



**COMMENTARIES ON SELECTED
JUDGEMENTS OF
HON. JUSTICE M.M.A. AKANBI**



**Edited by: I. A. Yusuf
M. M. Akanbi
A. T. Shehu**

HALLMARK
OF
JUSTICE
COMMENTRIES ON SELECTED JUDGEMENTS

OF

HON. JUSTICE M.M.A. AKANBI CFR, PCA (RTD)
THE WAKILI ILORY

Edited by: ***I. A. Yusuf***
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HALLMARK OF JUSTICE: COMMENTARIES ON SELECTED JUDGEMENTS OF
HONORABLE JUSTICE MUSTAPHA AKANBI

- 1. Judgement**
- 2. Justice, Administration of - Nigeria**

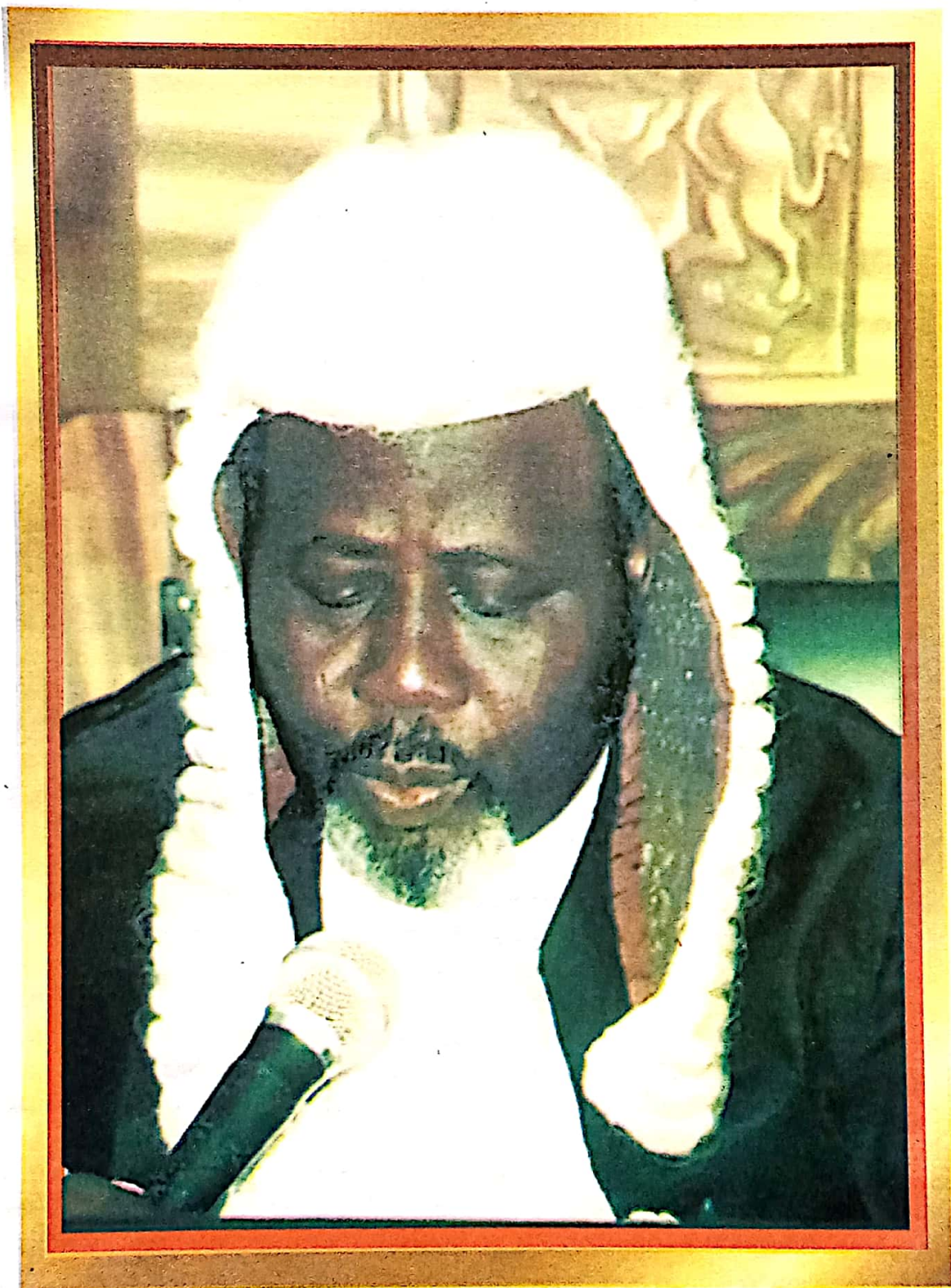
Added entry i. Faculty of Law, University of Ilorin, ed.

