IN THE COURT OF APPEAL
KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
ON FRIDAY THE 12TH DAY OF JULY, 2019
BEFORE THEIR LORDSHIPS

HUSSEIN MUKHTAR	**JUSTICE, COURT OF APPEAL**
OBIETONBARA O. DANIEL-KALIO	**JUSTICE, COURT OF APPEAL**
OLUDOTUN A. ADEFOPE-OKOJIE	**JUSTICE, COURT OF APPEAL**

CA/K/391/2016

BETWEEN

ZAINAB USMAN BICHI --- **APPELLANT**

AND

ALHAJI YAHAYA KARAMI ---- **RESPONDENT**

JUDGMENT

(DELIVERED BY OBIETONBARA O. DANIEL-KALIO, JCA)

The appeal here is over the judgment of the lower court, the High Court of Kano State, in a debt matter. According to the respondent who was the plaintiff at the lower court, the appellant (the defendant at the lower court) approached him for a soft loan to enhance her importation business. The respondent agreed and loaned the appellant on various occasions, sums of money in United State Dollars. After paying the sum of $250,000, there yet remained an outstanding balance of $750,000. The appellant undertook in writing to pay

off the outstanding balance. In addition, the appellant deposited the title documents of her properties with the respondent. Desirous of having the appellant pay the amount owed after much pleading to make her pay same failed, the respondent filed an action at the lower court in which he claimed as follows-

1. The sum of $750,000 (USD) or its Nigerian Naira equivalent at the extant prevailing Central Bank of Nigeria (CBN) Exchange rate.
2. The sum of $10,000 (USD) or its Nigerian Naira equivalent at the extant prevailing CBN exchange rate being Solicitors fees in respect of [the loan] recovery.
3. The cost of this action
4. Ten percent (10%) Court rate interest from date of judgment till the total judgment debt is absolutely collapsed.

In her judgment delivered on 21/7/15, the learned trial judge Aisha R.D. Muhammed, J noted that the appellant was served with the writ of summons on 24/12/14 but did not deem it fit to file a memorandum of appearance. The learned trial judge noted that the appellant's learned counsel on 24/12/14 filed a motion challenging the court's jurisdiction and also filed a

motion for leave to file a counter-affidavit to the respondent's case even though the case was not one based on the summary judgment procedure. The learned trial judge also noted that the motions filed by the appellant were abandoned as neither the appellant nor her counsel responded to the many hearing notices issued by the court. The learned trial judge further noted that in the circumstances, the court granted the respondent's application to prove his case. The learned trial judge also noted in her judgment that the appellant was absent from court and was unrepresented in court in spite of hearing notices served on the appellant and her counsel informing them of the date fixed for the cross-examination of the respondents witnesses. Having thus noted and found, the learned trial judge acting on the provision of Order 10 rules 1 & 2 of the Kano State High Court (Civil Procedure) Rules, entered judgment for the respondent.

Dissatisfied with the judgment, the appellant in a Notice of Appeal filed on 31/5/16 challenged the judgment on six grounds. The grounds without the particulars of the grounds are the following-

GROUND ONE

The learned trial judge erred in law when he allowed the plaintiff to prove his case on a date the

defendant was not aware of and thereby occasioned a miscarriage of justice

GROUND TWO

The learned trial judge misdirected himself in law which occasioned a miscarriage of justice on the appellant when he held that: "The defendant's counsel abandoned all the motions filed and failed to appear for the defendant in spite of many hearing notices sent by the court to him and the defendant" and therefore failed to properly evaluate and consider the hearing notices allegedly served on the appellant's counsel against the date for hearing of the case.

GROUND THREE

The learned trial judge erred in law when he held that "Another notice was served on the defence counsel who received and signed it..." without proper evaluation of the two (2) purported hearing notices allegedly served on the appellant.

GROUND FOUR

The learned trial judge erred in law when he held that "this court cannot set aside this judgment delivered on the 21st July 2015. I therefore refuse the application to set aside the judgment of this court. The judgment of this court is a judgment on the merit".

