

IN THE COURT OF APPEAL
KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
ON TUESDAY THE 12TH DAY OF DECEMBER, 2006
BEFORE THEIR LORDSHIPS

BABA ALKALI BA'ABA
AMIRU SANUSI
ABUBAKAR ABDULKADIR JEGA

JUSTICE, COURT OF APPEAL
JUSTICE, COURT OF APPEAL
JUSTICE, COURT OF APPEAL

CA/K/41M/20005

BETWEEN:

**NALBANK PLC (formerly
Known and called NAL
MERCHANT BANK PLC. APPELLANT/APPLICANT**

AND

AFRIMPEX ENTERPRISES LTD RESPONDENT

R U L I N G
(DELIVERED BY AMIRU SANUSI, JCA)

On 8/2/2005 the applicant herein filed its motion on notice also dated the 8th of February 2005. The reliefs sought in the application are reproduced below:-

- 1. AN ORDER of Departure from the Rules and to allow the appeal to be argued based on the bundle of papers attached to this application and marked as Exhibit "A".**

- 2. AN ORDER granting leave to the Appellant to amend its Notice of Appeal by the addition of four new grounds of appeal as shown in the Schedule to the Affidavit in support and marked as Exhibit 5.**
- 3. AN ORDER deeming the Amended Notice of Appeal dated 1st December 2004 and attached as Exhibit 6 as properly filed and served proper filing fees having being (sic) paid.**
- 4. AN ORDER deeming as duly filed and served the Appellants brief of Argument attached to the application as Exhibit “B” proper filing fees having been paid.**
- 5. AND for such further orders as this Honourable Court may deem fit to make in the circumstances of this case.”**

The application is supported by a five paragraph affidavit sworn to by one Miss Peace Onuoha, a litigation Secretary in the applicant’s law firm. Annexed to the application are the under listed exhibits:-

- (a) A letter dated 17/3/2003 written to the Director of of Appeals of the High Court of Justice, Kano State (i.e the lower court) inquiring whether the original trial judge’s file which was allegedly missing had been traced (Exhibit I.)**
- (b) Reply to Exhibit I by Chief Registrar of the lower court to the appellant’s/applicant’s Solicitors dated 20/3/2003, confirming that the**

**original judge's file was yet to be traced –
(Exhibit 2.)**

- (c) A photocopy of applicant's Certificate of Incorporation Exhibit 3.**
- (d) Original Notice Appeal dated 20/2/2001
Exhibit 4.**
- (e) Schedule of the Additional Grounds of Appeal
containing purposed Grounds of Appeal Nos 6,
7,8, and 9 – Exhibit 5.**
- (f) Amended Notice of Appeal dated 1st December
2004 – Exhibit 6.**

Other exhibits annexed to the motion include, Exhibit A, bundle of documents titled “Record of Appeal from the High Court of Justice (No.2) Kano State to the Court of Appeal and the Appellant’s Brief of Argument marked Exhibits A and B respectively.

The applicant on 22/9/2005, filed three paragraph counter affidavit to which two exhibits were annexed. The said exhibits are, letter titled ‘Re-loss of Original Judges filed in suit No K/523/98 Appeal No: CA/K/41M/2005 NALBANK PLC vs. AFRIMPEX ENTERPRISES LTD dated 15/6/05 written to the Chief Judge of Kano State High Court by Messrs M.A. Bello and Company of counsel to the present applicant, marked Exhibits A and a reply to

the above mentioned letter from the lower court's Registrar dated 21/7/05, marked Exhibit B.

On the other hand, the respondent herein in opposition to the application, filed a thirteen paragraph affidavit and annexed five exhibits thereto, i.e. Exhibits A-E. A Further Counter Affidavit of five paragraphs was also filed by the Respondent on 10/3/2006 to which one exhibit marked Exhibit "AA" was also annexed.

On 31/5/2006, this court ordered the learned counsel to the parties to file their written addresses on the motion dated and filed on 8/2/06 and on 18/9/2006 both learned counsel adopted their respective written addresses. In the written address filed by the learned applicant's counsel dated and filed on 20th June 2006, the learned counsel proposed one issue for the determination of the application and that sole issue is:-

"Whether in view of the affidavit evidence and the attached exhibits before this court, the applicant's motion has merit and should succeed."

