**GOVERNMENT OF BAYELSA STATE AND OTHERS**

**V.**

**ASCOT FLOWLINE (NIGERIA) LIMITED**

COURT OF APPEAL (PORT HARCOURT DIVISION)

9TH DAY OF MARCH 2016

CA/PH/531/2012

**LEX (2016) - CA/PH/531/2012**

OTHER CITATIONS

2PLR/2017/145 (CA)

**BEFORE THEIR LORDSHIP**

EJEMBI EKO, JCA (Presided)

MODUPE FASANMI, JCA (Read the Lead Judgment)

STEPHEN J. ADAH, JCA

**BETWEEN**

1. GOVERNMENT OF BAYELSA STATE

2. ATTORNEY-GENERAL OF BAYELSA STATE

3. COMMISSIONER, MINISTRY OF WORKS AND TRANSPORT

4. ACCOUNTANT-GENERAL OF BAYELSA STATE

5. COMMISSIONER, MINISTRY OF BUDGET – Appellant

AND

ASCOT FLOWLINE NIGERIA LTD (FORMERLY WILBROS NIGERIA LIMITED) – Respondent

**ORIGINATING COURT**

BAYELSA STATE HIGH COURT

**REPRESENTATION/LAWYERS**

T. Y. ABASI Ag: D. C. L Bayelsa State Min. of Justice – for the Appellants

ROTIMI AREMU - for the Respondent

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

DEBTOR AND CREDITOR LAW – RECOVERY OF CONTRACT DEBT:- Claim for outstanding sum due under a contract executed in favour of a State government - Summary judgment given by court without objection from the appellants except on the sum claimed – Appeal thereto – How treated

DEBTOR AND CREDITOR LAW – RECOVERY OF CONTRACT DEBT VIA SUMMARY JUDGMENT PROCEDURE:- Application for summary judgment procedure – Where stepped down for parties to explore out of court settlement and report back to the court for consent judgment – Failure to so report – Whether court entitled to proceed on the summary judgment procedure in the absence of any defence filed by the defence

COMMERCIAL LAW – CONTRACT:- Contract for sand-filling of the Niger Delta University permanent site for the benefit of the Bayelsa State government – Where sum due admitted – Whether can be enforced via summary judgment procedure – Where affidavit evidence(s) used in suit based on documents produced by debtor state entity – Whether opened to them to attack same on appeal

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - ADMISSIBILITY OF DOCUMENT:- Party who fails to challenge at trial - Impropriety of raising issue of on appeal.

APPEAL – JUDGMENT:- Reversal of - Nature of error that will ground.

APPEAL - SUMMARY JUDGMENT PROCEDURE:- Judgment given thereunder - Whether amounts to consent judgment on grounds of no objection to application for summary judgment.

EVIDENCE - ADMISSIBILITY OF DOCUMENT:- Party who fails to challenge at trial - Impropriety of raising issue of on appeal.

JUDGMENT AND ORDERS - CONSENT JUDGMENT:- Meaning of.

JUDGMENT AND ORDERS – JUDGMENT:- Reversal of – Nature of error that will ground.

JUDGMENT AND ORDERS - SUMMARY JUDGMENT PROCEDURE:- Judgment given thereunder - Whether amounts to consent judgment on grounds of no objection to application for summary judgment.

JUDGMENT AND ORDERS - JUSTICE AND TECHNICALITIES:- Duty on court to avoid technicalities and do substantial justice.

JUDGMENT AND ORDERS - SUMMARY JUDGMENT PROCEDURE:- Judgment given thereunder - Whether amounts to consent judgment on grounds of no objection to application for summary judgment.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The respondent claimed that it executed a contract for the Bayelsa State represented by the appellants for the sand-filling of the Niger Delta University permanent site. It filed an action in the High Court of Bayelsa State under Order 11, rule 1 of Bayelsa State High Court Rules, claiming the sum of N719,688,362,43 (seven hundred and nineteen million, six hundred and eighty-eight thousand, three hundred and sixty-two naira and forty-three kobo), being the outstanding sum due under the contract. The appellants failed to file their statement of defence and when their counsel mooted the idea of settling the matter out of court, the matter was adjourned for report of settlement.

The trial court after hearing the motion for summary judgment without objection from the appellants except on the sum claimed being part of debt owed the respondent by the appellants, the trial court entered judgment in favour of the respondent.

Aggrieved, the appellants appealed to the Court of Appeal, contending that the lower court erred by relying on uncertified public documents to grant respondent’s claims. The respondent filed a preliminary objection to the appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment in favour of the respondent without objection from the appellant and in the absence of a statement of defence. Dissatisfied, the Appellant appealed to the Court of Appeal.

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

*BY APPELLANTS:*

Whether the lower court was right to have relied solely on uncertified public documents to enter judgment in favour of the respondent in the absence of any defence.