LC KR 1424.2 H172 2015 DDC 347.077
ISBN: 978-978-946-011-3 (pbk) AACR2

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2015

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Printed d bound by:-
UNILORIN PRESS
University of Ilorin, Ilorin, Nigeria



HON. JUSTICE M.M.A. AKANBI CFR, PCA (RTD)
THE WAKILI ILORY

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Chapter 14

Suit No: CA/L/146/92

Between:

GERHARD SEEDORFF.....PLAINTIFF

And

1. ARCHBODE ENGINEERING LIMITED

2. G.O OLUBODE

3. T.A. OLAYOKUN

.....DEFENDANTS

COURT OF APPEAL (LAGOS DIVISION) MUHAMMED MUSTAPHA ADEBAYO AKANBI J.C.C

(Presided and Read the Leading Ruling),

EMMANUEL OLAYINKA AYoola J.C.A,

MUHAMMED SAIFULLAHI MUNTAKA-COOMASSIE J.C.A.

Friday 5th May, 1995

Comment by G. M. Olatokun* and M.T. Adekilekun**

INTRODUCTION

The court of first instance decided in favor of the respondent and struck out the case on the grounds that no cause of action was disclosed and that the appellant did not have locus standi to prosecute the action. The court, as can be seen, based its conclusion on the general principle of the law on privity of contract.

FACTS OF THE CASE

In an action commenced in the Federal High Court, Lagos, the appellant herein a plaintiff claimed, *inter alia* to be entitled to have his name entered in the 1st respondent's "registered of members and share ledgers" as the registered holder to twenty-five thousand ordinary shares in the 1st respondent's company. A consequence of such registration would be to confer on him certain rights in the company including the right to assume the position of a 'Director or Managing Director' of the 1st

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respondent's company in place of one Mr. Kurt Eichbauer from whom the appellant had obtained A SHARE transfer from and a share certificate. The premises upon which the appellant based his claim in the main are a resolution of the Board of Directors of the 1st respondent registering the name of the appellant as the holder of shares formerly held by one expatriate I and a consent judgment in respect of and affecting the same set of shares. The respondent did not file any defence to the action but rather applied that the action be struck out on the ground that no cause of action was disclosed and that appellant did not have *locus stand* to prosecute the action. The motion was heard and determined in favour of the respondents. The appellant was dissatisfied and appealed to the Court of Appeal.

PRINCIPLES OF LAW ENUNCIATED IN THE JUDGMENT

The main principles of law identified in this judgment are two. These include privity of contract and the issue of shares, i.e., the nature of rights conferred by share certificate and the right of transferee of unregistered share.

a. Privity of Contract

As far as contract is concerned, a party who is not a party to a contract cannot benefit from that relationship. This principle of law is known as privity of contract.⁹⁸ It was the opinion of the court of first instance that, the appellant, not being a party to a resolution of the Board of Directors of the 1st defendant's company dated 1st August 1979 as well as a consent judgment entered into on 15th April 1981, cannot benefit from the two documents. However, based on the fact of the present case, the issues raised were neither based on contract nor breach of any form of contract.

What transpired between the parties was basically that the name of the appellant be registered as a proprietor/shareholder of 25,000 ordinary shares in the books of the company. These shares have been allegedly transferred by one Mr. K. Eichbauer to the appellant vide the two documents stated above. It appears, as rightly pointed out by Muhammed Mustapha Akanbi JCC (retired), that the judgment of the court of first instance misconceived the real issue before the court.

The respondents at the lower court rather than filing their defence to the action, applied that the action be struck out on the ground that no cause of action was disclosed and that the appellant did not have *locus standi* to institute the action. The trial court then found in favour of the respondents on the basis that the appellant was not a party to the contract. The learned trial judge found support for the conclusion he reached on the general principle of the law that no stranger to a contract *impersonam* has the right to enforce it, let alone acquire any benefit there under. He relied on cases

of *Ikpeazu Vs ACB Ltd*⁹⁹, *Dunlop Pneumatic Tyres Co. Ltd. Vs Selfridge Co. Ltd*¹⁰⁰ and other cases on the same principle.

However, in a lead judgment delivered by Hon Justice M.M. Akanbi PCA (Rtd) on appeal, the Court of Appeal held that the claim before the trial court was not based on contract because neither the writ nor the statement of claim alleges any breach of any contractual obligation. It is the cause of action which a court should look at before the determination of a case. See *Coop Bank Vs. Lawal*¹⁰¹

The claim before the court primarily was for a mandatory order that the Share Transfer Form and Share certificate No.2 given to him by Mr. Eichbauer be accepted for cancellation and "in its place, a Share Certificate dated 16th April, 1981" be issued in his name as the "registered proprietor/shareholder of 2,500 ordinary shares of One Naira each fully paid" in the books of the company. It is this claim that the respondents challenged by a motion before the trial court on the grounds inter alia that he was not a party to the consent judgement and/or the resolution of the board and the trial court upheld the objection.

