

IN THE SUPREME COURT OF NIGERIA

On Tuesday, the 28th Day of March 2006

Before their Lordship

Salihu Modibbo Alfa Belgore Justice Supreme Court

Umaru Atu Kalgo Justice Supreme Court

Niki Tobi Justice Supreme Court

George Adesola Oguntade Justice Supreme Court

Mahmud Mohammed Justice Supreme Court

SC101/2001

Between

Newswatch Communications Ltd Appellant

And

Alhaji Aliyu Ibrahim Atta Respondent

Judgment of the Court

Delivered by

Delivered by Niki Tobi, JSC

This appeal has so much to do with dates and all that. It is an appeal in which the appellant complains of denial of fair hearing on the ground that the learned trial Judge refused its application to arrest the judgment delivered on 9th May, 1996. It is a case where the appellant, who was the defendant, had not the time to present its defence in court but finally had all the time in the world to file a motion to arrest the judgment delivered on 9th May, 1996. Fair hearing is fair hearing when and if it is fair to both parties.

It is a case of libel. The respondent as plaintiff sued the defendant, the appellant, for libel. The plaintiff claimed N25,000,000.00 damages for libel published by the defendant in the Newswatch Magazine Volume 19, No. 11 of 14th March, 1994 at page 7 under the story titled Fruits Of His Labour. The plaintiff also needed a perpetual injunction and he asked for it. The plaintiff was a former Inspector-General of Police. The offending publication reads:

"There is this little story about him making the rounds in Kam Salem House which we thought Ajudua would like to hear. He is said to be a very close friend of former I.G Aliyu Atta. One day, the story goes, Atta was holding a meeting with top police officers when he was informed that a very important visitor had stormed the Police Headquarters. The I.G., not one to keep an important visitor waiting promptly (yes) called off the meeting. As the top police officers filed out of the I.G.'s office, they were shocked to find that Oga's very important visitor was, wait for it, Ajudua. Ajudua grumble, grumble. We hear some of the top Police Officers are still smarting over that incident."

The plaintiff's case as narrated by the learned trial Judge in the judgment is that the plaintiff was in breach of his oath of office giving undue protection and respect to Chief Fred Ajudua, who was at all times material to the publication suspected of having committed some criminal offences or that the said Chief Fred Ajudua is a personal friend of the plaintiff and was thereby immune to any arrest or questioning or any other police procedure that was necessary to determine his involvement in the commission of the offence. Plaintiff also averred that the words complained of in the article in their ordinary and natural meaning meant and were understood to mean:

“(a) That the plaintiff was unfit to hold the office of the Inspector-General of Police by reason of favouritism, undue respect for members of the public over and above his official duties as Inspector-General and neglect of Police procedure and

protocol.

(b) That by virtue of his friendship with Chief Fred Ajudua the Plaintiff was prepared to cancel or call off any important meeting with his subordinates in order to attend to mere personal visits.

(c.) That the plaintiff in breach of his Oath of Office gave undue preference and regard to a member of the public over his official duties as a Police Officer and in consequence of all these the plaintiff had been seriously injured in his character and reputation in respect of his profession and office as Inspector-General of Police and has been brought into public scandal, odium and contempt."

The defendant was duly served the Statement of Claim. Although the defendant was served with the Statement of Claim before the hearing of the case it did not file a Statement of Defence until after PW3 gave evidence. The defendant filed a Statement of Defence and a Counter-Claim. The defendant counter-claimed N30,000,000.00 from the plaintiff as damages for libel as well as an order of injunction. And so both slammed at the other, a libel suit and an injunction to match. The defendant's claim was N5,000,000.00 more than that of the plaintiff in terms of damages.

The matter went for hearing. That was on 18/1/95. Two witnesses were taken that day. The plaintiff was one. Alhaji Musa Maiyaki Ajayi was another, he was PW2 and the plaintiff was PW1. PW2 was not cross-examined because of the absence of counsel for the appellant. The matter was adjourned to 21/2/95 for continuation of hearing. Fresh hearing notices were ordered to be sent to the defendant. Came 21/2/95, counsel for the defendant was not in court. The court took PW3 and adjourned the matter to 9/3/95.

On 9/3/95, counsel for the defendant brought two motions, one for extension of time to file Statement of Defence and Counter-Claim out of time and the other for an order of court granting leave to the defendant to recall all the plaintiff's witnesses who had testified for cross-examination. The motion for extension of time to file Statement of Defence and Counter-Claim was not opposed and it was duly granted. The motion for recall of the witnesses was opposed. An adjournment was granted counsel for the plaintiff to prepare his submission in opposition to the motion. But before the matter was adjourned to 11/4/95, the evidence of PW4 was taken.

On 11/4/95, both counsel addressed the court on the issue of recall of the witnesses of the plaintiff for cross-examination. The matter was adjourned to 24/4/95 for ruling. In his ruling, the learned trial Judge reluctantly granted the motion for recall of the witnesses for cross-examination. In his Ruling of 24/4/95, the learned trial Judge, Gumi, J. (as he then was) said, and I will quote him in extenso at pages 62 and 63 of the Record. The Judge made reference to his earlier ruling on 18/1/95 when he said on that day:

"In view of the foregoing it seems to me that the defendants and their counsel are by their conduct deliberately trying to delay the take off of this matter and that I shall not permit."

