

# In the Supreme Court of Nigeria

On Friday, the 23<sup>rd</sup> day of March 2012

## Before their Lordships

Mahmud Mohammed ..... Justice Supreme Court  
Mitchell Christopher Chukwuma-Eneh ..... Justice Supreme Court  
Muhammad Saifullah Muntaka-Coomassie ..... Justice Supreme Court  
John Afolabi Fabiyi ..... Justice Supreme Court  
Bode Rhodes-Vivour ..... Justice Supreme Court

**SC.337/2008**

## Between

General Electric Company ..... Appellant

## And

Harry Ayoade Akande ..... Respondents  
Lawrence Ademola Okunola  
New Africa Development Company Limited  
New Africa Technical & Electrical Company Ltd  
Power Holding Company of Nigeria Plc

## Judgment of the Court

Delivered by

Muhammad Saifullah Muntaka-Coomassie. JSC

The Appellant herein, General Electric Company Limited, is the 4<sup>th</sup> defendant in suit N<sub>o</sub> FHC/L/22/90 at the Federal High Court sitting in Ikoyi, Lagos, and has appealed against the judgment of the Court of Appeal delivered on 6<sup>th</sup> October, 2008. Four other defendants 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> did not appeal. The crucial and amazing aspect of this appeal is that the main appeal was pending and without hearing, the Court of Appeal decided abruptly to dismiss the appellant's appeal without hearing notwithstanding that the parties had filed their respective briefs of argument. The same court, now lower court, struck out, also without hearing, the appellant's Motion on Notice for leave to amend its Notice of Appeal, Appellants Brief of Argument and Reply Brief.

The 1<sup>st</sup> Respondent and one other were shareholders and directors in the 4<sup>th</sup> defendant/respondent company. Both had informed the 4<sup>th</sup> defendant that they were not happy with the way affairs of the 4<sup>th</sup> defendant's company were being run. As a result of the said internal wrangling, Harry Ayoade Akande instituted Suit N<sub>o</sub> FHC/22/90 in 1990 against the 2<sup>nd</sup> to 5<sup>th</sup> respondents, the Appellant inclusive. The amended statement of claim is as contained on pages 223 - 235. By its paragraph 46 the plaintiff claimed thus:-

“Whereof the plaintiff claims against the 1<sup>st</sup> - 4<sup>th</sup> Defendants jointly and/or in the alternative, severally, save where otherwise specifically indicated, and for the benefit of the 5<sup>th</sup> Defendant as follows:-

i) A Declaration that all funds, fees, commissions, remuneration and other sums of money paid or payable by the 4<sup>th</sup> defendant to the 3<sup>rd</sup> and/or the 1<sup>st</sup> and or 2<sup>nd</sup> defendant (s) (or any or either or all of them) under the various sales representative agreements between the said defendants are for the benefit of the 5<sup>th</sup> defendant company by virtue of the various agreements made between the 4<sup>th</sup> and 5<sup>th</sup> defendants, which agreements are legally and validly binding and enforceable on all the parties to this action.

ii) As special damages, commission, at 5<sup>½</sup> % on the various contracts sums namely:

- |     |                   |                              |
|-----|-------------------|------------------------------|
| (a) | U.S \$1,710631.00 | (5 ½% of US \$31,102,385)    |
| (b) | ₦144,677.50       | (5 ½% of N2)                 |
| (c) | US \$5,371,003    | (5 ½% of US \$97,654,000.00) |
| (d) | Yen 914,388,115   | (5 ½% of Yen 16,625,238,457) |
| (e) | ₦766,513.93       | (5 ½% of ₦13,936,617.00)     |
| (f) | US \$778,580.00   | (5 ½% of US \$14,156.000)    |
| (g) | ₦44,000.00        | (5 ½% of ₦800,000.00)        |

- iii) Interest on the above stated at 21% per annum from the date the sums fell due until judgment and thereafter at 6% until the sums are paid.
- iv) As special damages, commission on the sales of locomotives - US\$720,460.00 and interest thereon as stated above. An Order that a firm of Chartered Accountants be appointed to conduct an enquiry into the various other commissions paid by the 4<sup>th</sup> defendant to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in breach of its agreement with 5<sup>th</sup> Defendant and the payment over to the 5<sup>th</sup> Defendant of such sums.
- vi) An order of injunction restraining the 4<sup>th</sup> Defendant from making further payments of commission to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the projects forming the subject matter of this action.
- vii) An order directing the 6<sup>th</sup> defendant to withhold from payments due to the 4<sup>th</sup> defendant an amount not exceeding the sums claimed in this action by the plaintiff as commission due to the 5<sup>th</sup> defendant from the 4<sup>th</sup> defendant."

