**NAFAMA THIMNU**

**V.**

**UNION BANK OF NIGERIA PLC AND OTHERS**

IN THE COURT OF APPEAL OF NIGERIA

THE 17TH DAY OF DECEMBER, 2013

CA/YL/4/2011

**LEX (2013) - CA/YL/4/2011**

OTHER CITATIONS

2PLR/2013/127

(2013) LPELR-22127 (CA)

**BEFORE THEIR LORDSHIPS**

JIMI OLUKAYODE BADA, JCA

JUMMAI HANNATU SANKEY, JCA

ADAMU JAURO, JCA

**BETWEEN**

NAFAMA THIMNU - Appellant(s)

AND

1. UNION BANK OF NIGERIA PLC

2. MALLAM IBRAHIM A. UMAR

3. ALHAJI MOHAMMED AUWALU - Respondent(s)

**REPRESENTATION**

A. B. PANYI with BENJAMIN DANPOLLO - For Appellant

AND

D. SILAS and M.M. UMBA - For Respondent

**ORIGINATING COURT**

ADAMAWA STATE HIGH COURT

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

BANKING AND FINANCE LAW:- Banking practices – Recovery of loan – Matters arising therefrom – How treated

CONSTITUTIONAL LAW – FAIR HEARING:- Meaning – Role of court in adjudicatory process – Raising of issues suo motu by court and resolving same without allowing parties to address court on same – Where a court fails to give full consideration and determination of the case of a party - Whether amounts to breach of fair hearing – Effect

CHILDREN AND WOMEN LAW:- *Women and Justice administration* – miscarriage of justice – Woman’s case dismissed by matter raised unilaterally by the Court and decided without giving parties opportunity to address the court – whether amounts to constitutionally guaranteed right to fear hearing

DEBTOR AND CREDITOR:- Bank loan recovery – Judgment debtor – Structured payment by instalment – Disputes arising therefrom – How treated

**PRACTICE AND PROCEDURE ISSUES**

APPEAL:- Appeal against a decision on ground that trial court raised an issue suo motu, unilaterally resolved without calling parties to address it – What appellant needs to prove – Duty to show that the issue so taken Suo Motu is substantial and has led to a miscarriage of justice against the Appellant

COURT:- Role - Whether a court has jurisdiction to raise an issue suo motu and unilaterally resolve it in its judgment without giving parties opportunity to address it on same

COURT – ESTOPPEL:- Issue estoppel – Purpose – As an impediment which bars a person from relitigating an issue which has been isolated and raised in a particular proceeding and has been finally determined in that proceedings - Condition for issue estoppel

COURT - JURISDICTION:Issue raised suo motu by court - Whether a court has jurisdiction to unilaterally resolve it in its judgment without hearing both sides – Duty of court when iot raises an issue suo motu

**MAIN JUDGMENT**

JIMI OLUKAYODE BADA, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the Judgment of Adamawa State High Court, Yola in Suit ADSY/11/04 - NAFAMA THIMNU VS. UNION BANK OF NIGERIA PLC & 2 OTHERS Delivered on the 24th day of May, 2010 wherein the Plaintiff/Appellant's suit was dismissed on the ground that there is a valid subsisting and final Judgment delivered by Upper Area Court, Guyuk in respect of the same matter and between the same parties.

Briefly, the facts of the case are that on 5th day of March 2004, the Plaintiff/Appellant instituted an action against the Defendants/Respondents at the lower Court in which he claims as follows:-

"a. N1,000,000.00 One Million Naira damages against the 1st and 2nd Defendants for the trespass, threats, assault, intimidation, blackmail and defamation of character perpetrated on the Plaintiff on 12/3/2003 by the 2nd Defendant and others acting as the agents, servants and employers of the Defendant.

b. A declaration that the Plaintiff is not indebted to the 1st Defendant in the sum of N156,800,33 as at February, 2003 as alleged by the Defendants or in any sum higher than the said amount subsequent to the period by way of interest charges thereon.