Quoting the above in his Ruling of 24/4/95, and referring to same, the Judge continued:

"By that ruling, it is clear that the Court was not impressed by the conduct of the defendants/ applicants at that stage. Even after that they again refused to appear at the next date of hearing when more witnesses were taken. If the defendants/applicants and or their counsel had appeared on the occasions when the witnesses were taken, they would have cross examined those witnesses. The defendants/applicants chose to stay away from the proceedings thus forfeiting their right to cross-examine. I am satisfied that as far back as 15th September 1994 the plaintiff/respondent's solicitors wrote a letter informing the defendant/applicant's solicitors that the matter had been adjourned to 28th and 29th September, 1994 for hearing and also drawing their attention to the fact that they had not filed any statement of defence but it was only on 23/9/94, some days to the hearing date that the defendants/applicant's solicitors wrote to the court praying for an adjournment proffering the absence from the country of the reporter who allegedly wrote the story and the ill health of Mr. Awokoya as reasons for seeking for the adjournment and it was only on that date that they initiated the settlement moves. Despite, the fairly long adjournment given from September, 1994 to January 1995, the defendant/applicant neither filed a Statement of Defence nor appeared in Court on 18th January, 1995 when hearing started... I dare say that going by the foregoing, the conduct of the defendant/applicant is a bit reprehensible and ordinarily I should refuse to exercise the discretion in their favour. However since there are no hard and fast rules about the exercise of such discretions, I weigh the need to allow for a

cross-examination of the PWs against strict adherence to the rules of practice and procedure as I form the view that in the circumstances of the case the justice of the matter would be better served if I allow such cross-examination but on terms."

And so the learned trial Judge indulged the defendant by allowing counsel to cross-examine the witnesses.

Although the learned trial Judge made an order in his Ruling of 24/4/95 that the defendant should pay the sum of N45,000 into Court within two weeks as security for costs of recalling the four witnesses, the order was not complied with when the judgment was delivered on 9/5/96. It should be noted here that the learned trial Judge said in his Ruling that if the defendants/applicants defaulted to make the payment of N45,000 within two weeks as security for costs, the court "shall proceed with the continuation of the hearing of the remaining witnesses."

Without complying with the above order, counsel for the defendant, in a motion dated 22/5/95 prayed the Court to strike out the suit, set aside the issuance and service of all the originating summons on the ground that the Court lacked the jurisdiction to entertain the cause of action. On 24/7/95 the learned trial Judge held that he had jurisdiction in the matter. He dismissed the motion.

After the 24/7/95 Ruling, the Court went on vacation. On 14/9/95 the matter was mentioned but both parties were absent. So too on 26/10/95. Although the matter was adjourned to 22/11/95, the court did not sit. The court sat on 28/11/95. Only counsel for the plaintiff was present. He drew attention of the Court to its order of 24/2/95 on the payment of N45,000 as security for costs which was not complied with by the defendant. He sought for the discharge of the order, which the learned trial Judge granted as prayed.

The case for the plaintiff was closed. The matter was adjourned to 23/1/96 for the case of the defendant. Came 23/1/96, the defendant and counsel were absent, although counsel for the defendant had knowledge of the date. As two days were set for the matter, it was adjourned to the following day, 24/1/96 but both defendant and counsel were again absent.

Counsel for the plaintiff urged the court to hold that the defendant was no longer interested in putting up a defence to the action. The learned trial Judge agreed with counsel and "deemed that they had no defence to offer." He consequently adjourned the matter to 14/2/96 to enable counsel address him. On 14/2/96, counsel for the plaintiff addressed the court and the matter was adjourned to 20/3/96 for judgment. As the judgment was not ready, the learned trial Judge adjourned again to 9/5/96 for judgment. Before judgment and precisely on 25/3/96, counsel for the defendant filed a motion asking for the following two prayers:

"(1) An order arresting the judgment to be delivered in the suit.

(2) An order of the court granting leave to the defendants/applicants to adduce oral and documentary evidence and open its defence in the suit before judgment is entered."

The learned trial Judge reacted to the motion at page 77 of the Record as follows:

"The motion is supported by a 37-paragraph affidavit. I have carefully gone through those paragraphs and am of the opinion that most of them are outright falsehoods and are only crafted in order to waste the time of the Court and are indeed an abuse of the Court's process... these excuses are only such - excuses and are no reasons for either arresting a judgment or reopening a case closed for lack of serious prosecution by the defendants. In my opinion the application to arrest the judgment of the Court is only a gimmick designed to forestall the delivery of the judgment for as long as the defendants wish. I recognise it for the gimmick it is and that is why I refused to give any attention to it more so when the main reason why defendants want the judgment arrested is to enable them provide oral and documentary evidence... For these and the larger reasons I stated earlier, I do not think it is just or equitable to further waste time on applications such as the one in motion No FCT/HC/M/184/96. The judgment will therefore not be arrested because there is no valid warrant for its arrest."

Not satisfied, the defendant as appellant appealed to the Court of Appeal. That court dismissed the appeal. On the issue of arresting the judgment, the Court of Appeal said at pages 146 and 147 of the Record:

"On the main issue of not listing the motion to arrest the judgment, I am of the view the motion was a mere ploy to delay the

determination of the matter... In my view, the application to arrest the judgment after all the opportunities granted to the appellant which it deliberately refused to take was merely calculated to hinder the due administration of justice."

Dissatisfied, the appellant has come to the Supreme Court. Briefs were filed and exchanged. The appellant formulated two issues for determination:

"4.1 Whether the Court of Appeal was right in upholding the trial Judge's refusal to hear the Appellant's application to arrest the judgment and defend the suit.

"4.2 Whether the refusal to hear the Appellant's application to arrest the judgment was a violation of the Appellant's fundamental right to fair hearing under Section 33 of the 1979 Constitution as amended."

