**MALLAM SALIU GAMBARI**

**V**

**MADAM ABIBAT AMOPE**

COURT OF APPEAL (ILORIN DIVISION)

2ND DAY OF MARCH 2017

CA/IL/76/2016

**LEX (2017) - CA/IL/76/2016**

OTHER CITATIONS

2PLR/2017/13 (CA)

**BEFORE HIS LORDSHIP**

M. A. OWOADE JCA (Presided and Read the Lead Judgment)

CHIDI NWAOMA UWA JCA

HAMMA AKAWU BARKA JCA

**BETWEEN**

MALLAM SALIU GAMBARI – Appellant

AND

MADAM ABIBAT AMOPE (Suing for herself and on behalf of the heirs of the Late Mustapha Kuranga) – Respondent

**ORIGINATING COURT**

KWARA STATE HIGH COURT, ILORIN DIVISION (M. A. FOLAYAN J., Presiding)

**REPRESENTATION/LAWYERS**

ISMAIL ABDUL AZEEZ Esq. - for the Appellant.

B. R. GOLD, Esq. with T. A. HAMMED, Esq., S. O. MUFTAU, Esq. and I. A. AHMED, Esq.) - for the Respondent.

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

REAL ESTATE AND PROPERTY LAW – LAND:- Claim and counter-claim for title to land, damages for trespass committed and perpetual injunction – Where the trial court at the address stage declared the statement of defence, the counterclaim, respondent’s reply and defence to the counterclaim incompetent for being filed out of time – Judgment on merit granted to Plaintiff/Respondent’s – How treated on appeal

**PRACTICE AND PROCEDURE ISSUES**

ACTION – IRREGULARITY:- What constitutes – Legal effect - Whether automatically nullifies entire proceedings.

ACTION - WAIVER AND CONSENT:- Distinction between – Legal effects of

APPEAL - MISCARRIAGE OF JUSTICE - Case which occasions - Attitude of court thereto – Legal effect

JUSTICE - MISCARRIAGE OF JUSTICE - Case which occasions - Attitude of court thereto.

INTERPRETATION OF STATUTE - HIGH COURT (CIVIL PROCEDURE) RULES OF KWARA STATE, ORDER 10, RULES 4 AND 5 AND ORDER 4, RULE 2(1) THEREOF – Interpretation of - Whether apply independently of each other.

WORDS AND PHRASES - WAIVER AND CONSENT - Distinction between.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

In the High Court of Kwara State, the respondent filed a representative action for herself and on behalf of the heirs of the late Mustapha Kuranga. She prayed the court for a declaration of title to the land situate at No. 89, Abdul Azeez Attah Road, Baboko, Ilorin, Kwara State and all the structures erected thereon, damages for trespass committed by the appellant and perpetual injunction restraining the latter from committing further trespass on the land.

The appellant filed a statement of defence and counterclaim for declaration of title and order of perpetual injunction. The trial court at the address stage declared the statement of defence, the counterclaim, respondent’s reply and defence to the counterclaim incompetent for being filed out of time and after determining the action on the merit, granted respondent’s claims. Dissatisfied, the appellant appealed to the Court of Appeal contending that the trial court breached his right to fair hearing by declaring his processes incompetent.

In determining the appeal, the Court of Appeal considered Order 10, rules 4 and 5 of the High Court (Civil Procedure) Rules of Kwara State, 2005 which reads:

4. The parties shall not by consent enlarge or abridge any of the times fixed by the provisions of these rules for taking any step, filing any document or giving any notice”.

5. “The court may on such terms as it thinks just by order extend or abridge the period within which a person is required or authorized by these provisions, or by any judgment, order or direction to do any act in any proceedings”.

Provided that any party who defaults in performing an act within the time authorized by the court or under these rules shall pay to the court an additional fee of N100.00 for each day of such default at the time of filing his application for extension of time”.

