of such tribe;

c) Any person in a cause or matter in which he consents to the exercise of the jurisdiction of the Area Court.

In the instant case, a careful look at the record of proceedings of the trial Upper Area Court contained at Pages 4 -30 of the Printed Record, the Appellants/Defendants consented and submitted to the jurisdiction of the trial Upper Area Court by participating in the proceedings through their Counsel Ehimikhua Esq., who appeared on their behalf and even cross-examined PW1 and PW2 the (Respondent/Plaintiffs witnesses). Section 12 (1)(c) Area Court Law (Cap 11) Laws of Adamawa State ,1987 was therefore complied with by the trial Upper Area Court. The lower Court was therefore right when it held that the Upper Area Court had the jurisdiction to determine the Suit. Issue one is therefore resolved in favour of the Respondent and against the Appellants.

Issue two is whether the lower Court was right when it held that the Respondents were accorded fair hearing. The grouse of the Appellants/Defendants is that the Upper Area Court foreclosed them from entering their defence and that when the Upper Area Court delivered its judgment on 23/12/14 instead of 18/11/14; it ought to have put them on notice. On the issue of denying the Appellants their Constitutional right to enter their defence, it is trite that a Court should give parties reasonable time to present their case before it. If the Court affords parties the opportunity to present their case before it, any party that fails to utilize such opportunity cannot complain of lack of hearing. Page 16 of the Printed Record shows that when the Respondent/Plaintiff closed his case on the 17/12/13 the case was adjourned to 29/1/14 for defence. On the returned date, it was further adjourned to 4/03/14 for defence, again adjourned to 18/03/14, 29/4/14 and 5/06/14 for defence. On 5/06/14, it was adjourned to 29/09/14 and hearing notice ordered to be served on the Appellants/Defendants. On 29/09/2014 case was adjourned to 15/10/14. On the said date, Appellant/Defendants Counsel applied for another date for defence. It was adjourned to 4/11/2014. On the returned date neither the Appellants/Defendants nor their Counsel was in Court and the Court adjourned the case to 18/11/14 for judgment. From 17/12/13 to 4/11/14 when the Upper Area Court adjourned for judgment is a period of almost a year but still the Appellants/Defendants were not able to present their defence. In the case of Umaru v. Tunga (2012) ALL FWLR (Part 607) 726 at 740 it was held that:-

Where a Court created the enabling environment for fair hearing to all and a party did not take advantage of the environment, the fault is his and not that of the Court. In the instant case, where the Defendant failed to use the opportunity created by the trial Court to present his case the allegation of breach of fair hearing was discountenanced by the Court.

The lower Court was therefore on a sound footing when it held in its judgment reflected on Page 72 of the Printed Record that the trial Court was right to foreclose the Appellants/Defendants after giving them several adjournments to enter their defence but failed to do so.

On the issue that the lower Court adjourned the case to 18/11/14 for judgment but did not deliver same until 23/12/14 without hearing notice served on the Appellants/Defendants; from the Printed Record at Pages 21-28 it is shown that on 4/11/14, the case was adjourned to 18/11/14 for judgment. On the return date, the Court did not sit to deliver the judgment. The judgment which is contained at Pages 22-28 of the Printed Record was delivered on 23/12/14. The Respondent/Plaintiff was represented by Counsel, while the Appellants/Defendants were not in Court nor were they represented by Counsel. The issue for determination is what is the effect of delivering the judgment of the trial Upper Area Court after the scheduled date without notice to the Appellants/Respondents? In the case of Cotecna International Ltd. v. Church Gate (Nig.) Ltd. (2011) ALL FWLR (Pt. 575) 261 at 262, the Supreme Court held:

“It would appear to me and I am of the view that the delivery of judgment earlier than scheduled date without notice to the Appellant will not nullify the judgment unless the Appellant show that it has resulted in a miscarriage of justice. The Appellant has not shown that any miscarriage of justice has occasioned because its counsel was not present when the judgment was read. It is not shown that if the Appellant counsel had listened to the judgment which was delivered in open Court, the decision could have been otherwise.”

In the instant case, the Appellants have not shown that the delivery of the judgment on a later date of 23/12/14 rather than the earlier date of 18/11/14 without hearing notice to them had occasioned any miscarriage of justice to them; or that the judgment which was delivered in open Court could have been otherwise if the Appellants or their counsel had listened to it. Furthermore, in the case of Veritas Insurance Company Ltd. v. Citi Trust Investment Ltd. (1993) 3 NWLR (Pt. 281) 363 this Court held:

Parties and or their counsel sit in Court and listen to the judgment being delivered.