c. A declaration that the sum of N87,500.00 in the Plaintiff's Saving Account with the 1st Defendants Guyuk office to serve as her security, for the Plaintiff's loan repayment since 14/7/1995 is liable to attract interest thereon up to the time the Account is lawfully closed and or up to the time of Judgment in this suit

d. A declaration that the only lawful debt, if any, that is due from the Plaintiff to the 1st Defendant is the Judgment debt incurred against the Plaintiff by the 1st Defendant in the case between the 1st Defendant and the Plaintiff which Judgment was delivered by the Upper Area Court Guyuk on 17/12/96 against the latter without interest and in the total sum of N446,332.40.

e. A declaration that after the delivery of the Judgment by the Upper Area Court Guyuk in the said sum, of N440,332.00 the Plaintiff herein as Judgment debtor has paid to the 1st Defendant (without prejudice to the other payments which might be revealed in the Statement of Account) the sum of N260,000.00 and or any higher sum out of the Judgment debt, or alternatively a declaration that the Plaintiff has liquidated the said Judgment debt.

f. A declaration that the Plaintiff is entitled to be given by the 1st Defendant a comprehensive statements of both his Current Accounts and Savings Accounts with the 1st Defendant's Guyuk branch office from 1999 up to date in order to know the true balance outstanding on the Judgment debt, if any, and to pay same,

g. A declaration that the Plaintiff is entitled to use the amount standing in his credit in the Savings Account, including all the interests accruing thereon to off-set whatever balances that is left on the Judgment debt, if any, in liquidation thereof.

h. An order compelling the 1st Defendant to render accounts of all the moneys paid to it by the Plaintiff after the delivery of the Judgment of the Upper Area Court Guyuk on 17/12/96 in satisfaction of the Judgment debt.

i. An order directing the 1st Defendant to allow the Plaintiff to use the amount in his Savings Account kept with the 1st Defendant to settle any balance of Judgment debt found to be outstanding and payable to the 1st Defendant.

j. An order directing that should the 1st Defendant fail to award intereston the sums credited in the Plaintiffs Savings Account then the 1st Defendant should make such interest award on the said sums at the rate of 21% per annum and any other percents rate the Court deems proper from the time of the default in doing so till the lawful closure of the said Account.

k. An order directing the 1st Defendant to, upon the full satisfaction of the Judgment debt by the Plaintiff release to the Plaintiff his savings pass book kept as lien (security) for the loan repayment.

l. An order directing that upon liquidation of the Judgment debt by the Plaintiff, the 1st Defendant shall forthwith deliver-up to the Plaintiff all the original of the title deeds he deposited with the 1st Defendant on account of the said loan.

m. An injunction restraining the Defendants either by themselves, privies and or agents howsoever from further unlawfully entering the Plaintiff's house, threatening, blackmailing, insulting and intimidating his person and or defaming his character.

n. An injunction restraining the Defendants either by themselves, privies and agents howsoever from selling by auction the Plaintiff's mortgaged property located at Guyuk.

o. Costs of this action".

At the conclusion of hearing the Plaintiff's case was dismissed on the ground that the lower Court lacked jurisdiction in view of the subsisting final Judgment by the Upper Area Court, Guyuk in respect of the same matter and between the same parties.

The Appellant dissatisfied with the Judgment of the lower court now appealed to this court.