GROUND FIVE

The learned trial judge erred in law when he entered judgment against the appellant without giving the appellant fair hearing.

GROUND SIX

The decision of the trial court was against the weight of evidence.

The appellant's Brief of Argument was filed on 3/3/17 out of time but by an order of this court, deemed properly filed and served on 17/5/17. The appellant's brief of argument was settled by Abdul Adamu Esq. In response to the respondent's Brief of Argument, the appellant on 7/2/18 filed a Reply Brief of Argument.

The respondent's Brief of argument was filed out of time on 17/10/17 but was, by an order of his court, deemed properly filed and served on 25/1/18. The respondent's Brief of Argument was settled by S. U. Maiyaki Esq.

The appellant distilled the following five issues for determination in this appeal, viz-

1. Whether the failure of the lower court to consider the appellant's counsel's deposition on oath to the effect that they were not served with hearing notices against the date fixed for hearing is not fatal (Distilled from ground one).
2. Whether from the hearing notices purportedly served on the plaintiff/appellant it was appropriate for the lower court to believe that there was proper service on the appellant (distilled from grounds two and three).
3. Whether the learned trial judge is under legal duty to personally counter the affidavit challenging his record after being served with affidavit challenging the record of his proceedings (distilled from ground two)
4. Whether the lower court was right by not setting aside its default judgment after the appellant's

application to have it set aside (distilled from ground four)

5. Whether the failure or refusal of the lower court to adjourn the matter for filing written addresses by the parties and ordering hearing notice to be served on the appellant against the date for judgment is not a denial of appellant's right to fair hearing (distilled from ground five).

On the respondent's part, the following three issues for determination were formulated, viz-

1. Whether the failure or refusal of the lower court to adjourn the case for judgment instead of for filing written addresses by the parties and ordering hearing notice to be served on the appellant's against the date for judgment is not a denial of the appellant's right to fair hearing.
2. Whether from the hearing notices served on the appellant it was appropriate for the lower court to believe that there was proper service on the appellant.
3. Whether the lower court was right by not setting aside its judgment after the appellant's application to have it set aside.

Now, issue 4 formulated by the appellant, and issue 3 formulated by the respondent arise from ground four of the grounds of appeal. However ground 4 of the grounds of appeal does not arise from the judgment being appealed against. The judgment being appealed against as clearly stated in the Notice of Appeal, is the judgment in Suit No. K/538/2014 delivered by the lower court on 21/7/2015. Ground 4 of the grounds of appeal and the said issues 4 and 3 of the appellant and the respondent respectively, arise from and relate to the Ruling of the lower court delivered on 26/1/16. It is a well settled proposition of law that the grounds of appeal against a decision must relate to the decision. See **Saraki v Kotoye (1992) NWLR part 264 p. 156**. In other words, grounds of appeal are not formulated in nubibus. They must arise from the judgment. Ground 4 of the grounds of appeal and the issues for determination based on that ground are therefore incompetent. See **Kano Textile Printers Ltd v Gloede and Hoff (Nig) Ltd (2005) LPELR-1660 (SC).**

With regard to issue 5, the issue relates to ground 5 in the grounds of appeal. The particulars of the said ground 5 show clearly that the ground also relates to the Ruling of the lower court delivered on 26/1/16 and not the judgment appealed against in this appeal. That being the case, both ground 5 in the Notice of Appeal and issue 5 formulated by the appellant

based on it, are incompetent. See **Kano Textile Printers Ltd v Gloede and Hoff (Nig) Ltd (supra)**. Issues 4 and 5 being incompetent are struck out. The only live issues in this appeal are therefore issues 1-3.