The learned respondent's counsel on the other hand, formulated two issues to be considered for the determination of the application. The issues he proposed are;

- (a) Whether the motion on notice dated 8th February 2005 is competent or not; and**

- (b) Whether the applicant’s appeal can be heard and determined by this court in the absence of the notes of evidence or manuscript of the learned trial judge.”**

It would appear to me that the sole issue raised by the learned counsel for the applicant supra, if considered, would adequately resolve and determine the application. I will therefore be guided by it in treating the application. On the first prayer, the learned counsel for the applicant submitted that no record of appeal in this appeal was ever compiled by the registry of the lower court with regard to this appeal for reason of the missing or loss of the original notes of the learned trial judge who heard and determined the suit. He said all efforts by the Appeal Registry of the lower court under the supervision of its former Chief Judge to trace the records of appeal proved to naught. He said it is the prevailing circumstance that warranted him to seek for order of departure from the rules of this court to argue this instant appeal on the bundle of documents he annexed to his motion and exhibited as Exhibit B, pursuant to Order 7 Rule 2 of Rules of this Court of 2002. He also placed reliance on the authority of FIRST BANK OF NIGERIA PLC VS MAY MEDICAL CLINICS AND DIAGNOSTIC CENTRE AND 1 OR (2001) 9 NWLR (Pt.717) 28 at 39.

It is also the submission of the applicant's counsel, that the loss of the records of appeal was due to the negligence of the Kano State High Court, Appeal Registry staff, hence the appropriate order that this court should make in the circumstance is that of remittance of the case to the lower court for retrial of the suit. He cited OKOCHI VS. ANIMKWOI (2003) 18 NWLR (Pt.851) 1 at 23 and SYSTEM METAL INDUSTRY LTD VS. JAMES EHIZO (2003) 7 NWLR (Pt.820) 460 at 476- 477 Para H-A.

With regard to the other prayers on amendment of Notice of Appeal, the learned applicant's counsel submitted rightly in my view, that the grant of Prayers 2-4 will depend or rest on the grant of the first prayer for departure from the rules. He however conceded that application for amendment of grounds of appeal could only be granted if the proposed grounds of appeal to be added, prima facie, raise substantial points of law. See JESSICA TRADING CO. LTD VS. BENDEL INSURANCE CO. LTD (1993) 1 NWLR (Pt.271) 538 at 545 Para H.

It needs to be pointed out at this stage, that when arguing his motion in court, the learned counsel for the applicant orally introduced an alternative prayer for an order for remittance of the suit to the lower court for retrial, which said prayer did not feature in his motion papers.

The respondent in his written address submitted that it is the duty of registrar of the court below to compile the records of appeal and transmit them to the appeal court. See Order 3 Rules 10 and 13 of the Court of Appeal Rules 2002). (See also ENGINEERING ENTERPRISES OF NIGER CONTRACTORS CO OF NIGERIA VS. ATTORNEY GENERAL OF KADUNA STATE (1987) 2 NWLR (Pt.57) 381 at 390 – 391; FIRST BANK PLC VS. MAY MEDICAL CLINICS AND DIAGNOSTIC CENTRE and 1or (Supra). See also Order 7 Rule of Court of Appeal Rules 2002. The circumstance of this case according to the learned counsel for the respondent, would justify that all those concerned with the disappearance of the case file should be invited or made to swear to affidavits explaining the issue at stake for the consideration of this court and in the event that such affidavits are found conflicting, this court should resort to calling for oral evidence by the deponents. He also cited the case of FIRST BANK OF NIGERIA PLC VS. MAY MEDICAL CLINICS AND DIAGNOSTIC CENTRE LTD and 1 or (Supra), especially at page 39 B per Belgore JSC (as he then was).

