Incomplete Record of Appeal – Whether the Rule Against Jurisdiction Admits of Exception(s)

In the Supreme Court of Nigeria
Holden at Abuja
On Friday, the 6th Day of March, 2026

Before Their Lordships

Emmanuel Akomaye Agim
Chidiebere Nwaoma Uwa
Moore Aseimo Abraham Adumein
Obande Festus Ogbuinya
Mohammed Baba Idris
Justices, Supreme Court

SC.414/2016

BETWEEN

1. VINCENT UGO **APPELLANTS**
2. ANTHONY NWANZE
3. ANTHONY OKOLIE
(For themselves and on behalf of Members of Unuogbor family, Odafe-Isiuzor, Ibusa)

AND

1. DIOKPA MAHA **RESPONDENTS**
2. STEPHEN NWABUOKU
3. MICHAEL NWABUOKU
4. LOUIS ODITA
(For themselves and on behalf of Members of Umuobi family, Odafe-Isiuzor, Ibusa)

(Lead judgement delivered by Honourable Obande Festus Ogbuinya, JSC)

"***Generally, an appellate court is not bestowed with the jurisdiction to entertain an appeal based on an incomplete record. ... Howbeit, this cardinal principle of law is a malleable one. Its elasticity is located in the realm of irrelevancy of the missing process/proceeding, id est, an appellate court can hear an appeal on an incomplete record where the missing part of the record is so immaterial such that its absence cannot affect the decision of the appeal, one way or the other.***"

Facts

The Appellants, suing in a representative capacity, commenced Suit No. AKU/52/2011 at the High Court of Delta State against the Respondents, also sued in a representative capacity, claiming a declaration, general damages for trespass and a perpetual injunction in respect of a parcel of land known as Ani-Ugwude Ogbor, at Umogbor, Odafe Isiuzo, Ibusa. The Respondents filed a preliminary objection to the competence of the suit, which the trial court upheld, and struck out the suit.

The Appellants appealed to the Court of Appeal. In its judgement, the lower court struck out the appeal on the ground that the record of appeal was incomplete, in that it omitted a further and better affidavit allegedly filed by the Respondents in support of their preliminary objection. Nettled by the decision, the Appellants further appealed to the Supreme Court.

Issue for Determination:
The appellants distilled two issues for determination in their brief of argument. The Supreme Court, however, considered only the first issue as determinant of the appeal, thus:

> ***WHETHER*** *the learned Justices of the Court of Appeal were right in striking out the Appellant's appeal for incomplete record of appeal without hearing the parties on the issue they raised suo motu?*

Arguments

There was no appearance for the Respondents at the hearing of the appeal, and no brief of argument was filed on their behalf; thus, the submissions before the Supreme Court were those of the Appellants alone.

In their submission on the sole issue before the court, the Appellants contended that the decision of the lower court striking out the appellants' appeal for an incomplete record was the offspring of an issue the lower court raised *suo motu*, without inviting the parties to address it. They submitted that neither party had, before the judgement, raised the question whether a further and better affidavit allegedly filed by the Respondents ought to have formed part of the record of appeal. That it was the duty of the lower court, before resolving the point against the Appellants, to have afforded them an opportunity to be heard on it, and that its failure to do so occasioned a breach of fair hearing.

On the substance of the finding itself, the Appellants contended that there was, in fact, no further and better affidavit filed by the Respondents in support of their preliminary objection at the trial court to warrant its transmission as part of the record. Thus, the Appellants could not be said to have defaulted in the transmission of a complete record. They submitted further, relying on decided

cases, including **EKPEMUPOLO v EDREMODA (2009) 8 NWLR (PT. 1142) 166** and **AUDU v FRN (2013) 5 NWLR (PT. 1348) 397,** that a record of appeal binds the parties and the court.

Court's Judgement and Rationale

Deciding the issue, the Supreme Court held that it is elementary law that while a court is *showered with the discretion to raise an issue suo motu, on its own motion, it has the bounden duty, heaped on it by law, to invite parties in the matter and afford them the opportunities to address it before a decision is arrived at on the point*. Where a court fails to do so, such an injudicious judicial exercise will drag the court into the foggy arena of conflict as well as impinge on the inviolable rights of parties to fair hearing as ingrained in Section 36(1) of the Constitution. Citing **HAMBE v HUEZE (2001) 4 NWLR (PT. 703) 372 at 388-389**, *per* Achike, JSC, the Supreme Court restated that generally an appellate court cannot *suo motu* raise issues at the judgement stage which the parties did not raise without the perilous risk of stepping into the arena of conflict, and that where it does so in special circumstances, the court cannot found its decision on such new issues without first affording both parties or their counsel opportunity to address the court on the new issues.