I shall now proceed to issue 1. The appellant's learned counsel's submission dwelt with conflicting affidavit evidence with regard to service of hearing notice. It was contended that the conflicting affidavits should have been resolved through oral evidence. In response, the respondent's learned counsel submitted that from the records of proceedings, the appellant intentionally wanted to hamper the course of justice and did all she could to ensure that justice was hampered. However, it was contended the lower court afforded the appellant every opportunity to present her case by adjourning the case and making orders that hearing notices be served. In spite of the efforts of the lower court, it was submitted that the appellant kept absenting herself from court. We were referred to pages 74 and 78 of the record of appeal where according to learned counsel, there is clear proof that the appellant was given opportunities to present her case. I have looked carefully at p. 74-78 of the record of appeal. At p 74 there is a Hearing Notice. The endorsement as to service on that Hearing Notice is at p. 75 where the affidavit of service is to be found. The affidavit of service states that the defendant was served

"through address of the def. house". Which is the address of the defendant's house where service was effected? That address is not disclosed in the affidavit of service. The affidavit of service is vague. A court will not rely on a vague affidavit of service. See **Emerald Engineering Services Ltd & Anor v Intercontinental Bank Plc (2010) LPELR-19782 (CA).** **Page 76** of the Record of Appeal also shows a Heaving Notice. The endorsement as to service of that Hearing Notice is at p. 76A. The endorsement shows that the Hearing Notice was received by I. I. Wangida Esq on 25/3/2015 at 10.34 am. This no doubt, is good service. At P. 77 and 78 are Notices of Hearing for 22/6/15 and 28/10/15 respectively. There is no endorsement that both Hearing Notices were served on the appellant. What this means ex facie, is that from 22/6/15 to when judgment was delivered on 21/7/15, the appellant had no notice of hearing of the case. In coming to its decision, the lower court held that "the defendant's counsel abandoned all the motions filed and failed to appear for the defendant in spite of many hearing notices sent by the court to him and the defendant." This position of the lower court cannot be justified going by the vague endorsement and non-endorsement as to service of the Hearing Notice I have referred to above. There can be no over-emphasising the importance of a hearing notice in the determination of a matter in court. How can a party that

is blissfully unaware of a matter against him defend that matter? It is settled law that where a party ought to be issued with a hearing notice and none is issued, resulting in the absence of that party in court, that party has thereby been denied a fair hearing. A judgment or ruling delivered against him in such circumstances will be rendered null and void. See **Okafor v A. G Anambra State (1991) 6 NWLR part 33 p. 104.** Any failure or neglect to serve a hearing notice on a party is an infringement of that party's right and opportunity to be heard. See **O. O. Obu v Archibong (2009) LPELR-8897 (CA); Technip v AIC Ltd & ors (2015) LPELR -25386 (CA).** The appellant has made out issue 1. With the resolution of issue 1 in the appellant's favour, it will be a mere academic exercise to consider issues 2 and 3. Those issues at any rate, relate to the self-same issue of lack of fair hearing canvassed under issue 1. The appeal has merit. The result is that the judgment of the lower court is set aside. The case is hereby remitted to the Chief Judge of Kano State for assignment to another Judge for re-trial. I shall make no order as to costs.

OBIETONBARA O. DANIEL-KALIO

JUSTICE, COURT OF APPEAL

COUNSEL:

ABDUL ADAMU, ESQ. for the Appellant.

S. U. MAIYAKI, ESQ. for the Respondent.
M. J. ELLAH, ESQ.

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HUSSEIN MUKHTAR, JCA

I have had the advantage of previewing the lead judgment just rendered by my learned brother, **Obietonbara O. Daniel-Kalio, JCA.** I am in full agreement with the reasons therein and the conclusion arrived that the appeal has merit and should be allowed.

I hereby allow the appeal and adopt the consequential orders made in the judgment.

DR HUSSEIN MUKHTAR
JUSTICE, COURT OF APPEAL

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OLUDOTUN ADEBOLA ADEFOPE-OKOJIE JCA

I have had a preview of the judgment of my learned brother, **OBIETONBARA O. DANIEL-KALIO, JCA,** where the issues in contention have been set out and dealt with.

I also allow this appeal and remit this case to the Hon. Chief Judge of Kano State for trial de-novo before another Judge of the High Court of that State.

Parties, I also agree, shall bear their respective costs.

OLUDOTUN ADEBOLA ADEFOPE-OKOJIE

JUSTICE, COURT OF APPEAL