

IN THE COURT OF APPEAL
ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON WEDNESDAY THE 30TH DAY OF JUNE 2010
BEFORE THEIR LORDSHIPS:-

MARY U. PETER-ODILI
JIMI OLUKAYODE BADA
ABDU ABOKI

JUSTICE, COURT OF APPEAL
JUSTICE, COURT OF APPEAL
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CA/A/83/08

BETWEEN:

FEDERAL BOARD OF INLAND REVENUE.....APPELLANT
AND
EXPRESS PETROLEUM & GAS COMPANY LTD.....RESPONDENT

JUDGMENT
(DELIVERED BY JIMI OLUKAYODE BADA, JCA)

This is an appeal against the Judgment of the Federal High Court, Abuja in Suit No: FHC/AEJ/M/08/06 – Express Petroleum & Gas Company Ltd vs. Federal Board of Inland Revenue delivered on the 6th day of November 2006.

Briefly, the facts of the case are that the Respondent herein who was the Appellant at the lower Court brought an application for stay of Execution of Judgment of the Body of Appeal Commissioners pending the determination of the Appeal filed against the said decision.

The said application and the main appeal were heard together. And at the conclusion of hearing, the lower Court allowed the Appeal. The Respondent at the lower Court now the Appellant in this Court dissatisfied with the Judgment appealed to this Court.

The learned Counsel for the Appellant distilled three issues for determination set out as follows:-

“(1) Whether the lower Court was judicially obliged to pronounce on all the grounds of Appeal, having

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elected to hear the application for Stay of Execution and the argument in the Appeal.

- (2) Whether the said order as contained in ground two amounts to a Judgment and therefore disposing of the core issues of the Appeal bordering on tax assessments.
- (3) Whether the Judgment disposes of the issues without pronouncing on the other issues of capital expenses and allowances and the tax assessments raised thereon, when both parties argued the issues.”

The learned Counsel for the Respondent also formulated two issues for determination set out as follows:-

- “(1) Whether the lower Court properly reviewed the evidence put forward, and made findings before coming to the conclusion it reached having regard to the grounds of appeal as argued before it.
- (2) If the answer to the first issue is in the negative whether this Court has power to take over and review the case as presented at the lower Court.”

At the hearing, the learned Counsel for the Appellant referred to the Appellant's Brief of Argument filed on 25/1/2010 and the written address in Reply to the Respondent's Preliminary Objection filed on 14/4/2010. She adopted the Appellant's Brief of Argument and the Written Address in urging that the Appeal be allowed.

The learned Counsel for the Respondent also referred to the Respondent's Brief of Argument filed on 23/2/2010 and the Preliminary Objection filed on the same date.

He relied on the said Preliminary Objection in the Respondent's Brief of Argument in urging that Grounds 1 and 3 be struck out and dismiss the Appeal based on Ground 2.

It is appropriate at this juncture to deal with the Preliminary Objection raised by the learned Counsel for the Respondent.

The learned Counsel for the Respondent raised Preliminary Objection to the competence of Grounds 1 and 3 of the Notice of Appeal, which he

said raised the issue as to misdirection on facts while also raising in the same grounds an error of law thereby making the said Grounds 1 and 3 incompetent.

The learned Counsel for the Respondent referred to the Notice of Appeal and in particular Grounds 1 and 3 and submitted that the Appellant's alleged misdirection on facts while at the same time alleging an error of law. He argued that misdirection on facts and error in law are mutually exclusive of each other. He explained further that the Appellant can only allege misdirection on facts on one ground and an error of law in the other ground. He contended that certainly the grounds could not be couched in the same ground as such ground would be rendered incompetent and liable to be struck out. He relied on the following cases of:-

- University of Ilorin vs. Oyelana (2001) 1 FWLR Part 83 Page 2193 ratio 14 and at Page 2203 Paragraphs E – F;
- Tumo vs. Murana (2001) FWLR Part 33 Page 369 at 374.

In the circumstance, he urged this Court to hold that Grounds 1 and 3 as couched are incompetent and should be struck out.

In his response, the learned Counsel for the Appellant stated that the main issue for determination in the Preliminary Objection is whether Grounds 1 and 3 of the Appellant's Grounds of Appeal are incompetent.

