

Where Non-joinder of a Party to an Action will be Fatal

In The Supreme Court of Nigeria
Holden at Abuja
On Friday, the 16th day of February, 2024

Before Their Lordships

Kudirat Motonmori Olatokunbo Kekere-Ekun
Uwani Musa Abba Aji
Ibrahim Mohammed Musa Saulawa
Adamu Jauro
Emmanuel Akomaye Agim

Justices, Supreme Court

SC. 1098/2019

Between:

Asset Management Corporation of Nigeria

Appellant

And

- | | | |
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| <ol style="list-style-type: none">1. Suru Worldwide Ventures Nigeria Limited2. Inspector General of Police3. Commandant General of the Corps,
Nigeria Security and Civil Defence Corps4. Lagos State Commandant of the Corps,
Nigeria Security and Civil Defence Corps | } | Respondents |
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(Lead judgement delivered by Adamu Jauro, JSC)

Facts

The 1st Respondent was a customer of Oceanic Bank International Plc. (now *Ecobank Limited*). With the existing banker-customer relations, the 1st Respondent was granted several credit facilities by the bank, which the 1st Respondent did not repay at the due date or any time at all. Subsequently, the credit facilities were purchased by the Appellant in accordance with its statutory duties. The instrument evincing the loan purchase was the Loan Purchase and Limited

Servicing Agreement entered into between the Appellant and the bank. Further to the loan purchase, the Appellant took out an Originating Motion at the Federal High Court, Lagos where the Appellant sued 2nd – 4th Respondent, as well as the Commissioner of Police, Lagos State (*this party was later struck out by the trial judge on application by the Appellant*) seeking mainly, executory orders of court directing the Defendants or officers under their command/control to (i) assist the Appellant in the exercise of its rights as legal mortgagee under the Deeds of Legal Mortgage registered as 32/32/2023, 88/88/2032; (ii) maintain peace and for the protection of the Appellant's exclusive possessory rights over properties situate at 12, Reverend Ogunbiyi Steet, Ikeja, Lagos and 12, Allen Avenue, Ikeja, Lagos (the "*securities for the loan*").

The Appellant was successful at the trial court. However, when the 1st Respondent became aware of the decision of the trial court, the 1st Respondent (*whose mortgaged properties/securities for the loan was in issue*) appealed to the Court of Appeal, Lagos, on the basis that it is a necessary party and should have been made a party to the suit. The lower court delivered its judgement on 2nd July 2019, holding *inter alia* that the trial court should not have conducted proceedings without the 1st Respondent as a party. The court reasoned that the 1st Respondent could have assisted the court in determining some issues, including whether the Appellant's right of foreclosure/possession had arisen. The lower court therefore remitted the case to the trial court for hearing *de novo* with the 1st Respondent as a party.

Aggrieved by the decision of the lower court, the Appellant appealed to the Supreme Court. At the apex court, the 1st Respondent filed a Notice of Preliminary Objection and Motion on Notice seeking to strike out grounds 3, 4 and 5 of the Appellant's ground of appeal.

Issues for Determination:

The Preliminary Objection and Motion on Notice were argued on the following:

Issues in the Preliminary Objection and Motion on Notice

1. *Whether the Appellant possess the requisite locus standi to institute the suit and to file the present appeal.*
2. *Whether Grounds 3, 4, and 5 of the Grounds of Appeal are competent.*

Issue in the Substantive appeal:

The Appellant formulated five issues for determination of the appeal while the 1st, 2nd and 3rd Respondents formulated an issue each; the 4th Respondent did not file a brief. The Supreme Court, however, considered the following sole issue in determining the appeal:

Whether the 1st Respondent ought to have been joined as a party to the Appellant's suit before the trial court?

Arguments

Arguing the preliminary objection, the 1st Respondent submitted that the Appellant lacked the *locus standi* to institute the suit at the trial court as well as the extant appeal because it failed to exhibit a loan purchase agreement before the trial court, evincing the purchase of the debt from the bank to warrant the standing to sue in respect of the credit facilities - **UNITY BANK PLC. v AHMED (2019) 4 S.C. (Pt. IV) 21**. Reacting thereto, the Appellant argued that the preliminary objection must be struck out having been argued as part of the 1st Respondent's brief of argument rather than being filed separately and served with at least 3 (three) clear days to the hearing of the appeal as required under **Order 2 Rule 9 of the Supreme Court Rules 1985**. On the merit of the objection, it was submitted that the 1st Respondent was always aware of the loan purchase agreement (*between Appellant and the bank*) which goes to vest *locus standi* on the Appellant, especially as the 1st Respondent produced the said loan purchase agreement before the lower court.

Regarding the Motion on Notice, the 1st Respondent posited that Grounds 3, 4 and 5 of the Grounds of Appeal were mixed law and fact which therefore necessitated the leave of court to be sought and obtained before the said grounds could validly form part of the Notice of Appeal. In response, counsel for the Appellant argued that the identified grounds of appeal complained against the lower court's failure to comply with the doctrine of *stare decisis* and are thus, grounds of law- **EZENWAJI v UNIVERSITY OF NIGERIA & ORS. (2017) 5-6 S.C. (Pt. II) 73**.