The learned counsel for the respondent further argued that it will be against the interest of justice to resolve the issue of the missing records or manuscript of the trial judge against the respondent and

proceed to hear the appeal on the bundle of documents attached to this motion. The learned counsel in his further submission also opposed the oral prayer made by the applicant for retrial. This according to him, is because as he deposed in Paragraph 4 (a) to (e) of his Further Counter Affidavit of 10th March 2006, the applicant had filed a fresh action before the lower court emanating from the same transaction that led to this appeal and involving the same parties and on the same subject matter or issues. He said these pieces of facts which have not been controverted by the applicant, should be accepted and acted on by this court. He urged this court to refuse the application and the prayer for order of retrial as according to him, his client will be prejudiced if either them is granted.

I think it will not be out of place to reproduce at his stage, some relevant averments, by the parties in their respective affidavits. In the affidavit supporting the application, the following facts were deposed to on behalf of the applicant by one MISS PEACE ONUOHA. They read thus:-

PARAGRAPH

- 3 -That I was informed by Taiwo Abe Esq of counsel while being briefed by Miss Ronke Savage, the company secretary/legal adviser of the appellants on the 1st day of December 2004 at about 8.00 am and I verily believe all what she said in respect of this matters as follows:

- (a) That the judgment was given against the appellant Applicant as Defendant in the lower court on the 18/2/2000 by the presiding Honourable Justice Saka Yusuf.**
- (b) That the Appellant being dissatisfied with the judgment aforesaid instructed its former solicitors to file an appeal against same which instruction the Appellant's former solicitors Messrs Ibrahim Mudi and Company complied with by filing the Notice of Appeal within time.**
- (c) That pursuant to the Appellant's Notice of Appeal filed in the Lower Court the original judge's file of the High Court of Justice, Kano presided over by Honourable Justice Saka Yusuf was to be transmitted to the Kano High Court, Appeal Registry for the compilation of the Records of Appeal but was found to be missing in mysterious manner.**
- (d) That the compilation of the Record of Appeal for the above reasons was therefore impossible by the High Court Appeal Registry till date.**
- (e) That part of the efforts made to find the original judge's file was the swearing of Oath by the entire members of staff of the Kano State Appeal Registry, to determine the culprit responsible for the disappearance of the entire original judge's file immediately after judgment was delivered in December, 2002.**
- (f) That in spite of the oath swearing, the original file could not be traced even when the Appellants were persuaded by the Registry to give them more time to search its offices.**

- (g) That it is now over three years after the loss/disappearance of the original file without any hope that same will be found as shown in the Appellant's Solicitor's letter dated the 17th day of March, 2003 and the reply thereto dated the 20th day of March 2004, which are herewith attached as Exhibits 1 and 2 respectively.**
- (h) That the former Solicitors, Ibrahim Mudi and Company were debriefed in this matter sometimes in December, 2002”**

The applicant as I said earlier, filed a Further Affidavit on 22/9/2005, wherein the following averments were made:-

PARAGRAPH 2

- (a) That this Honourable court at the last adjourned date advised the appellant/applicant's counsel to once again seek the assistance of the Chief Judge of Kano State to intervene concerning the loss of the original judge's file containing the notes of evidence in the appeal.**
- (b) That the Appellant counsel in compliance with the Court of Appeal directive wrote to the Honourable Chief Judge of Kano State seeking his intervention once again in respect of the missing or loss of the original judge's file in this appeal and the letter was replied through the office of the Chief Registrar sometimes on 21st July, 2005. The letters are herewith attached and marked as Exhibits A and B respectively.**
- (c) That the Chief Judges of Kano State's response made through the office of the Chief Registrar was to**

the effect that the Appellant/Applicant should produce the documents in his possession so that same could be compiled by the Appeal Registry Kano as the record of appeal since the original Judge's file could still not be traced.

