**MADAM BISOLA ADESANYA**

**V.**

**MADAM MODINAT ALUBATA**

COURT OF APPEAL

28TH DAY OF APRIL, 2014

CA/I/230/2008

**LEX (2014) – CA/I/230/2008**

OTHER CITATION(S)

2PLR/2014/107 (CA)

**BEFORE THEIR LORDSHIPS:**

MONICA BOLNA'AN DONGBAN-MENSEM, J.C.A.

CHIDI NWAOMA UWA, J.C.A.

HARUNA SIMON TSAMMANI, J.C.A.

**BETWEEN**

MADAM BISOLA ADESANYA – Appellant

AND

MADAM MODINAT ALUBATA – Respondent

**ORIGINATING COURT**

1. OGUN STATE HIGH COURT OF JUSTICE HOLDEN AT SAGAMU (O. O. MAJEKODUNMI J.)

2. CUSTOMARY COURT GRADE 1, IKENNE, OGUN STATE

**REPRESENTATION**

MATHEW ARIYO ADEBAYO, Esq. for Appellant

Respondent was duly served but absent

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

REAL ESTATE AND PROPERTY LAW:- Claim for declaration of title over land under adverse possession – Appellate proceeding relating thereto – When would be deemed to be in breach of the constitutional right to fair hearing

CONSTITUTIONAL LAW:- Fair hearing – Meaning and elements – Failure to serve prescribed court process – Disposition of an appeal in the absence of a party without prior ntice - Whether breach of fair hearing can be waived or acquiesced into

WOMEN AND CHILDREN LAW – CONSTITUTIONAL AND HUMAN RIGHTS: -Woman - Defence of interest in property and place of business - Right to fair hearing – Fundamental nature of concept in judicial proceedings thereof

**PRACTICE AND PROCEDURE ISSUES**

JURISDICTION:- Court - Conditions for assuming jurisdiction over a matter

WORDS AND PHRASES: - Condition precedent”- “Omnia praesumuntur rite esse acta” – Meaning(s) thereof

SERVICE OF COURT PROCESS:- Failure to serve court process - Where statutorily required – Legal effect of

**MAIN JUDGMENT**

MONICA BOLNA'AN DONGBAN-MENSEM, J.C.A. (DELIVERING THE LEADING JUDGMENT):

On the 25th February, 2008; the Ogun State High Court of Justice holden at Sagamu Coram **Hon. Justice O. O. Majekodunmi (J)** delivered a judgment against the Appellant. (Pages 43-47 of the records for this appeal). The Appellant was the Plaintiff at the trial Customary Court which upheld her claim. The Respondent appealed successfully to the High Court. This appeal challenges the decision of the High Court.

The parties shall hereafter be referred to simply as Appellant and Respondent respectively.

The High Court sat in its appellate jurisdiction over the judgment of the Customary Court Grade 1, Ikenne, Ogun State.

The brief facts of this case are that, the Appellant who was Plaintiff at the Customary Court Grade 1, Ikenne, Ogun State instituted this suit in a representative capacity for and on behalf of the ***Layi Akinola Family*** against the Respondent claiming the following reliefs (page 6 of the record):-

(1) A Declaration that under Native Law and Custom of Ikenne Remo, Ogun State of Nigeria, the parcel of land upon which the defendant erected the wooden kiosk is part of the Plaintiff's Landed property situate, lying and being at No. 18, Igodo Street, Ikenne Remo, Ogun State. The value of the land is N4,000.

(2) The sum of N3,000.00 as general and special damages for the trespass being committed by the Defendant who has unlawfully and illegally installed her wooden kiosk on the land inspite of the protest of and complaints by the Plaintiff and her family members;

(3) The Plaintiff is also seeking for an order of Perpetual Injunction restraining the Defendant, his servants, agents, privies or anyone claiming through her from further acts of trespass on the land.

At the Customary Court, witnesses were called by both parties in support of their respective cases. At the end of the trial, the Hon. President and members of the Customary Court visited the ***locus in quo*** and delivered a judgment on the 10th November, 2005 granting all the reliefs sought by the Appellant (as Plaintiff) (pages 23-33 of the record). Dissatisfied by the Customary Court decision, the Respondent filed a notice of appeal to the High Court of Ogun State; Sagamu Judicial Division (pages 34-36 of the record)" The Appellant then filed a motion on notice dated 17th September, 2007 to dismissed the said appeal for want of diligent prosecution (pages 41-42 of the record). The motion was dismissed and the High court proceeded to hear the said appeal and dismissed same. The decision of the Customary Court was set aside.