It is submitted that the trial court misconceived this issue by holding that the appellant was not a party to the contract with the respondents. It is apparent from the claims before the lower court that it was not based on the issue of contract but rather on transfer and registration of shares.

Even though the Court Of Appeal found that the claim was not based on contract, it went further to consider the exception to the rule of privity of contract which the trial court ought to have considered. This is because, the case of *Dunlop Pneumatic Tyres Vs Selfridge (Supra)* which was cited with approval in *Ikpeazu V ACB (Supra)* recognises that property rights may in some cases be enforced by a person who is not a party to the contract. This is clear from the opinion expressed by *Viscount Haldeane* in *Dunlop V Selfridge (Supra)* thus;

"Our law knows nothing of *jus question tertio* arising by way of contract. Such a right may be conferred by way of property as for example, under a trust but it cannot be conferred on a stranger to a contract as a right to enforce the contract in person."

The law therefore allows in special circumstances the enforcement of property rights by a person who is not a party to the original contract as it is in the present case.

99 (1965) NMLR 374
100 (1915) AC 847
101 (2007) INWLR (Pt 1015) 287.

Therefore, the Court of Appeal was right in its decision when it held that the appellant has acquired an equitable interest in the shares.

b. Shares

i. Nature of Rights Conferred by Share Certificate

Shares are personal property and are transferable in a manner prescribed by the company's article.¹⁰² Mr. K. Eichbauer who retires from the 1st defendant company has the right to transfer his shares as his property to the appellant in this case.¹⁰³

A company may not register a transfer of shares unless a proper instrument of transfer has been delivered to the company.¹⁰⁴ A proper instrument of transfer for this purpose is an instrument appropriate/suitable for stamp duty purposes. In this case, a proper instrument of transfer is the share transfer form and share certificate No 2 given to the appellant by Mr. K. Eichebauer, on his transfer of shares.

Having delivered a proper instrument of transfer to the company, the company must within 2 months after a transfer of any shares complete and have ready for delivery the relevant share certificate.¹⁰⁵ In this case, the period between the time which the shares was transferred from the transferor to the transferee and the time when the case came up for hearing has exceeded 2 months.

In terms of the process of transfer, the process involves a proper instrument of transfer (i.e., a paper form) and a (paper) share certificate. The company gives effect to the transfer or transmission by removing the transferor from the register of members and inserting the name of the transferee.¹⁰⁶ The company cancels the share certificate in the name of the transferor and issues a new certificate in the name of the transferee. As long as this is not done, the transferee holds an equitable interest in the share;¹⁰⁷ here lies the real issue in this case.

The refusal by the directors of a company not to register any transfer must be done in good faith and the Company Act has provided that directors must exercise their powers for the purpose for which they are conferred and must have the progress of the

¹⁰² Brenda Hannigan, "Company Law" Oxford: Oxford University Press (2009) 339; See also, Abbott K. R., "Company Law" 5th Ed Great Britain: Guemseu Press Co Ltd (1993) 132.

¹⁰³ Hannigan, "Company Law", 340.

¹⁰⁴ Ibid.

¹⁰⁵ Abbott K. R., "5th Ed", 138; See also, Hannigan, "Company Law", 327; See also, Dennis Keenan, "Smith & Keenan's Company Law for Students" London: Pitman Publishing (1996) 198.

¹⁰⁶ Hannigan, "Company Law", 326.

¹⁰⁷ Per Akanbi PCA (retired) in *Gerhard Seedorff v Archbode Engineering Limited & 2ors* CA/L/146/92

company at heart knowing fully well that a shareholder may petition for relief when he sees that the company's affairs are being conducted in an unfair manner.¹⁰⁸ A share certificate confers a proprietary right and like any other property belonging to a person, it can be transferred or sold by the shareholder.¹⁰⁹ The shares are transferable in the manner provided in the articles unless the contrary is established by evidence.¹¹⁰ It is trite law that a contract for the sale of shares may be enforced by an order of specific performance. See the case of **African Continental Seaways Vs Nigerian Dredging Roads And General Works Ltd.**¹¹¹

In essence, the transferee or purchaser may have remedy against the company if it fails to honour its obligations. - See **Skinner V The City Of London Marine Insurance Corporation.**¹¹²

ii. Right of Transferee of Unregistered Shares

The law is that, the transferor remains a legal holder of the shares until the name of the transferee is entered into the company's register. Before the transferee can sue, the share certificate must have been delivered together with the registration fee to the company and his name must have been entered into the register of members of that company. Section 151(2) of the Companies and Allied Matters Act Cap. 59, Laws of the Federation of Nigeria, 1990 provides:

Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares in the company, unless a proper instrument of transfer has been delivered to the company:

Provided nothing in this section shall prejudice any power of the company to register, as shareholder, any person to whom, the right to any shares in the company has been transmitted by operation of the law.