Learned Counsel for the Appellant referred to Order 6 Rules 2 and 3 of the Court of Appeal Rules 2007 and submitted that the said Grounds 1 and 3 did not violate any of the Rules of Court.

She stated further that assuming without conceding that the two grounds of Appeal being objected to are deficient in any way, she urged the Court to look at it as technicality, which does not engender any injustice to the Respondent. She relied of the following cases:-

- Leasing Co. Nig. Ltd vs. Tiger Industry Ltd (2007) 14 NWLR Part 1054 at Page 356;
- Aderoumu vs. Olowu (2000) 13 NWLR Part 782 Page 64.

Learned Counsel for the Appellant finally urged that the Preliminary Objection should be dismissed.

In order to appreciate the objection of learned Counsel for the Respondent, it is necessary to set out the said Grounds 1 and 3 of the Notice of Appeal without its particulars.

"Gound 1

The Court erred in law and misdirected itself when it entered Judgment without considering and pronouncing on all the grounds of appeal properly filed and argued before it.

Gound 3

The Court erred in law and misdirected itself when it neglected to pronounce on the issue of capital expense and allowances allowable to the Appellant/Respondent and the assessment rose thereon, when both parties argued the issue."

A careful examination of the above Grounds 1 and 3 of the Notice of Appeal set out above revealed that the Appellant alleged error of law while at the same time he alleged misdirection in each of the Grounds of Appeal.

It is my view that the said grounds of appeal were badly couched. A Ground of Appeal cannot contain an error in law and a misdirection at the same time. A Ground of Appeal which alleges a misdirection differs from and it is in fact mutually exclusive of one which alleges an error in law. This is because a misdirection relates to the Court's statement of a party's case, whereas an error relates to the determination by the Court. See:-

- Nwadike vs. Ibekwe (1987) 4 NWLR Part 87 Page 718.

It is therefore my view that the said Grounds 1 and 3 are incompetent and are hereby struck out. See the following cases:-

- Akuchie vs. Nwamadi (1992) 8 NWLR Part 258 Page 214;
- Idaayor vs. Tigidam (1995) 2 NWLR Part 377 Page 359;
- University of Ilorin vs. Oyelana (Supra);
- Geosource Nig. Ltd vs. Biragbara (1997) 5 NWLR Part 506 Page 607;
- Tumo vs. Murana (Supra);
- Davidson Construction Ltd vs. Bees Electrical Ltd (2001) FWLR Part 63 Ratio 5 at Pages 156 and 162 Paragraphs D – F.

Having held above that Grounds 1 and 3 of the Notice of Appeal are incompetent, so also the issues formulated based on the incompetent Grounds are incompetent. Even where an incompetent ground of appeal is based on an issue with a competent ground of appeal, the incompetent

ground of appeal will contaminate the issue argued on the competent ground of appeal and will render the issue based on competent ground of appeal incompetent. See:-

- Ambrose Akuche vs. M. Nwamadi (Supra);
- Bereyin vs. Gbodo (1989) 1 NWLR Part 97 Page 372 at 380.

In view of the foregoing, Issue 1 formulated on behalf of the Appellant and Issue 1 formulated on behalf of the Respondent are hereby struck out since the issues were based on incompetent Grounds of Appeal.

I am now left with Ground 2 of the Appellant's Notice of Appeal and also Issues 2 & 3 from the Appellant's Brief of Argument.

The said issues are relevant and apt to determine this appeal and they are re-numbered as Issues 1 & 2 respectively.

Issues 1 & 2 (Taken Together)

"Whether the said order as contained in Ground 2 amounts to a Judgment and therefore disposing of the core issues of the Appeal bordering on tax assessments.

Whether the Judgment disposes of the issues without pronouncing on the other issues of capital expenses and allowances and the tax assessments raised thereon at the lower Court."

The learned Counsel for the Appellant stated that the lower Court granted the application for Stay of Execution but that it is not clear how the conclusion was reached without first allowing the appeal or partly allowing the appeal or even vacating the tax assessment first before making the consequential orders. He went further that as the Judgment stands, it cannot serve as a guide to anybody.