The respondent formulated the following single issue for determination:

"Whether the Court of Appeal was right in holding that the learned trial Judge's consideration and dismissal of the Appellant's motion dated 25th March 1990 without taking arguments from counsel to both parties was in the circumstances of the case not a violation of the Appellant's right to fair hearing."

Arguing the issues in his Brief of two pages together, learned counsel for the appellant, Mr. T. O. S. Fadahunsi, submitted that while a trial Judge has a discretion to grant or refuse an application, the discretion must be seen to be exercised judicially and judiciously; and a party aggrieved of the exercise of the discretion is at liberty to appeal.

He cited *Onyekwuluje v. Animashaun* (1996) 3 SCNJ 24 at 25. Citing *Nalsa and Team Associate v. NNPC* (1991) 8 NWLR (Pt. 212) 652 at 660 and *Otapo v. Summonu* (1987) 7 NWLR (Pt. 58) 587, learned counsel submitted that it is the duty of a court to hear every application properly brought before it. He submitted that the hearing cannot qualify as fair hearing under the *audi altarem partem* rule. He cited *Olumesan v. Ogundepo* (1996) 2 SCNJ 172 at 174. The refusal of the learned trial Judge to hear the application properly before it was a fundamental one that goes to the root of the whole hearing and it is fatal to the proceedings and renders same a nullity. He cited *Ekiyo v. Bomor* (1997) 7 SCNJ 479 at 480. He urged the court to allow the appeal.

Learned counsel for the respondent, Mr. O. A. R. Ogunde, raised a preliminary objection in his brief. He submitted that the ground being a ground of fact or at best a ground of mixed law and fact, leave of either the Court of Appeal or the Supreme Court ought to have been first sought and obtained. As the appellant did not seek leave, the appeal should be struck out. He cited *Obatoyinbo v. Oshatoba* (1996) 5 NWLW (Pt. 450) 531; *Metal Construction WA v. Migliore* (1990) 1 NWLR (Pt. 126) without the page number. Counsel pointed out that the appeal does not come within section 233(2) (b) or (c) of the 1999 Constitution. He said that the word "question" has often been interpreted to mean "issue for determination". He cited *Olawayin v. COP* (1961) 2 SCNLR 228 and argued that in considering whether or not a ground of appeal comes under section 233(2) (b) or (c), the question for determination must depend upon the interpretation of the appropriate constitutional provisions and a starting point in the consideration of such a ground is to consider whether or not it is such an issue for which a full court will be constituted. Counsel thereafter suddenly moved to another issue in section 234 of the Constitution on the number of justices that can sit in a matter. He thereafter jumped to the issue of proliferation of cases relating to the application of section 33 which were decided by a panel of only five justices. Counsel cited some cases. I think I can stop here in the preliminary objection.

Frankly I am thoroughly confused and the more I go on the submission on the objection, I will never get my bearing. Let me stop here. I will react to it later in the little way I understand it. That may not be the way counsel understands it. He has not really helped the court in his submission.

Taking the only issue, learned counsel submitted that the decision of the Court of Appeal affirming the dismissal of the appellant's motion filed on 25th March 1996 without taking arguments is unassailable. I thought that I have left the argument on the preliminary objection for good but I am in some mistake. Counsel roped it in once again when he argued the only issue by submitting that the appeal is incompetent as it is not against the decisions of the trial court or the Court of Appeal as their decisions relate to the motion dated 25th March 1996 and not the motion dated 24th April, 1996. He urged the court to dismiss the appeal as totally frivolous.

Learned counsel took the cases cited in the appellant's brief and submitted that they are not apposite to this appeal. Justifying the procedure adopted by the learned trial Judge, counsel cited a number of cases: *Magner Maritime Services Ltd. v. Oteju* (2005) 14 NWLR (Pt. 945) 517; *Oyekan_v. Akinrinwa* (1996) 7 NWLR (Pt. 459) 128; *Onajobi v. Olaonipekun* (1985) 1SC 156; *Ayisa v Akanju* (1995) 7 NWLR (Pt. 406) 129 and *Onogwu v. The State* (1995) 6 NWLR (Pt. 401) 276. It was the submission of learned counsel that as the appellant had not less than ten opportunities to present its defence but failed to do so, there cannot be a valid complaint that the appellant's right to fair hearing was breached. To learned counsel, that is not only a fallacious assumption but also a complete misconception. He urged the court to dismiss the appeal.

Let me first take the preliminary objection. It appears to be in two parts. While I understand the first part dealing with the issue of leave on alleged ground of law and fact, I do not think I understand properly the second one tied to the Constitution and ambitiously moving to the Supreme Court sitting in a panel of five and the court sitting in a panel of seven, which is the full court. I will not take the second leg of the objection not necessarily because I find it difficult to understand it, but essentially because it has no relevance to the live issues in this appeal.

The straightforward objection is that the appellant ought to have sought for leave to appeal on the alleged ground of mixed law and fact. A ground of law is said to be one of mixed law and fact, if the ground of appeal is neither exclusively law nor exclusively fact.

It is like a mixed grill on the lunch table. It is a hybrid situation of some law and some facts. While the point is conceded that facts are the fountain head of law and that one can hardly perforate or separate law from its factual milieu, the dichotomy between law and fact in a ground of appeal is much more than the ordinary relationship between law and fact. In other words, the mere fact that facts are the fountain head of the law, does not, in my humble view, apply *mutatis mutandis* to the regime of both in the couching of grounds of law as it relates to obtaining leave. In dealing with grounds of law, the Court must be satisfied that the content of law is inseparable from the content of facts as if they are Siamese twins, so much so that seeking leave becomes a desideratum. I think our adjectival law anticipates such a situation and not because there is some taint of fact in the law.

