

AKPAN v. FBN PLC

CITATION: (2016) LPELR-41201(CA)



In the Court of Appeal In the Calabar Judicial Division Holden at Calabar

ON THURSDAY, 12TH MAY, 2016

Suit No: CA/C/230/2015

Before Their Lordships:

CHIOMA EGONDU NWOSU-IHEME
ONYEKACHI AJA OTISI
PAUL OBI ELECHI

Justice, Court of Appeal
Justice, Court of Appeal
Justice, Court of Appeal

Between

MR. BRENDAN NICODEMUS AKPAN

- Appellant(s)

And

FIRST BANK OF NIGERIA PLC

- Respondent(s)

RATIO DECIDENDI

1. **APPEAL - RECORD OF APPEAL:** Whether an appellate Court can act on an incomplete record

"I agree with his Lordship entirely on the reasoning and conclusion that an Appellate Court cannot hear an appeal based on incomplete record of Appeal unless the parties by consent agree that the appeal shall be so heard which is not the case here."Per ELECHI, J.C.A. (P. 13, Paras. D-E) - [read in context](#)

2. **APPEAL - RECORD OF APPEAL:** Whether the compilation and transmission of record of appeal is the primary duty of the Registrar and the exceptions thereof

"By virtue of the provisions of Order 8 Rule 1 of the Court of Appeal Rules, 2011, the responsibility to compile and transmit the record of appeal primarily rests on the registrar of the lower Court and he must do so within sixty days after the notice of appeal is filed. In compiling the records, the registrar is to summon the parties before him to settle the documents to be included in the record of appeal and fix the amount to be deposited by the Appellant to cover the estimated cost of making up and forwarding the said record of appeal, Order 8 Rule 2. Where notice has duly been served on the parties and they fail to attend to compile records, the registrar may proceed to compile the records in accordance with the Rules of Court, Order 8 Rule 3. Where the registrar of the lower Court fails to compile and transmit the record of appeal, the appellant is empowered to do so by virtue of Order 8 Rule 4."Per OTISI, J.C.A. (P. 7, Paras. A-E) - [read in context](#)

3. COURT - DUTY OF COURT: Duty of an appellate court not to hear an appeal on incomplete record of appeal

"The appellate Court has a duty to ensure the records are complete as settled by the parties. Where a respondent disputes the genuineness or authenticity of the record of appeal or of portions thereof, he is duty bound to depose to an affidavit to challenge the said record; which will be served on the judge or registrar of the lower Court and on the other party *Irawo-Osan v. Folarin* (2007) LPELR-9040 (CA); *Orajeka v. Owuamalam* (2011) LPELR-4883 (CA); *Itita v. Government of Cross River State* (2010) LPELR-4341(CA). If the dispute of the respondent is with regard to the completeness of the record of appeal, the attention of the appellate Court must be called to this anomaly. Additional or supplementary records may be filed, pursuant to Order 8 Rule 6. If the additional or supplementary records are filed out of time, application to regularize same may be brought before the appellate Court. In any event, if the record of appeal is shown to be indeed incomplete, distorted or mutilated, the appellate Court cannot entertain the appeal; *Ekpemupolo v. Edremoda* (supra).

An appellate Court cannot hear an appeal on incomplete records. The Supreme Court, per Niki Tobi, *JSC inOkochi v. Animkwoi* (2003) 2 - 3 ,S.C 65, cautioned:

"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 wary to hear an appeal on incomplete records unless the parties by consent agree that the appeal should be so heard.

In the case of *Mutual Life & General Insurance v. Ihome* (2010) LPELR-4568 (CA), this Court observed, in the course of writing the judgment, that the testimonies of witnesses and proceedings at the Arbitration of the dispute between the parties therein were not part of the record of appeal. The documentary exhibits were also not transmitted. This Court, per Regina Nwodo, JCA (of blessed memory) noted that:

"An appellate Court hears an appeal on the records before it but must ensure that the records are complete."

In his opinion, contributed in support, Saulawa, JCA added that:

"... the Court of Appeal is devoid of jurisdictional competence to hear an appeal based on incomplete record of appeal. It is indeed a well settled law, that an appeal from the lower Court shall be determined by way of a rehearing. As such the Court has the onerous duty to rehear fully and accord a second consideration to such aspects of the entire records of appeal, comprising the lower Court's proceedings and evidence adduced there at, to such extent as the ground of appeal demand."

The Record of Appeal in the instant appeal was compiled and transmitted by the Appellant. The said Record of Appeal contained the processes filed by the parties including the written depositions but, it does not contain the record of proceedings for each day the matter was heard before the lower Court. While the Record of Appeal as transmitted has the witness depositions, it does not have the record of the cross-examination of respective witnesses and does not have the record of documents tendered before the lower Court and decisions of the trial Court admitting the exhibits.