The learned Counsel for the Appellant formulated four issues for determination of the appeal, the issues are reproduced as follows:-

"i. Was the trial court right when it failed to proceed and grant the relevant reliefs of the Appellant before it after coming to a finding and conclusion that the Judgment delivered by the Upper Area Court, Guyuk is valid and binding on the Appellant and the 1st Respondent bank, including the amount of Judgment debt payable? If the answer is in the negative, whether this Honourable Court now sitting on appeal can invoke its powers by proceeding to re-hearing on the said finding and enter Judgment accordingly?

ii. Whether it was right for the trial court to, suo motu, raise the "res judicata" principle in the course of its Judgment and using same as basis for dismissing Plaintiff's claim without affording the parties, especially the Plaintiff that was prejudiced thereby the opportunity to address it on that.

iii. Is the dismissal of the Plaintiff's claim by the trial court the proper order to make in the circumstances when such was not based on any of the live issues raised by the parties before it, but based on the court's alleged lack of jurisdiction?

iv. Whether the failure by the trial court to consider the live issues raised by the parties before it, but preferring to consider its own issue of "res judicata" which was used to dismiss the Plaintiff's case did not amount to a miscarriage of justice liable to set aside the said Judgment".

The learned Counsel for the Respondents formulated a lone issue for the determination of this appeal.

The issue is set out as follows:-

"Whether the trial High Court was right in dismissing the Appellant's claim".

At the hearing of the appeal learned Counsel for the Appellant referred to the Appellant's brief of argument filed on 9/5/2012 with the leave of court as well as the Appellant's reply brief of argument filed on 14/6/2013.

He adopted the two briefs as his argument in urging that the Appeal be allowed.

The learned Counsel for the Respondents also referred to the Respondents' brief of argument filed on 7/3/2013. He adopted the said brief as his argument in urging that the appeal be dismissed.

I have carefully examined the issues formulated for determination by Counsel for the parties, the lone issue formulated on behalf of the Respondents is encapsulated in the issues formulated on behalf of the Appellant. I will therefore rely on the issues formulated on behalf of the Appellant in the determination of the appeal.

**ISSUE I AND II (TAKEN TOGETHER)**

Learned Counsel for the Appellant stated that the trial court applied the doctrine of "issue estoppel" and found as a fact that there was a valid, binding and subsisting Judgment between the Appellant and the 1st Respondent as decided by the Guyuk Upper Area Court on the indebtedness of the Appellant to the 1st Respondent. He submitted that the 1st Respondent bank was wrong to have insisted for a figure different from the Judgment debt which is N1,568,000.33 as the amount of debt the Appellant was owing it. He relied on the following cases:-

- DIM VS ENEMUO (2009) 10 NWLR PART 1149 PAGE 352. - BAMGBEGBIN & OTHERS VS. ORIARE & OTHERS (2009) 13 NWLR PART 1158 PAGE 370.

Learned Counsel for the Appellant argued further that the lower Court mistakenly applied the doctrine of **"Res judicata"** instead of **"issue estoppel"** and dismissed the entire action.

He relied on the following cases of:-

- ETIM VS. OBOT & OTHERS (2010) 12 NWLR PART 1270 PAGE 108.

- IKENI & 1 OTHER VS. EFAMO & 2 OTHERS (2001) 5 SCNJ PAGE 144.

Learned Counsel also urged this Court to use its powers under Section 15 of the Court of Appeal Act by way of hearing and to enter Judgment in favour of the Appellant per reliefs (a) (c) (d) (e) (g) (i) (j) & (k) of paragraph 35 of the statement of claim. It was also submitted on behalf of the Appellant that the other issues which the trial Court did not bother to evaluate or make findings upon can be remitted back to the trial Court for its findings and determination. He relied on the following cases:-

- MAFIMISEBI & 1 OTHER VS. EHUWA & OTHERS (2007) 2 NWLR PART 1018 PAGE 385.

- INAKOJU & 17 OTHERS VS. ADELEKE & 3 OTHERS (2007) 4 NWLR PART 1025 PAGE423.

On the 2nd issue, the learned Counsel for the Appellant submitted that the trial Court was wrong to have raised the issue of **"Res judicata"** unilaterally in the course of its Judgment when it was not relied by the parties before it. He submitted that what the Court did amounted to a denial of the right of the parties to be heard. He relied on the following cases:-

- HAMBE & 1 OTHER VS. HUEZE & 2 OTHERS (2001) 2 SCNJ PAGE 31.