**DECISION(S) APPEALED AGAINST**

The trial Court declared the statement of defence, the counterclaim, respondent’s reply and defence to the counterclaim incompetent for being filed out of time and after determining the action on the merit, granted respondent’s claims. Dissatisfied, the Appellant appealed to the Court of Appeal.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

1. Whether the trial judge was right to have held that the statement of defence was incompetent leading, to a breach of fair hearing and natural justice. (Grounds 1 and 5).

2. Whether the trial judge was right to rely on the evidence in the written deposition of the witnesses, when the statement of defence had been declared incompetent, taking into cognizance that evidence is not led in vacuum but in furtherance of pleadings. (Grounds 2 and 3).

3. Whether the trial judge was right in the application in which exhibit 1 was put into being a piece of evidence in a previous proceeding.

*BY RESPONDENT:*

1. Whether the learned trial judge was right in holding the statement of defence/counterclaim of the appellant, incompetent and whether the appellant was denied fair hearing. (Grounds 1 and 5).

2. Whether the appellant suffered any miscarriage of justice by the reliance placed on the evidence on oath of the appellant, while considering the case on the merit by the trial court. (Grounds 2 and 3).

3. Whether the use in which the trial court applied exhibit 1 has occasioned a miscarriage of justice. (Ground 4).

**MAIN JUDGMENT**

OWOADE JCA (DELIVERING THE LEAD JUDGMENT):

This is an appeal against the judgment of the Kwara State High Court sitting at Ilorin (Coram: M. A. Folayan J.), delivered on 15 March 2016.

By writ of summons and statement of claim filed on 23 December 2011, the respondent as claimant claimed against the appellant as follows:

i. A declaration that the claimant is the owner of the land together with the structures erected on it situate at No. 89, Abdul Azeez Attah Road, Baboko, Ilorin.

ii. N500,000.00 (five hundred thousand naira) damages for trespass against the defendant.

iii. Perpetual injunction restraining the defendant from committing or/and further committing trespass upon the land together with the structures erected on it.

iv. Cost of this suit.

By a statement of defence and counterclaim of 22 January 2014, the respondent counterclaimed as follows:

1. “Declaration that the defendant is the owner of a piece of land upon which three shops are erected situate at Baboko, Ilorin measuring 35 x 30 = 1050 Sq. Ft particularly delineated in the plan No. 110/48 of Ilorin Authority.

2. Order of perpetual injunction restraining the claimant (defendant to the counterclaim) by herself, agents, servants and privies or any member of her family from further trespass or any capable of disturbing the rights of the counterclaimant on the said piece of land”.

The claimant/respondent filed a reply and defence to counterclaim on 28 May 2014. The trial of the case indeed proceeded on the above mentioned pleadings. One of the issues raised at the address stage by the learned counsel to the claimant/respondent was the incompetence of the statement of defence and counterclaim which admittedly was filed out of time, but to which the claimant/respondent had filed a reply and defence to counterclaim.

In his judgment contained at pages 168 to 190 of the record of appeal, the learned trial judge declared the appellant’s statement of defence and counterclaim and the respondent’s reply and defence to counterclaim as incompetent processes. He nevertheless claimed to have considered the case on its merit, held in favour of the respondent and dismissed the appellant’s counterclaim.

First, at page 183 of the records, the learned trial judge held thus:

“The non-compliance with Order 27, rule 1 bring into bear the operation of Order 10, rules 4 and 5.

The combined effect Order 10, rules 4 and 5 is that any process filed in contravention of Order 27, rule 1(2) by a defence and without seeking the leave of the court under Order 10, rule 5 is incompetent. By the operation of Order 10, rule 4, the non-compliance cannot be waived by either of the parties in the case.

The statement of defence filed in this case is incompetent, so also is the reply to same is a reply to an incompetent process which amounts to nothing.

I therefore hold that there is no competent statement of defence before the court in this case, and this implies that there cannot be a competent reply to same. I also hold that Order 4, rule 2(1) cannot save the situation because non-compliance with Order 27, rule 1(2) cannot be treated as mere irregularity, which the court can overlook in view of the provision of Order 10, rules 4 and 5. I therefore hold, that the incompetent statement of defence/counterclaim cannot be saved by Order 4, rule 2(1) of the rules of court”.