Learned Counsel for the Respondent had submitted that Issue No. 1 cannot be justly determined without the benefit of the missing portion of the record. However, the missing portion cannot simply affect a just determination of Issue No. 1 as distilled by the Appellant from the grounds of appeal. An appeal from the lower Court amounts to a rehearing of the matter presented before the lower Court for adjudication. All aspects of the matter, encompassing the processes filed, the lower Court's proceedings and evidence adduced there at, must be before the appellate Court. Where there are portions missing from the record of appeal, the appellate Court cannot pick and choose which of the issues that have been distilled for determination can sail with the incomplete record. The Court cannot speculate on any missing record. If there are portions of the proceedings before the lower Court which were not compiled and transmitted, and no additional records have been filed, the Court cannot speculate on the content of those missing proceedings.

The Appellant has an inalienable right of appeal against the decision of the lower Court. This right of appeal places an attendant duty on the appellant to ensure that the appeal is prosecuted diligently and timeously. In prosecuting his appeal, the appellant is obliged to place before the appellate Court all the relevant materials on the issue he has brought before the appellate Court to rehear, consider and determine; *Nwana v. Federal Capital Development Authority* (2007) 4 S.C. (Pt. II) 1. The provisions of Order 8 Rule 4 underscore this point. However, an appeal cannot be entertained upon confirmed incomplete records."Per OTISI, J.C.A. (Pp. 8-12, Paras. B-C) - [read in context](#)

4. EVIDENCE - PRESUMPTION OF CORRECTNESS: Whether the records of courts are presumed to be correct until they are successfully impugned

"A record of appeal, whether settled by the parties or by the registrar where the parties fail to attend to compile the records, is presumed to be correct and is binding on the Court and on the parties, *Gonzee (Nig.) Ltd v. NERDC* (2005) 13 NWLR (Pt. 943) 634 (SC). This is however a rebuttable presumption; *Ekpemupolo v. Edremoda* (2009) 8 NWLR (Pt. 1142) 166 S.C.; *Nuhu v. Ogele* (2003) 12 S.C. (Pt. 1) 32."Per OTISI, J.C.A. (Pp. 7-8, Paras. F-B) - [read in context](#)

(2016) LPELR-41201(CA)

ONYEKACHI AJA OTISI, J.C.A. (Delivering the Leading Judgment): The Appellant lodged this appeal against the judgment of the High Court of Akwa Ibom State, sitting at Ikot Ekpene Division, Coram Hon. Justice Stephen E. Okon, J. delivered on February 17, 2014, wherein the reliefs sought by the Appellant, as claimant, were granted in part.

The facts leading to this appeal as gleaned from the Record of Appeal are as follows: On or about 11/2/1997, the Appellant, who was a customer of the Respondent applied for an overdraft facility of N3,000,000.00 (Three Million Naira), from the Respondent to assist him boost his frozen fish trade. The sum of N1.5m (One Million, Five Hundred Thousand Naira) was approved by the Respondent. A Deed of Legal Mortgage was executed on May 13, 1997, over the Appellant's property covered by Certificate of Occupancy registered as 41/41/73 at the Lands Registry, Uyo. At the material time, the Appellant had substantial sums of money in his current and savings accounts domiciled with the Respondent. The Appellant operated the accounts with the approved overdraft. In the course of their relationship, disputes arose as to the state

A of indebtedness of the Appellant. The Respondent alleged
B that the Appellant had defaulted in the repayment of the
C overdraft sum and accrued interest therein and that the
D Appellant was indebted to the Respondent in the sum of
E N3,826,586.34 as at May 25, 2001. The Respondent made
demand for the repayment and also published Notice of
Sale of the mortgaged property in the Pioneer Newspaper
of June 25, 2001. The name and family house of the
Appellant was also published in the Daily Champion
Newspaper of December 17, 2002 as debtor/mortgagor.
The Appellant denied any subsisting indebtedness, claiming
that he had liquidated his indebtedness to the Respondent.
There was also a dispute over the interest rates and the
conditions of the overdraft facility. The Appellant took out
action against the Respondent in the lower Court. The
Respondent filed an Amended Statement of Defence and
Counter-Claim, to which the Appellant filed a Reply.

