

An Incomplete Record of Appeal – Effect of in Determining an Appeal

In the Supreme Court of Nigeria
Holden at Abuja
On Friday, the 19th Day of July 2024

Before Their Lordships
Ibrahim Mohammed Musa Saulawa
Tijjani Abubakar
Jamilu Yammama Tukur
Abubakar Sadiq Umar
Mohammed Baba Idris
Justices, Supreme Court

SC/208/2009

Between

1. BAWA DADA
2. AHMADU DADA
3. UMARU DADA

APPELLANTS

And

1. TANKO YANDAYI
2. UMARU BABA YANDAYI

RESPONDENTS

(Lead judgement delivered by Honourable Mohammed Baba Idris, JSC)

Facts

The Appellants commenced an action at the Upper Sharia Court, Paiko, seeking a declaration of title to a piece of farmland located along Yandayo Road near Yandayi Village in Paiko District, Paiko Local Government Area, Niger State. The Respondents denied the claim and, in turn, asserted ownership of the disputed land.

At the trial, the Appellants, as Plaintiffs, called four witnesses and led evidence to support their claim based on inheritance. The Respondents, in turn, called three witnesses and denied the Appellants' claims. Upon conclusion of the trial, the Upper Sharia Court, Paiko, delivered judgement in favour of the Respondents, dismissing the Appellants' claim.

Aggrieved by the decision, the Appellants appealed to the High Court, which overturned the judgement of the trial court and declared the Appellants as the rightful owners of the farmland. Dissatisfied with the decision of the High Court, the Respondents appealed to the Court of Appeal, which court set aside the decision of the High Court and reinstated the judgement of the trial court, with costs awarded against the Appellants. The Appellants, being dissatisfied with the decision of the Court of Appeal, filed an appeal to the Supreme Court.

Issues for Determination

The parties filed their respective briefs of argument. In the Appellants' amended joint brief, three issues were formulated for the determination of the appeal thus:

1. Whether bearing in mind the provision of Section 10 and 11(a) of the Niger State Administration of Shariah Law 2001, the lower court was right when it held that the Shariah procedure of AL-IZAR "will be relevant only where counsel do not appear for litigants and where no final addresses was delivered by counsel".
2. Whether the testimony of DW1 as a beneficiary to the judgement of the trial court can stand under Shariah.
3. Whether the trial court should have relied on the testimony of DW1 same having been challenged, without first conducting a trial-within-trial to ascertain his competence to testify.

The Respondents on their part formulated the following two issues for determination of the appeal, thus:

1. Whether the lower court was, in the circumstances of this appeal, right when it held that the Sharia procedure AL-IZAR: "will be relevant only where counsel do not appear for litigants and no final address were delivered by counsel."

2. Whether the testimonies of DW1 and DW2 are acceptable evidence under the Sharia Law.

Arguments

Arguing issue one, counsel for the Appellants submitted that Al-Izar as a fundamental rule of practice and procedure of Sharia is applicable even where parties are represented by counsel. It was submitted further that Al-Izar is a fundamental principle of practice and procedure of Islamic law which nullifies a proceeding where it is not adhered to whether parties are represented or not. Counsel argued a careful look at the entire record of the court will show that there was never a time that the trial court asked any of the parties if they have further evidence to present to the court, and that this was apparent on page 32 of the Record of Appeal where at the close of the trial, the court immediately adjourned for address by counsel. Also, on page 42 of the same record where upon the announcement of appearance by counsel, the court immediately went into delivery of its judgement with Al-Izar. It was submitted further that Islamic procedure of Al-Izar is one that is so fundamental that the court or judge cannot afford to overlook, whether there is legal representation or not. And that identification of parties appearing before a judge of Sharia is a paramount important Islamic procedure.

The Appellants contended further that the testimony of DW1 – Umaru Baba of Yandayi Village, cannot stand alone since he is a party to the suit and identified by the trial court in its judgement on page 62 lines 1 - 3. He argued that in Islamic law procedure, calling the testimony of a witness is called Taijrih; and under Islamic law procedure, by raising an objection to the testimony of a witness, the court is required to ask the witness whose testimony is being challenged if the allegation is true. If he admits it, it will be an acceptable admission (IQRAR) or his testimony stands discredited but if he denies, the court will then demand the challenging party to produce witness.

The Respondents on their part, countered the submissions above. Their counsel contended that the Sharia (Administration of Justice) Law, 2001 came into force in November, 2002 well after trial had commenced and therefore, is not applicable to the case by virtue of Sections 2 and 12 of the Interpretation Law, 1989. It was argued that the trial conformed substantially with the provisions of the Area Court (Civil Procedure) Rules. Counsel argued further that at the conclusion of the Defendants' (Respondents') evidence, their counsel prayed for

an adjournment to which the Plaintiffs' (Appellants') counsel answered -"No objection", and that both counsel agreed to make their final address to the court on a later date. He posited that the Appellants' counsel did not seek to rebut the evidence and the first time he raised the issue was on appeal before the High Court. It was argued that under Islamic Law, the courts are to consider the whole proceedings to determine where the justice of the case lies without recourse to technicalities. Regarding the evidence of DW1, it was submitted that the issue of whether the DW1 is the 2nd Defendant was not an issue during the trial and was only raised during address, and that his competence was never challenged under cross examination. He urged the court to dismiss the appeal.