At page 189 of the records, the learned trial judge held in favour of the claimant/respondent as follows:

“In conclusion I hereby enter judgment in favour of the claimant. It is hereby declared that on preponderance of evidence, the claimant has proved her claim to the 3 shops in dispute, therefore prayer for declaration of title in favour of the claimant and prayer or perpetual injunction restraining the defendant, his agent, privies or anybody claiming through him from committing further trespass on the property are hereby granted.

As for claim No. 2 for N500,000.00 damages for trespass, this court hereby award a sum N50,000.00 and the claimant’s cost of this suit is also awarded.

The defendant’s counterclaim is hereby dismissed”.

Dissatisfied with this judgment, the appellant filed a notice of appeal containing six (6) grounds of appeal in this court on 31 March 2016.

The relevant briefs of argument for the appeal are as follows:

1. Appellants brief of argument dated 8 November 2016 and filed on 9 November 2016, settled by Ismail Abdul Azeez Esq.

ii. Respondents brief of argument dated and filed on 10 November 2016, settled by B. R. Gold Esq.

iii. Appellants reply brief dated and filed on 17 November 2016, settled by Ismail AbdulAzeez Esq.

Learned counsel for the appellant nominated three (3) issues for determination as follows:

1. Whether the trial judge was right to have held that the statement of defence was incompetent leading, to a breach of fair hearing and natural justice. (Grounds 1 and 5).

2. Whether the trial judge was right to rely on the evidence in the written deposition of the witnesses, when the statement of defence had been declared incompetent, taking into cognizance that evidence is not led in vacuum but in furtherance of pleadings. (Grounds 2 and 3).

3. Whether the trial judge was right in the application in which exhibit 1 was put into being a piece of evidence in a previous proceeding.

Learned counsel for the respondent also formulated three (3) issues for the determination of the appeal as follows:

1. Whether the learned trial judge was right in holding the statement of defence/counterclaim of the appellant, incompetent and whether the appellant was denied fair hearing. (Grounds 1 and 5).

2. Whether the appellant suffered any miscarriage of justice by the reliance placed on the evidence on oath of the appellant, while considering the case on the merit by the trial court. (Grounds 2 and 3).

3. Whether the use in which the trial court applied exhibit 1 has occasioned a miscarriage of justice. (Ground 4).

Learned counsel for the appellant opened up on issue one by recalling the events which led to the appeal. The respondent took out a writ of summons with the accompany statement of claim at the court below on 23 December 2011, consequent upon which a preliminary objection was taken to the propriety of the said processes, before T. S. Umar, J. who upheld the appellant’s objection and found that the suit was statute-barred.

The respondent not satisfied with the ruling of T. S. Umar, J. appealed to this court which set aside the ruling and ordered a trial de novo. That upon the order of trial de novo, the appellant herein as the defendant at the lower court now filed his statement of defence incorporating a counterclaim on 22 January 2014.

The respondent subsequently filed a reply and defence to the counterclaim on 28 May 2014 having sought extension of time to do so from the court.

Learned counsel for the appellant submitted that the respondent sought the leave of the lower court before filing her reply and defence to counterclaim on 28 May 2014 and participated in the trial, without raising eyebrow to the competency or otherwise of the statement of defence being touted to have been filed out of time stipulated by rules of the lower court.

He submitted that the long line of decided authorities are on the same page, that objection to irregularity in procedure is raised at the commencement of the proceedings or at the time when the irregularity arises, and not when the party has slept on that right and allows the irregularity to continue to a finality, then the party cannot be heard to complain at the concluding or concluded stage of the proceeding.

He submitted that the only exception to this general rule is that the party would be allowed to complain on appeal, if it can show that it had suffered a miscarriage of justice, by the reason of the procedural irregularity.

