STOWE Vs. STOWE

(2012) 9 NWLR (Part 1306) Page 450

Stowing Justice with the sandbags of technicalities.

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INTRODUCTION

1. The decision of the Supreme Court in STOWE Vs. STOWE (2012) 9 NWLR Part 1306 Page 450 has once again stirred up a hornet's nest in the duty of our courts, particularly the Supreme Court, to prevent undue adherence to procedural technicality and defeat the ends of justice. The aspect of civil procedure that came up for consideration in that case was the legal effect of inserting the relief: "Whereof the Plaintiff claims as per writ of summons" in the statement of claim rather than set out the reliefs claimed in the writ of summons.

2. The appellants in the Supreme Court were the plaintiffs at the Port-Harcourt Division of the High Court of Rivers State. They commenced an action by writ of summons in October 1979 when the High Court (Civil Procedure) Rules Cap 61 Laws of Eastern Nigeria was the applicable rules governing civil procedure in Rivers State. When the plaintiffs filed their statement of claim, these reliefs claimed in the writ of summons were not repeated but they simply stated in paragraph 19 of the statement of claim **"Whereof the plaintiff claims as per writ"**.

3. The defendants did not at the trial court object to the drafting style used by the plaintiffs but participated fully in the proceedings until judgment. The learned trial judge TABAI J. (as he then was) delivered judgment on 10th October, 1990 and granted all the reliefs sought by the plaintiffs. On appeal by the defendants, one of the issues for determination was whether by stating in its statement of claim that "the plaintiffs claim as per writ", and the plaintiffs had abandoned the reliefs sought in its writ of summons and the reliefs granted by the trial court were "granted gratis".

STOWE AT THE COURT OF APPEAL

4. The Court of Appeal reversed the trial court's judgment on the ground that out of the seven reliefs granted, reliefs 3, 4 and 7 were not claimed at all. Even relief 2 (and by implication, 5 and 6) which appear to have been claimed in the writ of summons could not be granted since the statement "the plaintiffs claim

as per writ" in Paragraph 19 of the statement of claim tantamounts to the plaintiffs abandoning the reliefs in their writ of summons. (See STOWE Vs. STOWE (2001) 5 NWLR (Part 706) Page 394). The Court of Appeal relied on Order 33 Rule 7 of the High Court (Civil Procedure) Rules Cap. 61 Laws of Eastern Nigeria 1963 (Eastern Nigerian Rules) which provides as follows:

> *"Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may ask for general relief, and the same rule shall apply to any counterclaim made or relief claimed by the defendant in his defence".*

5. His Lordship NSOFOR JCA delivering the leading judgment at the Court of Appeal recognized that as at the date judgment was delivered at the High Court, the Eastern Nigerian Rules had been abrogated and replaced by the High Court (Civil Procedure) Rules of River State 1987 ("Rivers State Rules") but still held that the Eastern Nigerian Rules were applicable because the writ of summons was filed on 30th October, 1979 long before (the Rivers State Rules) came into force on the 1st of September, 1987.

6. The Court of Appeal also relied on Article 19.10 of Practice and Procedure in the Supreme Court, Court of Appeal and High Court by T. A. Aguda where the learned author opined thus:

> *"At one time, it was thought that it was sufficient to end up a statement of claim by making reference back to the claim on the writ. But under the rules this will not be sufficient. Therefore the practice is to end the statement of claim by making specific claim in respect of each item on the writ. It is not permissible to say simply that whereof the plaintiff claims per his writ of summons".*

The Court of Appeal further relied on LEWIS Vs. DURNFORD (1907) 24 LTR 64, a decision of the High Court in England which, applying CARGIL Vs. BOWER (1878-1879) 10 Ch.D 502, held that where a plaintiff in his statement of claim omits part of his claim, he will be deemed to have abandoned that part.

7. The Court of Appeal consequently held that the relief in Paragraph 19 of the plaintiff's statement of claim as per writ "constitutes an abandonment of the

reliefs in the plaintiffs' writ of summons as the reliefs were not specifically set out in compliance with Order 33 Rule 7 of the Eastern Nigeria Rules. The Court of Appeal allowed the appeal and struck out the plaintiff's suit.

STOWE AT THE SUPREME COURT

8. The plaintiffs appealed to the Supreme Court. At the Supreme Court, the apex court's attention was drawn to the Supreme Court's decisions in ENIGBOKAN Vs. A.I.I. Co. (1994) 6 NWLR (Part 348) Page 1 **(ENIGBOKAN)**. OKOMU OIL PALM CO. LTD. Vs. ISERHIENHIEN (2001) 6 NWLR (PART 710) PAGE 660. **(OKOMU OIL)**. AJAYI Vs. JOLAYEMI (2001) 10 NWLR (PART 722) PAGE 516 **(JOLAYEMI)** which were decisions of the Supreme Court not considered at the Court of Appeal. His Lordship, RHODES VIVOUR JSC delivering the leading judgment applied ENIGBOKAN and held that the Court of Appeal came to the correct decision. CHUKWUMA ENEH JSC delivering a concurring opinion referred to OKOMU OIL where the Supreme Court held that where the statement of claim states that the plaintiff claims as per the writ of summons, the reliefs claimed in the writ of summons is deemed incorporated into the statement of claim and becomes part of it.