*BY RESPONDENT:*

Whether considering the facts and circumstances of the case presented before the trial court, the lower court was right to enter judgment in favour of the respondent under the summary judgment procedure as done by the lower court.

*AS ADOPTED BY COURT*

[The Court adopted the issue formulated by the Respondent].

**MAIN JUDGMENT**

FASANMI JCA (DELIVERING THE LEAD JUDGMENT):

This is an appeal against the judgment of the Bayelsa State High Court of Justice in suit No. YHC/173/2011 delivered on 8 March 2012.

The lower court entered judgment in favour of the respondent in the sum of N719,688,362,43 (seven hundred and nineteen million, six hundred and eighty-eight thousand, three hundred and sixty-two naira and forty-three kobo) only being the sum due to the respondent from the contract between the appellants and the respondent for the sand-filling of the Niger Delta University permanent site since January 2009 to June 2011 by the appellants.

The respondent commenced this suit against the appellants jointly and severally for recovery of outstanding debt due to the respondent, as a result of a contract executed by the respondent for Bayelsa State government represented by the appellants. The writ of summons together with the statement of claim and other processes were filed and served on the appellants. The claim of the respondent being one on liquidated money demand, the respondent on the 11 December 2011, filed an application for summary judgment since it is allowed under Order 11 rule 1 of Bayelsa State High Court Rules, 2010. Appellants failed to file their statement of defence.

Submitted further that appellants through their counsel mooted the idea of settling the matter out of court. After series of adjournment for report of settlement, the trial court adjourned the matter till 17 February 2012, for a report of settlement or hearing of the motion before the court as both counsel were in court.

At the hearing of the motion for summary judgment, learned counsel for the appellants did not oppose the application but submitted that the sum claimed by the respondent was due as part of the money owed the respondent by the appellants. The learned trial judge as a result entered judgment in favour of the respondent.

Dissatisfied with the judgment, appellants filed their notice of appeal on 25 April 2012. Appellants filed their brief of argument on 20 February 2013. It was deemed properly filed and served on 7 April 2014. Appellants reply brief was filed on the 22 September 2014. Learned counsel for the appellants adopted the two briefs filed and urged the court to allow the appeal.

The respondents brief of argument was filed on 11 September 2014. It was deemed properly filed and served on the 22 September 2014. Respondent also filed a notice of preliminary objection on 11 September 2014 on the ground that the notice of appeal filed on 25 April 2012 was incompetent for failure to comply with condition precedent to the filing of the appeal and thus robs the court the jurisdiction to entertain the matter. Respondent’s counsel incorporated the argument on the preliminary objection in the respondent’s brief of argument from pages 8-11 of the brief.

Learned counsel for the respondent on the preliminary objection submitted that the judgment which formed the basis of this appeal was a consent judgment. Submitted that appellants through their counsel conceded to the application for summary judgment by not opposing the application. The court delivered the judgment on 8 March 2012, which formed the basis of this appeal. Learned counsel for the respondent submitted that by conceding to the application for summary judgment makes the judgment of the lower court a consent judgment.

Learned counsel for the respondent contended further that being a consent judgment, appellants ought to first obtain the leave of either the lower court or this honourable court before appealing against the said judgment of 8 March 2012.

Appellants did not obtain leave before filing the notice of appeal thus making the appeal to be incompetent and robbing the court of the jurisdiction to hear and determine same. Reliance was placed on the cases of Korobotei & Ors. v. Obubo & Ors. (1999) 9 NWLR (Pt. 620) 655 at page 678, Josiah Cornelius Ltd v. Chief Cornelius O Ezenwa (1996) 4 NWLR (Pt. 443) 391 at page 407, (1996) 37 LRCN 618 and S.P.D.C Ltd v. Orunari (2014) All FWLR (Pt. 733) 1996. Learned counsel for the respondent urged the court to strike out the appeal for being incompetent.

Learned counsel for the appellants submitted that at the time respondent moved its motion, settlement was still open ended. Submitted that the statements made by him that:

“My lords, we are not really opposed to the application but just to straighten the records, is that the contract is still subsisting. The sum claimed is just a part that is due that we have been unable to pay, proposed terms of settlement were drawn up but not filed due to the insurgence of successive administration within this period. It is not as though settlement has failed.”

Clearly show utmost good faith, therefore they could not be applied as weapons of destruction nor can they be conveniently regarded as admission by counsel on behalf of his client.

Submitted that in a consent judgment, the agreed terms of settlement must be filed in court and it is from those terms that the court enters consent judgment, but that summary judgment is a summary hearing wherein the belief of the claimant, the defendant has no defence to the action. He referred to the case of United Bank for Africa Plc & Anor. v. Alhaji Babangida Jargaba (2007) All FWLR (Pt. 380) 1419, (2007) 43 WRN 1, (2007) 5 SCNJ 127, (2007) LPELR - 3399 (SC) 27, (2007) 11 SC 169.

