

IN THE TAX APPEAL TRIBUNAL
SOUTH WEST ZONE
HOLDEN AT IBADAN

APPEAL NO.: TAT/IB/048/2020

BETWEEN

UNION BANK NIGERIA PLC

APPELLANT

AND

ONDO STATE INTERNAL REVENUE SERVICE

RESPONDENT

Reply on Point of Law to the Respondent's Written Address Dated 15 June 2020

1. Introduction

This reply on point of law (the "Reply") is in response to the Respondent's written address dated 15 June 2022 filed in opposition to the Appellant's objection to the delivery of judgment on Respondent's counterclaim. In support of the objection, the Appellant has filed a 5-paragraph affidavit deposed to by Levi Chiefuna, Esq. (the "Affidavit"). One exhibit is attached to the Affidavit. We rely on all the paragraphs of the Affidavit.

2. Summary of the Respondent's new points

In its written address, the Respondent raised the following new points –

- (a) The Appellant's objection to the delivery of the judgment in the counterclaim constitutes an abuse of the court process because it purports to arrest the Tribunal's judgement.
- (b) *Aberuagba v Oyekan* (2020) 2 NWLR (Pt. 1707) 165 C.A. does not apply to the instant appeal.
- (c) The Tribunal may deliver a separate judgment on the counterclaim or the same or different day with the judgment in the main appeal because the counterclaim is a separate action.
- (d) By the authority of *Duru v Ladipo* (2016) All FWLR (Pt. 840) 1348; and *Obolo v Iluoyenikan* (2013) LPELR- 20324 (CA), the Tribunal is not functus officio from delivering judgment on the Respondent's counterclaim, even though it has struck out the appeal.

3. Reply

The Appellant's objection to the delivery of the Tribunal's judgment in the counterclaim constitutes an abuse of the court process

- 3.1 The Respondent argued that the Appellant's counsel's objection will have the effect of arresting the Tribunal's judgment, and is therefore improper and an abuse of the court process. We submit that the Respondent's arguments on this point are misconceived and misleading. Arrest of judgment contemplates an attempt to forestall the already fixed judgment of the court to obtain an unwarranted advantage or an eleventh-hour relief that falls outside the rules of court (*Ukachukwu v PDP & ors.* (2013) LPELR- 21894 (SC)). In *Newswatch Communication Ltd v. Attah*, which was cited by the Respondent, the defendant filed an application specifically seeking an arrest of judgment so it may enter a defence in the suit.
- 3.2 We submit that the case of *Newswatch Communication Ltd. v Attah* (supra) is distinguishable from the instant appeal on the ground that the Appellant's objection is neither intended to obtain an undue advantage nor to obtain an eleventh-hour relief not supported by the Tribunal's Rules. By the objection, the Appellant's counsel, as ministers in the temple of justice, have performed their duty to assist the Tribunal in the dispensation of justice (*Ankuma v Suleiman & anor.* (2022) LPELR – 57244 CA) by raising the point that the Tribunal lacks the jurisdiction to deliver another judgment in a proceeding it had struck out and concluded. The objection therefore does not amount to an attempt to arrest of the additional judgment because the Appellant does not by the objection seek to obtain any undue advantage or relief. We urge the Tribunal to so hold.
- 3.3 In the result, we also contend that the objection is not an abuse of the court process as it is not an improper use of the judicial process, nor is it intended to irritate or annoy the Respondent. (See *R-Benkay Nigeria Ltd. v Cadbury Nigeria Ltd.* (2012) LPELR- 7820 (SC). See also *Ukachukwu v PDP & ors.* (supra).)
- 3.4 We also contend that it is not true, as the Respondent has represented at paragraph 3.1 of its written address, that the Tribunal had, at the time it delivered judgement in this matter on 13 April 2022, "reserved judgement on the counterclaim", and the Appellant waited until 27 May 2022 before objecting to the delivery of the judgement on the counterclaim. The Tribunal did not reserve any part of its judgement when it delivered the judgement in the appeal on 13 April 2022. In fact, it was when the Appellant's counsel received an SMS message from the registry of the Tribunal that this appeal was coming up for "judgement on the counterclaim" on 23 May 2022 that the Appellant became aware that the Tribunal intended to deliver an additional judgement (see paragraph 4 of the Affidavit).
- 3.5 In the event, we submit that the Appellant did not knowingly wait until the date scheduled by the Tribunal for the delivery of the additional judgement before objecting to same, as erroneously argued by the Respondent. As such, the Respondent's argument that the Appellant has abused the process and was seeking to "arrest the judgement" of this Honourable Tribunal is based on erroneous facts. We humbly urge the Tribunal to so hold.