The above quoted provision is still the law, and this decision was also affirmed in the Supreme Court case of **A.G Lagos State Vs Eko Hotels Ltd.**¹¹³

¹⁰⁸ The case at hand reveals that the directors of the company have refused to register the appellant as a share holder in the company. Where a person is entitled to a share certificate and the company refuses to issue it, an order may be made that the company issue the certificate and rectify the register of members. See, Kiser D. Barnes, "Cases and Materials on Nigerian Company Law" Nigeria: Obafemi Awolowo University Press Limited (1992) 314 and 317; See also, Hannigan, "Company Law", 346.

¹⁰⁹ See S 115 of the Companies and Allied Matters Act, 1990.

¹¹⁰ Ibid

¹¹¹ (1997) 5 SC 235, 244.

¹¹² (1882) 14 QBD 882.

¹¹³ (2006) 18 NWLR (pt1011) 378 at 4.

RELEVANCE OF THE JUDGMENT TO CURRENT POSITION OF THE LAW:

In **New Resources International Limited & Lofty Investment Nigeria Limited V Ejike Oranusi**,¹¹⁴ it was held that shares are in the nature of personal estate and freely transferable, subject to the statutory restrictions and articles of the company. Hence, a member of a company like Mr. K. Eichbauer has the right to transfer shares belonging to him and this right is unfettered.

Just like the present case relied very much on the Companies and Allied Matters Act, it has been held that acquisition of shares in a company is matters regulated by the CAMA. The transfer of shares in a limited liability company must be registered and appropriate paper filed, per Rhodes-Vivour JSC in **A.O. Afolabi & 6ors V Western Steel Works & 2ors**.¹¹⁵

Section 310(2) of the Companies and Allied Matters Act states that, the word 'member' in Section 311 to 313 of the Act includes: any person to whom shares have been transferred or transmitted by operation of law. In the case under consideration, the appellant can be said to be a member of the company. See the case of **Wilson V Okeke**.¹¹⁶

The learned judge in the case under consideration has rightly made a declaration in order to protect the member of the company. The learned judge has found that the court of first instance had a misconception about the case by basing its judgment on privity of contract, and has rightly ordered a trial denovo when he sees that the purported action by the director of the company will affect the appellant's individual right as a member of the company.¹¹⁷

CONCLUDING REMARKS:

It is a settled law that any person to whom shares have been transferred/transmitted is a member of the company. Consequently, such member has the right to have his name registered as transferee of shares by the directors of the company. The refusal by the director of the company to comply with this law as seen in the case under consideration prompted the appellant in this case to sue in the court of law, demanding that his name be registered in the register of members of the company as a shareholder. The trial judge has thus, acted rightly, by allowing the appeal and

¹¹⁴ (2011) 2 NWLR pt 1230 at 107.

¹¹⁵ (2012) 17 NWLR pt 1329 at 303

¹¹⁶ (2011) 3 NWLR pt 125 at 456-478

¹¹⁷ See *Wilson v. Okeke* (Supra) at 472-473.

consequently, remitting the case to a lower court for a trial *denovo* before another judge in the high court.

It is not on record that this case was decided upon by the Supreme Court of Nigeria. However, all the sound judicial principles enunciated in this case are still the law. Even if this Court of Appeal's decision were to be appealed against, there is every possibility that the Supreme Court of Nigeria would have affirmed the sound judgment handed down by his Lordship Hon. Justice M. M. Akanbi, PCA (Rtd).

It is worthy of note that the decision in **Gerhad Seedorff V Archbode Engineering Limited & Ors (Supra)** which was delivered almost two decades ago still stands the test of time and similar position has also been stated by the Supreme Court of Nigeria in **A.G Lagos State V Eko Hotels Limited (Supra)**. Finally, the lead decision of my Lord Hon. Justice Mustapha Akanbi PCA (RTD) remitting the case to the lower court for a *trial denovo* was most commendable because there was no oral hearing of the case by the court below.

Suit No: CA/L/146/92

Between:

GERHARD SEEDORFF.....PLAINTIFF

And

1. ARCHBODE ENGINEERING LIMITED

2. G.O OLUBODE

3. T.A. OLAYOKUN

.....DEFENDANTS

COURT OF APPEAL (LAGOS DIVISION) MUHAMMED MUSTAPHA ADEBAYO AKANBI J.C.C
(Presided and Read the Leading Ruling),

EMMANUEL OLAYINKA AYoola J.C.A,

MUHAMMED SAIFULLAHI MUNTAKA-COOMASSIE J.C.A.

Friday 5th May, 1995

COMPANY LAW – Share – Registration of share – who can apply for - Whether transferor or transferee – Relevant consideration.