- (d) That inspite of the fact that both Mr.M.B. Adoke and Taiwo Abe have thereafter had audience with Hon. Justice S.C. Yusuf (The Chief Judges of Kano State) and the Chief Registrar in respect of the missing original file, same could not produce any fruitful result.**
- (e) That the documents requested from the Appellant's counsel by the office of the Chief Registrar of Kano State are the same documents brought before this court in respect of which an order of departure is being sought before this court.**
- (f) That it will be in the interest of justice to grant this application as every effort made by the Appellant/Applicant since February 2001 to locate the original Judge's file have proved futile.**

In reply to the above averments by the applicant reproduced above, the Respondent's counsel in his Counter Affidavit inter alia, deposed as follows:-

PARAGRAPH

That I am further informed by Bala Sule Mohammed Yakassai the Registrar of the trial lower court, on the said 9th day of March, 2005 at about 8.45am while at the premises of the lower court and I verily believe him to be true and correct as to the

following facts.

- (a) That he has seen and perused the contents of a Motion on Notice dated 8th day of February, 2005 together with the affidavit in its support and all the annexures thereto.**
- (b) That shortly after judgment was delivered by the Lower court, Mr. Ibrahim Mudi, Esq. learned counsel to the appellant at the lower court approached him several times and pleaded with him to release the Judge's file to him (Mudi, Esq.).**
- (c) That he (Bala Yakassai) refused Mudi's request and directed him to liaise with the High Court, Appeal Registry.**
- (d) That Mudi, Esq. still persisted and even enlisted the support of some senior staff of the High Court of Appeal Registry to pressurize him (Bala) to release the files to Mudi, Esq. but he still refused.**
- (e) That the file was however duly and properly released to the Appeal Registry in line with the relevant rules and procedures.**
- (f) That all these facts, amongst others, were contained in the counter affidavit of the said Bala Yakassai in opposition to a Motion on Notice brought by Mudi Esq. on behalf of the Appellant before this court.**

Now shown to me are Certified True Copies of Bala's counter affidavit in Motion No:CA/K/51/M/02 with the annexure thereto attached herewith and marked as Exhibit "A"

**in response to the Motion filed by Mudi Esq,
Certified True Copies of which are also
attached herewith and marked as Exhibit “B”.**

- 8. That I know that Mudi, Esq. did not in anyway respond to Exhibit A or any of its annexures in the said Motion No:CA/K/51/M/02 when it came up before this court.**
- 9. That indeed the said Motion No: CA/K/51/M/02 was struck out on 20th day of May, 2002 when the Applicant, through I.Y. Ahmed who represented Mudi Esq. withdrew the application and a cost of N=3000 was awarded in favour of the Respondent by this court. Certified True Copy of the enrolled order of this court is attached herewith and marked as Exhibit C.**
- 10. That the alleged “Mystery”, if any at all, surrounding the disappearance of the judge’s file, is better explained by Mudi Esq.**
- 11. That I am also further informed by the said Ahmed Raji Esq on the said date, same place and at about the same time and I verily believe it to be true and correct as to the following facts.**
 - (a) That this Appeal and indeed the case of the Respondent turns on the intricate facts of this case which are contained in the judge’s notes of evidence.**
 - (b) That it is practically impossible for the respondent to argue any Appeal or any Appeal be argued in this matter without the evidence on record of the lower court.**

- (c) That Exhibit A attached to the Applicant's motion papers as the purported bundle of records of Appeal as compiled by the applicant is incomplete and does not contain the notes of evidence of the trial judge.**
- (d) That it may be impossible for this court to determine the Appeal without the notes of evidence of the trial judge and a complete record of Appeal.**
- (e) That Exhibit B attached to the affidavit of the Applicant has no bearing to the issues that were either canvassed or argued before the lower court.**
- (f) That the learned trial Judge merely summarized the evidence of the witnesses before him in his judgment of 18th day of December, 2000.**
- (g) That it is not true that the trial judge's file got missing when it "was to be transmitted to the Kano High Court Appeal Registry" as alleged, Exhibit A attached to the counter affidavit of Bala Yakassai and the annexure thereto shows the movement of the file and it indicates that the file was indeed received at the Appeal Registry, Kano on the 26th day of April, 2001.**
- (h) That despite the withdrawal of Motion No:CA/K/51/M/02, the applicant again filed Motion No: CA/K164/M/03 dated 7th day of May, 2003, the**

latter Motion was struck out on the 22nd day of January, 2003 due to the absence and non-representation of the applicant, with a cost of N=2000 awarded in favour of the respondent Certified True Copy of the enrolled order of this Court in respect thereof, is annexed herewith and marked as Exhibit D.