On the substantive issue of non-joinder, it was submitted on behalf of the Appellant that the lower court was wrong to have held that the 1st Respondent should have been joined as a party to the suit. Counsel argued that there was no relief sought against the 1st Respondent to warrant a joinder, and so the lower court should not have expanded the scope of reliefs sought in the Originating

Motion without affording him the opportunity to make representations/clarifications on whether the mortgage debt was still “unliquidated, relative to the other causes in litigation between the parties”. Reliance was placed on **YUSUF v ADEYEMI (2009) 15 NWLR (Pt. 1165)** in submitting that for purpose of joinder, interest of parties in the suit must relate to the reliefs sought in the suit. It was submitted that the legal mortgagee becomes the owner of the mortgaged property after a mortgage is consummated (*which legal interest is retained until the mortgage debt is repaid*). In this wise, having acquired the credit facilities from the bank, it was contended that the mortgagee’s right over the mortgaged property is a legal interest which supersedes the mortgagor’s equitable interest - **OKUNEYE v F.B.N. PLC. (1996) 6 NWLR (Pt. 457) 749**.

In reaction, counsel for the 1st Respondent submitted that the Appellant failed to establish any prejudice or miscarriage of justice suffered on account of the lower court’s decision allowing the 1st Respondent be joined to the suit in the interest of fair hearing and justice. It was argued that given the Appellant’s allegation of indebtedness of the 1st Respondent, it cannot shut the 1st Respondent out of the suit.

Court’s Judgement and Rationale

In resolving the preliminary objection, the Supreme Court held that the 1st Respondent complied with the provisions of the Supreme Court Rules having actually filed a separate Notice of Preliminary Objection on 13th January 2023, which was well beyond the 3 (three) clear days before the hearing of the appeal. Thus, while the preliminary objection was contained in the 1st Respondent’s Brief of Argument, there was a distinct Notice of Preliminary Objection in accordance with the Rules. The contention was thereby discountenanced.

On the 1st Respondent’s challenge against the Appellant’s standing to sue, the apex court considered paragraphs 10-13 of the supporting affidavit of the Appellant’s Originating Motion and found that the Appellant had clearly demonstrated a presence of interest to protect *i.e.* the debt owed to the bank by the 1st Respondent (*which the Appellant had acquired*). Other than the fact that there was correspondence exchanged between the Appellant and the 1st Respondent on the issue of indebtedness, the 1st Respondent actually exhibited the Loan Purchase Agreement and therefore, cannot act unaware of the said agreement. The preliminary objection was thereby, dismissed for lacking in merit.

Deciding the issue of competence of some of the grounds of appeal as identified, the Supreme Court held that from a reflection of the grounds and their particulars, the tenor of the complaints embedded in the said grounds are that the lower court failed to conform with the doctrinal principle of *stare decisis* having refused to follow decisions of the apex court in arriving at its decision. Their Lordships therefore, took the position that the grounds were grounds of law alone – thus falling within the purview of Section 233(2)(a) of the 1999 Constitution. The motion was consequently dismissed.

Deciding the issue in the substantive appeal relating to joinder of the 1st Respondent, the court held that *where the Plaintiff claims relief(s) which when granted will have a binding effect on a person who is not a party to the action, the action becomes incompetent as the necessary party has not been joined*. The apex court defined a necessary party as one whose presence and participation is necessary or essential for the effective and complete determination of the claim before the court. *The general rule is that no action shall be defeated by reason of non-joinder of a party and a court shall determine the suit before it between the parties before it. However, there are instances where failure to add a party to an action will be fatal. Where a necessary party whose presence is necessary for the determination of all the questions in a suit is not added as a party, the failure will have fatal consequences and the judgement will be unstainable* - *RMAFC v A-G RIVERS STATE & ANOR. (2023) LPELR – 60355(SC)*.

In this case, the Supreme Court examined the affidavit in support of the Originating Motion filed by the Appellant at the trial court and came to the conclusion that it was practically impossible to arrive at a resolution on the Appellant's assertions in the absence of the 1st Respondent, *and it was indeed not open to the Appellant or any party in litigation to assume that another party or person has no defence to an action or a question arising in litigation*. Also, the Appellant had no place to assume that a person whose interest is affected in an action has no reply or answer to questions affecting his interest. The apex court held that, no matter how certain a party or judge is about a question to be determined, the principles of natural justice must not be ignored. While it may appear that no relief was claimed against the 1st Respondent, it is not in doubt that it was the 1st Respondent who stood to be affected as the reliefs targeted its properties.

Regarding the Appellant's analysis equating the situation of the mortgaged properties to that of an outright sale, Their Lordships explained that in a legal mortgage, the mortgagee retains the right of redemption and he is entitled to recover ownership of the mortgaged property once he has repaid the loan or

liquidated the indebtedness. In effect, the Appellant's power to foreclose or gain possession over the mortgaged property were not at large but subject to certain conditions such as when the debt is due but remains unliquidated by the mortgagor. The apex court noted that it was for this reason that the need to hear the 1st Respondent's side of the story on whether the Appellant's power to foreclose and gain access to the property was in fact exercisable.

In conclusion, the Supreme Court held that the non-joinder was a violation of the rule of natural justice and the 1st Respondent's right to fair hearing. Their Lordships, therefore, unanimously dismissed the appeal of the Appellant. The other issues raised by the Appellant were not considered so as not to prejudge the issues, since the matter was to return to a trial judge for determination with the 1st Respondent as a party.

Appeal dismissed.

Representation:

Collins Ogbonna Esq. for the Appellant; with Samuel Onah Esq and U.U. Fingesi Esq.

Mr. Layi Babatunde SAN for the 1st Respondent; with Oladele Ojogbede Esq. and David Owoeye Esq.

Godwin Attai Haruna Esq. for the 2nd Respondent; with Anma Chris Uche Esq. and Jessica Amarachi Opara Esq.

I.S. Dokubo Esq. for the 3rd Respondent.

Patrick Okonjo Esq. for the 4th Respondent.

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