Learned counsel for the appellants submitted that the judgment of the lower court is not a consent judgment but a judgment on the merit. He urged the court to dismiss the preliminary objection as lacking in merit.

A consent judgment is a judgment the provisions and terms are agreed to by the parties and the terms of settlement must be filed in court. Where court makes an order based upon such terms of settlement filed, there emerges a consent judgment from which the parties could appeal only by the leave of the court. See the case of Race Auto Supply Company Limited & Ors. v. Alhaji Faosat Akibu (2006) All FWLR (Pt. 327) 486, (2006) 6 SCNJ 98, (2006) 6 SC 1. The application moved before the court at page 132 of the record of appeal is an application for summary judgment brought pursuant to order 11 rule 1 of the Bayelsa State High Court Rules, 2010. The essence of the order is that respondent believed that appellants have no defence to the action.

Judgment under this kind of special procedure cannot be a consent judgment. See the case United Bank for Africa Plc & Anor. v. Alhaji Babangida Jargaba (supra). If there is consent or admission under the summary judgment procedure, such consent or admission does not amount to a consent judgment. I am therefore of the view that the judgment the subject matter of the appeal in this case is a judgment on the merit and not a consent judgment and I so hold. The preliminary objection is devoid of merit and it is hereby dismissed.

On the merit of the appeal, appellants distilled a sole issue for determination thus:

Whether the lower court was right to have relied solely on uncertified public documents to enter judgment in favour of the respondent in the absence of any defence.

The respondent in its brief of argument distilled a lone issue for determination thus:

Whether considering the facts and circumstances of the case presented before the trial court, the lower court was right to enter judgment in favour of the respondent under the summary judgment procedure as done by the lower court.

I have gone through the issues formulated by the parties and in order to properly situate the issues in contention between the parties, I will adopt the issue distilled by the respondent which is stated above.

Learned counsel for the appellants submitted that the set of documents which were admitted by the lower court and which formed the basis of the judgment of the lower court are exhibits A - J attached to the affidavit in support of the motion for summary judgment. The documents are at pages 30-38 of the record of proceedings. He contended that the documents are public documents. Their use and admissibility before a court of law is governed by the relevant provisions of the Evidence Act, 2011.

Submitted that only certified true copies of public documents are generally admissible.

Learned counsel for the appellants contended further that though the lower court went through all the exhibits, it did not treat the documents as if it had never been admitted. Submitted that the judgment was therefore given in error. The judgment of the lower court is therefore fundamentally defective and ought to be set aside. He referred to the case of Duke v. Ene (2008) All FWLR (Pt. 440) 672 at page 679, paragraphs B - C. He urged the court to resolve the sole issue in favour of the appellants and allow the appeal.

Learned counsel for the respondent submitted that the only ground of appeal and its particulars which constitute the core complaint given rise to this appeal is false, misleading and not supported by the record. He contended that the learned Chief Judge gave judgment in favour of the respondent upon reviewing the case presented by the parties, borne out of the application for summary judgment filed, the affidavit evidence, the submission of counsel to the respective parties and admission of the appellants through their counsel that the sum claimed was due.

It is contended that the assertion of the appellants that the judgment was granted solely on the uncertified document is mischievous to deny the respondent the money due to it and which had been admitted by the appellants. He submitted further that since appellants did not object to the use of any of the attached documents as exhibits, it is too late on appeal for the appellants to complain about their being used and or relied upon having consented to their use at the hearing of the application. Learned counsel for the respondent submitted that where a case was heard on affidavit evidence as in this present case on appeal, where exhibits are not formally tendered but attached to affidavit, they cannot be ignored or dismissed by wave of hand or mere technicality, as the appellants are canvassing in this appeal. He referred to the case of Nwosu v. Imo State Environmental Sanitation Authority (1990) All NLR 379, (1990) 2 NWLR (Pt. 135) 688.

Appellants being government of Bayelsa State and its agents were the authors of some of the documents attached as exhibits, and they have the custody of the documents. If they have any objection as to contents of the documents they ought to have filed their own copy in opposition to the one attached to the application of the respondent for summary judgment.

The fact that the appellants had no defence to the claims of the respondent before the lower court was put beyond all doubts when counsel to the appellants at the hearing of the application for summary judgment submitted unequivocally that he was not opposing the application for summary judgment and that the sum claimed was due. Submitted that the complaint of the appellants in the appeal is an attempt to use technicality to defeat the course of justice. He urged the court to resolve the sole issue against the appellants and dismiss the appeal as lacking in merit.

The judgment of the lower court appealed against is a summary judgment obtained under the summary judgment procedure as provided for under Order 11 rules 1-7 of the Bayelsa State High Court Rules, 2010. It is on record that the learned trial chief judge adjourned the matter severally for report of settlement.