Taken aback by the decision of the High Court, the Appellant filed a notice of appeal dated 21st May, 2008 and filed on the same day in which five grounds of appeal were raised. (Pages 48-50 of the record) On the 13th February, 2014, when this appeal was called up for hearing, the learned Counsel for the Appellant, **Mathew Ariyo Adebayo Esq.** drew the attention of the court to the fact that no Respondent brief had been filed and that on the 14th day of June, 2012 this court granted an Order for the appeal to be heard on the Appellant's brief alone. The Court was also reminded of its order made for the transmission of a certified true copy of an Additional Record of Proceedings which was filed on the 22nd October, 2009 but deemed filed on the 9th February, 2010.

The appeal was therefore heard on the Appellant's brief alone in accordance with ***Order 18 Rule 10 of the Rules of this court, 2011.***

The learned Counsel for the Appellant adopted and relied on the Appellant's brief of argument dated and filed the 17th June, 2009. The Appellant raised four issues for the determination of this court as follows:-

*1. Whether the failure of the Respondent to fulfill the conditions precedent to the Appeal did not deprive the Appellate High Court (the lower court) of the jurisdiction to hear the Appeal.* ***(This was distilled from Ground 2 of the Notice of Appeal)***

*2. Whether the hearing of the Appeal in the absence of the Appellant and her Counsel at the same sitting on 14/11/2007 immediately following the striking out of the Appellant's Motion on Notice which sought to strike out the Appeal for lack of diligent prosecution was not in breach of the Appellant's constitutional right to fair hearing.* ***(This was distilled from Ground 1 of the Notice of Appeal)***

*3. Whether the attempt by the learned Appellate Judge to re-evaluate witnesses evidence was necessary when the trial Court's evaluation of the evidence and the decisions arrived at thereby are clear and are not perverse.* ***(This was distilled from Grounds 3 & 4 of the Notice of Appeal)***

*4. Whether having successfully proved trespass against the Respondent the Appellant was not ipso facto entitled to award of damages,* ***(This was distilled from Ground 5 of the Notice of Appeal)***

In determining this appeal, issues 1 and 2 will be taken together while issues 3 and 4 separately, if necessary.

**Issue 1**

The learned Counsel for the Appellant challenges the jurisdiction of the learned Judge of the High Court to have heard and determined the appeal of the Respondent on two planks. The first, which is argued under issue one is that the Appellant before the High Court had not fulfilled the conditions for the appeal as set out by the Customary Court which heard the case of the Appellant as Plaintiff. The learned Counsel for the Appellant posits that after the Respondent filed his notice of appeal at the Customary Court on 6th December, 2005, the court fixed the following conditions of appeal:-

(i) that the Appellant (i.e. Respondent herein) should deposit the sum of Ten Thousand Naira (N10,000.00) only for compilation and transmission of the Record of Appeal to the High Court, Sagamu;

(ii) that the Appellant (i.e. Respondent herein) should enter into Bond for the sum of Ten Thousand Naira (N10,000.00) only and a surety in the like sum;

(iii) That conditions (i) and (ii) forgoing should be perfected within 30 days from the 8th December, 2005.

The learned Counsel posits that the appeal was not properly brought before the High Court which was thereby deprived of the jurisdiction to hear and determine the appeal. The alleged defect lies in the failure of the Respondent to fulfill the 1st condition set out by the trial Customary Court. The second plank is that the Appellant was neither invited by the Registrar of the Customary Court for settlement of records of appeal to the High Court nor was he notified of the date fixed for the hearing of the appeal. The Appellant also alleged that he was not served with the records of appeal purportedly compiled. That the Respondent is in breach of ***Order 44 Rule 5 of the Rules of the High Court of Ogun State 1987***, argued under issue two.

Counsel submits that the failure to serve court process where service is required is a failure which goes to the root of the case. That the High Court lacks the jurisdiction to hear and determine the appeal as it was not initiated by due process of law and upon fulfillment of a condition precedent to the exercise of his jurisdiction (Refers **Remawa v. NACB Consultancy & Finance Company Ltd (2007) 2 NWLR (Pt.1017) 155 @ 163-164. Madukolu v. Nkemdilim (1962) 2 SCNJR 341, A-G Kano State v. A-G Of the Federation (2007) 6 NWLR (Pt.1029) 164 @ 173**).