COMPANY LAW – Share – Unregistered share – Transferee therefore –Right of

COMPANY LAW – Share – certificate – Right conferred thereby – Nature of

COMPANY LAW – Share – certificate not yet registered – Right confirmed thereby –

Nature of.

COMPANY LAW – Privities of contract – Stranger to a contract – Whether can enforce contract – When can enforce contract.

Issue:

Whether the learned trial Judge was right in holding that the appellant not being party to both the resolution and the consent Judgment has no *locus standi* to sue to and enforce the right conferred on him by the said resolution and consent judgment.

Facts:

In an action commenced in the Federal High Court, Lagos, the appellant herein a plaintiff claimed, *inter alia*, to be entitled to have his name entered in the 1st respondent's "registered of members and share ledgers" as the register holder to twenty-five thousand ordinary shares in the 1st respondent company. A consequence of such registration would be to confer on him certain rights in the company including the right to assume the position of a 'Director or Managing Director' of the 1st respondent company in place of one Mr. Kurt Eichbauer from whom the appellant had obtained A SHARE transfer from and a share certificate.

The premises upon which the appellant based his claim in the main are a resolution of the Board of Directors of the 1st respondent registering the name of the appellant as the holder of shares formerly held by one expatriate and a consent judgment in respect of, and affecting the same set of shares. The respondent did not file any defence to the action but rather applied that the action be struck out on the ground that no cause of action was disclosed and that appellant did not have *locus standi* to prosecute the action. The motion was heard and determined in favour of the respondents. The appellant was dissatisfied and appealed to the Court of Appeal.

Held: (unanimously allowing the appeal)

1. *On nature of right conferred on holder of share certificate not yet registered.*

A party who has obtained a share transfer form and a share certificate from its original holder but yet to register same in his name acquires an equitable interest in the shares. (P. 229. Paras. G-H)

PER AKANBI PCA at pages 229-230, paras. H-A:

"The Transfer Form and Share Certificate No: 02 given to him by Eichbauer *Prima facie* show that the later has parted with his shares in the company to the appellant. Exhibit B, the resolution of the Board unequivocally approved of the transfer and it has not been alleged that a new resolution has been passed to alter the situation. As a matter of fact there is nothing to show that the Board or the

respondents have made up their mind to refuse to register the appellant's name. It has not been averred that a notice of refusal has been sent to the transferee vide Section 153(1) of the Companies and Allied Matters Act (Cap. 59) of the Laws of the Federation. See also in *Re Hackney pavilion Ltd.* (1924) 1 Ch 276 at 280."

2. *On when stranger to contract can enforce same:-*
Property rights may in some cases be enforced by a person who is not a party to the contract. But it cannot be conferred on a stranger to a contract as a right to enforce the contract in person. [*Ikpeazu v. A.C.B Ltd* (1965) NMLR 374 referred to] (P.230, paras. C-D).
3. *On Nature of right conferred by share certificate –*
Share certificates confer proprietary right and like any other property belonging to a person it can be transferred or sold by the shareholder. The transferee or purchaser may have a remedy against the company if it fails to honour its obligation (P. 230 paras. D-E).
4. *On Right of transferee of unregistered share –*
Until the name of the transferee of a share is so registered, the transferor remains the legal holder of the shares (P. 230. Paras. E-F)
5. *One Proper person to apply for registration of shares –*
Although section 152 of the Companies and Allied Matters Act, 1990 provided for the registration of transferee of share at the request of the transferor, several other authorities state that the transfer is the proper person to apply for registration of transfer of shares although the transfer may also apply. (P. 231. Paras. A-B)

Per AYOOLA, J.C.A. at page 231, paras. A-D;

"It is noteworthy that notwithstanding that Section 77 of the (English) Companies Act 1948 is substantially in the same terms as Section 152(1) of the companies and Allied Matter Act, 1990 (Cap 59) which provided for registration of transfer of share at the request of transferor, several authoritative English books on Company Law, of which Halsbury's Law stated that the transferee is the proper person to apply for registration. In Halsbury's (op. cit) at para. 410 there is this passage:-

"the transferee is the proper person to apply for registration, but the transferor may also apply (Emphasis mine). It would appear that both Section 77 of the of the English Act and Section 152 of C.A.M. do not have the consequence of excluding the transferee from applying to have the transfer registered but merely permitted the transferor also to take such step.

In several case applications to court to order the Directors to have the transfer registered have been made jointly by the transferor and the transferee. One case in which such application was made by the transferee only is *Re Copal Varnish Company Ltd* (1917) 2 Ch 349 in which it was held that the transferee was entitled to an order directing the company to register the transfer. That order was made notwithstanding that, as recognized by Eve J in that case, until the registration of the transfer, the transferee has only an equitable interest in the shares"

Nigerian Case Referred in the Judgement

Ikpeazu v. A.C.B. Ltd (1965) NMLR 374

Foreign Cases Referred to in the Judgement

Dunlop Pneumatic Types Company Ltd v. Selfridge & Company Ltd (1915) AC 847

In Re Copal Varnish Company Ltd (1917) 2 h 349

In Re Hackney Pavilion Ltd. (1924) 1 Ch 276

London Foundries Association v. Clarke (1838) QBD 576

Skinner v. The City of London Marine Insurance Corporation (1885) 14 QBD 882.