In response to the suit, the Appellant filed its amended Statement of Defence and raised the points of law defences that:-

- (a) the suit is incompetent in that the 1<sup>st</sup> Respondent, the plaintiff ought to obtain leave of court before instituting the action which is a minority shareholder's action brought on behalf and for the benefit of the 4<sup>th</sup> defendant (respondent) but failed to obtain such leave.
- (b) the said claim is statute barred in that it was commenced 14 to 17 years after the alleged cause of action accrued.

See pages 5 - 12 and reproduced at pages 233 - 243 and 425 - 432 of the "record".

Having seen the pleaded defects in the plaintiff's suit, the Appellant, the 4<sup>th</sup> defendant, filed a motion dated 2<sup>nd</sup> April, 2001 for an Order to set down for hearing those points of law. However, without hearing the said Motion on Notice, the learned Chief Judge of the Federal High Court before whom the matter was previously pending, delivered her ruling on the motion and held that the issues had already been previously litigated. The Appellant was dissatisfied with the ruling of the trial court, delivered on 20/3/2002 and therefore appealed to the Court of Appeal Lagos Division.

All the parties in the appeal exchanged their respective briefs of argument.

On the 6<sup>th</sup> October, 2008, the motion to amend the appellant's Notice of Appeal was fixed for hearing. What is to be noted here is that the substantive appeal was not fixed for hearing on the said 6/10/2008. The presiding justice of the Court of Appeal suddenly proceeded to dismiss the appeal without hearing either the motion or the substantive appeal. His lordship had this to say:

"..... In the circumstances we agree with the 5<sup>th</sup> respondents counsel that this is an appropriate case for this court to invoke the Provisions of Order 6 Rule 6 of the rules of this court. Consequently in our final consideration of the application for adjournment it should be refused. Since the motion dated 25/9/08 is incompetent in terms of the ambiguity contained in its prayers it cannot be adjourned but instead, it is hereby struck out. The appeal itself even though it is not for hearing today can however be treated in terms with Order 6 Rule 6 of the court of Appeal rules 2007 (supra) it is accordingly hereby dismissed. Costs of ₦30,000.00 is awarded to each of the 1<sup>st</sup> and 5<sup>th</sup> respondents."

Not satisfied with the above decision of the court below the Appellant again further appealed to the Supreme Court. The appeal was heard on appellant's brief alone as ordered by this court when all the respondents failed to file their respondents brief of argument.

Argument on Issue No 1 is quite clear. I cannot imagine that a court of law can lawfully decide a matter before it without hearing. It is a fact that cannot be altered that the appeal before the lower court on that 6/10/2008 was not fixed for hearing. It was only the motion on notice that was fixed for hearing but the learned justice could not even exercise patience to hear the motion. There was no reason whatsoever for dismissing the main and substantive appeal before it. This is palpably wrong to say the least.

It is totally wrong for all courts below to take an appeal which has not been fixed for hearing on a particular date. The court cannot hear an appeal on a date fixed for hearing of a motion without the consent of both parties and the court.

The court must have read the provisions of Order 6 Rule 6 of the Court of Appeal rules upside down when without hearing at all, it dismissed the main appeal on a date fixed for the hearing of the motion without giving audience to both counsel in the matter.

This is very sad indeed.

There was no respondents brief in this appeal, I was shocked to discover that none of the counsel, including the learned senior counsel, was bold enough to say that the procedure adopted by both the Chief Judge of the Federal High Court and the learned Justice of the Court of Appeal Lagos were wrong and un-acceptable. The preliminary objection filed by the 4<sup>th</sup> respondent on 27/10/2009 to this appeal is noted. I have gone through the preliminary objection and hold that all the grounds for the objection are misplaced and untenable, same deserved to be dismissed. I therefore hold that the preliminary objection has failed and same is dismissed by me.