- OYEKANMI VS. NEPA (2000) 12 SCNJ PAGE 75.

- KRAUS THOMPSON ORGANIZATION VS. UNIVERSITY OF CALABAR (2004) 9 NWLR PART 879 PAGE 631.

The learned Counsel for the Respondents in his response submitted that the trial Court was right in dismissing the claim before it. He referred to the part of the decision of the trial Judge on page 213 of the record of proceedings where he held that:-

"The foregoing is the case for the Plaintiff and the Defendants ideally, this is the right stage for this Court to proceed and determine the live issues raised by the parties, but in the course of reviewing the evidence of both parties, I discovered that the parties in the instant case were before Upper Area Court Guyuk and the cause of action between the parties is identified with the cause of action before this Court".

He submitted that the claim before the Upper Area Court was for the loan and interest. The Judgment of the Area Court did not say that interest was not inclusive, He submitted further that it is not every issue raised **suo-motu** by a Judge that would amount to miscarriage of Justice if the parties are not allowed to address the Court on same.

He relied on the case of:-LEADERS LTD VS. BAMAIYI (2010) 18 NWLR PART 1225 PAGE 329.

Learned Counsel for the Respondents submitted that the relief sought by the Appellant in paragraph 35 of the statement of claim are ancillary claims and the amount of money owed by the Appellant is yet to be paid and that it attracts interest.

He also submitted that since the trial Judge had evaluated the evidence before it, it would be unfair for this Court to proceed under Section 15 of the Court of Appeal Act to determine the remaining reliefs. He finally urged that the appeal should be dismissed.

On 5th day of March 2004, the Appellant instituted an action at the lower Court against the Respondents which claim was set out earlier in this Judgment.

At the conclusion of hearing, the lower Court on page 214 of the Record of Appeal in its Judgment stated among others as follows:-

"..I am satisfied that the evidence adduced before this Court in respect of this matter established the fact that there is a valid subsisting and final Judgment delivered by Upper Area Court, Guyuk in respect of the same matter and between the same parties, this Court therefore, has no jurisdiction to hear and determine this suit, because the principle of Res-Judicata has ouster its jurisdiction hence the fate of this matter is to dismiss same and it is hereby dismissed"

The lower Court applied the doctrine of "issue estoppel" pursuant to Section 54 of the Old Evidence Act, but now Section 173 of the Evidence Act 2011. By the Section previous Judgments were made to be conclusive proof of facts actually decided by the Court as against parties and their privies.

The Judgment debt as pronounced by Upper Area Court, Guyuk is N446,332.40 and it is binding on the parties.

Issue estoppel is an impediment which bars a person from relitigating an issue which has been isolated and raised in a particular proceeding and has been finally determined in that proceedings. The rule is that once an issue has been raised and distinctly determined between the parties, then as a general rule neither party can be allowed to fight over that issue all over again.  
See:-

- IKOKU VS EKENKWU (1995) 7 NWLR PART 410 PAGE 637.

- BAMGBEGBIN VS. ORIARE (SUPRA).

The condition for "issue estoppel" to operate in any given case are as follows:-

a. That the same question was decided in earlier proceedings;

b. That the Judicial decision said to create the estoppel was final.

c. That the parities to the Judicial decision or their privies were the same persons as the parties in to the proceedings in which the estoppel is raised or their privies.

See:-

- ADEDAYO US. BABALOLA (1995) 7 NWLR PART 408 PAGE 383.

- DIM VS. ENEMUO (SUPRA).

In the instant case under consideration, there is the evidence before the trial Court that the Upper Area Court Guyuk in its Judgment declared that the sum of **N446,332.40** as the Judgment debt. And on page 27 of the Record of Appeal, the Court went further to grant an Order of instalmental payment in respect of the said Judgment debt.