He referred on the above to the cases of Duke v. Akpabuyo Local Government (2005) 12 SCNJ 280 at 295, (2006) All FWLR (Pt. 294) 559; Adejumo v. David Hughes & Co. Ltd (1989) 5 NWLR (Pt. 120) 146 at 158; Maja v. Samouris (2002) FWLR (Pt. 98) 818, (2002) 3 SCNJ 29 at 45

He submitted that the respondent herein only deemed it fitat the address stage for the first time in the life of the proceedings to object to the competency of the statement of defence, after she had filed a reply and defence to counterclaim to the said processes.

He submitted that in matters of procedural irregularity such as in the instant case, it is settled that such an irregular proceeding can only be set aside if the party affected acted timeously and before taking any fresh step, since discovering the irregularity.

That it is when a point on procedural irregularity is timeously and properly raised that it becomes necessary for an appeal court and indeed a trial court to consider its merit: Duke v. Akpabuyo. It would seem appropriate, said counsel, to tag the efforts of the respondent at the address state to undo what had been done by asserting that the statement of defence was not competent in the face of her reply and defence to counterclaim as belated.

He premised this assertion on the fact that ex-nihilo nihil fit - you cannot put something on nothing and expect it to stand as a reply and defence to counterclaim filed presupposes the regularity of the statement of defence or sheer waiver to the irregularity associated with the said statement of defence as reply and defence to counterclaim cannot be filed in vacuum.

He referred to the provision of Order 27, rule 1(3) of the Kwara State High Court (Civil Procedure) Rules, 2005 and submitted that the act of filing a reply and defence to counterclaim by the respondent was nothing but waiver.

He argued that the concept of waiver equals to simply failing to take advantage of a right very obvious to a party where it is clear that there is no other reasonable presumption in explanation of the party’s step, so far taken in the proceedings, before the court, then that the right, is let to go, that is, he has acquiesced in his right.

He referred to the case of Nigeria Bottling Company Plc v. Ubani (2014) All FWLR (Pt. 718) 803, (2014) 4 NWLR (Pt. 1398) 421 at 453 and submitted that the consequence of waiver defeated the issue of non-compliance.

He submitted that the trial judge having failed to countenance the statement of defence, on the basis that it was incompetent, deprived the appellant a fair hearing to ventilate his grouse and state his own side of the dispute as the (trial judge) arrived at that decision premised on the fact that he chose some aspects of the rules of lower court, which state the time the statement of defence must be filed i.e. Order 27, rules 1(2) while ignoring Order 4, rule 2(1) of the same rule.

He submitted that it is trite that rules of court are made for attaining justice with ease, certainty and dispatch. They are made for the purpose of obtaining justice by parties in the citadel of justice. They must not be used as a clog in the wheel of justice.

He referred on this to the case of Dingyadi v. I.N.E.C. (No.1) (2010) All FWLR (Pt. 550) 1204, (2010) 18 NWLR (Pt. 1224) 1 at 146. Still on the same wicket, counsel submitted that the declaration of the statement of defence by the trial judge as incompetent is a breach of fair hearing and natural justice. This assertion, he said is strengthened by the fact that at the lower court, pleadings are fulcrum upon which evidence is led and a proper interpretation of the provision of section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), shows that the right to fair hearing, extended beyond merely affording the parties a hearing, but also includes a proper consideration and determination of the issues canvassed by the parties before the court.

On this, counsel referred to the case of Nyesom v. Peterside (2016) All FWLR (Pt. 824) 38, (2016) 7 NWLR (Pt. 1512) 452 at 550.

He submitted that following the above proposition of law, the decision of the trial judge via non-consideration of the statement of defence and counterclaim, clearly violated rights to fair hearing of the appellant as enshrined in the Constitution of the Federal Republic of Nigeria, 1999 (as amended). He submitted that of equal relevance to this appeal is the pedantic stance of the trial judge on Order 10, rules 4 and 5 of High Court (Civil Procedure) Rules, Kwara State, 2005 which culminated in the perverse decision arrived at when he held:

“That Order 10, rule 4 does not give any of the parties right to waive the issue of computation of time and that the court has a discretion by Order 10, rule 5 to enlarge the time, but it must be upon application and payment of penalty fees fixed at N100.00 for each day of such default.

