United Bank For Africa Plc v. BTL Industries Limited

[2005] 10 NWLR (Pt. 933) 356

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Facts

Whilst the substantive appeal was pending at the Supreme Court and after the parties had exchanged briefs of argument, the Appellant, United Bank For Africa Plc, filed an application seeking some interlocutory reliefs including:

> "7. An order granting the appellant leave to adduce additional evidence for the court to receive on appeal"

The documents sought to be tendered as additional evidence were attached to the affidavit in support of the application as exhibits "U06" to "U09". These were letters allegedly written to the Appellant in relation to the subject matter of the appeal after the appeal had been heard at the Court of Appeal but before judgment of that Court. The Appellant therefore contended that the documents were not in existence at the time of trial, that the documents corroborated the case of the Appellant and that no witness and examination would be required.

The prayer was opposed by the Respondent who, in the counter affidavit and by argument of counsel on its behalf contended *inter alia* that:

i. The maker of the documents had testified for the Appellant as DW5 at the trial court between 8th February and 11th September, 2001 and was adjudged by the trial court to be a person interested.
ii. Exhibit U06 was reply to a letter dated 14th July, 2001 but the witness suppressed the existence of that letter
iii. By the time the judgment of the Court of Appeal was delivered on 22nd July 2003, the documents were in existence and available but were not brought to the attention of the Court of Appeal
iv. The documents contradict the case of the Appellant at the trial court.

After hearing arguments of counsel for the parties the Supreme Court unanimously ruled that the documents sought to be tendered as additional evidence did not meet the

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requirement of the law for tendering additional evidence on appeal. The prayer was therefore refused.

Comment

The lead ruling was delivered by Honourable Justice G. A. Oguntade in his characteristic lucid and incisive manner. His Lordship was able to explicitly demonstrate that:

i. By a consistent line of authorities, the principles relating to tendering of additional evidence on appeal are fairly settled.[1]

ii. The grant of leave to adduce additional evidence on appeal is a matter for the discretion of the court which discretion is exercised judicially and judiciously upon the facts and circumstances of each case

iii. Before the court can grant leave to adduce additional evidence on appeal, three conditions must co-exist, to wit:
   (a) the evidence sought to be adduced must be such as could not have been with reasonable diligence obtained for use at the trial;
   (b) the evidence should be such as, if admitted would have crucial effect on the whole case; and
   (c) the evidence must be such as apparently creditable in the sense that it is capable of being believed and need not be incontrovertible.

iv. The discretion to grant leave to adduce additional evidence on appeal is sparingly exercised as the courts lean against hearing of fresh evidence on appeal.

It is apparent from the above that the burden of establishing the need for grant of leave to adduce additional evidence on appeal lies on the applicant. The burden is indeed a heavy one. This is in view of the attitude of the courts against admission of fresh evidence on appeal which attitude is itself predicated on certain hallowed principles of law some of which will be considered albeit very briefly.

[1] See Asaboro v Aruwaji (1974) 4 SC 119; Okpanum v SGE (Nig.) Ltd [1998] 7 NWLR (Pt. 559) 537; Gazu v Nyiam (1998) 2 NWLR (Pt.538) 477; Obasi v Onwuka (1987) 3 NWLR (Pt. 61) 364.

1. There must be an end to litigation

This principle is often expressed in the Latin maxim *interest republicea ut sit finis litium* which simply means that it is in the public interest that there is an end to litigation. A situation where litigation can continue endlessly is not only undesirable but may actually spell doom for the society as it is bound to erode confidence in the administration of justice and encourage recourse to self help. Such a situation may arise if parties are allowed unrestricted opportunity of adducing fresh evidence on appeal. In that case, parties may be inclined to bring forward their respective evidence by instalments and lay ambush for each other giving rise to endless litigation. It may also encourage parties to be less diligent in the articulation of their case and marshalling of all relevant evidence at the trial since they can always make up for the deficiency on appeal. The result again will be endless litigation. The influence of the desire to have an end to litigation on the attitude of the courts towards admission of additional evidence on appeal is underscored by the pronouncement of Honourable Justice Oguntade in BTL case[2] when his Lordship held at page 371 of the report that:

> **"The discretion to grant a party the liberty to call new evidence on appeal is one sparingly exercised. This is because its indiscriminate use portends great danger for the administration of justice. In a case as this which was commenced at the High Court, parties exercise their right to file pleadings and later call evidence at the trial in support of their different standpoints. Witnesses called are cross-examined by their adversaries. It is the normal expectations therefore, that parties would diligently bring before the court all the evidence needed in support of their case including all documents.**
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> **Human experience shows that we get wiser after an event. When judgment has been given in a case, parties with the advantages of what the court said in the judgment get new awareness of what they might have done better or not done at all. If the door were left open for everyone who has fought and lost a case at the court of trial to bring new evidence on appeal there would be no end to litigation and all the parties would be worse for that situation."**

[2] Supra.