The principle underlying **"issue estoppel"** contemplates that there must be an end to litigation, and so neither party to a suit is allowed to challenge in the Court a finding of fact binding on them in that decision.

The Judgment of the lower Court earlier referred to and a part of which was set out showed that the Appellant's claim before the lower Court was dismissed based on **"Res-Judicata"** This issue was not raised by any of the parties before the lower Court. And the lower Court did not call on the parties to address it before dismissing the action.

In my humble view, it is wrong for the lower Court to raise the issue of **"Res-Judicata"** in its Judgment and decide the fate of the Appeal on that issue without inviting the parties to address it on the point. In other words, a court has no jurisdiction to raise an issue Suo Motu and unilaterally resolve it in its judgment without hearing both sides. Where a court raised an issue Suo Motu, it is fair that the court should hear Counsel to the parties on the matter most especially from the party that may be adversely affected as a result of the issue raised, Where a court raised an issue without giving Counsel the opportunity to address on it, the court would be in breach of the principle of fair hearing. There is a legal duty on the court to give the parties or their legal representatives the opportunity to address it on the issue raised. See:-

- OLATUNJI VS. ADISA (1995) 2 NWLR PART 376 PAGE 167.

- ADENIRAN VS. ALAO (1992) 2 NWLR PART 223 PAGE 350.

- YUSUFF VS. N.T.C LTD (1977t 6 S.C. PAGE 39.

It should however be noted that it is not in all cases where a court raises an issue Suo Motu that will lead to reversal of the decision so reached. The appellate court sitting over such judgment must be convinced that the issue so taken Suo Motu is substantial and has led to a miscarriage of justice against the Appellant.

The issue raised Suo Motu by the lower court upon which the claim of the Appellant was dismissed was based upon only relief (b) in paragraph 35 of statement of claim. The remaining legs of the reliefs i.e. (a), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o) were not determined by the lower court. Clearly it is an injustice to the Appellant to dismiss his claim when the subject matter of the claim at the Upper Area Court is different from the subject matter of his claim before the High Court.

In my humble view the decision of the lower court which dismissed the Appellant's claim has led to miscarriage of justice to the Appellant. This Court and the Apex Court has consistently frowned on such a practice. See:-

- OGIAMIEN VS. OGIAMIEN (1967) N.S.C.C. PAGE 190 AT 192.

- HAMBE VS. HUEZE (SUPRA).

- ONWUNALU & OTHERS VS. OSADEME (1971) ALL NLR PAGE 15 AT 17.

The learned Counsel for the Appellant urged this Court in its Appellate jurisdiction to use its powers under Section 15 of the Court of Appeal Act and re-hear the Appellant's claim before the lower Court.

The learned Counsel for the Respondents on the other hand submitted that the matter cannot be re-opened. He urged this Court to decline the request.

In this appeal, it is clear after looking at the Appellant's claim and the Judgment of the lower Court that the trial Court has failed to determine all the issues in controversy between the parties.

It must be appreciated that this Court is an Appellate Court and not a Court of first instance. It is very important that the High Court must give its opinion on any matter and when it comes on Appeal, the Court of Appeal will consider the case as a whole before giving its own decision.

This Court will not allow itself to be turned into a Court of first instance in the name of invocation of its powers under Section 15 of the Court of Appeal Act. Apart from that the pre-conditions for the invocation of Section 15 of the Court of Appeal Acthave not been fully complied with.

In view of the foregoing issues I and II are resolved in favour of the Appellant and against the Respondents.

**ISSUES III AND IV (TAKEN TOGETHER).**

The learned Counsel for the Appellant submitted that the trial Court was wrong in dismissing the Plaintiff's claim before it when such was not based on any live issues raised by any of the parties nor was it based on the merits of the case. He went further in his submission that the failure of the trial Court to determine the case before it has violated their rights to be heard. He argued that the case of the Appellant was not considered on its merit and that the trial Court ought to have struck out the Appellant's suit.