At the conclusion of hearing, the learned trial Judge
granted part of the reliefs sought by the Appellant and
dismissed the Counter-Claim. The Appellant being
dissatisfied with the said judgment lodged this appeal, out
of time but

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by leave of this Court granted on October 22, 2015. The
B Notice of Appeal was filed on October 29, 2015 upon six
grounds of appeal. Specifically, the part of the judgment
complained about is as follows:

1. The decision of the lower Court holding that the claim for
B refund of N4,849,814.28 custodied by the Respondent is
unsupportable and unacceptable.

a. The decision of the lower Court holding that there was
C no clear evidence on the interest rate which governs the
overdraft transaction between the Appellant and the
Respondent.

b. The refusal of the lower Court to resolve the controversy
D relating to sum of N1,078,065.000 wrongly
misappropriated from the Appellant's account by servants
of the Respondent.

c. The decision of the lower Court refusing to award
E damages for defamation of the Appellant using the criteria
of slander as the reason.

The parties exchanged Briefs of Argument, including the
Appellant's Reply Brief, which were respectively adopted
on 19/4/2016 by David G. Udo, Esq., for the Appellant, and
F by Ms. T. Akinlalu, Esq., of Counsel, who adopted the
Respondent's Brief settled by Lady Helen Egube. Out of the
six grounds of
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A appeal, learned Counsel for the Appellant, distilled six
B issues for determination, which were adopted by the
Respondent, as follows:

1. Whether case deposits and case withdrawal transactions
B between a customer and a bank represented by confirmed
vouchers can be used for reconciliation purposes and
determination of obligation between the disputant parties
C particularly where the banker refused to issue a statement
of account when demanded by the customer.

2. Whether the criteria of proving libel are the same with
the criteria of proving slander in defamation of character
D matters.

3. Whether the content of an admissible document can be
contradicted by the content of an inadmissible document.

4. Whether the trial Court was right in failing to resolve the
E issue relating to wrongful case withdrawals from the
Appellants' account amounting to N1,078,065.00 which was
not controverted by the Respondent.

5. Whether there was any evidence from the Respondent to
F contradict the case of the Appellant or create any weight in
the other side of the Justice scale against the case of the
Appellant.

6. Whether it was the duty of the Appellant to prove
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the interest paid on the overdraft facility and how much He had paid back when the Appellant had actually proved that the Respondent was custodying his funds amounting to N4,849,814.28 and N1,078,065.00 after the overdraft facility had been fully refunded.

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In response to the submissions of the Appellant on Issue No 1, learned Counsel for the Respondent contended that the Appellant had failed, omitted or deliberately refused to file along with the Record of Appeal the proceedings and evidence taken at the lower Court. That with this omission, the issue for determination cannot be resolved in favour of the Appellant as the appeal has to be heard on complete records. Reliance was placed on **Olorunyolemi v. Akhagbe (2010) ALL FWLR (Pt. 525) 246 at 257**. I consider this contention by the Respondent to be in the nature of a preliminary objection which ought to be resolved first.

At page 6 paragraph 4.03 of the Respondent's Brief learned Counsel for the Respondent submitted:

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"Appellant(sic) Counsel failed, omitted and or deliberately refused to file along with his Records of Appeal the proceedings and evidence taken before the lower

Court.

Submit that Records of Appeal must consists of not merely all processes so filed by parties at the lower Court, but also evidence and records of proceedings showing the respective dates of events before the lower Court.

See **Positive v. Ugbane (2004) All FWLR (Pt. 219) p. 1171 at p. 1173 Held 1.**

Submit that this omission by Counsel is deliberate and calculated to pull wool over the eyes of this Honourable Court. Thus, based on this deliberate and fraudulent act of the Appellant, issue one in entirety can not be resolved in favour of the Appellant."

Reliance was placed on the case of **Olorunyolemi v. Akhaghe (2010) ALL FWLR (Pt. 525) 246 at 257.** Learned Counsel for the Respondent by these submissions attacked the completeness of the Record of Appeal.

In response to these submissions, learned Counsel for the Appellant at paragraph 3.02 at page 3 of the Reply Brief stated:

"Documents tendered as exhibits were front-loaded by parties at the trial Court and upon certification by the lower Court registry, form part of the record of this appeal. However exhibits tendered by both parties at the trial Court were separately

A forwarded by the Registrar of the trial Court to the
B Registrar of this Court under a secured arrangement in late
C December 2015."

D By virtue of the provisions of Order 8 Rule 1 of the Court of
E Appeal Rules, 2011, the responsibility to compile and
F transmit the record of appeal primarily rests on the
G registrar of the lower Court and he must do so within sixty
days after the notice of appeal is filed. In compiling the
records, the registrar is to summon the parties before him
to settle the documents to be included in the record of
appeal and fix the amount to be deposited by the Appellant
to cover the estimated cost of making up and forwarding
the said record of appeal, Order 8 Rule 2. Where notice has
duly been served on the parties and they fail to attend to
compile records, the registrar may proceed to compile the
records in accordance with the Rules of Court, Order 8
Rule 3. Where the registrar of the lower Court fails to
compile and transmit the record of appeal, the appellant is
empowered to do so by virtue of Order 8 Rule 4.