In conclusion the appeal succeeds and same is hereby allowed. The appeal shall be reverted back to the Court of Appeal Lagos Division for hearing of the appeal by a different panel which was not involved in the hearing of the appeal. ₦50,000.00 costs to the appellants herein

**Judgment delivered by**  
Mahmud Mohammed. JSC

This appeal was heard on the Appellant's brief of argument alone as all the Respondents had failed to file their respective Respondents briefs of argument. From the record of appeal, the sitting of the Court of Appeal Lagos on 6<sup>th</sup> October, 2008, was to hear a motion by the Appellant/Applicant to amend the Notice of Appeal. The motion was filed on 26<sup>th</sup> September, 2008 but dated 25<sup>th</sup> September, 2008. In the course of the hearing, the Appellant/Applicant applied for a short adjournment asking for another date for the hearing of that motion after withdrawing 2 other motions which were struck out that day. The record shows there was proof of service on 2<sup>nd</sup> and 7<sup>th</sup> Respondents. Appellants appeal was not fixed for hearing that day but briefs have been filed.

The record also shows quite clearly that in Ruling on the application for adjournment, the Court of Appeal not only refused the application for adjournment of motion dated 25<sup>th</sup> September, 2008 but proceeded not only to strike out the motion for being incompetent but also proceeded to dismiss the substantive appeal which was not fixed for hearing on that day, 6<sup>th</sup> October, 2008, purportedly under Order 6 Rule 6 of the Court of Appeal Rules 2007.

Since the Court itself had stated plainly in it's Ruling to refuse the application for adjournment that the Appellant's appeal was not fixed for hearing that day, that Court lacked jurisdiction in dismissing the appeal without hearing. It was in breach of Appellant's right of fair hearing. See *Adeniyi v Governing Council of Yaba College of Technology (1993) 6 NWLR (Part 300) 526*. Therefore the decision was a nullity for having been given in breach of 5.36 of the Constitution of Federal Republic of Nigeria, 1999.

The decision was also a nullity not having been given by 3 Justices of the Court of Appeal as required under the Constitution. See the case of *Sokoto State Government v Kamdex Nig. (2007) 7 NWLR (Part 1034) 466 at 494*.

On the request of the Appellant to determine the matter under S 22 of the Supreme Court Act, the appeal not having been heard by the Court of Appeal, this Court lacks jurisdiction to usurp the jurisdiction of that Court to hear the matter under S.22 of the Supreme Court Act.

It is for the foregoing reasons that I entirely agree with my learned brother Muntaka-Coomassie. JSC in his leading judgment that this appeal must be allowed. Accordingly, I also allow the appeal, set aside the decision of the Court of Appeal given on 6<sup>th</sup> October, 2008 in complete breach of the Appellant's right of fair hearing. The case is remitted to the Lagos Division of the Court of Appeal for hearing the Appellant's appeal, in respect of which briefs have already been field, on the merit by a different panel of that Court.

I abide the order on costs in the leading judgment.

**Judgment delivered by**  
Christopher Mitchell Chukwuma-Eneh. JSC

I have read the lead judgment prepared by my learned brother Muntaka-Coomassie. JSC in this matter just delivered and I am in complete agreement with him that the appeal has merit and should be allowed.

I have also perused the record of appeal in this matter and I see no justifiable grounds for the events of 6/10/2008 before the lower court. Having refused the appellant/applicant's application for an adjournment leading to striking out of the motion on notice for leave to amend its Notice of Appeal, appellant's Brief of Argument and Reply Brief clearly listed for hearing on that date and as if the reaction is not enough to deprecating the appellant's want of diligence in the prosecution of this matter, the lower court has curiously proceeded for reasons not otherwise apparent on the record to also strike out the main appeal without hearing the appellant on that question even when the parties' briefs of argument have already been filed and exchanged and the appeal has not been listed for hearing before it. This is the basis of the appellant's appeal to this court and in my view the

complaint is properly well taken as no matter how irritant the appellant's posturing in this matter might have been it is no ground at all for striking out the entire appeal not listed before it for hearing on that date as no two wrongs can make a right.