Putting the position nakedly, a question of mixed law and fact will prevail where the facts struggle with the law for first place in the ground of appeal, not because some infinitesimal facts edify the law. Let courts of law not over blow this aspect of our adjectival law which is really fluid and therefore difficult to apply in practice. A little grain of fact in the law should not tilt the position to straight mixed law and fact. That will leave our adjectival law in this area highly polarised and cannot be policed or handled effectively.

With the above, I now take the ground of appeal. It is on fair hearing. That is the complaint and counsel for the appellant cited section 33 of the 1979 Constitution. In most cases, particulars of error give away the ground as one of facts. I have examined the particulars and the brief of the particulars relate to law. They repeat section 33 of the 1979 Constitution, and stated that the Supreme Court has decided in a plethora of authorities on the section and finally stating that the proceedings were a nullity. In my view all these are issues of law, that is, section 33, the case law on the section and the nullity of the proceedings. In sum, I am satisfied that the only ground of appeal deals with law for which no leave is required. The preliminary objection fails.

The first issue is on the learned trial Judge's refusal to hear the appellant's application to arrest the judgment with a view to defending the suit. The state of the law is that a court must hear a motion or any process before it, however unmeritorious. A court should not ignore a motion or process before it and give a decision one way or the other without considering the motion or process. That is good and valid law.

Learned counsel for the appellant, relying on the case *Onyekwuluje v. Animashaun* (1996) 3 NWLR (Pt. 439) 637 called the attention of the decision of this court to the effect that "the objection should not have been ignored". In that case, this court held that it is a cardinal principle of the administration of justice to let a party know the fate of his application whether properly or improperly brought before the court. It will amount to unfair hearing to ignore an objection raised by a party or his counsel against any slip in the proceedings. The court is duty bound to express in writing whether it agreed with the objection or not. Although the issue may be technical in nature, but where technicality touches a fundamental objective to fair hearing, it cannot be ignored.

What are the relevant facts in Onyekwuluje? Counsel for the appellant raised an oral objection in the Court of Appeal to the competence of certain grounds of appeal filed by the respondents. The respondents counsel then objected, contending that the appellant's counsel ought to have brought the objection by way of motion. The appeal was then argued. In its judgment, the Court of Appeal neither ruled on the appellant's objection on the said day nor considered same in its final judgment. It was in the above circumstances this court allowed the appeal and ordered a retrial.

Are the circumstances the same in this appeal, I ask? The answer is, no. In this case, although the learned trial Judge did not rule on the motion when it was brought, he finally did so in his judgment. That is the alternative procedure this court said in Onyekwuluje, that is, the court should either rule on the motion on the day of the objection or on the day final judgment is delivered. In considering the motion in his final judgment, the learned trial Judge examined the motion when he said at page 77 of the Record, and I quote it at the expense of repetition or prolixity:

"Before then and on 25/3/96, the defendant's counsel Mr. Quadri filed a motion on notice brought pursuant to the inherent jurisdiction of the court praying for a date to enable him be heard for:

- (1) An order arresting the Judgment to be delivered in the suit.
- (2) An order of the court granting leave to the defendants/applicants to adduce oral and documentary evidence and open its defence in the suit before judgment is entered.

The motion is supported by a 37-paragraph affidavit. I have carefully gone through those paragraphs and am of the opinion that most of them are outright falsehoods and are only crafted in order to waste the time of the Court and are indeed an abuse of Courts process... I took great pains to set down and highlight all that had taken place during the pendency and subsequent hearing of this matter and it is my considered opinion that it is not enough and is certainly not just for the defendants to simply state as they did in paragraphs 20, and 22 of the affidavit in support of the motion that they had received no hearing notice since 23/11/95 or that a particular counsel in the plaintiff's Chamber had been bereaved and had stayed away from office from November, 1995 to January, 1996 or that the defendants had tried to reach the Court's Registrar by phone in order to get hearing dates but could not get through. These excuses are only such - excuses and are no reasons for either arresting a judgment or reopening a case closed for lack of serious prosecution by the defendants. In my opinion the application to arrest the judgment of the Court is only a gimmick designed to forestall the delivery of the judgment for as long as the defendants wish."

The above is a most adequate consideration of the motion to arrest the judgment. In the circumstances, Onyekwuluje does not apply, and I so hold.

There still remains a point and it is the refusal of the learned trial Judge to hear counsel move the motion. Can that vitiate or nullify the decision of the learned trial Judge? I think not. Although the learned trial Judge did not formally hear counsel on the motion, he really considered it in the judgment and came to a conclusion that I cannot fault. In my view, there is no miscarriage of justice by not formally hearing the counsel in the peculiar circumstance of this case, and the peculiar circumstance is that the learned trial Judge thoroughly considered the motion and gave a brilliant judgment which I cannot fault.

If what I have said above is not enough to justify the decision of the learned trial Judge, I will invoke the powers conferred on this court by section 22 of the Supreme Court Act and the result of the invocation of the section is that I place myself in the position of the trial Judge and do what that court should have done. In that position of changing baton like athletes in a relay race, I come to the same conclusion as the learned trial Judge. In coming to the same conclusion, I have carefully read the affidavit in support of the motion and I do not see any merit. Has the appellant suffered any injustice in my action? I do not see any injustice. I say this because I have used the case law in his brief, a possible case law he should have used in the trial court. Looking at this issue from all possible angles, I am of the firm view that it must fail and it accordingly fails.

That takes me to the second issue. It is in respect of the alleged refusal of the learned trial Judge to hear the appellant's application to arrest the judgment. There is not much difference between the two issues except that the second issue is tied to the fair hearing principle in the Constitution. I will take the issue in the way counsel formulated it.

