**STAR DEEP WATER PETROLEUM LTD. AND OTHERS**

**V.**

**A. I. C. LIMITED AND OTHERS**

IN THE COURT OF APPEAL OF NIGERIA

THE 24TH DAY OF MARCH, 2011

CA/L/610M/05 (R)

**LEX (2011) - CA/L/610M/05 (R)**

OTHER CITATIONS

2PLR/2011/86 (CA)

**BEFORE THEIR LORDSHIPS**

HUSSEIN MUKHTAR, JCA

JOHN INYANG OKORO, JCA

MOHAMMED AMBI-USI DANJUMA, JCA

**BETWEEN**

1. STAR DEEP WATER PETROLEUM LTD. (An affiliate of Chevron Corp.)

2. TEXACO NIGERIA OUTER SHELF LTD.

3. PETROLEO BRESILERO NIGERIA LTD.

4. STATOIL NIGERIA LIMITED

5. FAMFA OIL LIMITED - Appellant(s)

AND

1. A. I. C. LIMITED

2. MANNESMANN ANLAGENBAG AG

3. MANNESSMANN DEMAG AG

4. TACHNIP OF FRANCE

5. TOTAL UPSTREAM NIG. LTD. - Respondent(s)

**REPRESENTATION**

LADIPO SOETAN Esq., with ITA EDET Esq. and A. AFADAMEH Esq. - For Appellant

AND

S. A. ADESANYA, SAN with G. O. OKUSANYA Esq. and W. KASAH Esq. - for the 1st respondent

PAUL USOROH, SAN, with SIXTUS ONUKA Esq., C. S. EZE Esq. and STANDLEY NEGBENEBOR Esq. - for the 4th respondent

L. A. OWOLABI Esq. with C. EZEDIARO Esq. - for the 5th respondent

2nd & 3rd respondent unrepresented

- For Respondent

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

CONSTITUTIONAL LAW:- Competency of court – Court of Appeal - Section 247(1) and Section 294(2) of the Constitution of the Federal Republic of Nigeria, 1999 – Where a different panel of judges heard a case and a different panel gave the judgment on them – Validity of

**PRACTICE AND PROCEDURE ISSUES**

APPEAL:- Panels of judges of Court of Appeal – Where different panel gave judgment over an appeal heard by a different panel – Legal effect

COURT:- Competency of – How determined – Where panel of Court of Appeal judges sitting for the judgment is different from one that heard the matter – Validity of judgment thereto

JUDGMENT AND ORDERS:- Court of Appeal – Decision given a panel of judges any one of whom did not hear the matter – Competency of

JURISDICITION:- Meaning of – Essence – Court of Appeal – Jurisdiction of a different panel of judges to give judgment over a case heard by a different panel

INTERPRETATION OF STATUTE - SECTION 247(1) OF THE CONSTITUTION, 1999: Interpretation of section 247(1) of the Constitution, 1999

INTERPRETATION OF STATUTE - SECTION 249(2) OF THE 1999 CONSTITUTION: Interpretation of section 294(2) of the 1999 Constitution

**MAIN JUDGMENT**

JOHN INYANG OKORO, J.C.A. (DELIVERING THE LEAD RULING):

By a Motion on Notice dated and filed on 1st December, 2005, the Appellants/Applicants had prayed for "an order staying the execution of the Judgment of the High Court of Lagos State delivered in Suit No. LD/264/88 on 4th November, 2005 pending the final determination of the appeal contained in the Notice of Appeal dated 7th November, 2005". This motion was heard by this court on 27th September, 2010 by a panel consisting of their Lordships: Clara Bata Ogunbiyi, JCA (Presiding), Hussein Mukhtar, JCA and Mohammed A. Danjuma, JCA. Ruling was reserved, and on the 15th of December, 2010, the said Ruling was delivered by a panel of Justices consisting of Clara Bata Ogunbiyi, JCA, Adzira Gana Mshelia, JCA and Mohammed A. Danjuma, JCA. As the Registry of this court was in the process of dispatching clean copies of the Ruling to the parties, it was discovered that Justice Mshelia was erroneously included in the panel that delivered the Ruling having not been a member when the motion was heard.

In view of this obvious mistake, counsel to the parties were invited to address the court on the validity of the said Ruling in view of the change in the composition and membership of the panel at the hearing of the motion and the Ruling thereof. The submissions of the respective parties as made by their counsel are summarized hereunder.

It was the submission of Ladipo Soetan Esq., learned counsel for the Appellants/Applicants, that the said Ruling is a nullity and that it be set aside and the motion heard de-novo. In support of this argument, he cited the following cases: Shuaibu v. Nigeria: Arab Bank Ltd. (1998) 5 N.W.L.R. (pt.551) 582; Ubwa v. Tiv Area Traditional Council (2004) 11 N.W.L.R. (pt.884) 427 and Sokoto State Govt. v. Kamdex Nig. Ltd. (2007) 7 N.W.L.R. (pt.1034) 466.