Indeed, any court worth its salt would have showed a great restraint in the circumstances. The appellant rightly has with respect, taken exception to the lower court's preposterous reaction as it impugns on the appellant right of fair hearing - thus rendering the entire proceedings of that date invalid and incompetent. I therefore, allow the appeal and abide by the orders contained in the lead judgment.

**Judgment delivered by**  
John Afolabi Fabiyi. JSC

This is an appeal against the decision of the Court of Appeal, Lagos Division handed out on 6<sup>th</sup> October 2008.

The appeal of the appellant which was not slated for hearing thereat was dismissed despite the fact that parties had filed their respective briefs of argument. In the same fashion, a pending motion on notice for leave to amend appellant's Notice of Appeal, Brief of Argument and Reply Brief was also struck out without hearing same.

The appellant was not happy with the stance taken by the court below and has appealed to this court. On behalf of the appellant, three issues were formulated for determination in this appeal. They read as follows:

- “1. Whether the lower court (the Court of Appeal) was wrong when it dismissed the appellant's appeal before that court on 6<sup>th</sup> October, 2008.
2. Whether the lower court was wrong when without hearing the appellants Motion on Notice dated 25<sup>th</sup> September, 2008, the court struck out the motion.
3. Whether in the circumstances of this case, this Honorable Court should determine the issues the appellant had submitted to the lower court and the Federal High Court including the remedies set out in Relief N<sub>o</sub> 3 in the Notice of Appeal dated 15<sup>th</sup> October, 2008 (at pages 679-686 of the record of appeal)”.

The court below in its ruling at page 678 of the Record of Appeal pronounced as follows:

“The appeal itself even though it is not for hearing today can however be treated in terms with Order 6 Rule 6 of the Court of Appeal Rules 2007 (supra) it is accordingly hereby dismissed. Costs of ₦30,000.00 is awarded to each of the 1<sup>st</sup> and 5<sup>th</sup> respondents”.

Learned counsel for the appellant submitted that the Court of Appeal was incompetent and had no jurisdiction to dismiss the substantive appeal which was not slated for hearing and briefs of argument had been filed by the parties.

The lower court, in its ruling, appreciated that the appeal was not slated for hearing on 6<sup>th</sup> October, 2008. It was the appellant's motion on notice that was slated for hearing.

The lower court had no jurisdiction to consider and determine the main appeal. The case of [\*Alhaji Uba Kana v Bauchi Meat Products Co. Ltd\*](#) (1978) 9-10 SC 51, (1978 All NLR 242 cited by the appellant's counsel is of moment.

The parties briefs of argument were before the court below on 6<sup>th</sup> October, 2008 when it dismissed the appeal without hearing same on the merits. The court below relied on Order 6 Rule 6 of the Court of Appeal Rules, 2007 to dismiss the appeal *brevi manu*. The stated Rule provides as follows:

“The court shall have power to strike out a notice of appeal when an appeal is not competent of for any other sufficient reason.”

The above rule does not empower the court below to dismiss the appellant's appeal. The court has power to strike out notice of appeal for incompetence; not to dismiss the appeal right away. In this matter, the brief of argument had been filed. As stated in *Philip Obiora v Paul Osele* (1989) 1 NWLR (Part 97) 279 the dismissal of the appellant's appeal in the surrounding circumstances of this case by the court below is an instance of wrongful assumption of jurisdiction not a mere wrongful exercise of judicial discretion. The court below had no jurisdiction to dismiss the appeal for want of prosecution when the appellant had in fact filed its brief.

In the same manner, the lower court struck out the appellant's motion on notice dated 25<sup>th</sup> September, 2008 without hearing same. Such a step was not proper. A court of law is bound to hear any application before it. It had no jurisdiction to determine

the application, which as extant in the records it refused to hear same. See *Adeyemi v Ike Oluwa & Sons Ltd (1993) 8 NWLR (Part 309) 27 at 51-52*; *Chief Virgilus Ani v Chief Luke Mama Nna (1996) 4 NWLR (Part 440) 101 at 120*.

The court below lacked the competence to determine the application when it did not allow the applicant's counsel to argue same before it. See *UBN Plc v CFAO (1997) 11 NWLR (Part 527) 118* and *Urhobo v Oteri (1999) 2 NWLR (Part 589) 147*, both cited by appellant counsel and clearly of moment.