**Issue 2**

Counsel submits that on the 14th day of November, 2007, the learned High Court Judge struck out a motion on notice filed by the Appellant and proceeded to hear the appeal without notice to either the Appellant or his Solicitor. The motion dated 17th September, 2007 (pages 41-42 of the records) sought an order of the High Court striking out the appeal filed by the Respondent against the decision of the Customary Court for want of diligent prosecution.

Counsel also submits that the High Court heard and determined the appeal in non-compliance with ***Order 44 Rule 5 of the Rules of High Court of Ogun State.*** That he was neither invited by the Registrar of the Customary Court for settlement of records of appeal to the High Court nor was he notified of the date fixed for hearing. He was also not served with the records of appeal purportedly compiled by the Registrar of the Customary Court.

It is the submission of the learned Counsel that the Appellant was denied fair hearing by the learned Judge of the High Court who proceeded to strike out the motion on notice filed by the Appellant and to hear the substantive appeal of the Respondent in the absence of the Appellant or his Solicitor, Cited to buttress this submission is the case of **The State v. Onagoruwa (1992) 2 NWLR (Pt.221) 33 @ 58** where it was held that:-

"a man can never have a verdict entered against him on a matter relating to his civil rights and obligations without being given opportunity of being heard. The rule is in fact one of the essential cornerstones of our judicial process".

That in determining whether a person's right to fair hearing has been breached, the courts consider the procedure followed in the determination of the case and not the correctness of the decision. Counsel also cites **Karibi-White** in **State v. Onaguruwa (supra)** where my lord held that:-

"fair hearing lies in the [procedure followed in the determination of the case, not in the correctness of the decision, It does not matter that the decision made subsequently therefore is correct. A denial of right to be heard is a breach of Constitutional right, natural justice and rules of court" It is elementary and fundamental principle of administration of justice in Nigeria that no decision can be regarded as valid unless the trial Judge or court has heard both sides of the conflict".

(Refers **Bank of the North v. Abiola (2007) 1 NWLR (Pt.1014) 23 @ 25-26. Anidiobi v. Anidiobi (2007) 2 NWLR (Pt.1017) 1 @ 5 page 13**).

**When there** is a condition precedent for something to be done, it has to be done before any other action is taken. In the instant appeal there were conditions laid down by the trial Customary Court as seen at page 37 of the record and reproduced in his judgment before the Respondent can appeal to the High Court" Those conditions are preconditions for the Respondent to fulfill before he appeals the Customary Court's judgment.

The **Black's law dictionary 6th edition** defines a condition precedent as

"one-which must happen or be performed before the estate to which it is annexed can vest to be enlarged; or it is one which is to be performed before some right dependent thereon accrues or-some act performed".

See **Adeleke v. Oska (2006) 16 NWLR (Pt.1006) 608 @ 710.**

My lord **Onnoghen JSC** explained the high premium of a condition precedent that gives jurisdiction to adjudicate on a matter in the case of **Ohakim v. Agbaso & Ors (2010) LPELR-2359 (SC)** P. 25-26 as follows:-

"for a court of law or tribunal to have jurisdiction to hear and determine any matter before it, it must satisfy the now settled conditions or have the following ingredients:- (a) it must be properly constituted as to the number and qualification of its membership; (b) any condition precedent to its exercise of jurisdiction must have been fulfilled; (c ) the subject matter of the case must be within its jurisdiction; and (d) the case or matter must have been brought to the court by the due process of the law. " Emphasis mine.

See also Onnoghen JSC in **SLB Consortium Ltd v. NNPC (2011) LPELR-3074 (SC) @ 13. Rhodes-Vivours in Ogaga v Umukoro & Ors (2011) LPELR-8229 (SC) @ 37**.

Although the Courts no longer dwell on technicality, when an action is instituted without compliance with a condition precedent or a prescribed pre-condition for activating or setting the required legal process in action, the process must be struck out as incompetent. The court is equally derobed of competence to entertain it and it lacks the jurisdiction to determine the suit**" (Madukolu v. Nkemdilim) (1962) 2 SCNJR 341.)**

From the facts of the case, can it be said that the condition precedent for the Respondent to appeal the decision of the Customary Court was fulfilled?