The learned Senior Counsel for the 1st Respondent, Prof. Adesanya, SAN, submitted that the Ruling in focus was an inchoate decision of the court and violates Section 294(2) of the 1999 Constitution of the Federal Republic of Nigeria. He agrees with Soetan Esq. that the Ruling is a nullity and adopts the cases cited by him but drew the attention of the court to Shuaibu's case and submitted that it was decided under the 1979 Constitution of Nigeria. He urged this court to set aside the said Ruling. As to whether the same panel that first heard the motion or another panel should be constituted to re-hear same, learned Senior Counsel says he remains indifferent.

Paul Usoroh, SAN, the learned senior counsel for the 4th Respondent posited that after reviewing the cases by the Apex Court in respect of the matter at hand, he is of the view that the Ruling is invalid and a nullity. He however, cited the case of Adeigbe & Anor. v. Kusimu & Ors. (1965) 1 All NLR 260 where he submitted that the Supreme Court held that where such situation as in this Ruling occurs, the court should look at the facts whether it is a nullity or an irregularity. In all, he urged this court to set aside the said Ruling and set up a fresh panel to hear the motion.

Finally, L. A. Owolabi Esq., counsel for the 5th Respondent, apart from agreeing with the position taken by other counsel in this matter, urged that all the Justices who took part in the hearing of the motion including Hon. Justice Mshelia who later took part in the writing of the Ruling should be disqualified from taking part in the rehearing of the motion.

By way of an addition, Prof. Adesanya SAN is of the view that the case of Adeigbe v. Kusimu (Supra) cited by Usoroh, SAN is marginally relevant in this case because Section 294 of the 1999, Constitution was not enacted when the case was decided. The 2nd and 3rd Respondents, though duly served with hearing notice, were not represented in court when these arguments were taken.

The narrow issue to be decided in this case is whether the Ruling delivered by a panel of this court of which one of the members did not take part in the hearing of the motion is valid.

By virtue of Section 247(1) of the Constitution of the Federal Republic of Nigeria, 1999, for the purpose of hearing an appeal before the Court of Appeal, it must consist of not less than three Justices of the Court of Appeal. This number is just the minimum as there can be more in certain other appeals or matters depending on the nature and circumstances of the matter before the court. My understanding of this provision is clearly that a minimum of three Justices of the Court of Appeal shall sit and determine appeals brought before it. It is also my view that only the three Justices who heard the Appeal can possibly write the Judgment. It does not permit any Justice who did not take part in the hearing to emerge to write a Judgment or Ruling. This will not only be absurd but could breed injustice as the new Justice did not hear any argument in the case and as such cannot come to any conclusion in the matter. A Judge who did not give the parties a hearing on a complaint, cannot determine or decide the case of the parties justly. See Sokoto State Govt. v. Kamdex Nig. Ltd. (Supra).

Also, under Section 294(2) of the 1999 Constitution of the Federal Republic of Nigeria, each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion. As concerns the Court of Appeal, and with regard to the Ruling in focus, two members constitute the majority as it were. By the same Section of the 1999 Constitution, a Justice of the Court of Appeal who did not take part in the hearing of an appeal, can in fact take part in the delivery of the Judgment but cannot take part in the writing of the Judgment. He cannot express his opinion in the Judgment.

This is trite. The Constitution, having provided for a minimum number of three Justices to form a panel to sit and deliver Judgment in the Court of Appeal, anything short of this minimum renders the panel incompetent and the outcome of their sitting, including the Judgment thereof, becomes a nullity, however well conducted.

For a decision of this court or any other court for that matter to be valid, the composition of the court must be competent. The Apex Court has set a standard which makes a court competent to deliver a valid Judgment. In Madukolu v. Nkemdilim (1962) 2 SCNLR, 341, the Supreme Court states that a court is competent when:

(a) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or the other;

(b) the subject matter of the case is within its Jurisdiction and there is no feature in the case which prevents the court from exercising its Jurisdiction; and

(c) the Case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of Jurisdiction.

There is need to emphasise here that any defect in competence is fatal, for the proceedings are a nullity, however well conducted.

In the instant case, three Justices, Ogunbiyi, Mukhtar and Danjuma JJCA took part in the hearing of the Motion on Notice.

However, and quite unfortunately, probably due to pressure of work, on the date the Ruling was delivered, the panel changed with regards to those who wrote the Ruling. They include, Justices Ogunbiyi, Mshelia and Danjuma JJCA. Definitely, Justice Mshelia did not take part in the hearing of the motion.

She had no opportunity of seeing counsel argue the motion and she had no contribution to make in the circumstance. Thus, in the eye of the law, only two Justices, Ogunbiyi and Danjuma, JJCA delivered the Ruling which is against the tenor of Section 247(1) of the 1999 Constitution. The panel which wrote the Ruling was not properly constituted and as such, the said Ruling is a nullity. see Madukolu v. Nkemdilim (supra); Ajao v. Atao (1986) 5 N.W.L.R. (pt.45) 802; Maiwa v. Abdu (1980) 1 N.W.L.R. (pt.17) 437; Orugbo v. Unah (2002) 16 N.W.L.R. (pt.792) 175.