Again in the Further Counter Affidavit dated and filed on 10th march 2006, the respondent deposed, inter alia, that the applicant has instituted a fresh action before the lower court having the same parties and same subject matter with the that in the decision of the lower court now being appealed against by the applicant/appellant. The respondent annexed Exhibit A.A which is a copy of the Writ of Summons and Statement of Claim in the fresh suit. It is to be noted that the applicant did not file any reply to the counter affidavit and further counter affidavit.

It is crystal clear from the averments in both the affidavits filed by the applicant and the counter affidavits filed by the respondent and the exhibits annexed thereto, that the records of appeal in respect of this case were missing at the lower court. This is an indisputable fact which both parties are at one with. Similarly, it is an established fact too, that this court at one time ordered the parties to liaise with the learned Chief Judge of the lower court to assist in seeing to it, that the records of appeal were traced. Despite the efforts made by both the former and present Chief Judges of Kano State High Court, the

records of appeal could not be traced. In other words, all efforts made by parties and indeed by the lower court to trace the case file or records of appeal did not yield any positive result. It is a fact, it was sequel to that, that the lower court in response to a letter written by the appellant/applicant to it, that it replied him (Applicant) and urged him to produce the documents in his possession so that the records could be compiled, which he did . There is no indication however, that the respondent was similarly approached by the lower court to do same, even if it will merely serve comparison purpose. It is an established fact too, that it was only the documents supplied by the appellant/applicant that was compiled to form the bundle of documents attached to the present motion and marked Exhibit A. There is no gainsaying that the respondent was not invited or called upon for the purpose of settlement of the purported records of appeal compiled by the lower court now presented to this court to use for the consideration and determination of this appeal.

It could be deduced from the counter affidavit filed by the respondent, that he is insisting that the bundle of document did not contain the manuscript of the learned trial judge and he is also emphasizing that such bundle of document is incomplete and could thus not be used by this court in the determination of the appeal filed by the appellant/applicant. These pieces of averments made by the respondent have not been debunked by the applicant, as no reply

to the counter affidavits was filed by him. The law is trite, that any averment made in an affidavit which is not controverted by the opposite party is deemed to be accepted and the same can be believed and the court can act on same.

Before an appellate court can hear and determine an appeal filed before it, the record of proceedings and the judgment of the lower court duly authorized and certified, must be made available to it. It is only when such documents are placed before it that it can hear and determine the appeal before it the merit. Where the manuscript of the trial court or part of the record is missing, an appellate court will not be able to fairly determine the appeal. See **F.B.N PLC VS. MAY MEDICAL CLINICS (Supra)**. As I posited supra, there is no dispute that the bundle of documents attached to this motion which does not contain the manuscript of the learned trial judge is incomplete and there is no evidence to show that the purported records, were settled by the parties. In **OKOCHI VS ANIMOKWOI (Supra)**, Niki Tobi JSC had this to say on page 23 paragraph I;

“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 weary 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 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 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. This is a very difficult decision and an appellate court can only take it in very obvious and clear circumstance. Where there is doubt in the mind of the court as to the materiality or otherwise of the missing record, the doubt must be resolved against hearing the appeal in the interest of justice. In such a situation, other efforts should be made to procure the missing portion of the record. Where all diligent efforts to procure the missing part of the record fails, the court should take the most painful decision of ordering a retrial in the matter if the missing portion of the record is material to the appeal. This must be a decision of last resort which must be taken after all efforts at location the missing portion of the record fails. Although the decision to order a retrial will protract the litigation, an Appellate Court has no option in the matter. It is a better evil, if I may use that expression unguardedly, for the litigation to protract and do justice at the end of the day, than doing injustice by hearing an appeal on incomplete record.”

In a situation where the records or documents presented to an appellate court for the purpose of the hearing and determination of an appeal is incomplete or part of the records is missing, the appellate court has either of these three option to take, namely;

- (a) It can hear the appeal on such incomplete records

or documents presented before it provided the parties consent to that and such consent must be clearly recorded.