Counsel, quite a legion, find the fair hearing principle duly entrenched in the Constitution as a pathway to success whenever they are in trouble on the merits of the case before the court. Some resort to it as if it is a magic wand to cure all ills of the litigation. A good number of counsel resort to the principle even when it is inapplicable in the case.

The constitutional principle of fair hearing is for both parties in the litigation. It is not only for one of the parties. In other words, fair hearing is not a one-way traffic but a two-way traffic in the sense that it must satisfy a double carriage-way, in the context of both the plaintiff and the defendant or both the appellant and the respondent. The court must not invoke the principle in favour of one of the parties to the disadvantage of the other party undeservedly. That will not be justice. That will be injustice.

It is the duty of the court to create the atmosphere or environment for a fair hearing of a case but it is not the duty of the court to make sure that a party takes advantage of the atmosphere or environment by involving himself in the fair hearing of the case. A party who refuses or fails to take advantage of the fair hearing process created by the court cannot turn around to accuse the court of denying him fair hearing. That is not fair to the court and counsel must not instigate his client to accuse the court of denying him fair hearing.

A trial Judge can indulge a party in the judicial process for some time but not for all times. A trial Judge has the right to withdraw his indulgence at the point the fair hearing principle will be compromised, compounded or will not really be fair as it affects the opposing party. At that stage, the trial Judge will, and rightly too for that matter, retrace his steps of indulgence and follow the path of fair hearing as it affects the opposing party, who equally yearns for it in the judicial process. At that stage, the party who is not up and doing to take advantage of the fair hearing principle put at his door steps by the trial Judge, cannot complain that he was denied fair hearing. Such is the situation I see in this appeal.

The fair hearing principle formerly entrenched in section 33 of the 1979 Constitution, and now section 36 of the 1999 Constitution, is not for the weakling, the slumberer, the indolent or the lazy litigant, but it is for the party who is alive and kicking in the judicial process by taking advantage of the principle at the appropriate time. The principle is not available to a party who sets a trap in the litigation process against the court and accuses the court of assumed wrong doing even when such so-called wrong doing is, as a matter of fact, propelled or instigated by the party, through his counsel.

Counsel qua advocate as an expert of law has an unfettered right to advise his client on what line of action to take in the light of the applicable law. While there cannot be any argument on this right of counsel, the owner of this big power, he is expected to exercise it only in the light of the enabling law in the matter. He should take into serious consideration that the client, the novice in law, will have no choice than to rely wholly and fully on the position of the law as given to him by counsel.

I believe that the way counsel conducted the matter was his way and the client, the novice in the law, had no choice than to follow him. He used all the delaying tactics that he knew and were available to him. They were not one, not two, not three but many. He thought that by using such tactics he will finally get his way and when the learned trial Judge adjourned for judgment, counsel thought, and very wrongly for that matter, that he had caught the trial Judge in the trap or web. He thought, and again, wrongly for that matter, that the appellate courts will be with him when he dangles the fair hearing principle entrenched in the Constitution. He got it very wrong. He got it all wrong too.

And so the appellant, unfortunately, became the victim of all the tactics and tricks of counsel. It has my sympathy but my sympathy does not go far enough to help him.

The position may have been different if counsel assiduously and painstakingly defended the action from the first day. Things may not have been different, depending on the facts of the case and the defence put forward by the appellant. But counsel used fruitless delaying tactics and he has made his client to fall into a ditch where a return journey is impossible to obtain judgment in the case. All his efforts to short-change the adverse party and the court have come to naught as the road is permanently closed against the appellant. Litigation is not a matter of planting mines to deceive the opponent with a view to destroying his case undeservedly in limine. On the contrary, litigation is a process where the parties set out their cases frankly and fully for the determination of the court. A trickish and miserly presentation of a client's case is not part of good advocacy.

What was the appellant waiting for between 8/5/94 when the action was instituted and 14/2/96 when counsel for the respondents addressed the court? Why did the appellant not lead evidence in defence and why did counsel not address the court? Why did counsel wait till 25/3/96 "to file a motion to adduce oral and documentary evidence and open its defence in the suit before judgment"? Where was the oral and documentary evidence waiting? Was the oral and documentary evidence not available all along? Did the oral and documentary evidence become available on 25/3/96? The Statement of Claim was filed way back on 18/5/94. After filing the Statement of Defence and Counter-Claim, what was the appellant waiting for till the judgment was delivered on 9/5/96?

There are still questions galore but I can stop here. This is a case where the appellant had no time to present its defence but had all the time in the world to file a motion to arrest the judgment of the court. I am here repeating what I said in the introduction of this judgment. The law is certainly not in its favour. The law is very much against the appellant. I do not want to say that the appellant is a victim of bad advocacy. It has my sympathy, I say once again.

In sum, the appeal fails as it lacks merit. It is dismissed with N10,000 costs against the appellant and in favour of the respondent.

Judgement delivered by
Salihu Modibbo Alfa Belgore. J.S.C.

The Appellant had all the opportunities at trial court to defend the action leading to this appeal. It has however, for reason best known to it, failed to avail itself, the opportunities. Right to be heard is a two-edged sword - to the Plaintiff to be heard timeously and for the defendant to avail itself the rights, Constitutional rights, extended to it by the Court to present its side of the case. The Court must hear the parties, both parties to the case; but the Court is not a slave of time that must wait indefinitely for a party to decide when to come to present its case. To delay hearing of a case deliberately is an abuse of Court processes which in turn, defeats justice.

The appeal, as my learned brother, Tobi JSC, has held in the lead judgement, has no merit and I also dismiss it with N10,000.00 costs to respondent.