9. The learned Justice also considered JOLAYEMI where the Supreme Court held that even if the prayer in a statement of claim that a plaintiff claims "as per writ" makes it defective, a defendant who participates in the trial without objecting to this defect will not be permitted to raise the objection at address stage.

10. Notwithstanding the reference to these cases, His Lordship refused to apply them but held as follows:

> *"However, in the instant case, the applicable law and rule rest on the fact that the statement of claim must state specifically what is being claimed and that to state thus "as per the writ of summons" in the statement of claim as the prayer or as to the reliefs sought in the statement of claim is not permitted under the rules. In other words that this requirement under the rules is mandatory. The plaintiff is required to state in full in the statement of claim, what the plaintiff has claimed as per the writ otherwise the reliefs as contained in the writ will be deemed abandoned, in that case, the statement of claim stands without any reliefs sought as the reliefs as claimed*

in the writ is deemed abandoned. This view is supported by decision per Iguh, JSC in ENIGBOKAN Vs. AMERICAN INTERNATIONAL INSURANCE CO. (NIG). LTD. (1994) 4 NWLR (PT 348) 1 AT 20, PARAGRAPH F-H".

11. FABIYI JSC, in his concurring opinion made no reference at all to OKOMU OIL and JOLAYEMI but applied ENIGBOKAN. NGWUTA JSC held that the plea "whereof the plaintiff claims as per writ" "contravenes the applicable High Court Rules (and that) it is a departure from the decisions of the apex court discussed in the lead judgment". PETER-ODILI JSC delivering the concurring opinion also applied ENIGBOKAN.

THE SUPREME COURT AS A COURT OF LAST RESORT

12. Striking out a plaintiff's claims on the ground that he claims in his statement of claim "as per writ of summons" rather than repeat the reliefs claimed in the writ of summons, appears, even at first sight to be rather harsh and unjust. A plaintiff who is victorious after having his case heard on the merits will expect to lose the case only if the trial court was wrong on the merits or that the court lacked jurisdiction. It is for this reason that one needs to examine STOWE critically to see whether the Supreme Court was right in affirming the judgment of the Court of Appeal.

13. As a court of last resort, it is expected that the Supreme Court will take care to ensure that every basic or manifest error is avoided, that successful party gets judgment on the merits, precedent is comprehensively discussed and properly applied, statutory or rule interpretation is scrupulously examined and where any decision is hinged on whether non-compliance with rules of court will result in a nullity or an irregularity, the Supreme Court will lean in favour of the latter except when it is obvious that circumstances otherwise dictate.

AN UNSATISFACTORY RESTATEMENT OF CASE LAW

14. The first fundamental flaw in STOWE is the inaccurate restatement of the case law on supersession of the writ of summons by the statement of claim. As at

the date STOWE was decided, there was no decision of the Supreme Court wherein it was held that where a plaintiff claims (in his statement of claim) as per writ of summons, such claim supersedes the writ and would be deemed to be an abandonment of the reliefs claimed in the writ of summons.

15. In ENIGBOKAN, the legal effect of a plaintiff claiming "as per writ" did not arise for determination at all since the relief in the statement of claim was not so framed. What was decided was that the Court of Appeal was in error when it held that relief (1) claimed in the writ of summons was still subsisting when by its non-inclusion in Paragraph 38 of the fourth amended statement of claim, it must be taken to have been abandoned. (See the dictum of OGUNDARE JSC at Page 16 of the Report).

16. It is curious that RHODES-VIVOUR JSC in delivering the leading judgment in STOWE ignored OGUNDARE's judgment in ENIGBOKAN but preferred the concurring opinion of IGUH JSC. PETER-ODILI JSC went as far as saying that "the principles in KESHINRO Vs. BAKARE (have) since been abandoned in that (the Supreme Court) has laid down in no uncertain terms what the practice is and that was stated in ENIGBOKAN…….". Needless to say, <u>all</u> the learned Justices cited the dictum of IGUH JSC (a concurring opinion) with approval with PETER-ODILI stating that ENIGBOKAN had approved KESHINRO Vs. BAKARE.