Court's Judgement and Rationale

The Supreme Court, in deciding the appeal, examined the Record of Appeal and emphasized its fundamental role in the adjudicatory process. The apex court held that *cases must be decided based on the Record of Appeal, as its absence or incompleteness would impede the proper hearing of appeals*. The court held further that *a Record of Appeal encompasses, but is not limited to, all relevant processes filed in relation to the appeal, exhibits tendered (if any), and the judgements or rulings of the lower courts*.

The court noted that the appeal was brought against the judgement of the Court of Appeal (Abuja Division) and from the Appellants' Notice of Appeal, the appeal was against the "whole decision" of the lower court and sought an order setting aside the judgement while praying for a re-trial. Their Lordships held that *for the court to effectively hear and determine the appeal, the entirety of the judgement of the lower court, as complained of by the Appellants, must be properly placed before it*.

The Supreme Court held that the meaning of the "whole decision" of the Court of Appeal is as provided under Section 247(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended); emphasizing that for the purpose of hearing appeals, the Court of Appeal must be duly constituted by not less than three Justices of the Court of Appeal. Furthermore, the court referred to Section 294(2) of the 1999 Constitution (as amended), which mandates that each Justice of the Supreme Court or the Court of Appeal must express and deliver their opinion in writing or may adopt, in writing, the opinion of another Justice who delivers a written opinion.

From the provision above, the Supreme Court noted that when these duties are carried out by the Justices of the Court of Appeal, a leading judgement, concurring and/or dissenting judgements are delivered. It is trite that both the leading judgment and concurring judgments crystallize into the whole judgement of an appellate court. The court relied on its earlier decision in **OLORUNTOBA-OJU & ORS v ABDUL-RAHEEM & ORS (2009) LPELR - 2596 (SC)**, where it was decided that “... *a concurring judgement forms part of the leading judgement and it is meant to complement same by way of addition or an improvement on the issues resolved in the leading judgement. Both leading and concurrent judgements crystallize into the judgement of an appellate court.*”

To this end, the Supreme Court stated that for it to effectively determine the instant appeal, the entire decision complained of must be properly placed before the court and contained in the Record of Appeal. Upon a thorough examination of the Record of Appeal, the Justices of the Supreme Court found that the judgement of the lower court was recorded at pages 138–158 of the Record of Appeal. However, only the leading judgement delivered by Ahmad Olanrewaju Belgore, JCA, was included in the record. The concurring judgements of Abubakar Datti Yahaya, JCA, and Massaud Abdulrahman Oredola, JCA, were absent from the Record of Appeal. The law is settled that *an appellate court only hears an appeal on the record before it and must ensure that the record is complete as it would amount to a legal sacrilege for an appellate court to adjudicate upon an appeal in the face of an incomplete record of appeal.* The Court reiterated this position, relying on the dictum of Tobi, JSC in **OKOCHI. & ORS v ANIMKWOI & ORS (2003) LPELR - 2455 (SC)**, where the Lordship held that - “*As an appellate court hears an appeal on the records before it, it must ensure that the records are complete as settled by the parties. An appellate court must be wary to hear an appeal on incomplete records and must not hear an appeal on incomplete records unless the parties by consent, agree that the appeal should be so heard. And such a consent which, will be a basis of a successful defence of waiver in the event of a retraction on the part of any of the parties, must be recorded by the appellate court. There could however be another situation where an appeal could be heard when the records are incomplete. Such a situation will be where the missing part of the record, in the view or opinion of the court, is so immaterial, clearly so immaterial that it cannot affect the decision of the appeal one way or the other.*”

The Supreme Court held that *the purpose of appeal in the appellate court, is to re-hear the issues in the subject appeal; hence, the appellate court is entitled to see all the materials on which the decision appealed was predicated in order to properly scrutinize same. A complete record of appeal is not therefore a*

privilege, it is mandatory, failing which the appellate court cannot re-hear the appeal. - UKIRI v EFCC (2018) LPELR-43992 (SC).

The incompleteness of the Record of Appeal in the instant case deprived the apex court of the necessary means to effectively hear and determine the appeal, as the entire decision complained of was not contained in the record before the court. Their Lordships emphasized that the omitted judgements were crucial for the just determination of the appeal and could not be waived or deemed immaterial. They noted further that any decision reached in such circumstances, affecting the rights of the parties, would inevitably result in a miscarriage of justice.

Appeal Struck Out.

Representation

S.A. Oshodi, Esq. for the Appellants.

O.P. Odia Esq. with D.S. Danboyi Esq. for the Respondents.

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