Judgement delivered by
Umaru Atu Kalgo. J.S.C.

I have read before now the judgment just delivered by my learned brother Niki Tobi JSC in this appeal. I agree with him entirely that there is no merit in the appeal and it ought to be dismissed together with the preliminary objection raised therein.

The facts giving rise to this appeal have been fully set out in the leading judgment of my learned brother Tobi JSC and I do not intend to repeat them here except where necessary. The crucial issue for the determination of the appeal as shown in the parties' briefs is simply this: whether the Court of Appeal was right in upholding the refusal of the trial judge to hear the appellant's application to arrest the judgment.

In the trial Court, the action which was for libel and injunction, was filed on the 18th of May 1994. The appellant, as the defendant was given all the opportunities to defend the action but failed to do so. This was followed by numerous adjournments at the instance of the respondent. In the course of these adjournments and precisely on the 14th of September 1994 the appellant wrote the trial court and the counsel for the respondent indicating a move or desire to settle the matter out of court. A proposal of the terms of settlement, was made by the respondent on the 4th of November 1994 and communicated to the appellant on the 9th of November 1994, but the appellant did not take any action on this. The hearing in the case was commenced on the 18th of January 1995 and subsequently on the 21st of February 1995. On each occasion, the appellant was notified of the sitting of the court but failed to turn up.

The case proceeded to judgment without hearing the appellant or his defence. But before the judgment was delivered the

appellant filed a motion on 25th March 1996, to arrest the judgment and for an order granting him leave to adduce oral and documentary evidence in his defence. The motion was not heard by the trial judge before delivering the judgment on the 9th of May 1996; hence the appeal.

It is common ground that the appellant filed his statement of defence and counterclaim since 9th of March 1995, after the trial in the case had already commenced without them. Other witnesses for the respondent were later heard in the absence of the appellants even though they were notified of the hearing. The application to recall the witnesses for cross-examination of the witnesses was also granted on terms which the appellant failed to comply with and had to be discharged. Considering the attitude of the appellant throughout the proceedings at the trial, the learned trial judge, who had a duty to do justice to both parties before him on equal basis, was perfectly justified in my view to proceed with the ease without the appellant as he did. The learned trial judge in fact dealt with the motion for arrest of judgment and for calling oral evidence in defence when in his judgment after examining the affidavit in support of the motion, said:-

"These excuses are only such - excuses and are no reasons for either arresting a judgment or reopening a case closed for lack of serious prosecution by the defendants. In my opinion the application to arrest the judgment of the court is only a gimmick designed to forestall the delivery of the judgment for as long as the defendants wish".

The Court of Appeal also examined the circumstances of this case and the failure of the trial court to hear the motion of the appellant in court before judgment and came to the following conclusion:-

"The appellant had been given ample opportunity to defend the claims made against them and also to prosecute their counter-claim. The appellants merely refused to use the opportunity given them. Under the circumstances, the learned trial judge was fully justified to have (1) closed the defence and (2) concluded that the appellants had no evidence to offer on their pleadings".

I entirely agree with this finding and find no merit in the appellant's arguments on issue 1 in his brief. It is my respectful view therefore that the point raised in issue 2 did not arise at all.

It is trite law that the primary duty of a judge in the adjudication of cases is to do justice to the parties without fear or favour. See *Sha (Jnr) V. Kwan* (2000) 8 NWLR (pt. 670) 685. He or she should not be carried away by sentiment or undue adherence to legal technicality. He or she must be impartial, fair and just to both parties, and because of the double sided nature of justice and fairness, the judge must be even handed. In our adversary system, it is incumbent upon the parties in a case, to put their respective cases across the table before the judge, who as an impartial arbiter and umpire, will adjudicate on the issues in controversy. That is the epitome of fair trial. See *Calabar East Cooperative Thrift and Credit Society Ltd. & Ors. V Etim Emmanuel Ikot* (1999) 14 NWLR, 225 at 242. But where, as in the instant case, a party deliberately refused or neglected to lay his case across the table despite all the opportunities granted to him by the court to do so, up to the time judgment was delivered, that party cannot be heard to complain about the trial being unfair to him. Therefore in the circumstances of this case, I am in full agreement with the concurrent findings of the two lower courts that the trial was fair and I see no reason to interfere with their decisions.

For the above and the more detailed reasons given in the leading judgment of my learned brother Tobi JSC, I also find no merit in this appeal. I dismiss it with N10,000.00 costs in favour of the respondent.

Judgement delivered by
George Adesola Oguntade. J.S.C.

The respondent was the plaintiff at the Federal Capital Territory High Court, Abuja and had sued the appellant as the defendant for damages in defamation. On 9-5-96. the learned trial Judge Gummi J. (as he then was) gave judgment in favour of the plaintiff for two million Naira as damages for defamation. The defendant was dissatisfied with the said judgment and it brought an appeal against it before the Court of Appeal, Abuja Division (hereinafter called 'the Court below'). On 17-12-99, the Court below dismissed the appeal. The defendant has now come before this Court on a final appeal. In the appellant's

brief filed, the issues for determination in the appeal were identified as the following:

“4.1 Whether the Court of Appeal was right in upholding the trial Judge's refusal to hear the appellant's application to arrest the judgment and defend the suit.

4.2 Whether the refusal to hear the appellant's application to arrest the judgment was a violation of the appellant's fundamental right to fair hearing under section 33 of the 1999 Constitution as amended.”