Learned Counsel for the Appellant therefore urged this Court to set aside the Judgment of the lower Court and uphold the Judgment of the Body of Appeal Commissioners to reflect the true intention of the law on the important issue of tax.

The learned Counsel for the Respondent on the other hand submitted that in a situation where the lower Court failed to properly appraise and make adequate findings regarding the case presented before it, that this Court has power to take over and review the entire case and still come to the right conclusion.

Learned Counsel contended that looking at the Judgment of the lower Court as contained in the Record of Appeal, the conclusion to be drawn is that the case of the parties were properly appraised by the lower Court. He went further that where the Court finds otherwise, this Court has power to go ahead and to review the parties' case.

He relied on Section 16 of the Court of Appeal Act and Section 6(6) (a) and (b) of the 1999 Constitution of the Federal Republic of Nigeria.

In this case under consideration, both the Motion on Notice for Stay of Execution and the argument in the Appeal were taken together by the lower Court. And in the Judgment delivered on 6th day of November 2007, the Court held thus:-

"JUDGMENT

The Appellant by a motion on notice dated 19/12/06 prayed this Court for an order staying the execution of the judgment of the Body of Appeal Commissioners dated 24/11/06 pending the determination of the Appeal filed against the said decision in Appeal No. 355/2004.

The application is supported by a 4 paragraphs affidavit sworn to by one Stephen Gbenga Oni and 3 documents annexed as Exhibits SGO I, SGO II and SGO III respectively and a 12 paragraphs further and better affidavit sworn to by one Victor Oruno.

The Respondent filed a 5 paragraphs affidavit sworn to by Stella Nuhu.

The Court on 15/5/07 ordered parties to file written arguments.

The Appellant's written address as furnished by learned Counsel I. N. Ambule Esq. is dated 4/6/07 but filed on 8/6/07 while the Respondent's brief of argument as furnished by learned Counsel Tanko Ashang Esq. is dated and filed on 28/6/07.

The Appellant's reply on points of law was filed on 2/10/07.

I have read the motion for stay and the supporting affidavits. I have read the counter affidavit of the

Respondent. I have thoroughly read the submissions of Counsel for and against the grant of stay. In particular, I have taken cognizance of the Respondent's oral reply to the effect that Counsel does not oppose the application but urges Court if appeal is allowed and tax assessment vacated, in the interest of justice to order the Respondent to issue fresh tax assessments based on capital gains instead of petroleum tax, so that whatever sum is due to the Federal Government will be recovered.

I have read the authorities cited. It's trite that issues not denied/controverted is deemed admitted. Having not opposed the application of the Appellant, same is granted as prayed.

However, this Court has power to make consequential orders as follows:-

- (1) That the Respondent is hereby ordered to issue fresh tax assessment forms on the Appellant based on capital gains not petroleum tax.*
- (2) No order as to cost.*

A. I. CHIKERE
JUDGE
6/11/07."

A careful perusal of the Judgment of the lower Court set out above would show that even though the Motion for Stay of Execution and the main Appeal were argued together, the lower Court did not review the arguments on tax assessment and issues upon which tax assessment was made. The lower Court in its Judgment just granted the Motion for Stay of Execution and proceeded to make consequential orders without reviewing the submissions of Counsel on both sides concerning the main appeal. There was nothing in the Judgment setting out why Capital Gains Tax Act should apply in the transaction between the parties as against Petroleum Profit Tax Act.

The learned Counsel for both the Appellant and the Respondent were of the view that this Court should order retrial or assume Jurisdiction under

Section 15 of the Court of Appeal Act and review the case and subsequently give Judgment.

An Appellate Court will not ordinarily interfere with the findings of fact of the lower Court but will only do so under the following circumstances:-

- (a) Where the findings are perverse, or
- (b) The findings are not supported by evidence, or
- (c) The findings have not been arrived at as a result of judicial discretion, or
- (d) The trial Court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial; or
- (e) The trial Court had drawn wrong conclusion from accepted credible evidence, or
- (f) The trial Court had taken an erroneous view of the evidence adduced before it, or
- (g) The findings were reached as a result of wrong application of some principles of substantive law or procedure.