MISAPPLICATION OF BINDING PRECEDENT

17. It is submitted therefore that the Supreme Court misapplied ENIGBOKAN since the issue that arose for determination in STOWE did not arise at all in ENIGBOKAN. However, the point arose directly in some other decisions of the Supreme Court, two of which were discussed but not applied by CHUKWUMA- ENEH JSC. These are OKOMU OIL and JOLAYEMI. The other decision not mentioned at all in STOWE is EKPEMUPOLO Vs. EDREMODA (2009) 8 NWLR (PART 1142) PAGE 166.

18. In OKOMU OIL, the Supreme Court had to interpret Order 13 Rule 7 of the High Court Civil Procedure Rules of Bendel State (which rule is in pari materia Order 33 Rule 7 of the Eastern Nigeria Rules).

UWAIFO JSC delivering the leading judgment held as follows:

> *"I think reference in a statement of claim to the writ for the reliefs claimed makes the statement of claim complete as it incorporates the writ: It is accepted that the synonym of the word "incorporate" includes, roll into one, merge, link with join together, fuse, assimilate: see Barlett's Roget's Thesaurus, 1st Edition, paragraph 753.15 at page 663 and paragraph 757.9 at page 668. I am satisfied that Ubaezonu JCA was right in his observation in Owena Bank case (supra) at pp. 714-715 that "where a statement of claim states that the plaintiff claims 'as per writ of summons', the claim in the writ of summons is incorporated in the statement of claim and becomes part of it". Once there is such incorporation, the statement of claim is taken to contain the relief stated in the writ, which statement of claim would otherwise have been defective and contrary to the requirements of Order 13 Rule 7 reproduced above".*

19. In JOLAYEMI, the Supreme Court appeared to have differed from OKOMU OIL in that the Court held that the relief "the plaintiff therefore claims as per writ of summons" offends Order 25 Rule 12(3) of the Kwara State High Court (Civil Procedure) Rules (in pari materia Order 13 Rule 7 considered in OKOMU OIL). OGUNDARE JSC (who incidentally delivered the leading judgment in ENIGBOKAN) held as follows:

> *"Admittedly, there has been no strict compliance with the above rule. What the plaintiff has done in paragraph 19 of his statement of claim was to incorporate the writ of summons in the said statement of claim. There is at the worst an irregularity here. The irregularity was not objected to at the earliest opportunity. The 1st defendant did not, in his original statement of defence, raise any objection to paragraph 19 of the statement of claim. Neither did he do so in his amended statement of defence. In both documents he raised a counter claim but said nothing about the seeming irregularity in the plaintiff's statement of claim. It was only in the final address of learned Counsel to the 1st defendant that learned Counsel mentioned for the first time the irregularity in his statement of claim (see page 533)"*

The learned Justice further opined at page 535

> *"The 1st defendant ought to have raised this objection before pleading to the statement of claim. Having pleaded to it and having allowed a full blown*

trial to be held. I think it is too late for the 1st defendant to raise the issue at the address stage. This is more so that at no time was the 1st defendant misled as to the claims of the plaintiff which he answered fully to both in his pleadings and evidence – see KESHINRO VS. BAKARE (1967) ANLR 299. In the circumstances of this case, although I have held that plaintiff's statement of claim is defective in that it offends Order 25 Rule 12(3) of the trial Court's rules, this is a mere irregularity which could have been cured by amendment, on terms, if objection had been raised at the appropriate stage. The 1st defendant having pleaded to the pleading cannot raise the issue of the defect more so that there has been no miscarriage of justice".

20. BELGORE JSC (who was also involved in ENIGBOKAN) concurred. It is interesting to observe that none of the learned Justices made any reference to ENIGBOKAN (although OKOMU OIL was not also discussed). In EDREMODA, what was to be decided was whether the relief "whereof the plaintiff claims as per their writ of summons" was in violation of Order 13 Rule 7 of the Bendel Rules. TABAI JSC (who as a High Court Judge decided STOWE) had no difficulty applying OKOMU OIL. The learned Justice refused to apply ENIGBOKAN (cited by the opposing counsel).

21. A review of these cases show that when STOWE came before the Supreme Court for consideration, the legal effect of the relief "whereof the plaintiff claims as per writ" would either be decided on OKOMU OIL or AJAYI Vs. JOLAYEMI but definitely not on ENIGBOKAN. By ignoring OKOMU OIL, JOLAYEMI and EDREMODA, the Supreme Court created great confusion and instability in the application of the doctrine of judicial precedent. Binding precedent was not just overlooked but with regard to CHUKWUMA-ENEH JSC blatantly ignored.

22. As if that was not enough, when the same issue came up for decision a year later in GARAN Vs. OLOMU (2013) 11 NWLR PART 1365 PAGE 227, the Supreme Court expressly disapproved the application of ENIGBOKAN and approved OKOMU OIL. M.D. MOHAMMED JSC delivering the leading judgment held thus:

"In Okomu Oil Palm Ltd. Vs. Iserhienrhien (supra), this court per Uwaifo JSC has amply clarified the principle the court stated in Enigbokan Vs. American International Insurance Co. Nig. Ltd (supra).