In my view, none of the parties before the court in this instance has a right which can be waived. I quite agree with the defence counsel that the proper time to raise objection based on procedural irregularity is at the commencement of the proceedings and not at the final stage, but I doubt if the provisions of computation of time can be waived by any of the parties”.

It is crystal clear, said counsel, that the learned trial judge did blow hot and cold at the same time taking into cognizance, the quotation from the judgment above, in that, in one breath he agreed with the appellant’s counsel that time to raise objection to irregularity is at the commencement of the proceedings, and not at the final stage as employed by the respondent’s counsel and in another, had uncertainty (doubt) as to whether provisions of computation of time can be waived.

Appellant’s counsel referred to the case of Ogwe v. Inspector-General of Police (2015) All FWLR (Pt. 779) 1055, (2015) 7 NWLR (Pt. 1459) 505 at 528 and submitted that the appropriate order the trial judge ought to have made was for one of ordering penalty and not the one that shut out the appellant via his pleadings which made evidence at the trial court to be onesided.

Learned counsel for the respondent on the other hand, submitted that by the wordings of Order 10, rule 4, it is well impossible to treat issue of time, as prescribed by the rules as an irregularity which could be waived by the act of any of the parties to a case. That the draftsman was emphatic in the use of the word “shall” to declare issue of time, a no-go area for the parties to abridge or enlarge. Therefore, neither the appellant nor the respondent is clothed with the powers to waive an obligation created by the provision of Order 10, rule 4 of the rules of court.

He submitted that the above stance is reinforced by the fact that, it is now firmly settled that, rules of court are not mere rules, but they partake of the nature of subsidiary legislation by virtue of section 18(1) of the Interpretation Act and therefore have the force of law and must be obeyed. He referred to the case of Owners of MV “Arabella” v. Nigerian Agricultural Insurance Corporation (2008) All FWLR (Pt. 443) 1208, (2008) 34 NSCQR 1091.

He submitted that it is clear that a process filed without the requisite leave of the court remains null and void, which could not be waived or be treated as mere irregularity. He referred to the case of Chief Ujile D. Ngere and Anor. v. Chief Job William Okuruket XIV and 30 Ors. (2014) All FWLR (Pt. 742) 1766 at 1781.

Learned counsel for the respondent submitted that it is no gainsaying to state that, the legal status of the processes remain “void” while all the action predicated on it also remain a nullity.

This, he said is because, ex-nihilo nihil fit, it is practically impossible to build something on nothing. He referred to the cases of Ayorinde v. Kuforiji (2007) All FWLR (Pt. 362) 1966; U.A.C. v. Macfoy (1961) 3 NMLR 1405.

In fact, said counsel, the provision of Order 10, rule 5 makes it mandatory for the appellant if seeking leave to pay penalty, which shows that failure to seek leave is not an irregularity which can be waived by either party. The trial court was therefore right to declare as it did in the judgment, that the statement of defence/counterclaim together with the accompanied processes filed without the leave of court is incompetent.

Learned counsel for the respondent submitted further that, the trial court at the expense of being accused of shunning out the appellant in the case, actually considered the matter before it on the merit by given ample consideration to the evidence of both the respondent and appellant alike.

He submitted that to argue as the appellant did or paint the picture of denial of fair hearing in the case against the trial court could not be right. This, he said is because, all the basic attributes of fair hearing explicated by this court in the case of Uchenna Onyechere Ibezim and 2 Ors. v. Nnamdi Dennis Dike Onwuegbu Ibezim and Anor. (2015) All FWLR (Pt. 813) 1783 at 1824 were explicitly adhered to by the trial court in this case.

He submitted that the whole essence of fair hearing which is coterminous with fair trial, connotes given parties to any proceedings, the opportunity to present their case. He referred to the case of Messiah Okpani Adakole v. Major Innocent Ogbuagu and Anor. (2015) All FWLR (Pt. 782) 1751 at 1776.

He submitted that the trial court was fair to the parties and urged us to resolve the issue against the appellant and to dismiss the appeal.