A similar stand had been taken by **Coker JSC** in **Asaboro v Aruwaji**[3] where it was held that:

> **"We are not unmindful of the fact that it would be a dangerous precedent to allow a person who did not call evidence in the lower court, or who for one reason or another, had called insufficient evidence at the trial, with comparative ease, to bring forward for the first time before this court the evidence which could and should have been adduced before the trial Judge. Such an attitude would be disastrous to the principles of seeing an end to litigation."**

Much earlier, the Privy Council in **Edie Maud Leeder v Nance Ellis**[4] had approved the dictum of Street CJ of the Court of New South Wales to the effect that:

> **"parties should not be permitted to protract proceedings indefinitely by taking a chance on the hearing in the lower court as to whether the evidence is sufficient, and on finding it insufficient should then be able to come to the appellate court and ask for fresh evidence to be admitted, which was available at the time and in respect of which no difficulty arose in the way of putting that evidence before the court, and seek to have the matter reopened on that ground."**

2. Doctrine of *res judicata*

This is a specie of estoppel arising from decisions of court. Broadly speaking, once a case is determined on its merit by a court of competent jurisdiction, all parties to the case are estopped from reopening or relitigating the case. They can only challenge the decision by way of appeal. The doctrine is also founded on the principle that there must be an end to litigation in addition to the principle that a man should not be pursued twice for the same cause.[5] Estoppel applies not only to issues raised in a case

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[3] Supra at 90
[4] (1953) AC 52.
[5] See Okukuje v Akwido [2001] 3 NWLR (Pt. 700) 261

but also to all issues and matters which ought to be raised in the case.[6] A litigant is not allowed to split his cause of action and litigate on them piecemeal.[7] The doctrine requires that a litigant must bring forth all issues and evidence relevant to a case to enable the court determine the case once and for all. Where a litigant deliberately or inadvertently omitted to bring forth any relevant issue or matter and the case is finally determined, he is estopped from raising such issue or matter in a subsequent litigation.[8] If a party who has lost a case and who cannot reopen the case before the trial court or court of coordinate jurisdiction were to be allowed to appeal and adduce additional evidence, he would have been given the opportunity of reopening the trial on appeal and thereby circumvent the doctrine of res judicata.

3 Evaluation of evidence belongs to the trial court

The law is settled that evaluation of evidence is the primary responsibility of the trial court which has the advantage of watching the witnesses testify.[9] Evaluation of evidence is generally not the duty of an appellate court. This is why an appellate court will generally not interfere with a finding of fact by a trial court which is based on evaluation of evidence adduced before the trial court. As **Muhammed JSC** held in **Odiba v Muemue**[10]

> **"It is not the function of an Appeal Court to substitute its own views for those of a court of first instance with respect to facts found by the court based on a dispassionate appraisal of the evidence before it. See *Kasumu and Anor v. Abeo* (1972)2 S.C. 69."**

That the Supreme Court was influenced by this rule in refusing the application in BTL case[11] is apparent in the judgment of Oguntade JSC when his Lordship held:

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[6] See Gafai v UAC (1962) N.N.L.R. 73
[7] Ibid
[8] Ibid.
[9] *Ebba v Ogodo* (1984)4 SC. 84; (1984)] SCNLR 372, Atolagbe v. Shorun (1985) 1 NWLR (Pt.2) 360; Obodo v. Ogba (1987) 2 NWLR (Pt.54) 1; Shell B.P. v. Cole (1978) 3 SC 183; Egonu v. Egonu (1978) 11-12 SC 111; Woluchem v. Gudi (1981) 5 SC 291.
[10] (1999) CLR 90 (SC): (1999) 10 NWLR (Pt. 622) 174 (SC)
[11] Supra.

> **"It is undisputed that the same person who signed the documents which appellant/applicant wishes to put in as additional evidence had himself been a witness at the trial of the suit. He had testified as DW5. He was at the hearing extensively cross-examined and the trial Judge had the opportunity of expressing an opinion as to his credibility as a witness. Viewed from this angle, the attempt to put in evidence documents prepared by this same person is an indirect way to enhance the credibility of this person as a witness. The applicant's request if granted draws this court, an appellate court into an area traditionally reserved for trial courts in civil matters. It is the province of the court of trial to ascribe probative value to the evidence of witnesses."**

However, it is also settled that this rule is not absolute as an appellate court can embark on evaluation of evidence and interfere with finding of fact in appropriate cases. Where the trial court failed to properly evaluate the evidence, an appellate court has a duty by way of re-hearing to evaluate the evidence as if it were the trial court.[12] Where the evidence is purely documentary and does not involve assessing credibility of witnesses, it is recognised that an appellate court is in as good a position as the trial court as regards evaluation of such evidence. On the other hand, where the evidence involves assessing credibility of witnesses, an appellate court will not embark on the evaluation of such evidence. In such a case, the appellate court may have to order a retrial.[13]

4. Admission of fresh evidence on appeal may defeat the purpose of appellate system of justice

Our appellate system of justice founded on progressive hierarchy of courts as established by the 1999 Constitution recognises the fact that the courts are manned by human beings who are not immune to error. **Oputa J.S.C**., in **Oredoyin v Arowolo**[2]

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[12] See Adegoke v. Adibi & Anor (1992) 5 NWLR (Pt.242) 410; Lion Buildings v. Shadipe (1976) 12 SC 135.