Aberuagba v Oyekan does not apply to the instant appeal

- 3.6 The Respondent argued laboriously that *Aberuagba v Oyekan* (supra) does not apply to the instant appeal on the grounds that (a) it involved a land matter, and (b) the originating processes were void because they were not signed by a legal practitioner. The Respondent

further argued that the counterclaim can only be affected if and only if the court declined jurisdiction because of the voidness of the originating process.

- 3.7 We submit, contrary to the Respondent's argument, that the principle established in *Aberuagba v Oyekan* (supra) applies to the instant appeal.
- 3.8 The principle established in *Aberuagba v Oyekan* (supra) is that although a counterclaim is separate from the main suit to which it is grafted, a counterclaim cannot be founded on an incompetent proceeding over which the court cannot exercise jurisdiction. The reason for which the proceeding is declared incompetent is immaterial. It suffices that the court reached its decision on any of the bases set out in by the Supreme Court in *Madukolu v Nkemdilim* (1960) FSC 344, namely (a) the court is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction, and (c) the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction
- 3.9 In addition, we also submit that the argument by the Respondent (in paragraph 4.3 of the Respondent's written address) that the requirement of pre-action notice being a statutory requirement in favour of the Respondent, it does not operate against it, is misleading. The Respondent did not cite any judicial authority in support of this strange argument because there is none. We submit that this argument by the Respondent is an attempt to waive the requirement of pre-action notice, which the Respondent had by itself made the basis of its objection against the appeal, and which objection this Honourable Tribunal had sustained. The Tribunal cannot permit the Respondent to approbate and reprobate (*Canal Inv. Ltd. v. Tourist Countryside Resorts Ltd* (2017) 3 NWLR (Pt. 1553) 441 C.A.).
- 3.10 We respectfully urge this Honourable Tribunal to so hold.

The counter claim being a separate action, the court must deliver a separate judgment for it whether or not on the same date as the judgement on the main appeal

- 3.11 Relying on *Orojo v Adeniyi* (2017) LPELR 41985 SC, the Respondent argued that a counterclaim is a separate claim in which a court is bound to deliver a separate judgement, and that such separate judgement may be delivered on the same date with the judgement on the main claim, or may be delivered on a different date. Whilst we agree with the foregoing authority and argument of the Respondent, we submit that our objection is not against the delivery of the judgement on the counterclaim on a different date.
- 3.12 Rather, the Appellant's objection is against the delivery of the judgement on the grounds that (a) the Tribunal no longer has the jurisdiction to entertain the counterclaim having struck out the whole proceedings, (b) the proposed judgement amounts to an additional judgement, because the Tribunal did not reserve judgement on the counter claim on 13 April 2022 when it delivered the extant judgement in the appeal; and the Tribunal, with respect, can therefore not reconvene to deliver judgement in a proceedings it had struck out, and (c) since the proposed judgement is not a correction of the extant judgement, then it amounts to

an additional judgement and the Tribunal being functus officio in the appeal, lack the jurisdiction to deliver the additional judgement.

- 3.13 We also submit that this instant appeal constitutes an exception to *Oroja v Adeniyi*, (supra). This is because the question of whether a counterclaim tied to an incompetent proceedings or claim can survive the death of the main claim, as clearly considered in *Aberuagba's* case was not considered by the Supreme Court in *Oroja v Adeniyi* (supra). In the result, we submit that *Oroja's* case (supra) is clearly distinguishable from the instant appeal, and cannot be regarded as an authority for what it did not decide (*Adesokan & ors. v Adetunji & ors.* (supra)). We humbly urge this Honourable Tribunal to so hold.