- (b) It can hear the appeal on such incomplete record where the missing part of the records is, in its view, not material; and.**
- (c) Alternatively, the appellate court can refuse to hear the appeal and take the last resort and order the remittance of the case to the lower court to hear it de novo, that is to say, to order a retrial.**

In the present case, the manuscript of the trial judge which is, in my view, a vital or material part of the records, is missing and all effort to trace the records proved abortive. It is no doubt a material necessary for consideration by this court in order to decide whether the judgment of the lower court was right or wrong. I believe this court can not do justice when such vital or relevant documents are not placed before it. Admittedly, any party aggrieved by the decision of a High Court, has constitutional right of appeal to this court and he also has the constitutional right to have his appeal heard determined on the merit. See Section 241 of the Constitution of Federal Republic of Nigeria of 1999. But where due to inadvertence, negligence or carelessness of the staff of a trial court the records of appeal or vital part of it are missing or lost, the party aggrieved by its decision who is desirous of appealing will obviously be deprived of his

constitutional right of his appeal to be heard and determined on the merit. In such a situation, justice demands that the appellate court should order the suit to be heard freshly by the lower court .

In the instant case, the respondent is urging this court to refuse the application and strike same out. This court had, in a similar situation in the case Engineering Enterprises of Niger Construction Company of Nigeria Vs. A.G of Kaduna State (supra) struck out an appeal where the judgment of the lower court was missing. But on further appeal the apex court, the latter court per Bello CJN (of Blessed memory) while quashing decision had this to say:-

“It seems to me that striking out the plaintiff’s claim as the court of Appeal did, was tantamount to the condonation by the Court of Appeal of the constitutional wrong committed by the Kaduna State High Court. That Court was therefore wrong in making the order striking out the claim.

In my considered view, the only order that may be consistent with the plaintiff’s constitutional right of appeal is to give him another opportunity to start all over so that his rights of appeal, which he was deprived of, may be restored if the result of the hearing de novo so warrants.”

Now in the instant application, there is no mutual consent or consensus by the parties that the bundle of documents, Exhibit A, should be used for the determination of the appeal and as I remarked above, the manuscript of the trial judge is a vital document which will

assist this court in determining whether his judgment is wrong or otherwise, is missing. I therefore think that the only option open to this court which will best serve the interest of justice, is to order a retrial of the suit by the lower court.

The learned counsel for the respondent raised the point that the applicant did not asked for an order of retrial in his motion on notice but orally asked this court to, in the alternative, order a retrial of the suit when arguing the motion. I however wish to observe, that it was the respondent's counsel himself who for the first time introduced the issue of retrial in his Written Reply, when he urged this court not to order a retrial since a fresh action was allegedly filed by the applicant and he even annexed to his Further Counter Affidavit, Exhibit AA, i.e. the Writ of Summons and Statement of Claim on the said fresh action. In this situation, I do not see the reason why the respondent's counsel would complain or be disturbed, when the applicant responded to that issue, albeit orally, as his alternative relief. Now even if the applicant had not asked for such relief or the respondent did not introduce same, I feel this court has power under Section 16 of the Court of Appeal Act to order the remittance of a suit to a trial court for purpose of retrial or rehearing.

Thus, it is my considered view, that the justice of this case lies in the suit being retried by the lower court, so that both parties could be

satisfied that they have enjoyed their constitutional rights of appeal to the fullest. An order of retrial is therefore in my opinion the appropriate order which would probably meet the justice of the case. I accordingly so order.

On the whole, the first prayer is refused and in its stead, I order that the suit be remitted to the learned Chief Judge of Kano State High Court for retrial by another Judge. Having refused to grant the first prayer and in view of the order of retrial I made supra, it will be a futile exercise to deal with the other prayers sought in the application as they are over taken by event. No order as to costs, hence parties should bear their own costs.

**AMIRU SANUSI
JUSTICE, COURT OF APPEAL**

TAIWO ABE for the Applicant/Appellant

T.A . ABORISADE for the Respondent.