Their Lordships held, however, that this principle is a flexible rule of law which admits of certain exceptions, and that the need for address by the parties becomes unnecessary where: *(a) the issue relates to the courts own jurisdiction; (b) both parties are/were not aware or ignore a statute which may have a bearing on the case…. (c)… on the face of the record serious questions of the fairness of the proceedings is evident* - **OMOKUWAJO v FRN (2013) 9 NWLR (PT. 1359) 300 at 332**, *per* Rhodes-Vivour, JSC. Examining the reasoning of the lower court, the Supreme Court held that it was woven around the absence of complete record flowing from the Appellants' abandonment of their duty vis-à-vis the transmission of record, which was a classic exemplification of a jurisdictional point/issue, since an appellate court is only clothed with the jurisdiction to adjudicate over an appeal that is greeted by a complete record. It held that *an issue of jurisdiction rotates outside the universe of raising an issue ex proprio motu," so that "a court of law can, proprio vigore, on its own strength, rake it up without being injurious to the law*.

The Supreme Court then turned to whether the record was, as a matter of fact, incomplete. It held that ***the record is the bedrock, soul, touchstone, keystone, and bible of every appeal. It binds the parties and the court. Neither a party nor the court is granted the latitude to add or subtracts from the contents of the record. Nor is either permitted to stray away from it. Hence, the importance of transmission of complete record to the appellate court cannot be over emphasised. Generally, an appellate court is not bestowed with the jurisdiction to entertain an appeal based on an incomplete record. ... Howbeit,***

this cardinal principle of law is a malleable one. Its elasticity is located in the realm of irrelevancy of the missing process/proceeding, id est, an appellate court can hear an appeal on an incomplete record where the missing part of the record is so immaterial such that its absence cannot affect the decision of the appeal, one way or the other."

Their Lordships then examined the record of the trial court, including the respondents' affidavit in support of their preliminary objection and the submissions of their counsel when the preliminary objection was argued on 19th November 2012, and held that it was decipherable from these extracts that the further and better affidavit, which is the marrow of this issue, was never filed in support of the respondents' preliminary objection, and that, if there was any such process, it related to a previous application which was disposed of by the trial court.

Further, that even if a further affidavit was filed, counsel for the respondents having failed to mention it as one of the processes that propped the preliminary objection, it became enveloped in the dense fog of irrelevancy/insignificance, and that, by the respondents own showing, the further and better affidavit was an absent process. Based on the foregoing, the Supreme Court held that the lower court's insistence on transmission of the process was tantamount to asking the Appellants to "build castle in the air" which is both a natural and physical impossibility, the Appellants being sheltered properly under the canopy of the legal maxim: *Lex non cogit ad impossibilia* – the law does not compel an impossibility. And that the Appellants did not, in the least, fracture the law on transmission of record as to magnet the dire penalty of an incomplete record meted out to their appeal by the lower court.

The Supreme Court concluded that the lower court's *categorisation of the Appellants' appeal as one marooned in the murky ocean of an incomplete record, with its attendant toxic consequence in law, was, with due respect, a flagrant defilement of the law. It was ultra vires the power of the lower court, which has to be mowed down by the unbiased judicial sword of this court.* The sole issue was thus resolved in favour of the Appellants and against the Respondents.

On the whole, the Supreme Court held that the appeal was imbued with merit and allowed it. The judgment of the lower court, in Appeal No. CA/B/246/2013, delivered on 10th November 2015, striking out the Appellants' appeal on account of an incomplete record, was set aside, and the Appellants' appeal before the lower court was allowed. The Appellants' suit - Suit No. AKU/52/2011, was remitted to the Chief Judge of Delta State for an expeditious determination, on its merit, by another judge of the High Court of Delta State.

Appeal allowed.

Representation

N.A. Erondu, Esq. for the Appellants
No appearance for the Respondents

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