By the authority of *Duru v Ladipo* (2016) All FWLR (Pt. 840) 1348 at 1372; *Obolo v Iluoyenikan* (2013) LPELR- 20324 (CA), the Tribunal is not functus officio from delivering judgement on the Respondent's counter claim, even though it struck out the main appeal

- 3.14 The Respondent argued, relying on the Court of Appeal authorities of *Duru v Ladipo* (2016) All FWLR (Pt. 840) 1348 C.A. and *Obolo v Iluoyenikan* (2013) LPELR- 20324 (CA), that the Tribunal is not functus officio from delivering judgment on the Respondent's counter claim, even though it has struck out the main appeal.
- 3.15 We urge the Tribunal to note that none of the authorities decided (a) the issue of when a court or tribunal becomes functus officio, and (b) their decisions do not also touch on the issue of whether the main claim is struck out or dismissed on the grounds of failure to fulfil a precondition for the exercise of jurisdiction by the court, as is the case in the present appeal. In the event, we humbly submit that *Obolo v Iluoyenikan* and *Duru v Ladipo* can be distinguished from the present case because they do not agree "in facts and in legal principles" (*Adesokan & ors. v Adetunji & ors.* (supra)). We urge the Tribunal to so hold.
- 3.16 In addition, *Obolo v Iluoyenikan* (supra), and *Duru v Ladipo* (supra) were decided by the Court of Appeal in 2013 and 2015 respectively. And it is clear that the two decisions are in conflict with *Aberuagba v Oyekan* (supra) which was delivered in 2018. Accordingly, *Aberuagba v Oyekan* is the most recent decision, and is thus, with respect, the binding authority on the Tribunal, when placed side by side with *Obolo v Iluoyenikan* (supra) and *Duru v Ladipo* (supra).
- 3.17 We rely on *Olawoye v Bello* (2015) LPELR – 24475 (CA), in which the Court of Appeal held that when a lower court is faced with two conflicting decisions, the later in time should be adopted. We further rely on *Oji & anor. v Ndukwe & ors.* (2019) LPELR – 48226 (CA), where the Court of Appeal per Lokulo- Sodipe JCA at p. 47 held thus:

“The law would appear to be settled that a Court below this Court cannot on its own, elect to choose which one out of the conflicting decisions, or perceived conflicting decisions of this Court, it is to follow. This is just as this Court and indeed any other subordinate Court in the judicial hierarchy of this country, have no power to elect which one out of any conflicting decisions of the Supreme Court, it will or should follow. The Supreme Court has made it abundantly clear that in line with the principle of *stare decisis* and strict recognition of its supremacy as it were, this Court must follow its decision that is later in time in the event any of its conflicting decisions, are placed before this

Court in respect of any matter in contention before it (i.e. Court of Appeal). See in this regard the case of OSAKUE V. FEDERAL COLLEGE OF EDUCATION (TECHNICAL) ASABA (2010) 5 SCM 185.”

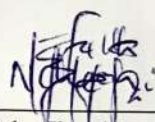
- 3.1 On the whole, for the reason that the Tribunal does not intend to correct any clerical or typographical error in the judgment but to deliver an additional judgment, it is our contention that the Tribunal is *functus officio*. In the alternative, if the Tribunal finds that it is not *functus officio*, it is our humble submission that the only order it can make is the striking out of the counterclaim, the Tribunal having struck out the appeal on which the counterclaim is grafted for want of jurisdiction. We respectfully urge the Tribunal to so hold.

4. Conclusion

- 4.1 On the basis of all the foregoing, we humbly urge the Tribunal to discountenance the Respondent’s arguments in opposition to this objection, and sustain the objection.

- 4.2 May it please the Tribunal.

Dated this 24th day of June 2022



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