Nigeria Statute Referred to in the Judgement

Companies and Allied Matter Act, Cap 59, Law of the Federation of Nigeria, 1990 S. 152(1).

Foreign Cases Referred to in the Judgement

Companies Act 1948 (English), S.77

Book Referred to in the Judgement

Halsbury's Laws of England 3rd Ed. Vol. 6 p. 259 para. 538

Appeal:

This was an appeal against the judgement of the Federal High Court, which struck out the appellant's action for want of *locus stand*. The Court of Appeal, in an unanimous decisions, allowed the appeal.

History of the case:**Court of Appeal**

Division of the Court of Appeal to which the Appeal was brought Court of Appeal, Lagos.

Names of the Justices that sat on the Appeal: Mohammed Mustapha Adebayo (PCA) (Presided and Read the Leading Judgement). Emmanuel Olayinka Ayoola JCA, Mohammed Saifullahi Muntaka Coomassie, JCA.

Appeal NO. CA/L/146/92

Date of Judgement: Friday, 5th May, 1995.

Names of Counsel: Chief A.C. Tagbo – for the Appellant

G.A. Oniya – for the Respondent

High Court:

Names of the High Court: Federal High Court, Lagos.

Name of the Judge: Jinadu, J.

Suit No: FHC/L/12/81

Date of Ruling: Monday, 30th March, 1992.

Counsel:

Chief A.C. Tagbo – for the appellant

G.A. Oniya – for the respondent

Akanbi. P.C.A. (Delivering the Leading Judgment)

In an action commenced in the Federal High Court, Lagos, the plaintiff claimed inter alia to be entitled to have his name entered in to first defendant's "register of members and share ledgers" as the registered holder of twenty-five thousand ordinary shares in the first defendant company. A consequence of such registration would be, to confer on him certain rights in the company including the right to assume the position of a "Director or Managing Director" of the 1st defendant company in place of one Mr. Kurt Eichbauer from whom the plaintiff had obtained a share transfer form and a share certificate.

The premises on which the plaintiff based his claim in the main can be gathered from the following paragraphs of his statement of claims:-

- 4 By a Resolution of the Board of Director of 1st defendant Company dated 1st August 1979, the 1st defendant resolved as follows:-
- "(1) The shares of the non resident removed from that company since his share holdings have been sold.
 - (2) The shares of the non resident investment in the Company which was previously held by Mr. Mr. K. Eichbauer should be registered in the name of Mr. G. Seedorff and that the balance of the equity of N8,600:00 being the foreign investment should be called for immediately to complete the 25% share holding of the original paid up capital of 100,000:00
 - (3) Mr. K. Eichbauer retires from the Company and Mr. G. Seedorff takes his place."
5. Plaintiff avers that said sum of N8,600.00 was paid by Mr. K. Eichbauer to complete the 25% shareholding (by the expatriate investor) of the original paid up capital of 100,000 ordinary shares so that the plaintiff could promptly take the place of Mr. K. Eichbauer.
6. In consequence, the parties in the action in Suit No. FHC/L/12/81 filed Terms of Settlement dated 6th day of April 1981 upon which a consent Judgement was entered on 15th April 1981, paragraph 3 thereof states as follows:
- "Note:- No Transfer of any of the Shares comprised in this Certificate will be registered until the certificate has been delivered at the Company's Office."

The defendants did not file any statement of defence; but instead filed a motion pursuant to Order XXVIII Rule 1 of the Federal High Court (Civil Procedure) Rules 1976, that the action be dismissed on the grounds that: -

"The Statement of Claim discloses no cause of action against the defendant in that:-

- (a) the plaintiff not being a party to the consent judgement or the resolution of the Board is not competent to bring this action; and
- (b) Any action based on the resolution is statute barred."

This motion was heard by the Federal High Court on 24th February, 1992 and a considered ruling was delivered on 30th March 1992. In the said ruling, the learned Judge in the court below found that on the evidence before the Court, the plaintiff was neither a party to the "consent judgement" Exhibit A, nor to Exhibit B, the resolution on which he had sought to found his case; and not being a party to either, he could not

derive any benefit therefore. In the result, he held that the plaintiff had neither the *locus stand* to sue, nor a cause of action against the defendants and so dismissed the claim in *limine*.