In the hearing of the suit before the trial court, the appellant had not shown diligence or a keen interest to defend the suit. After a number of adjournments, the trial court adjourned the suit to 14/2/96 for Counsel's address. The appellant's Counsel did not show up. What subsequently happened is as stated in the trial Court's judgment at pages 77-78 of the record of proceedings thus:

“After the plaintiffs' Counsel's address, I adjourned the matter to the 20/3/96 for judgment but on that day the judgment was not ready and so we adjourned again to.....(sic) for judgment. Before then and on 25/3/96, the defendants Counsel Mr. Quadri filed a motion on notice brought pursuant to the inherent jurisdiction of the court praying, for a date to enable him be heard for:-

(1) An order arresting the judgment to be delivered in the suit.

(2) An order of the Court granting leave to the defendants/applicants to adduce oral and documentary evidence and open its defence in the suit before judgment is entered.

The motion is supported by a 37-paragraph affidavit. I have carefully gone through those paragraphs and am of the opinion that most of them are outright falsehoods and are only crafted in order to waste the time of the Court and are indeed an abuse of the Court's process. The motion was not brought under any rule of practice or procedure but on the inherent jurisdiction of the court. In *Usikaro v. Itsekiri Land Trustees* (1991) 2 N.W.L.R (Pt. 172). The Supreme Court had this to say in inherent power of Court:-

“It is settled that apart from the rules, a Court of record has an inherent power to postpone the hearing of any matter set down for hearing before it if the justice of the case so demands.....”

I took great pains to set down and highlight all that had taken place during the pendency and subsequent hearing of this matter and is my considered opinion that it is not enough and is certainly not just for the defendants to simply state as they did in paragraphs 20, 21 and 22 of the affidavit in support of the motion that they had received no hearing notice since 23/11/95 or that a particular counsel in the Plaintiffs Chamber had been bereaved and had stayed away from office from November, '95 to January, 1996 or that the defendants had tried to reach the Court's Registrar by phone in order to get hearing dates but could not get through. These excuses are only such - excuses and are no reasons for either arresting a judgment or reopening a case closed for lack of serious prosecution by the defendants. In my opinion the application to arrest the judgment of the Court is only a gimmick designed to forestall the delivery of the judgment for as long as the defendants wish. I recognise it for the gimmick it is and that is why I refused to give any attention to it more so when the main reason why defendants want the judgment arrested is to enable them provide oral and documentary evidence. If they have such good reasons as to why they should be heard even at this late stage, I will suggest that the best thing for them to do is to immediately appeal against the judgment on the grounds among others that they were not given fair hearing but not to resort to fanciful gimmicks designed to frustrate or stultify the delivery of a product in the making of which they refused to participate. For these and the larger reasons I stated earlier I do not think it is just or equitable to further waste time on applications such as the one in motion No. FCT/HC/M/184/96. The judgment will therefore not be arrested because there is no valid warrant for its arrest.”

The appellant, in his appeal to the Court below raised the complaint that it was denied its fundamental right to fair hearing. The Court below per Musdapher JCA (as he then was), who wrote the lead judgment had this to say:

“I have, as mentioned above, recounted in great details the conduct of the appellant throughout the trial before the lower Court. In my view, the application to 'arrest' the judgment after all the opportunities granted to the appellant which it

deliberately refused to take was merely calculated to hinder the due administration of justice. From the records available, the appellant always claimed that they would settle the matter out of court when indeed they merely wanted to delay the due administration of justice. The procedure for arrest of judgment is now hardly known in our Civil jurisprudential system. It is the act of staying a judgment, or refusing to render judgment in an action at law in Criminal cases after verdict. It is usually for some intrinsic matter appearing on the face of the record, which would render the judgment if given erroneous or reversible. Under the old Common law rule the procedure for arrest of judgment is not peculiar to the criminal cases alone, it was available in civil cases under the Old Common Law Rules, but the procedure is alien to the rules of Court and does not apply in civil matters. See *Bob-Manuel v. Briggs* (1995) 7 NWLR (Pt.409) 537. The application made to arrest the judgment is accordingly misconceived both in law and in fact. The appellant had been given ample opportunity to defend the claims made against them and also to prosecute their Counter-claim. The appellants merely refused to use the opportunity given them. Under the circumstances, the learned trial Judge was fully justified to have (1) closed the defence and (2) concluded that the appellants had no evidence to offer on their pleadings. In the end, I reject the complaint under this issue and resolve the same against the appellant.”

Was the court below wrong in its views reproduced above? I think not. A party complaining that he has been denied the right of fair hearing under section 33 of the 1979 Constitution ought to remember that, in a civil case, a balance has to be struck between the plaintiff's right, to have his case heard expeditiously and the defendant's right, to put across his defence to plaintiff's suit. A party who has been afforded the opportunity to put across his defence and who fails to take advantage of such opportunity cannot later turn round to complain that he was denied a right to fair hearing. Surely, it is not the place of the Court to compel a defendant to come and put across his defence. In the instant case, I think that the appellant had deliberately set out to exhaust the patience of the trial Judge. Several adjournments were granted to enable the appellant come and give its defence. The appellant failed to utilise the opportunities afforded it.

On the day the trial Court wanted to give judgment, the appellant's Counsel came with a motion to arrest the judgment. This Court in *Nalsa & Team Associates v. N.N.P.C.* (1991) 8NWLR (Pt. 212) 652 at 676, stressed the necessity to hear all applications properly brought before the court. See also *Otapo v. Summonu* (1987) 2 N.W.L.R (Pt.58) 587. The emphasis however is that such applications must be only those properly brought before the Court. The Rules of Court do not make provision for an application to arrest a judgment, which is about to be delivered by a Court. An application not recognised by the Rules of Court cannot be described as a proper application. I think that the application, to arrest the judgment about to be delivered, was in fact, a cynical attempt to taunt the trial Court, given the fact that the appellant had before then, disdainfully refused to put his defence. I am unable to see that the appellant was in the circumstances denied its right to fair hearing.