Faced with a similar situation in Ubwa v. Tiv Area Traditional council (supra) the Supreme Court held that the Judgment of the Court of Appeal delivered on 14th February, 2000 was a nullity and was set aside because the members who heard the appeal and those who wrote the Judgments were not the same. However, in an earlier case of Shuaibu v. Nigeria-Arab Bank Ltd. (Supra) the Supreme Court held the Judgment to be an irregularity because the same panel that heard the appeal also sat and delivered the Judgment. Though the Judgment of Hon. Justice Adio, JCA (as he then was) who did not participate in the hearing of the appeal or in the delivery of the Judgment, but was inadvertently included in the record of appeal, the Supreme Court held that irrespective of how his Judgment got into the record of appeal, since it was the same panel that heard the appeal that delivered the Judgment of the court, the Judgment of the Court of Appeal was not a nullity because what happened in the proceedings of that court was a mere irregularity. I am unable to see the difference between the case of Ubwa and Shuaibu in terms of the panel that heard the appeal and the panel that wrote the Judgment. In both situations, not all the members who heard the appeal wrote Judgment in the two appeals. The only difference is that whereas in Ubwa's case, all the panel members who heard the appeal did not sit to deliver the Judgment, though the Judgment of Mangaji JCA who did not participate in the hearing of the appeal was included, in shuaibu's case all the panel members who heard the appeal also sat and delivered the Judgment with the Judgment of Adio JCA who did not take part in the hearing of the appeal. Be that as it may, where a Judge who did not take part in the hearing of an appeal, writes Judgment in the said appeal, that Judgment is a nullity as he has no foundation upon which to stand to write the said Judgment. The Judgment of the other two members cannot be the Judgment of the court being inchoate or incomplete.

I am of the view that the controversy which the cases of Adeigbe & Anor. v. Kusimo & ors. (supra) and shuaibu v. Nigeria Arab Bank Ltd. (Supra) may have raised has been adequately laid to rest in the recent case of Sokoto State Govt. v. Kamdex Nig. Ltd. (Supra). Thus, I hold that the Ruling delivered by this court on 15th December 2010, in this case, is a nullity and ought to be set aside.

One last thing I wish to add is whether the Court of Appeal has power to set aside the said Ruling. Generally, a court has no power to set aside its own Judgment where such Judgment has been properly and duly entered. Rather, such a Judgment is the subject of an appeal to a higher court should any of the parties so desire. It is the higher court that has power to either affirm or set aside the Judgment. However, the power of a court to set aside its own decision is exercisable when such decision is a nullity or where the Judgment was obtained by fraud. In such circumstance, the same court or a court of co-ordinate Jurisdiction has power to set it aside. See Adeyemi Bero v. Omotosho (2008) 15 N.W.L.R. (pt.1111) 576 and Nen Ltd. v. Asiogu (2008) 14 N.W.L.R. (pt.1108) 582.

In the circumstance of the instant case, the Ruling delivered by this court on 15th December, 2010, being a nullity cannot be allowed to stand. This court has power to set it aside and I hereby make an order that the said Ruling be and is hereby set aside. I further order that the said motion be heard de-novo by a new panel of this court to be set up by the presiding Justice.

There shall be no order as to costs.

**HUSSEIN MUKHTAR, J.C.A**.:

I have had the privilege of previewing the ruling just rendered by my noble and learned brother okoro, JCA. I completely agree with his reasons and the conclusion arrived therein, which I adopt as mine.

There is nothing useful I can further add to it. I subscribe to all the consequential orders made in the ruling.

**MOHAMMED A. DANJUMA, J.C.A.:**

I have had a preview of the lead Ruling just delivered by my Lord and senior brother J.I. Okoro JCA - and I agree with him entirely, that the Ruling delivered in this motion, No. CA/L/610M/05 by a panel of Justices which included one that was not amongst the Justices that heard the motion on the day it was heard and reserved on the 27/9/10; and who also did not merely announce or render the opinion of one of the Justices who sat on the panel, but indeed wrote an opinion that formed part of the said Ruling, rendered the entire decision of this court in that Ruling a nullity.

It was, de jure, a decision of an improperly constituted quorum of only 2 Justices that rendered their opinions. The decision was not only inchoate as rightly submitted by the learned senior counsel for the 1st Respondent, Professor Adesanya, SAN, but violated section 294(2) of the 1999 Constitution in that the decision of the 3rd member of the panel Mukhtar JCA, who participated at the hearing, was unfortunately not the one that was announced or delivered as one of the opinions of the 3 Justices that heard the motion.

On the strength of the binding authority in the cases of SOKOTO STATE GOVERNMENT v. KAMDEX NIG. LTD. (2007) 7 NWLR (Pt 1034) 466, MADUKOLU v. NKEMDILIM (7962) 2 SC NLR 347 and SECTION 247(1) of the 1999 Constitution, I am also in accord with the lead Ruling that the Ruling delivered on the 15th December, 2010 in this case is a nullity and must be set aside. It is accordingly set aside.

I also agree with the consequential order made to the effect that the motion be heard de-novo by another panel to be constituted by the Presiding Justice of this court and that relating to costs as made in the lead Ruling.