A close perusal of the record may reveal some or a total absence of compliance with ***Order 44 Rule 5 of the Oyo State (Civil Procedure) Rule 1987.***

The condition as laid down by the Customary Court at page 37 is presumed to have been fulfilled contrary to the submission of the learned Counsel for the Appellant that one of the conditions was not fulfilled. If the condition were not fulfilled, the record of proceedings would not have been transferred to the High Court. The Registrar of the Customary Court who is responsible for preparing the appeal processes would have filed a notice of non-compliance had the conditions not been complied with. No such notice was referred to in this appeal. The conditions must have been fulfilled before the transfer of the records of proceeding to the High Court as shown at page 39-40 of the records of appeal. The law presumes to be properly done, that which is supposed to be done. The Latin phrase is ***Omnia praesumuntur rite esse acta.***

The Appellant complained of not being invited for settlement of record but has not shown how his non invitation for: settlement of record has occasioned him injustice. The Respondent is at liberty to compile supplementary records if documents he considers relevant have been excluded.

However, the failure to serve court process where it is required is a failure which goes to the root of the case.

**Order 44 Rule 5 of the Rules of the High Court of Ogun State 1987** provides that:-

"When notifying a party of the day fixed for the hearing of the appeal, the Registrar of the Court shall send him a copy of the proceedings"

Notification here refers to the serving of hearing notice on the party.

Under our adversary system of jurisprudence, to hear a case without one of the parties having been served with the hearing process is except in an ex parte proceedings would render the trial a nullity. The service of the court's processes is basic and indispensable to adjudication. A failure to serve the court processes robs a court of the jurisdiction and competence to deal with the matter. In the case of **Chukwuma v. FRN (2011) LPELR-863(SC)** my lord **Mohammed JSC** explained **@ pp23-24** that:-

"The concept of fair hearing postulates a hearing in which the authority is fairly exercised, that is consistent with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the right to present evidence, to cross-examine and to have findings supported by evidence. It thus, implies that both sides be given an opportunity to present their respective case and that each side is entitled to know that case is being made against it and given an opportunity to reply thereto".

In the instant appeal, the High Court disposed of the Appellant's preliminary objection in his absence and went ahead to hear and determined the substantive appeal also in his absence. There is nowhere in the records for this appeal which shows an affidavit of service on the Appellant at the High Court as evidence of proper service of hearing notice yet the learned High Court Judge went ahead to hear and determined the appeal, My **lord Ogundare JSC** in the case of **Societe Generale Bank (Nigeria) Ltd v. Adewunmi (2003) LPELR-3081 (SC) @ p**. 2 held that:-

"The purpose of affidavit of service is to convince the court that the persons on whom the processes are to be served have been duly served. Where there is no affidavit of service and the person served with a writ or any other process of a court appears in court, there is no further need to insist on proof of service. There cannot be a better proof than the appearance in court of the person on whom the process was served". Emphasis mine.

While **Katsina-Alu JSC @ pp.17** held that:-

"where notice of any proceeding is required, failure to notify any party is a fundamental omission which entitles the party not served and against whom any order is made in his absence to have the order set aside on the ground that a condition precedent to the exercise of jurisdiction for the making of the order has not been fulfilled"

My Lord **Mustapher JSC** was even more elaborate on this issue in the case of **Kida v. Ogunmola (2006) LPELR-1690 (SC) @ p**.16 when he held that:-

"Service of process on a party to a proceeding is crucial and fundamental...failure to serve process where service of process is required is a fundamental vice. It deprieves the trial court of the necessary competence and jurisdiction to hear the suit" In order words, the condition precedent to the exercise of jurisdiction was not fulfilled. That being so, the trial court, in the instance case had no jurisdiction to hear the appellant's application and enter judgment against the respondent in default of filing statement of defence. The proceeding as far as it affected the respondent on the 24/12/1996 was a nullity"

(See also **Mbadinuju & Ors v. Ezuka & Ors (1994) LPELR-1851 SC @ 44 Odutola v. Kayode (1994) LPELR-2262 SC @ 14**)

I agree with the submission of the learned Counsel to the Appellant that the Appellant was denied fair hearing by the learned Judge of the High Court. Having struck out the motion of the Appellant for want of prosecution, the Appellant was entitled to be served a fresh notice for the hearing of the appeal' This is imperative because there is no evidence of service of hearing notice on the Appellant before the court proceeded to take the appeal in his absence. This was a clear infringement of the Constitutional right of the Appellant as enshrined in section 36 of the 1999 Constitution.

It is clear that the learned High Court Judge breached the settled rule of audi alteram partem which postulates that a court or tribunal must hear both sides at every material stage of the proceedings before handing down a decision. If there is a need to depart from these fundamental requirements, the reasons for so doing must be stated in details. None was so stated in the records.

