

IN THE COURT OF APPEAL
KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
THIS FRIDAY THE 12TH DAY OF JULY 2019

BEFORE THEIR LORDSHIPS

HUSSEIN MUKHTAR
OBIETONBARA O. DANIEL-KALIO
OLUDOTUN A. ADEFOPE-OKOJIE

JUSTICE, COURT OF APPEAL
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CA/K/226/2016

BETWEEN:

ZAINAB USMAN BICHI APPELLANT

A N D

ALHAJI YAHAYA KARAMI ... RESPONDENT

J U D G M E N T
(DELIVERED BY HUSSEIN MUKHTAR, JCA)

This appeal was ignited by decision of the High Court of Kano State, delivered on 26th January 2016, after hearing an application dated **22nd July 2015** seeking for an order setting aside the default judgment of the Court delivered on **21st July 2015**, on ground of non-service of hearing notice on the Appellant.

The Appellant allegedly owes the Respondent \$750,000.00 (Seven Hundred and Fifty Thousand U.S Dollars).

The Respondent asserted that he unsuccessfully tried at

entreaties by colleagues, family members and associates to get the Appellant pay back the outstanding sum.

The Respondent finally resorted to litigation and the case came up for mention on 10th March 2015 where B. Y. Gambo Esq. of Counsel appeared for the Appellant. Thereafter, the case was adjourned for hearing to 25 March 2015.¹

On the return day 25th March 2015, the Appellant was neither in court nor represented.² The court further adjourned the case for hearing.

The Respondent called 3 witnesses and tendered 7 exhibits (A1, A2, B1, B2, C1, C2, and D) in proof of his case.³

The case was then adjourned to 22 June 2015 for cross-examination of the Respondent's witnesses ordering fresh service of hearing notice on the Appellant.⁴ On the return day 22nd June 2015, due the Appellant's absence, the Respondent's counsel moved the Court below pursuant to Order 10 Rule 3 of the Kano State High Court (Civil Procedure) Rules 2014, to enter default judgment for the Respondent, on ground of the Appellant's persistent absence in court.

On 21st June 2015 judgment was entered for the Respondent against the Appellant wherein all the Respondent's claims were

¹ See pages 74 and 75 of the Record of Appeal.

² Ibid see page 27 of the Record of Appeal.

³ Ibid See pages 28 to 76A of the Record of Appeal.

⁴ The hearing notice and proof of service of notice are contained on pages 1 and 2 of the Additional Record of Appeal.

granted.⁵

The Appellant then filed a motion dated 22nd July 2015 seeking to set aside the judgment delivered on 21st July 2015 contending that it was a default judgment, which could be set aside by the same court. A counter affidavit was filed by the Respondents in opposition to the Appellants' application.

In a considered ruling delivered on 26th January 2016, the trial court refused the Appellants' application to set aside the judgment and dismissed same. Hence this appeal, Notice of which is three-grounded thus:

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

2. The learned trial Judge misdirected himself in law which occasioned 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 inspite 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.

3. The learned trial Judge erred in law when he held that:

⁵ Ibid at pages 133 to 137 of the Record of Appeal

"this court cannot set aside this judgment delivered on the 21st July 2015. I therefore refused the application to set aside the judgment of this court. The judgment of this court is a judgment on the merit"

Three issues were raised and argued by the Learned Counsel for the Appellant **Dr. Nasiru Aliyu, Esq.** and similarly endorsed by the Learned Counsel for the Respondent **S. U. Maiyaki, Esq** thus:

- 1. 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 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 Ground Two)**
- 3. 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 Three).**

It was argued for the Appellant that after hearing the respondent's witnesses, the Court below, should have adjourned the matter for final address, and should not have proceeded to deliver its

judgment without serving the Appellant with necessary processes to attend the court.⁶

It was further argued that Order 31 Rule 5 of the Kano State High Court (Civil Procedure) Rules, requires the court to order the filing of written addresses by the parties after conclusion of hearing, which condition was not complied with in the instant case.