I agree with the lead judgment by my learned brother Tobi JSC that this appeal lacks merit. I would also dismiss it with N10,000.00 costs against the appellant and in favour of the respondents.

Judgement delivered by
Mahmud Mohammed. J.S.C.

The judgment of my learned brother Niki Tobi JSC which has just been delivered was read by me in draft before today. I entirely agree with him that, inspite of the dust raised by the appellant through its learned Counsel on the alleged violation of its right of fair hearing in the course of the hearing of the action at the trial court, this appeal is devoid of merit and straight away deserves to be dismissed.

This appeal arose from the decision of the High Court of Justice of the Federal Capital Territory Abuja in which Gummi J. (as he (hen was) found the appellant liable in a claim for libel by the respondent and awarded N2,000,000.00 as damages against the appellant. Aggrieved by this decision, the appellant challenged it at the Court of Appeal by a notice of appeal containing 10 grounds of appeal from which 4 issues were raised for the determination of the appeal. The Court of Appeal in its judgment dismissed the appellant's appeal and affirmed the judgment of the trial Court against the appellant including the N2,000,000.00 damages awarded against it.

However, when the appellant decided to appeal to this court against the judgment of the Court of Appeal, it decided not to appeal against the whole judgment affirming the judgment of the trial court on the questions of liability in libel and damages. Instead, the appellant craftily decided to isolate only one aspect of the judgment of the Court below in which that Court endorsed the decision of the trial court refusing to grant the appellant's application to "arrest" the judgment of the trial court. Only one ground of appeal was filed to question that part of the judgment of the court below. The ground reads-

1. The learned Justices of the Court of Appeal erred in law when they found and held that the trial Court's decision to decide motion No M/195/96 for 'An Order arresting the judgment to be delivered in the suit herein inter alia dated 24th April, 1996 and filed 9th May 1996, without hearing the appellant was not a flagrant violation of section 33 of the 1979 Constitution as amended.

Particulars of Error

- (a) Section 33 of the 1979 Constitution provides for hearing of parties to a suit.
- (b) The appellant filed its motion dated 24th April, 1996 but filed on 9th May 1996.
- (c) The trial Court proceeded on the 18th May 1996 to decide the motion without hearing the parties.
- (d) Section 33 of the 1979 Constitution was flagrantly violated.
- (e) The Supreme Court of Nigeria has decided in a plethora of authorities that violation of section 33 of the 1979 Constitution, nullifies the entire proceedings, no matter how well conducted.
- (f) The proceedings were a nullity.

The only irresistible conclusion to arrive at from the conduct of the appellant in not challenging the decision of the Court below affirming the judgment of the trial Court on the merit, means that the appellant has no quarrel at all with the judgment, particularly when at a certain stage of the proceedings at the trial Court it was prepared to negotiate for the settlement of the claim of the respondent out of Court. The question now is, if the appellant is apparently happy with the concurrent judgments of the courts below on the merit, who is then appealing against the refusal of the application to arrest the judgment which the appellant itself is not questioning on appeal? The answer of course is not far from the conduct of the learned Counsel to the appellant who decided to stay away from the main battle ground in the normal proceedings in the hearing of the case lasting two years, only to emerge in an ambush to destroy the good work of the trial Court and the opponent's Counsel who sacrificed their valuable time for the judgment in the matter to come out at the end of the hearing, the truck of which was full of obstacles put across by the learned Counsel to the appellant.

Arising out of the sole ground of appeal filed by the appellant in this appeal, the only real issue falling for determination is whether having regard to the circumstances of this case, the appellant's right of fair hearing as enshrined under section 33(1) of the 1979 Constitution was breached by the trial court in dismissing the application to arrest the judgment. There is no doubt at all that the principles of fair hearing are fundamental to all Court procedure and proceedings. Like jurisdiction, the absence of it vitiates proceedings however well conducted. See *Salu v. Egeibon* (1994) 6 NWLR (Pt.348) 23 at 40; *Ceekay Traders Ltd v. G.M. Company Ltd* (1992) 2 NWLR (Pt.222) 132 and *Atano v. Attorney General, Bendel State* (1988) 2 NWLR (Pt. 75) 201. Fair hearing according to the law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. See *Ekpeto v. Wanogho* (2004) 18 NWLR (Pt.905) 394 at 411. Fair hearing in accordance with the law also envisages that the Court or tribunal hearing the parties' case, should be fair and impartial without it showing any degree of bias against any of the parties. See *Nwafor Elike r. Nwankwoala & Ors* (1984) 12 S.C. 301 and *Isiyaku Mohammed v. Kano N.A.* (1968) 1 All NLR424.

In the present case, even the learned counsel to the appellant who is complaining of denial of fair hearing, has not accused the learned trial judge of bias. This is because the learned trial Judge who was very fair to the parties gave them equal opportunities without any let or hindrance from the beginning of the trial to the end of it to present their respective case and

defence. The appellant however, through deliberate inaction on the part of its learned Counsel, refused to make use of the opportunity and the good atmosphere provided in the course of the hearing of the case by the trial Court only to now turn round to complain of a denial of fair hearing which was clearly a deliberate creation. This is because to me where a party to a suit has been accorded a reasonable opportunity of being heard and in the manner prescribed under the law, and for no satisfactory reason or explanation that party fails or neglects to attend the sittings and proceedings of the court, that party cannot thereafter be heard to complain of lack of fair hearing.

On the whole, I entirely agree that there is no merit at all in this appeal which I also hereby dismiss with N10,000.00 costs to the respondent.