It is important to state that the learned High Court Judge deprived the Appellant right to a fair hearing which is a Constitutional breach, a breach to natural justice and breach to the rules of court. The Appellant was never given the opportunity to be heard. Fair hearing entails that the court should exercise its authority in consistent with the fundamental principles of justice. (Refers section 36 of the Constitution of the FRN, 1999, Womiloju & Ors v. Anibire & Ors (2010) LPELR-3503 (SC) p.15, FRN v. Akubueze (2010) LPELR-1272 (SC) p.9).

From the entire proceedings as shown in the records for this appeal, I find that the Appellant's right to fair hearing has been breached, His lordship erred in law by proceeding to hear and determine the appeal without a compelling documentary evidence of the service of hearing notice on the Appellant.

In the circumstance, this appeal succeeds for what of jurisdiction. The decision of the High Court of Ogun State per **Hon. Justice O. O. Majekodunmi (J)** delivered on the 25th February, 2008 is hereby set aside.

A cost of N30,000.00 is awarded to the Appellant and against the Respondent.

It is hereby so ordered.

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

I read in advance the draft of the judgment of my learned brother, M. B. Dongban-Mensem, JCA. I agree that the appeal be allowed, I allow same.

**HARUNA SIMON TSAMMANI, J.C.A.:**

I had the privileged of reading before now, the judgment delivered by my learned brother, **M. B. Dongban-Mensem, JCA.**

I agree with the findings and conclusion of my learned brother that the Appellant's right to fair hearing was breached by the court below. On the day the Appellant's Motion seeking to strike out the Respondents Appeal at the court below for lack of diligent was struck out, the learned trial Judge had the duty to adjourn the hearing of the appeal before it and issue a fresh hearing notice to be served on the Appellant on record. This the learned trial Judge failed to do, but after striking out the Appellant's Motion before it, proceeded to hear the substantive appeal before him that same day, and in the absence of the Appellant, whose counsel was also not in court. That singular act breached the Appellant's fundamental right to fair hearing guaranteed by Section 35(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Thus Adekeye, JSC in the case of **F.B.N. Plc v. T.S.A. Ind. Ltd (2010) 15 NWLR (pt.1216) p.247** had this to say:

The right to fair hearing is a right guaranteed by Section 36 of the 1999 Constitution, the Supreme Law of the country to every citizen of Nigeria. It cannot be waived neither can its beach acquiesced in. The right to fair hearing is a fundamental and constitutional right of a party to a dispute to be afforded an opportunity to present his case to the adjudicating authority" The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived at in the case. As reasoned in the case of **Otapo & Ors. v. Sunmonu & Ors. (1987) 2 NWLR (Pt.58) p.587** at pg.605 the Supreme Court held that –

"A hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused hearing or not given an opportunity to be heard, the hearing cannot qualify as a fair hearing."

Clearly in this case the Appellant was neither heard in the substantive appeal before the court below, nor was he given an opportunity to be heard.

It is for the above reason and the more reasons detailed in the lead judgment that I agreed that this appeal is meritorious and should be allowed. Accordingly I also allow the appeal and set aside the judgment of the court below delivered by Hon. Justice O. O. Majekodunmi delivered on the 25th February, 2008.

**Cases referred to**

Adeleke v. Oska (2006) 16 NWLR (Pt.1006) 608

A-G Kano State v. A-G Of the Federation (2007) 6 NWLR (Pt.1029) 164

Anidiobi v. Anidiobi (2007) 2 NWLR (Pt.1017) 1

Bank of the North v. Abiola (2007) 1 NWLR (Pt.1014) 23

Chukwuma v. FRN (2011) LPELR-863(SC) 23

F.B.N. Plc v. T.S.A. Ind. Ltd (2010) 15 NWLR (pt.1216) 247

FRN v. Akubueze (2010) LPELR-1272 (SC) 9

Kida v. Ogunmola (2006) LPELR-1690 (SC) 16

Madukolu v. Nkemdilim (1962) 2 SCNJR 341

Mbadinuju & Ors v. Ezuka & Ors (1994) LPELR-1851 SC 44

Odutola v. Kayode (1994) LPELR-2262 SC 14

Ohakim v. Agbaso & Ors (2010) LPELR-2359 (SC) 25

Remawa v. NACB Consultancy & Finance Company Ltd (2007) 2 NWLR (Pt.1017) 155

Societe Generale Bank (Nigeria) Ltd v. Adewunmi (2003) LPELR-3081 (SC) 2

The State v. Onagoruwa (1992) 2 NWLR (Pt.221) 33

Womiloju & Ors v. Anibire & Ors (2010) LPELR-3503 (SC) 15