The fact that parties were attempting to settle the matter out of court does not mean that appellants should not file their defence to the claim of the respondent most especially when there was already an application for summary judgment pending to be taken in the matter. If the appellants actually had defence to the claim of the respondent, they ought to have filed their defence at least to meet the case of the respondent whilst they continue to pursue the purported settlement if at all they indeed wanted the matter settled out of court. Appellants ought to show good faith and file their defence even after the matter was adjourned for judgment to show that they were not just out to frustrate the respondent from obtaining judgment against them.

Appellants did not object to the use of any of the attached documents as exhibits at the hearing of the application. I agree with the submission of the learned counsel for the respondent that it is too late on appeal for the appellants to complain about their use at the Court of Appeal. See the case of Kossen (Nig.) Ltd v. Savannah Bank (Nig.) Ltd (1995) 9 NWLR (Pt. 420) 439, paragraphs E - F, (1995) LPELR-SC 209, (1995) 12 SCNJ 29 per Ogundare JSC where he opined thus:

“Where certain documents are admissible in evidence upon fulfilment of certain conditions or under certain circumstances, an appellant who fails to object to their admissibility in the trial court cannot do so at the Court of Appeal.”

Raimi v. Akintoye (1986) 3 NWLR (Pt. 26) 97, (1986) 5 SC 87 and Sadiku Osho & Anor. v. Michael Ape (1998) 8 NWLR (Pt. 562) 492 at page 505, paragraphs A - C per Onu JSC, where he opined thus:

“Where a party at the trial of an action consents to the admission of a documentary evidence, the consent amounts to an undertaking that he has permanently waived his right to object to the document at any later stage and thereby precludes him from raising any complaint or objection on appeal that the same was inadmissible.”

I am therefore of the view that appellants have waived their right to object to the exhibits attached to the affidavit either certified or not certified. The case of Aminu & Ors. v. Hassan & Ors. Electronic Citation LER (2014) All FWLR (Pt. 725) 205, (2014) 5 NWLR (Pt. 1400) 287, (2014) S.C 44/2002 cited by the learned counsel for the appellants in his reply brief is not applicable to the case at hand because appellants have not shown how they have suffered injustice or a miscarriage of justice as a result of the admissibility of the exhibits.

Courts are enjoined to do substantial justice to cases and not to allow technicality to defeat the course of justice. Technical justice in reality is not justice but a caricature of it. Substantial justice is predicated on the rule of law, the life blood of democracy. See the cases of Omoju v. Federal Republic of Nigeria (2008) All FWLR (Pt. 415) 1656, (2008) 2-3 SC (Pt. 1) 1, (2008) 7 NWLR (Pt. 1085) 38 at page 57, paragraphs D - G; Adebayo v. Okonkwo (2001) FWLR (Pt. 75) 465, (2002) 8 NWLR (Pt. 768) 1 and Union Bank of Nigeria Plc v. Ikwen (2000) 3 NWLR (Pt. 648) 223.

Appellants attack on the use of uncertified public document is nothing but an afterthought because this issue was not raised at the lower court. It is an attempt to frustrate the respondent under the shield of “we want to settle” when they knew they did not have a defence to the claim of the respondent.

It is not every error of a trial court that must result in the setting aside of a judgment. It must be established that the error has occasioned a miscarriage of justice which appellants have not established in this instance. See the case of Udeze & Ors. v. Chidebe & Ors. (1990) 1 NWLR (Pt. 125) 141, (1990) 1 SCNJ 104.

In the instant case, appellants through their counsel admitted before the lower court that the sum claimed was due to the respondent. I will refer to page 123 of the record where learned counsel for the appellants stated thus:

‘“My lord, we are not really opposed to the application but just to straighten the records, is that the contract is still subsisting. The sum claimed is just a part that is due that we have been unable to pay, proposed terms of settlement were drawn up but not filed due to the insurgence of successive administration within this period. It is not as though settlement has failed.”

What miscarriage of justice has the appellants suffered when they failed to pay the respondent after executing its own part of the contract. It should be the other way round that the respondent will suffer miscarriage of justice when appellants have no defence to the claim and they did not oppose the application. I say no more.

The sole issue is hereby resolved against the appellants.

Finally, this appeal lacks merit in its entirety and it is hereby dismissed. The judgment of the lower court in suit No. YHC/173/2011 delivered on 8 March 2012 is hereby affirmed. N50,000.00 (fifty thousand naira) costs is hereby awarded against the appellants and in favour of the respondent.

**EKO JCA:**

I read in draft, the judgment just delivered by my learned brother, Modupe Fasanmi JCA. The judgment represents my views in the appeal. I hereby adopt it, including the orders made therein.

Appeal dismissed