Looked at from any angle, I should say with due respect to the learned JCA that all steps taken in this matter by him appear hasty and unwarranted. The appellant had genuine reasons for complaining against the stance posed by him.

The two issues discussed above are resolved in favour of the appellant.

For the above reasons and those carefully adumbrated in the lead judgment of my learned brother Muntaka-Coomassie. JSC, I too hereby allow the appeal and set aside the stated decision of the court below, I endorse all consequential orders contained in the lead judgment; that relating to costs inclusive.

**Judgment Delivered by**  
Bode Rhodes-Vivour. JSC

This is an appeal from the decision of the Court of Appeal, Lagos Division delivered on the 6<sup>th</sup> of October, 2008.

Parties had filed their briefs of argument, and a Motion on Notice for leave to amend appellant's Notice of Appeal; Brief of Argument and Reply was fixed for hearing on the 6<sup>th</sup> of October, 2008. Without hearing the motion which was fixed for hearing on the 6<sup>th</sup> of October, 2008 or the substantive appeal, which was not fixed for hearing on the 6<sup>th</sup> of October, 2008, this is what the presiding judge of the Court of Appeal said on the Motion on Notice:

“... In the circumstances we agree with the 5<sup>th</sup> respondents counsel that this is an appropriate case for this court to invoke the provisions of Order 6 Rule 6 of the Rules of this court. Consequently in our final consideration of the application for adjournment it should be refused. Since the motion dated 25/9/08 is incompetent in terms of the ambiguity contained in its prayers it cannot be adjourned but instead, it is hereby struck out.....”

And, on the appeal, His Lordship said

“... The appeal itself even though it is not for hearing today can however be treated in terms with Order 6 Rule 6 of the Court of Appeal Rules 2007. It is accordingly hereby dismissed costs of ₦30,000.00 is awarded to each of the 1<sup>st</sup> and 5<sup>th</sup> respondents.”

The right to fair hearing entrenched in Section 36 of the Constitution entails not only hearing a party on an issue which may or may not be resolved in his favour, but also ensuring that the hearing is fair and in accordance with the twin pillars of justice to wit: *audi alteram partem* and *nemo iudex in causa sua*. See *Adigun v. A. G. Oyo State (1987) 1 NWLR (Part 53) page 678*.

*Audi alteram partem* means “please hear the other side”. This is a maxim denoting fairness and a canon of natural justice. A judge at all times should allow both parties to be heard and should listen of the case of each. *Nemo iudex in causa sua* means that no judge should preside over a matter in which he has a personal interest or involvement. In this appeal it is the former that is relevant.

On the 6<sup>th</sup> day of October, 2008, the appellant was present in court and announced his appearance in court. Without hearing the appellants counsel, the Court of Appeal struck out his Motion on Notice and proceeded to dismiss the appeal. This clearly violates the clear mandatory constitutional right of fair hearing provided by Section 36 of the Constitution.

A judge must hear all applications, no matter how simple or frivolous they may appear, and it is only after counsel is afforded a hearing that an order striking out the motion can be said to be appropriate. An order of dismissal signifies that the court had entertained the matter on the merits. In the Court of Appeal the appellant was not allowed to move his Motion of Notice on the day fixed by the court for the hearing of the motion. Furthermore, the appeal was dismissed, without a hearing, on a day that the appeal was not fixed for hearing. The learned judge made orders without allowing either side to be heard. Consequently the orders striking out the motion and dismissing the appeal were made in clear denial of the parties right to fair hearing given by Section 36 of the Constitution and fell far short of the maxim *audi alteram partem*. The entire proceedings are a nullity.

One asks himself if it is justice to the parties that the appeal was dismissed without either of them being heard. I think not. The justice of this case lies in the appeal being heard so that parties would be satisfied that they have enjoyed their Constitutional rights of appeal to the fullest.

For this and the much fuller reasoning in the leading judgment of my learned brother, Muntaka-Coomassie. JSC which I was privileged to read in draft, I would allow the appeal and order that the appeal be heard by another panel of the Court of Appeal Lagos Division.

**Counsel**

U. H. Azikiwe ..... Appellant  
*with him*  
Festus Oniya  
O. Eboreme

A. J. Owonikoko SAN ..... 4<sup>th</sup> Respondent/Applicant  
*with him*  
F. Tyokase