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CASE DIGEST

AWARD OF DAMAGES IN AN ACTION FOR LOSS OF CARGO IN INTERNATIONAL CARRIAGE MUST BE IN LINE WITH MONTREAL CONVENTION AND SECTION 48 (1) CIVIL AVIATION ACT

Turkish Airlines v AL Uma Ventures Ltd
Court Of Appeal
(Lagos Division)

(MUHAMMAD IBRAHIM SIRAJO; ONYEKACHI AJA OTISI; ADEBUKUNOLA ADEOTI BANJOKO JJ.CA)

On the 24th of December 2011, the Respondent approached the Appellant, a foreign Airline that operates cargo services, to convey 182kgs of Hair attachments from Lagos to one Emile Musanbuku, a customer in Glasgow, United Kingdom. Upon the agreement of the parties to the terms of the contract, the Respondent paid the entire freight and other duties charged by the Appellant for the services to be rendered. The Appellant, however, failed to deliver the consignment of goods to the Respondent's customer in Glasgow or return the same to Lagos. The Appellant did not also return to the Respondent the value of the goods and all incidental expenses incurred despite demands to that effect, through correspondences, which were not responded to by the Appellant. Numerous meetings, telephone calls, entreaties, etcetera, were put forth to the Appellant, but all did not yield any positive result. Thus, the Respondent resorted to going to Court, and led its Originating Process before the Federal High Court, Lagos Division (trial Court).

Upon the Appellant failing to enter an appearance and to file their statement of defence after being served with the Respondent's originating process, the Respondent sought an order for judgment against the Appellant.

On this note, the Appellant, through its counsel, filed a motion on notice before the lower court for an extension of time within which he may file his Memorandum of Conditional Appearance as well as for a deeming order. A day after filing the first application, the Appellant filed another application seeking an order to set aside the motion for judgment filed by the Respondent, for being incompetent on the ground that it was signed by an undisclosed person.

On the hearing date, the Appellant drew the court's attention to his pending application for an extension of time to enter appearance and indicated his readiness to move the application. Counsel to the Respondent opposed the application on the ground that it did not comply with the rules as same was not accompanied with the Statement of Defence, List of witnesses, Statement of witnesses on oath and List of documents to be relied upon, and the court refused the application for non-compliance with the Rules.

Learned counsel for the parties further advanced arguments on which application should be heard first between the Respondent's application for judgment and the Appellant's application to set aside the purported service of the originating processes. On this note, the Appellant's counsel suggested that the two applications be taken together, but the Respondent's counsel objected to that suggestion. Upon taking the arguments, the trial court ruled that the Appellant was not properly before the court and so counsel on its behalf cannot be heard and its application cannot be taken. The trial court then heard the Respondent's application for judgment and proceeded to enter judgment for the Respondent as per his heads of claim.

This aggrieved the Appellant, and by a Notice of Appeal, appealed the decision of the trial Court before the Court of Appeal. One of the issues for determination is whether the Court below had jurisdiction to enter judgment and award damages in an action for loss of cargo in a sum exceeding the limit of liability for loss of cargo stipulated by the Civil Aviation Act CAP C13 Laws of the ederation of Nigeria 2004.

Learned counsel for the Appellant stated that the judgment sums totalled N4,184,140.00 (Four Million, One Hundred and Eighty-Four Thousand, One Hundred and Forty Naira only). He submitted that the contract between the Respondent and the Appellant, being one of carriage of cargo by air, the rights and duties of the parties are regulated by The Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Montreal on 28th May 1999, otherwise called The Montreal Convention, whose application has been domesticated in Nigeria by the Civil Aviation Act, CAP C13, Laws of the Federation of Nigeria, 2011, particularly, section 48 (1) thereof.