Being dissatisfied with the decision, the plaintiff thereafter called the appellant has lodged an appeal in the matter. Initially, two grounds of appeal were filed, but these were with leave of Court, amended to bring up to three. It is unnecessary to set out these long and windy grounds of appeal. Nor do I find it necessary to set out all the various issues identified for determination in the appellant's brief. They can all be encompassed in or accommodated within the single and precise issue identified by the respondent in this matter. The one issue raised by the respondent reads as follows:

"Whether the learned trial Judge in the Court below was right in holding that the plaintiff/appellant not being a party to both the resolution and the consent judgement has no *locus stand* to sue to enforce the right conferred on him by the said resolution and consent judgement."

It is common ground that the appellant was not a party to the so-called "consent judgement". He was not a party in the proceedings (i.e. Suit No. FHC/L/12/81) even though the enrolled order in that case specifically enjoined the plaintiff therein (Mr. Kurt Eichbauer) to sell;

"His N25,000 twenty-five thousand Naira) Shares in Archibode Engineering Limited to Mr. Seedorff (*the plaintiff in this case*) or any other person or persons named by him" (in italics supplied)

Equally so, there is no dispute that the appellant was not a party to the resolution of the company made on 1st August, 1979. In fact, he could not have been, since at the material time, he had not acquired shares in the company. Only Mr. Eichbauer, whose share certificate was turned over to the appellant and Chief C.M. Olubode, who was described as the Chairman of the Company would appear to have participated in the passing of the resolution.

For the sake of clarity, however, I reproduce below the resolution in full:-

"A RESOLUTION"

Present: Chief C.M. Olubode (Chairman)

Mr. K. Eichbauer

In Attendance:

M.A. Solaja (Mrs)

J.A.A. Adeniyi & Co. (Auditor)

- (1) Mr. M.Y. Agboola should be removed from the Company since his share holdings have been sold.

- (2) The shares of the non resident investment in the Company which was previously held by Mr. K. Eichbauer should be registered in the name of Mr. G. Seedorff and that the balance of the equity of N8,600.00 being the foreign investment should be called for immediately to complete the 25% share holding of the original paid up capital of 100,000.
- (3) Mr. K. Eichbauer retires from the company and Mr. G. Seedorff takes his place."

It is evident from the above that the appellant by this resolution was expected to take the place of Mr. Eichbauer and have his name registered accordingly against the shares hitherto held by the latter who was to retire from the company. And it is also significant to note that by this resolution, Mr. M.Y. Agboola has also ceased to be a member of the company, leaving perhaps only Chief C.M. Olubode to run the show. But that is neither here nor there.

The respondents have argued and the lower Court has held that the appellant not being a party to the so-called consent judgement (Exhibit A) or the resolution (Exhibit B) has neither the *locus stand* to sue nor a maintainable cause of action. The learned trial Judge found support for the conclusion he reached on the general principle of law that no stranger to a contract in personam has the right to enforce it, let alone acquire any benefit there under: He relied on the following cases: *Ikpeazu v. A.C.B. Ltd* (1965) NMLR 374; *Mercantile Bank of Nigeria Ltd. V. Abusonwam* (1986) 2 NWLR (Pt. 22) 270; *Tweedle v. Atkinson*; (1861) 1 B7S393; *Dunlop Pneumatic Tyre Co. Ltd. Selfridges & Co. Ltd.* (1915) AC 847.

It however, appears to me that a lot of confusion has been introduced into this matter largely because the nature and import of the claim before the Court was not fully appreciated by both the Court and the parties to the action. The claim before the Court clearly was not founded on contract. For neither the writ nor the statement of claim alleges any breach of any contractual obligation. And the enrolled order (Exhibit A) variously described as a consent judgement as well as the resolution of 1st August, 1979 (Exhibit B) cannot by any stretch of imagination be regarded as a deed or agreement or a contract document.

The appellant in this case has not claimed to have entered into any contract with the respondent. The claim before the Court primarily was for a mandatory order that the share Transfer From and Share Certificate No. 02 given to him by Mr. Eichbauer be accepted for cancellation and "in its place a share certificate dated 16th April, 1981" be issued in this name as the "registered proprietor/shareholder of 25,000 ordinary shares of N1.00 each fully paid" in the books of the company.

It is this claim that the respondents sought to defeat by filing motion on 21st November, 1991. The motion questions the competence of the appellant to bring the action albeit on the grounds *inter alia* that he is not a party to the "consent judgement" and/on the resolution of the "Board". The judgement I dare say misconceives the real issue before the Court. The claim is not dependent upon whether or not the appellant was a party to Exhibit "A" or "B". The issue is, has the appellant any right or interest in the shares sought to be registered in his name? It seems to me he has acquired an equitable interest. See *In Re Copal Varnish Company Ltd.* (1917) 2 Ch. 349 at 354. But whether such interest is registrable or not is not for me to say at this stage.