[13] See Shell BP Petroleum Development Company of Nigeria Ltd. v. His Highness Pere Cole & Ors. (1978) 3 SC 183; Agore v. Ashiru & Ors. 1 All NLR (Pt.2) 51, Sanusi v Ameyogun [1992] 1 NSCC 681. But a retrial will not be ordered where the evidence on which such retrial is to be based is that which ought to have been adduced but was not adduced at the trial. See Sanusi v Ameyogun (supra) per WALI JSC. See also Enekebe v. Enekebe (1964) 1 All NLR 102.

described an appeal as an invitation to a higher court to find out whether on proper consideration of the facts placed before it, and the applicable law, the lower court arrived at a correct decision. Also, **Irikefe JSC** held in **Rabiu v State**[14] that:

> **"the possibility that a decision by an inferior court may be scrutinized on appeal by a higher court, at the instance of an aggrieved party…is by itself a safeguard against injustice by acting as it were a curb against capriciousness or arbitrariness"**

It was also recognised by **Nnaemeka Agu JSC** in **Sanusi v Ameyogun** [15] that

> **"…a Judge of utmost sincerity and optimum honesty as well as profound industry and knowledge of the law could reach a decision which could turn out to be wrong on appeal…"**

When a piece of evidence is adduced at the trial court, a litigant is entitled to expect that he will have the opportunity of having the evidence reviewed by three successive courts.[16] It is in this wise that appellate courts always advise that lower courts pronounce on all issues raised in a case so that the appellate court can have the benefit of the opinion of the lower court.[17]

When fresh evidence is adduced on appeal, the appellate court is deprived of having the benefit of the opinion of the lower court on such evidence. This is more so where, as was sought to be done in the BTL case, the fresh evidence is adduced at the Supreme Court. Allowing such evidence has the potential of distorting or circumscribing the appellate system of justice.

Conclusion

In refusing the application for leave to adduce additional evidence on appeal in BTL case, the Supreme Court was able to justify the negative attitude of the court towards

[14] (1980) 8-11 S.C.130 at 175 –176.
[15] [1992] 1 NSCC 681
[16] Though in most cases the opportunity in not exhausted either by choice or otherwise.
[17] 7 Up Bottling Co. Ltd. v. Abiola And Sons Bottling Co. Ltd [2001] 13 NWLR (Pt. 730) 469; Bureau of Public Enterprises v National Union of Electricity Employees [2003] 13 NWLR (Pt. 837) 382; Titiloye & Ors. v. Olupo & Ors. [1991] 7 NWLR (Pt. 205) 519.

such application. However, the Court made it explicitly clear that regardless of any negative attitude, the Court has the discretion to grant such application in the interest of justice and upon satisfaction of certain well defined conditions. In reaching this conclusion, Oguntade JSC who delivered the leading judgment did a thorough review of the authorities in this regard. This is in tandem with the tradition of the Supreme Court. As a court of last resort, the Supreme Court[18] has a duty to maintain consistency in our case law as much as possible and this can only be achieved by reference to all relevant previous decisions before taking a position in a case. Where the Court is departing from any of its previous decisions this should be clearly and expressly done. A situation whereby conflicting decisions[19] are emerging from the Supreme is a disservice to our judicial system and is clearly a consequence of departure from the tradition of properly reviewing all relevant authorities in every case. Though this is more of exception than general rule, it cannot be justified under any circumstance given the fact that the Court is made up of some of the best jurists that can be found anywhere in the world. It is hoped that the emerging deficiency will be nipped in the bud in the interest of our judicial system.

[18] And indeed all our courts particularly the Court of Appeal which has been churning out conflicting decisions from its different divisions.

[19] See Anatogu v Iweka II [1995] 8 NWLR (Pt. 415) 547 where the Court failed to consider Onobruchere v Esegine [1986] 1 NWLR (Pt. 19) 799 before holding that originals of public documents are not admissible; Ogli Oko Memorial Farms Ltd v Nigerian Agricultural And Co Operative Bank Limited (2008) 4 SC 95 and Akpaji v Udemba (2009) 2-3 SC 1 on the apparently contradictory positions taken by the Court on the effect of failure to pay appropriate filing fee on the jurisdiction of courts; Kraus Thomson Organisation Ltd v University of Calabar (2004) 4 SC 65 and Bello v National Bank of Nigeria [1992] 6 NWLR (Pt 246) 206 on the proper venue for commencement of action in contract/payment of money.