In his reply brief, the learned counsel for the appellant reminded us that in the construction of statutes, the whole of the statute must be read in order to determine the meaning and effect of the words being interpreted.

He distinguished the case of Chief Ujile D. Ngere and Anor. v. Chief Job William Okuruket XIV and 30 Ors. as cited out of context, in that the leave espoused by the Supreme Court in that case is in respect to appeal on ground of mixed law and facts and not pertaining to the case at hand, which is amply provided for by Order 4, rule 2(1) of the rules of the lower court.

There are two legs to appellant’s issue one. The first is whether the learned trial judge was not in error to have declared the appellant’s statement of defence and fortiori the respondent’s reply incompetent in the circumstances of the case. The secondis whether having done so, the appellant could still be said to be given fair hearing in the case.

I think the learned trial judge was patently in error to have declared the appellant’s statement of defence and counterclaim incompetent, null and void at the address stage of the trial, much after the respondent had filed a reply and defence to counterclaim and after the trial itself have been concluded.

The reason for this is that the objection to the procedural irregularity committed by the appellant ought to have been raised timeously. In the circumstance, the concept of waiver applies as the respondent failed to raise the procedural objection timeously.

This is the expected result of the combined reading and/or application of the provision of Order 27, rule 1(2) and Order 4, rule 2(1) of the Kwara State High Court (Civil Procedure) Rules, 2005.

The first states that:

“A defendant shall not later than 30 days after service on him of the claimant’s originating process and accompanying documents, file his statement of defence, set off or counterclaim if any together with a written statement on oath of each witness to be called and a copy of every document to be relied on at the trial”.

The second reads thus:

“An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed, unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity”.

The position of the law espoused above has the backing of the highest judicial authority in the land. It is because, it is not every irregularity that automatically nullifies an entire proceeding, particularly where the irregularity did not in any way materially affect the merits of the case, or occasion a miscarriage of justice or where, in any case, it is much too late in the day for a party to complain about such irregularity.

See Chief Osigwe Egbo and 16 Ors. v. Chief Titus Agbara and 4 Ors. (1997) 1 NWLR (Pt. 481) 293, (1997) 1 SCNJ 91; Atanda v. Ajani (1989) 3 NWLR (Pt. 111) 511 at 545; Ukiri v. Geo-Prakla (Nig.) Ltd (2010) All FWLR (Pt. 534) 53, (2010) 16 NWLR (Pt. 1220) 554 at 558.

In the instant case, the learned trial judge declared the appellant’s processes incompetent on his belief that parties cannot consent to enlarge or abridge time fixed under the rules by the provision of Order 10, rules 4 and 5 of the High Court (Civil Procedure) Rules of Kwara State, 2005. This is wrong.

The provision of Order 10, rules 4 and 5 is differently intended from the provision of Order 4, rule 2(1) and operate exclusively of each other, one not preventing the operation of the other.

Order 10, rules 4 and 5 read as follows:

Rule 4:

“The parties shall not by consent enlarge or abridge any of the times fixed by the provisions of these rules for taking any step, filing any document or giving any notice”.

Rule 5:

“The court may on such terms as it thinks just by order, extend or abridge the period within which a person is required or authorized by these provisions, or by any judgment, order or direction to do any act in any proceedings”.

Provided that, any party who defaults in performing an act within the time authorized by the court or under these rules shall pay to the court an additional fee of N100.00 for each day of such default at the time of filing his application for extension of time”.

The purpose of Order 10, rule 4 in particular is to prevent, parties by private treaty to bargain out the provisions or theoperation of the provisions of the rules of court. In other words, parties are not allowed to take over the functions of the courts under its rules, especially in this case, the discretion of the court as enshrined in Order 10, rule 5 of the same rules to extend or abridge time.

This is quite different from saying that a party who has not raised objection timeously under the provision of Order 4, rule 2(1) would not be taken to have waived his right of objection under the rules.

Indeed, 8th Edition of the Black’s Law Dictionary clearly distinguished the word “waiver” from “consent”; that is, “consent”, as used under the provision of Order 10, rule 4 of the applicable rules of court.