It was also argued on behalf of the Appellant that the trial Judge did not determine the live issues instead, it followed a wrong direction where it raised the issue of Res-Judicata.

He relied on the cases of:-

- OYEKANMI VS. NEPA (SUPRA)

- OSHODI & OTHERS VS. EYIFUNMI & 1 OTHER (2000) 7 SCNJ PAGE 295 ESPECIALLY RATIO 18.

The learned Counsel for the Respondents in his response submitted that the reliefs sought by the Appellant before the trial Court are ancillary reliefs based on the matter before the Upper Area Court Guyuk. He argued that this matter cannot be reopened again because it was dismissed based on Res-Judicata. He finally urged that this appeal be dismissed.

Issues III and IV under consideration are related to issue II earlier resolved. In addition to all I have said on the issues earlier treated, I will go further to say that where a court fails to give full consideration and determination of the case of a party as in this case, it is a situation touching on the violation of the party's right to fair hearing. It is trite that where there is a breach of a party's constitutional right to fair hearing, then the proceedings are vitiated thereby requiring the intervention of an appellate court on a complaint of the affected party. Put in another way, a court has the duty to consider the claims submitted to it for adjudication. Where a court failed to consider and adjudicate on such claims, it is usually an error of law because the omission constitutes a denial of the party complaining of his right of fair hearing as enshrined in the 1999 constitution of the Federal Republic of Nigeria (as amended) See the following cases:-

- OPUIYO VS. OMONI WARI (2007) 6 SCNJ PAGE 131

- ADIGUN VS. ATTORNEY GENERAL OYO STATE (1987) 1 NWLR PART 53 PAGE 678

- NWOKORO VS. OSUMA (1990) 3 NWLR PART 136 PAGE 22 AT 32 – 33

- AMADI VS. THOMAS APHIN & CO. LTD. (1972) 1 ALL N.L.R. PART 1 PAGE 409.

Consequent upon the foregoing, it is my view that failure of the trial Court to determine the Appellant's case as set out before the Court has violated the right to be heard and once the right to be heard or in other words right to fair hearing was violated, the decision is liable to be set aside.

See:- UZUDA & 2 OTHERS VS. EBIGAH & 2 OTHERS (2009) 15 NWLR PART 1163 PAGE 1.

Therefore, the dismissal of the Plaintiff's/Appellant's claim by the trial court without considering the live issues raised by the parties is wrong.

This issues III and IV are also resolved in favour of the Appellant and against the Respondents.

In the result having resolved issues I to IV in favour of the Appellant, it is my view that there is merit in this appeal and it is allowed.

The Judgment of the lower Court delivered on 24th day of May 2010 is hereby set aside. In its place this Suit with NO: ADSY/11/04 - NAFAMA THIMNU VS. UNION BANK OF NIGERIA PLC & 2 OTHERS is hereby remitted to the Office of the Chief Judge of Adamawa State for reassignment to another Judge who shall hear and determine the case without further delay.

There shall be no order as to costs.

**JUMMAI HANNATU SANKEY, J.C.A.:**

I have read the Judgment of my learned brother, **JIMI OLUKAYODE BADA, JCA**, in this Appeal.

I agree with his reasoning that the Appeal has merit and ought to succeed. I also will, and hereby allow the Appeal. I abide by the consequential orders made in the lead Judgment.

**ADAMU JAURO, J.C.A.:**

I have had the advantage of reading in advance the lead judgment just delivered by my learned brother, JIMI OLUKAYODE BADA, J.C.A. I am in full and complete agreement with the reasoning and conclusion contained therein, to the effect that the appeal is meritorious.

I adopt the judgment as mine and the appeal is hereby allowed. The judgment of the lower Court delivered on 24th May, 2010 is hereby set aside and the case is remitted to the Hon. Chief Judge Adamawa State for re-assignment to another Judge. I abide by consequential orders made in the lead judgment.