It is clear from the subsequent decision that the lower court is manifestly in error in its application of the principle to the facts of the case at hand. In the Okomu Oil Palm Co. Ltd. case, like in the instant case, the plaintiff in his writ of summons had sought specific reliefs but did not repeat the reliefs at the end of his amended statement of claim, instead, he concluded by saying "whereof the plaintiff claims as per writ of summons". The issue this court considered in the Okomu Oil Palm Co. Ltd. case, the very issue that has resurfaced in the instant appeal, is whether the court below is wring to have found the appellant's similar pleadings unavailing to him because of its being bereft of any reliefs and/or a breach of the trial court's adjectival rules."

Later on in the judgment, the learned Justice held as follows:

"Learned appellant counsel is on a firm terrain in his submission that the appellant who has "claimed per his writ of summons" in his statement of claim has competent grievance which the lower court wrongly adjudged he does not disclose. A process is said to supersede another if it is subsequent to and completely severed from that order. Once there is interconnectivity between the process that was first in time and the subsequent process, the latter cannot be rightly said to have superseded the former. For supersession of an earlier process by a subsequent process to occur there must be a complete disconnect between the two imposed by the fact of the one completely occupying the place or role of the other."

STOWE SHOULD BE OVERRULED

23. Regrettably, STOWE was not cited in GARAN Vs. OLOMU neither did His Lordship NGWUTA JSC who was involved in both cases discuss it in his "concurring" opinion, in which he even came to a decision contrary to the leading judgment on that point. The Supreme Court, (as the case law on the point now stands) has not helped lawyers with respect to what is the legal effect of the relief "whereof the plaintiff claims as per writ of summons". However, one thing is sure. Such a relief in the statement of claim cannot amount to an abandonment of the reliefs claimed in the writ of summons. OLOMU OIL, EDREMODA and GARAN stand together whilst JOLAYEMI takes the middle course. However, STOWE is at the opposite end applying ENIGBOKAN which with respect has nothing to do with the issue raised and determined in STOWE. It is submitted that STOWE must be taken to have been wrongly decided not only because it failed to properly review existing case law but also because it misapplied the case law it reviewed. The Supreme Court

should take the next available opportunity to properly restate the case law on the point and restore certainty to judicial precedent.

IS PROCEDURAL LAW APPLICABLE PROSPECTIVELY?

24. Another reason why STOWE ought to be overruled is that the Supreme Court made an error in law with regard to whether rules of procedure should operate prospectively or retrospectively. It is an elementary principle of law that procedural law existing at the time of the hearing of the case whether at the trial or on appeal applies to the prosecution and defence of the case. It does not matter whether the procedural law comes into force before or after the cause of action arises or has arisen and whether before or after an appeal is filed or has been filed. See ROSSEK Vs. A.C.B LIMITED (1993) 8 NWLR (PART 312) PAGE 382. The Supreme Court therefore ought to have applied the 1987 Rivers State Rules rather than the Eastern Nigeria Rules. FABIYI and PETER-ODILI JSC were wrong when they held that the "applicable rules of court" were the rules in existence when the suit was filed on 30th October, 1979. The 1987 Rules provide in Order 2 Rule 1 thus:

> *1) Where in beginning or purporting to begin any proceedings, or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings, or any document, judgment or Order therein.*
>
> *2) The Court may on the ground that there has been such a failure as mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein, or it may exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with proceedings generally as it thinks fit.*

25. Had the 1987 Rules been applied, there could not have been any room for holding that "the statement of claim is naked as regards reliefs claimed" (RHODES-VIVOUR JSC) or that "the use of the word "shall" (in Order 33 Rule 7) points to mandatory realm" (FABIYI JSC). The Supreme Court also applied the opinion of T.A. Aguda as if it were binding precedent. The opinion of authors, however reputable such authors are, can only be persuasive. It is

surprising that the Supreme Court did not see AGUDA's opinion this way but preferred this opinion to OLOMU OIL or even JOLAYEMI. Whichever way one looks at it, STOWE was wrongly decided and ought to be overruled.

CONCLUSION

26. The doctrine of judicial precedent is of utmost importance in the administration of justice. Different panels of an appellate court ought to ensure that they do not give an impression that judicial precedent is like a pendulum swing according to the whims of the Justices in each panel. It is submitted that STOWE was not with elementary laden errors of law, the decision as a judgment of the highest court in the land is, to put it mildly, embarrassing. STOWE has now stowed the stream of justice with the sandbags of needless technicality. The earlier they are removed, the better.

Oluwemimo Ogunde, SAN