They do not play any role beyond listening and at times taking down random notes in the course of the delivery of the judgment. Some do not take notes, they just listen and leave Court at the end of the judgment with the usual clich “as the Court pleases” even when the pleasure of the Court is not the pleasure of the party who lost the case. Perhaps the position should have been different if the matter was at the stage of physically taking evidence or at the point of address.

The second issue is therefore resolved in favour of the Respondent and against the Appellants.

The third issue for determination is whether the lower Court was right when it held that the Respondent proved his case before the trial Upper Area Court. The claims of the Respondent/Plaintiff before the trial Upper Area Court as reflected at Page 23 of the Printed Record are as follows:-

a) The sum of N1,670,000 being the outstanding balance remaining unpaid from the hire and use of the Plaintiffs two (2) construction machines.

b) 10% interest on the judgment sum.

The evidence of the Respondent/Plaintiff contained at Page 8 of the Printed Record shows that the 1st Appellant went to the Respondent and hired an excavator and a grader. The grader was hired for 12 days at N80,000 per day making the total money to N960,000. The excavator was hired at N110,000 per day for 11 days which totals N1,120,000. That the sum total is N2,170,000.00. That the 1st Appellant paid to the Respondent N500,000, leaving the unpaid balance of N1,670,000.00. This Court observes that the evidence of PW1 was not discredited during cross-examination as shown on page 12 of the printed record. The other complain of the Appellant is that while the Respondent as PW1 stated that at page 12 of the printed record that the name of the site engineer is Isaac, he called one Engineer Robinson Isaiah (page 14-15 of the record) with no explanation as to the two names. That PW1 also stated at pages 12-13 of the printed record that “besides this work which we did on credit there are other previous works which we did. I can’t remember how much was paid for the previous work we did for him. This was in 2012 but I can’t remember the money paid”. According to Counsel, these are material contradictions that go to the root of the Respondents claim before the trial Upper Area Court which it did not advert its mind to. On the side of the Respondent, it was argued that evidence was led as to the claims of the Respondent upon which the trial Court entered judgment in favour of the Respondent.

It is trite that contradictions in the evidence of witnesses may not necessarily be fatal to a case especially when they are minor, and the judgment of a trial Court will not be reversed on appeal because there were contradictions in the evidence of witnesses, it must also be shown that the Court did not advert its mind to those contradictions. See Taiwo v. Ogundele (2012) ALL FWLR (Pt. 639) 1033 at 1048 Paras. F-G.

In the instant case, the lower Court at Pages 71-72 of the Printed Record adverted its mind to the alleged material contradictions raised by the Appellants. The lower Court held:-

“On issue four, it is the contention of the Appellant that the Plaintiff/Respondent never proved his case His argument was that under cross examination PW1 testified that he wrote the name of the 1st defendant as Christopher as given to him, and the name of the Engineer as Isaac; but PW2 testified that the name of the Engineer is Robinson, and there was no attempt to clarify the name Robinson Isaiah and Isaac and yet the Court relied on their testimonies. In my view, the fact that there was misdescription of the said Engineer whether the surname was Isaac or Isaiah did not change the substance of the claim of the Plaintiff/Respondent from the Defendants/Appellants. The claim of the Plaintiff/Respondent is clear. It was for services of machineries hired by the Defendant/Appellant which has not been settled for.

For this reason, the Plaintiff/Respondent has proved his claim as required by law, moreover, the Defendants/Respondents did not offer any defence for these claims at the trial Court."

As I stated earlier, the lower Court had adverted its mind to the alleged contradictions as highlighted above. This Court will not interfere with such finding of the lower Court since it is not perverse. The third issue is accordingly resolved in favour of the Respondent and against the Appellant. Having resolved the three issues against the Appellant, this Appeal lacks merit and is hereby dismissed. I affirm the judgment of the lower Court delivered on 19/12/2016 which affirmed the decision of Upper Area Court 11, Yola. Parties to bear their respective costs.

**CHIDI NWAOMA UWA, J.C.A.:**

I read in advance a draft copy of the judgment of my learned brother, ABDULLAHI MAHMUD BAYERO, J.C.A., just delivered. I agree with my learned brothers reason and decision arrived at, that the Appeal is lacking in merit. I also dismiss the appeal for lacking in merit and abide by the order made as to costs in the leading judgment.

**JAMES SHEHU ABIRIYI, J.C.A.:**

I agree.-end!