



Right of Appeal and Cause of Justice

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Right of Appeal

The right to appeal against the decision of a court is not contained in any of the sections of the Constitution¹ on fundamental rights², but has been described as a fundamental right nonetheless³.

Recently, the Supreme Court of Nigeria examined the provisions of the Constitution on the right of appeal, in **Virgin Atlantic Airways v. Mrs. Francisca Pablo Amaran**.⁴ The Respondent in that case challenged the competence of the Appellant's proposed appeal⁵ on the grounds (among others) that the Appellant had no right of appeal against a garnishee order *nisi*, being an order made upon the hearing of a *motion ex parte*. The Respondent relied for this contention on the provision of Section 14 (1) of the Court of Appeal Act which provides that:

'(1) Where in the exercise by the High Court of a State or, as the case may be, by the Federal High Court of its original jurisdiction an interlocutory order or decision is made in the course of any suit or matter, an appeal shall, by leave of that court or of the Court of Appeal, lie to the Court of Appeal; but no appeal shall lie from any order made ex parte, or by consent of the parties, or relating only to costs.'

The Supreme Court in arriving at its decision on this point considered the provisions of Sections 1 (3), 241, 242, 243 and 318 of the Constitution, and held that the provision of Section 14 (1) of the Court of Appeal Act that no appeal shall lie from an order made *ex parte* was in conflict with sections 241, 242(1) and 243 of the Constitution, which prescribe the right to appeal to the Court of Appeal and do not limit the right to certain types of decisions, and that Section 318 of the Constitution defines a decision to mean any determination of the court. The court declared in conclusion that by virtue of Section 1(3) of the Constitution, Section 14(1) of the Court of Appeal Act was void to the extent of that inconsistency.⁶

¹ The Constitution of the Federal Republic of Nigeria 1999 (As Amended)

² Chapter IV, Sections 33-46 of the Constitution

³ A.G. Federation v. Bi-Courtney Limited (2014) LPELR-22968 (CA)

⁴ "The Virgin Atlantic Decision" (2021) 12 NWLR (Part 1789) 91

⁵ On an application for leave to appeal

⁶ Per Agim J.S.C. at pages 112-113

Analysis

Although the court in the Virgin Atlantic Decision rightly held that the Constitution does not prohibit an appeal to the Court of Appeal from a decision made *ex parte*, it is our respectful view that the Constitution does not confer a right of appeal from every decision of the High Court, contrary to the Virgin Atlantic Decision. The Constitution provides that there is no right of appeal against a decision of the High Court granting unconditional leave to defend an action or from an order absolute for the dissolution or nullity of a marriage where the party appealing had time and opportunity to appeal from the *decree nisi* but did not do so.⁷

The Virgin Atlantic Decision also throws up the vexed issue of the right to appeal to an appellate court against all decisions of the trial court, which is one of the major factors responsible for the delay in conclusive determination of matters before the courts.⁸ Considering the provision of Section 241 (2) of the Constitution which prohibits an appeal against two decisions which (in our view) may be termed as not prejudicial to the right of either party, and Section 243 (1) (b) of the Constitution which provides that a right of appeal to the Court of Appeal shall be exercised in accordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal, it is our view that the right of appeal to the appellate courts ought to be regulated and not left open to all decisions. Decisions which do not impede the determination of the substantive matter on the merits should not be open to appeal. This would include most decisions made upon motions *ex parte*.⁹

The Supreme Court recognized again, the situation created by the indiscriminate exercise of the right of appeal, in **Pillars Nigeria Limited v. William Kojo Desbordes & Anor.**¹⁰ when it observed¹¹ that:

⁷ Section 241(2)

⁸ Other factors include the court's docket which sometimes occasions long adjournments and the periodic transfer of judges resulting in the need to commence some hearings *de novo*

⁹ Decisions on motions *ex parte* are usually interim decisions which do not terminate the suit. However, an exception could be made for such decisions as garnishee orders *nisi* which was the subject of the Virgin Atlantic Decision, as it would be unjust to deprive a judgment debtor or a garnishee the right to appeal against a decision which would potentially deprive them of funds.

¹⁰ (2021) 12 NWLR (Part 1789) 122 which incidentally, was decided on the same date as the Virgin Atlantic Decision and the lead judgment also delivered by Agim J.S.C. as in the Virgin Atlantic Decision

¹¹ Per Ogunwumiju J.S.C. at page 144

The justice of this case is very clear. The appellant has held on to property regarding which it had breached the lease agreement from day one. It had continued to pursue spurious appeals through all hierarchy of courts to frustrate the judgment of the trial court delivered on 8/2/2000 about twenty years ago. After all, even if the initial notice to quit was irregular, the minute the writ of summons dated 13/5/1993 for repossession was served on the appellant, it served as adequate notice. The ruse of faulty notice used by tenants to perpetuate possession in a house or property which the landlord had slaved to build and relies on for means of sustenance cannot be sustained in any just society under the guise of adherence to any technical rule.'

The complaint of the appellant in this case at the Court of Appeal and the Supreme Court was that the respondent failed to plead and prove service of the statutory notices required by law. As rightly observed by Ogunwumiju J.S.C., whether a landlord served statutory notices or not, a tenant served with a writ of possession would know that he is required to give up possession. The question of statutory notices would thus only be important after filing an action in court, in determining whether the tenant ought to be given time to secure alternative accommodation. In our view, it would defeat rather than promote the cause of justice, to permit a tenant who does not dispute the title of the landlord or make some other claim (such as a claim that he is not in breach of any of the covenants of a lease and is being asked to give up possession contrary to the stipulated term of the lease), to appeal on the issue of the presence or validity of statutory notices.

It is noteworthy that the Supreme Court in the Virgin Atlantic Decision ultimately refused the appellant's application for extension of time to seek leave to appeal, leave to appeal and extension of time to appeal because the appellant failed to give good reasons for the delay in appealing, and the proposed appeal was deemed to be academic, because the Court of Appeal had stayed the garnishee proceedings being challenged by the appellant. However, we are of the view that the time expended in arriving at this decision¹² could have been saved by legislation or regulation limiting the right to appeal against decisions which do not affect the ultimate determination of the rights of the parties in the substantive suit, such as the appellant's proposed appeal to the Supreme Court in the Virgin Atlantic Decision against an order restoring a garnishee order *nisi* which had been stayed pending the determination of his appeal against the substantive decision.

¹² The judgment of the Court of Appeal against which the appellant appealed was delivered on 29 June 2018, and the decision on the appellant's application for leave to appeal was made on 5 February 2021, almost three years later

Recommendation

It is our recommendation that the appellate courts' enabling Acts and laws be amended to empower both courts to do a preliminary review of the Notices of Appeal filed in or transmitted to the courts, and administratively disallow appeals on subject matters which would not affect the determination of the substantive matter before the court. This would save the time expended in determining such appeals, and result in a speedier dispensation of justice. The provisions of the Constitution allowing appeals as of right and with leave of court should also be amended with these realities in mind.

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