See the following cases:-

- Awara vs. Alalibo (2003) FWLR Part 144 Page 415 at 418 Ratio 1 at Page 471 Paragraphs B – D;
- Nnubia vs. A.G. Rivers State (1999) 3 NWLR Part 593 Page 82;
- Menkiti vs. Menkiti (2000) 8 NWLR Part 607 Page 154;
- Tiwani Ltd vs. C.T.M.B. Ltd (1997) 8 NWLR Part 515 Page 140.

Furthermore, although it is not every mistake, error or irregularity committed by a trial Court that automatically results in an appeal against the decision being allowed, it is only when the error or irregularity is so substantial as to occasion a miscarriage of justice that an Appellate Court is bound to interfere. See the following cases:-

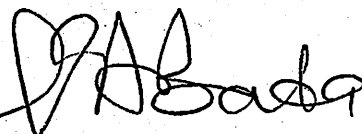
- Nkoko vs. Akpaka (2000) 7 NWLR Part 664 Page 225;
- Ebong vs. Ikpe (2002) 17 NWLR Part 797 Page 504.

In the instant appeal, the procedure adopted by the learned trial Judge was irregular in that the Judgment of the lower Court is vague, it was not supported by evidence and the findings were not arrived at as a result of a proper exercise of Judicial discretion. There were no decisions on some vital issues in the appeal before the lower Court, for example the lower Court failed to review the arguments on tax assessment and issues upon which tax assessment was made.

In the result issues 1 and 2 are hereby resolved in favour of the Appellant.

Consequent upon the foregoing and in the interest of Justice, the Judgment of the lower Court in this matter delivered on the 6th day of November 2007 is hereby set aside and in its place, this Appeal is hereby sent back to the Chief Judge of the Federal High Court Abuja for re-assignment to another Judge who will hear the appeal on its merit without further delay.

They shall be no order as to costs.

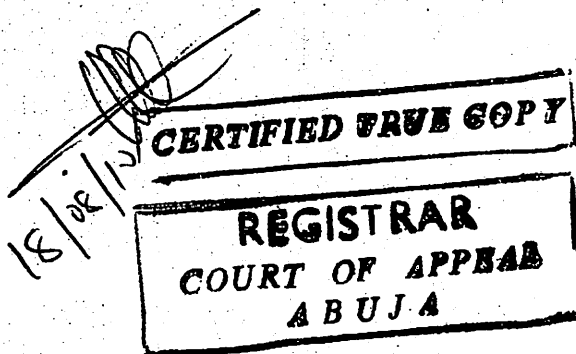


**JIMI OLUKAYODE BADA
JUSTICE, COURT OF APPEAL**

COUNSEL

MRS B. H. ONIYANGI with her F. M. BELLO for the Appellant.

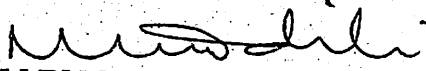
I. N. AMBULE for the Respondent.

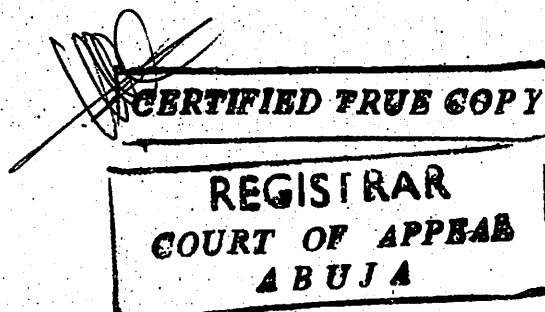


APPEAL NO: CA/A/83/2008

MARY U. PETER-ODILI (JCA)

I had the advantage of reading in draft the judgment of my learned brother, JIMI OLUKAYODE BADA. I agree with the decision and orders my brother made. I have nothing else to add.


**MARY U. PETER-ODILI
JUSTICE, COURT OF APPEAL**



18/08/11

CA/A/83/2008

ABDU ABOKI, J.C.A.

I have read in draft the lead Judgment delivered by my learned brother, Jimi Olukayode Bada J.C.A. I agree with the reasoning and conclusions of my Lord. I hereby set aside the Judgment of the lower Court delivered on the 6th day of November, 2007 and also send this Appeal back to the Chief Judge of the Federal High Court, Abuja for re-assignment to another Judge to hear it on the merit without further delay.

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JUSTICE, COURT OF APPEAL

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