The Learned Counsel for the Appellant **urged the Court** to hold that the appellant was not accorded fair hearing and to **resolve issue 1 in favour of the Appellant.**

It was, however, argued for the Respondent that the Appellant was afforded ample opportunity by being served several hearing notices but failed to turn up to defend the case. It was submitted that, in the circumstances, the lower court was right in entering judgment against the Appellant. Reliance was placed on the case of **Ezechukwu and Anor. V. Onwuka (2016) SCMJ 71 at 89-9, paras H-I** where the Supreme Court per Muhammed JSC held that:

“it is certainly not open to a litigant that had been served hearing notice commanding him to proceed to court to defend the case instituted against him by another, to assert a breach of his right to fair hearing if eventually a decision is given against him. Section 36(1) of the 1999 Constitution (as amended) which

⁶ See pages 27 - 33, and 33A of the Record.

enshrines the doctrine of fair hearing the Appellants' waive with gusto does not avail them. The section only provides that before any decision is taken by a court of law against them, the Appellants' be given the opportunity to present their side of the matter. The Appellants' who chose to voluntarily stay away from the court after that opportunity had been extended to them are not covered by the section of the Constitution they now assert provides for them. So be it."

in the instant case, the Appellant asserted that the Court below failed to allow parties to address the court after hearing before delivering the judgment and no notice was served on the parties in respect of the date of the judgment as provided by the Kano State High Court (Civil Procedure) Rules.

When a statute provides for a procedure for doing anything, such procedure must be strictly followed. See the case of **Achu V. C.S.C. Cross River State (2009) 3 NWLR (Part 1124) 475 at 504 paras F - H.**

The Court below should have broadened its horizon and strained its arms to embrace all parties before it in the interest of fair hearing. The failure to adjourn the matter for filing written addresses as required by the Rules of Court as well as failure to serve hearing notice on the appellant on the date fixed for judgment, offended the doctrine of fair hearing. See the case of **Gov. Zamfara State v. Gyalange (2013) 8 NWLR (Part 1357) page**

462 at 481, paras G - H where Mukhtar, J.S.C. (as he then was) delivering the lead judgment observed thus:-

"The words 'fair Hearing' used in a case portends that all the rules of procedure of courts and relevant laws that are applicable to an action in a court before which the litigation is are complied with absolutely."

The rule of *audi alteram partem* requires that each side in litigation be afforded equal opportunity to put forward its case in strict compliance with the principles of fair hearing as enshrined under section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)⁷. The cases of both sides must be adequately considered and weighed against each other in line with the principles of fair hearing in the Constitution.⁸ This failure has occasioned a substantial miscarriage of justice that compels the intervention of the appellate court.

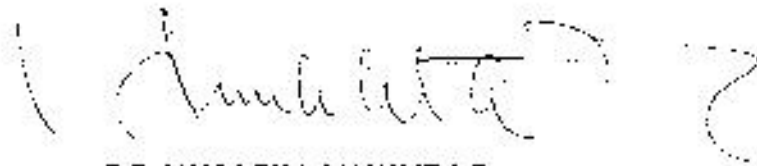
Issue one clearly has to be and is resolved in favour of the Appellant against the Respondent. This resolution further renders the remaining two issues totally insignificant and merely academic in nature. The Appeal succeeds on the resolution of issue one and it is hereby allowed.

The decision of the Court below on 26th January 2016 is accordingly set aside. In the stead thereof the default judgment entered without complying with Rules of Court is hereby set aside

⁷ Hereinafter referred to as "the Constitution"

⁸ *Ibid*

and the case remitted back to Hon. C. J. of Kano State for assignment to another judge for trial de-novo. The parties shall bear their respective costs.



**DR HUSSEIN MUKHTAR
JUSTICE, COURT OF APPEAL**

APPEARANCES:

DR. NASIRU ALIYU, ESQ., FOR THE APPELLANT

**S. U. MAIYAKI, ESQ.,
With him: M. J. ELLAH, ESQ.,) FOR THE 1ST AND 2ND RESPONDENTS**

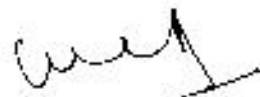
CA/K/226/2016

JUDGMENT

(DELIVERED BY OBIETONBARA DANIEL – KALIO, JCA)

I have read in draft form, the judgment of my noble lord **Hussein Mukhtar, JCA**. My lord has succinctly dealt with the issue in this appeal. I must emphasise that it has been recognised from time immemorial that fair hearing is at the very heart of justice. No matter how convincing a case is, the other side must be given an opportunity to present his case. Justice can be said to be ambidextrous in nature. It must be even-handed, hence *audi alteram partem* is one of the twin pillars of natural justice.

I too allow the appeal. I abide by the consequential order made by my lord.



OBIETONBARA DANIEL-KALIO

JUSTICE, COURT OF APPEAL

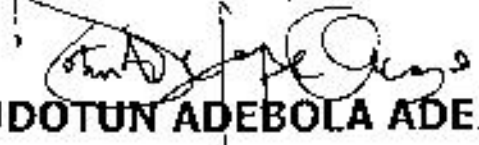
CA/K/226/2016

OLUDOTUN ADEBOLA ADEFOPE-OKOJIE JCA

I have had a preview of the judgment of my learned brother, **Hussein Mukhtar, 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