The Transfer Form and Share Certificate No/02 given to him by Eichbauer *prima facie* show that the latter has parted with his share in the company to the appellant Exhibit B, the resolution of the Board unequivocally approved of the transfer and it has been alleged that a new resolution has been to alter the situation. As a matter of fact there is nothing to show that the Board or the respondents have made up their mind to refuse to register the appellant's name. It has not been averred that a notice of refusal has been sent to the transferee vide Section 153(1) of the Companies and Allied Matters Act (Cap. 59) of the Laws of the Federation. See also *in Re Hackney Pavilion Ltd.* (1924) 1 Ch 276 at 280.

The difficulty in this case stems from the fact that it was decided on demurer and has not gone through to full trial. What is more the judgement of the trial Court as I have tried to show above, was based on the misconception that Exhibits "A" and "B" were contract documents to which the appellant was never a party. The same reasoning permeated the argument in this Court to the extent that it was not even appreciated that the case of *Dunlop Pneumatic Tyres Company Ltd v. Selfridge & Company Ltd* AC 847, which was cited with approval in *Ikpeazu v. A.C.B. Ltd* (1965) NMLR 374 recognizes that property rights may in some cases be enforced by a person who is not a party to the contract. This is clear from the opinion expressed by Viscount Haldane L.C. in *Dunlop v. Selfridge (supra)* that:-

"Our Law knows nothing of Jus question tertio arising by way of contract. Such a right may be conferred by way of property as for example, under a Trust but it cannot be conferred on a stranger to a contract as a right to enforce the contract in person." (Italics supplied for emphasis)

Clearly, share certificates confer proprietary rights and like any other property belonging to a person, it can be transferred or sold by the shareholder. The transferee or purchaser may have remedy against the company if it fails to honour its obligation. See *London Foundries Association v. Clarke* (1838) QBD 576 at 582. See also *Skinner v. The City of London Marine Insurance Corporation* (188) 14 QBD 882.

But that as it may, it appears to me that it is the desire to enforce the right to have his name on the register of members as the transferee of the shares of Eichbauer that prompted the appellant to sue. For until his name is so registered, the transferor remains the legal holder of the share and that may give rise to some complication perhaps not contemplated when the resolution of 1st August, 1979 was passed by the company.

Finally, because there has been no oral hearing in this case, and issues were joined in certain respects, I refrain from making any comment on the powers of the Board of the Company to refuse the registration, or as to who can compel such registration or at whose instance a legal transfer can be effectuated. In so far as I am concerned, it is enough for the reasons already stated to hold that the reasons given by the learned trial Judge for the dismissal of the action is untenable and unjustified.

This appeal therefore succeeds, and it is hereby allowed. The judgement of the trial Court is accordingly set aside. The case is remitted to the lower Court for a trial *denovo* before another Judge of the High Court. The appellant is entitled to the costs of the appeal assessed at N1,000.00.

AYOOLA, J.C.A.

I have had the privilege of reading in advance the judgement delivered by my learned brother, Akanbi, President, Court of Appeal. I entirely agree with the conclusion he arrived at that this appeal be allowed and with the reasons he has clearly given for that conclusion. I need only add a few comments purely as a matter of academic interest. It is noteworthy that notwithstanding that Section 77 of the (English) Companies Act 1948 is substantially in the same terms as section 152(1) of the Companies and Allied Matters Act, 1990 (Cap 59) which provided for registration of transfer of shares at the request of transferor, several authoritative English books on Company Law, of which Halbury's Law stated that the transferee is the proper person to apply for registration. In Halbury's (op.cit) at para. 538 there is this passage:-

"The transferee is the proper person to apply for registration, but the transfer may also apply (Emphasis mine)."

It would appear that both Section 77 of the English Act and Section 152 of C.A.M.A. do not have the consequence of excluding the transferee from applying to have the transfer registered by merely permitting the transferor also to take such step.

In several cases applications to court to order the Directors to have the transfer registered have been made jointly by the transferor only is *Re Copal Varnish Company*

Ltd (1917) 2 Ch 349 in which it was held that the transferee was entitled to an order directing the company to register the transfer. That order was made notwithstanding that, as recognized by Eve J in that case, until the registration of the transfer, the transferee has only an equitable interest in the shares. I am in entire agreement with the view held by my learned brother Akanbi, P.C.A that Jinadu .J. misconceived the basis and purport of the appellant's claim when he treated it as one to enforce a contract and imported into the case the doctrine of privity of contract. For these and the fuller reasons which are contained in the judgement of Akanbi P.C.A I too would allow the appeal. I abide by all consequential orders made by my learned brother Akanbi, P.C.A

MUNTAKA-COOMASSIE, J.C.A

I have had the privilege of reading in draft the judgement of my learned brother, Akanbi, P.C.A.

I agree with his reasoning and conclusion and abide by all the consequential orders made therein.

Appeal allowed.