A record of appeal, whether settled by the parties or by the
registrar where the parties fail to attend to compile the

records, is presumed to be correct and is binding on the Court and on the parties, **Gonzee (Nig.) Ltd v. NERDC (2005) 13 NWLR (Pt. 943) 634 (SC)**. This is however a rebuttable presumption; **Ekpemupolo v. Edremoda (2009) 8 NWLR (Pt. 1142) 166 S.C.**; **Nuhu v. Ogele (2003) 12 S.C. (Pt. 1) 32**.

The appellate Court has a duty to ensure the records are complete as settled by the parties. Where a respondent disputes the genuineness or authenticity of the record of appeal or of portions thereof, he is duty bound to depose to an affidavit to challenge the said record; which will be served on the judge or registrar of the lower Court and on the other party **Irawo-Osan v. Folarin (2007) LPELR-9040 (CA)**; **Orajeka v. Owuamalam (2011) LPELR-4883 (CA)**; **Itita v. Government of Cross River State (2010) LPELR-4341(CA)**. If the dispute of the respondent is with regard to the completeness of the record of appeal, the attention of the appellate Court must be called to this anomaly. Additional or supplementary records may be filed, pursuant to Order 8 Rule 6. If the additional or supplementary records are filed out of time, application to regularize same may be brought before the

A appellate Court. In any event, if the record of appeal is
B shown to be indeed incomplete, distorted or mutilated, the
C appellate Court cannot entertain the appeal; **Ekpemupolo**
D **v. Edremoda (supra)**.

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D settled by the parties. An appellate Court must be wary to
E hear an appeal on incomplete records unless the parties by
F consent agree that the appeal should be so heard.

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G witnesses and proceedings at the Arbitration of the dispute
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complete."

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"... the Court of Appeal is devoid of jurisdictional competence to hear an appeal based on incomplete record of appeal. It is indeed a well settled law, that an appeal from the lower Court shall be determined by way of a rehearing. As such the Court has the onerous duty to rehear fully and accord a second consideration to such aspects of the entire records of appeal, comprising the lower Court's proceedings and evidence adduced there at, to such extent as the ground of appeal demand."

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A exhibits.

B Learned Counsel for the Respondent had submitted that
C Issue No. 1 cannot be justly determined without the benefit
D of the missing portion of the record. However, the missing
E portion cannot simply affect a just determination of Issue
F No. 1 as distilled by the Appellant from the grounds of
G appeal. An appeal from the lower Court amounts to a
rehearing of the matter presented before the lower Court
for adjudication. All aspects of the matter, encompassing
the processes filed, the lower Court's proceedings and
evidence adduced there at, must be before the appellate
Court. Where there are portions missing from the record of
appeal, the appellate Court cannot pick and choose which
of the issues that have been distilled for determination can
sail with the incomplete record. The Court cannot speculate
on any missing record. If there are portions of the
proceedings before the lower Court which were not
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appeal places an attendant duty on the appellant to ensure that the appeal is prosecuted diligently and timeously. In prosecuting his appeal, the appellant is obliged to place before the appellate Court all the relevant materials on the issue he has brought before the appellate Court to rehear, consider and determine; **Nwana v. Federal Capital Development Authority (2007) 4 S.C. (Pt. II) 1**. The provisions of Order 8 Rule 4 underscore this point. However, an appeal cannot be entertained upon confirmed incomplete records.

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In this circumstance, the only order to make is to strike out the appeal. This appeal is accordingly hereby struck out. The Respondent is entitled to costs, which I assess at N50,000.00

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CHIOMA EGONDU NWOSU-IHEME, J.C.A.: I was given the opportunity to read in draft the judgment just delivered by my learned brother, O. A. OTISI, J.C.A. I agree with his reasoning and conclusion. I agree that in prosecuting his appeal which is his inalienable right, the Appellant must place before the Court all the relevant materials concerning the appeal.

Since it has been established that the Records are incomplete, the only safe and

A proper order is to strike out this appeal for being incompetent. I abide by the order awarding N50,000 costs in favour of the Respondent made by OTISI, JCA in the lead judgment.

PAUL OBI ELECHI, J.C.A.: I have had the singular privilege of reading in draft, the Judgment just delivered by my learned brother - Onyekachi Aja Otisi, JCA.

I agree with his Lordship entirely on the reasoning and conclusion that an Appellate Court cannot hear an appeal based on incomplete record of Appeal unless the parties by consent agree that the appeal shall be so heard which is not the case here.

Also, I agree with him that the only order to make is to strike out the appeal, and abide by the orders as to costs.