“Waiver - 1. Renounciation of right or benefit. 2. An intentional and voluntary relinquishment of a known legal right. 3. Intentional given up right.

“Consent” - 1. Agreement - voluntary acceptance of the wish of another. 2. To agree to something. A contract would not be valid unless all the parties consented to it. 3. Agreement or permission that is given voluntarily by a competent person, either orally or in writing. Sometimes referred to the written form of an agreement.

In this respect, the learned trial judge was particularly wrong when he held at pages 183 - 184 of the record of appeal that:

“By the operation of Order 10, rule 4 the non-compliance cannot be waived by either of the parties in this case. I, therefore, hold that there is no competent statement of defence before the court in this case. I, also hold that Order 4, rule 2(1) cannot save the situation, because non-compliance with Order 27, rule 1(2) cannot be treated as mere irregularity, which the court can overlook in view of the provision of Order 10, rules 4 and 5”. Indeed, as rightly pointed out by the learned counsel for the appellant, the consequence of waiver defeated non-compliance.See Nigeria Bottling Company Plc v. Ubani (2014) All FWLR (Pt. 718) 803, (2014) 4 NWLR (Pt. 1398) 421 at 453.”

On the second leg of appellant’s issue one, I do agree with the learned counsel for the appellant, that the learned trial judge having declared at page 183 of the record that “the statement of defence filed in this case is incompetent, so also the reply to same, to an incompetent process which amounts to nothing” could no longer be heard to say that the appellant, enjoyed fair hearing or fair trial in the trial that ensued.

The learned trial judge having failed to countenance the statement of defence of the appellant, on the basis that it was incompetent, deprived the appellant a fair hearing to ventilate his grouse and state his own side of the dispute.

This is because fair hearing is synonymous to fair trial and it is a fundamental principle of the administration of natural justice, that a defendant and his witnesses should be heard before the case against him is determined and it is a denial of justice to refuse to hear a defendant and his witnesses: Mallam Sadau of Kunya v. Abudul Kadir of Fagge (1956) 1 FSC 3 at 41.

In the instant case, it could not be said that the appellant was heard after his statement of defence and counterclaim has been wrongly declared incompetent.

It is the law that where a case has occasioned a miscarriage of justice, such matter is liable to be set aside by a court no matter how well decided.

Pan African International Inc. and 2 Ors. v. Shoreline Lifeboats Ltd and Anor. (2010) All FWLR (Pt. 524) 56, (2010) 3 SC (Pt. 1) 59.

In the circumstance, issue one is resolved in favour of the appellant.

In this appeal, appellant’s issue one has turned to be a determinant issue. I do not find it necessary to consider other issues raised in this appeal.

This appeal is allowed. The judgment of M. A. Folayan J. in suit No. KWS/331/2011 is hereby set aside. Suit No. KWS/331/2011 is remitted to the Honourable Chief Judge of Kwara State for assignment to another judge for trial.

A sum of N30,000.00 (thirty thousand naira) costs is awarded to the appellant.

**UWA JCA:**

I read in advance, the judgment of my learned brother, Mojeed Adekunle Owoade JCA. I agree that the appeal be allowed, I allow same and also remit suit No. KWS/331/2011 to the Chief Judge of Kwara State for assignment to another judge for trial. I abide by the order made as to costs in the leading judgment.

**BARKA JCA:**

Having also read the records of appeal and the submissions of learned counsel, I do agree with my lord, Mojeed Adekunle Owoade JCA, that the denial by the lower court in considering the appellant’s statement of defence, deprived him of his fundamental right to fair hearing, and a decision premised in breach of fair trial cannot be allowed to stand. I agree with the lead judgment that this appeal has merit and the decision of the lower court, per M. A. Folayan, J. delivered on 15 March 2016 should be set aside.

I also, do agree that the case below, not having been properly ventilated, same ought to be and is hereby remitted to the Kwara State Chief Judge, to assign the case to a different judge for determination on the merit. I abide on order of costs made in the lead judgment.

Appeal dismissed