He submitted that by Article 29 of the Montreal Convention, a Plaintiff can only succeed in his claim where he can prove that he has complied with all the requirements of the Act and not based on the general rules of breach of contract or negligence, just as the common law reliefs to which a Plaintiff would have been entitled has now been whittled down and enshrined in a statutory provision. Placing reliance on **Abacha & 4 Ors. vs. Fawehinmi (2000) 6 NWLR (Pt.660) 228 @ 229**, counsel submitted that where an International Treaty has been ratified and domesticated into our laws, it becomes binding on our courts to give full effect to it. Learned Counsel referred to Article 22 (2) of the Montreal Convention on the limits of a carrier's liability for destruction, damage, or loss of cargo, and the 2009 upward review of the said liability by the International Civil Aviation Organization from 17 Special Drawing Rights (SDR) per kilogram to 19 SDR per Kilogram. He summed that the total sum of N4,184,140.00 (Four Million, One Hundred and Eighty-Four Thousand, One Hundred and Forty Naira only) awarded to the Respondent by the lower court was clearly above and outside the monetary limit of the Appellant's liability for compensation for the loss of the Respondent's cargo, which limit can only be exceeded under Article 22 (3) of the Montreal Convention.

In reply to the Appellant's Counsel, Respondent's Counsel argued that in the absence of defence to the Respondent's claim and counter affidavit to the motion for judgment, the lower court was right in awarding the value of the lost cargo, freight charges and damages to the Respondent for breach of contract. He submitted on the quantum of money awarded to the Respondent that the provisions of the Civil Aviation Act, were never raised before the lower court due to the absence of defence. Respondent's counsel maintained that the complaint of the Appellant under ground 2 of the grounds of appeal from which issue 2 was formulated is not predicated on the judgment appealed against, and therefore incompetent, he placed reliance on **Okolie vs. Marinho (2006) 15 NWLR (Pt.1002) 316; Adesina vs. Adeniran (2006) 8 NWLR (Pt.1011) 359 @ 374-375; THOR Ltd vs. FCMB Plc (2002) 4 NWLR (Pt.572) 427.** The Learned Counsel also argued in the alternative that even if the Appellant is allowed to raise the issue of the Civil Aviation Act and the Montreal Convention on the quantum of damages awarded to the Respondent, the decision of the trial court cannot be reversed as the same was founded on the unchallenged evidence before it. He cited as authority for this proposition, the cases of **Cameroon Airlines vs. Otutuizu (2005) 9 NWLR (Pt.929) 202 @ 224; Okonkwo vs. Onovo (1999) 4 NWLR (Pt.597) 110** and urged the court to resolve the issue against the Appellant and dismiss the appeal.

In resolving the issue, the Court held that:

Special Drawing Rights (SDR) are supplementary foreign exchange reserve assets defined and maintained by the International Monetary Fund (IMF). SDRs are units of account for the IMF and not a currency per se. They represent a claim to currency held by IMF member countries for which they may be exchanged. See Wikipedia, the online Encyclopedia at https://www.wikipedia.org. The value of SDR to a US Dollar fluctuates with time. For example, as of 6th April 2021, one SDR exchange for 1.42 US Dollars, but on 7th June 2022, while I was preparing this Judgment, one SDR exchange for USD 1.344766. As of 28th January 2013, when the Judgment now on appeal was entered, the exchange rate of one SDR to a dollar was 1.536 on the website of the International Monetary Fund (IMF). The rate was higher in January 2013 than it is today. It follows therefore that the maximum damages that can be awarded to the Respondent under Article 22 (2) of the Montreal Convention for the loss of his consignment cannot exceed the product of 1.536 USD multiplied by 3,458 SDR, which equals USD5,311.448. In converting this amount to Naira, I accept the exchange rate of the US Dollar to the Naira as of 28th January 2013, submitted by the Appellant in paragraph 4.19, page 9 of its Brief, which was not contested by the Respondent. The exchange rate of 155.23 Naira to a US Dollar was gotten from the Central Bank at http://www.cenbank.org/Exchange Archives. asp. when the sum of 5,311.448 USD is multiplied by the exchange rate of the dollar to the Naira as of 28th January 2013 which was 155.23, the total sum will translate to ₦824,502.28. this is the limit of damages the lower court has power to award under the Montreal Convention. In awarding the Respondent the total sum of ₦4,184,140.00 (Four Million, One Hundred and Eighty-four Thousand, One Hundred and Forty Naira), **the lower Court has acted far in excess of its powers in the award of compensation/damages under the Montreal Convention. Consequently, the judgement cannot stand.**

Issue resolved in favour of the Appellant.
O.R Odjighoro for the Appellant.
Respondent, not represented, though served with hearing notice through counsel.
This summary is fully reported at (2022) 7 CLRN