

SUPREME COURT OF NIGERIA
23RD JULY, 1993. SC.20/1988
CORAM:- A. G. KARIBI-WHYTE, S. KAWU,
S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI, JJSC

MIKE OMHENKE OBOMHENSE APPELLANT

AND

RICHARD ERHAHON RESPONDENT

*APPEALS - Conditions necessary to be satisfied before appeal
is struck out - conditions not fulfilled - whether
appeal was rightly struck out*

*ADJOURNMENTS - Refusal by court to grant adjournment to appellant -
whether appellant is denied fair hearing thereby*

*COURTS - Reliance by court - on a ground not raised by appellant
- and not supported by evidence- to dismiss appeal -
whether proper*

*INTERPRETATION- Construction of statutory provisions - 06 r 2 Court of
OF STATUTES Appeal Rules 1981 - where ordinary plain words will
be absurd - duty of the court*

*PRACTICE & PROCEDURE - Periods within which briefs of argument must
be filed by parties - whether the time begins to run from the time of a c -
tual collection of record of proceedings - or time of receipt of registrar's
invitation*

*PRACTICE & PROCEDURE - Failure of Appellant to collect record of
proceedings in time - Respondent applying to court to dismiss the appeal-
appellant in turn applying to file additional grounds of appeal - whether
Appellant's conduct amounts to laxity - sufficient to lead to dismissal of
the appeal*

FACTS

The Appellant as plaintiff in the High Court brought an action against the respondent for trespass, injunction etc. The High Court of the then Bendel State after hearing the case dismissed the Appellant's case in its

entirety. The Appellant filed a notice of appeal on the 31st day of May, 1982 and in April 1987, the High Court wrote the parties informing them that the record of proceedings was ready for collection. The Respondent promptly collected his own but the Appellant did not collect his until six months after. The Respondent then brought a motion to dismiss the Appellant's appeal for want of diligent prosecution. The Appellant in turn filed a motion for leave to amend his notice and grounds of appeal, thereby filing additional grounds. Both motions were considered together. The Court of Appeal after refusing an application for adjournment by the Appellant dismissed the Appellant's Appeal as prayed by the Respondent. The Appellant has now appealed against the ruling of the Court of Appeal to the Supreme Court on grounds of fair hearing and that the ruling is not supported by the provisions of the rules relied on by the Respondent.

HELD (unanimously allowing the appeal)

1. The two conditions for striking out or dismissing an appeal which are absent when the case is called for hearing and not filing the declaration in accordance with provisions of the Court of Appeal Rules 1981, have not been satisfied in this case as the Appellant was present when the case was called on for hearing. (p.90 L39)
2. It is a well established principle that where a relief or remedy is claimed under a wrong law but is supported by facts establishing the remedy, the claim will not be denied merely because of the wrong law relied upon. (Falobi v. Falobi (1976) 1 NMLR 169 applied) (p.91 L11)
3. Merely because a record of proceedings was not collected till six months after the Appellant was invited to do so could not be regarded as evidence of laxity. And that fact alone, without more is not sufficient to dismiss an appeal. (p.92L20)
4. Although failure to file brief of argument is a ground for dismissal under 0.6 r. 10 of the Court of Appeal Rules 1981, as the Appellant (before the lower court) did not rely on that ground, the Court cannot make for him the case he did not consider reasonable to make or which is not supported by evidence. (p.92 L24)
5. The Court of Appeal was wrong in the view that applying for leave to file and argue additional grounds of appeal, instead of applying

for extension of time to file brief of argument is ipso facto evidence of apathy in the prosecution of the appeal. It is rather a matter of exercise of professional judgment which may be unwise but certainly not evidence of apathy. (p.93 L21)

6. It is an important principle for the construction of the provisions of a statute that where the words are clear and unambiguous, they must be given their ordinary meaning. In the instant case, the words used must be given their ordinary literal meaning since there is nothing in the rule to qualify or modify them. (p.95 L15)
7. As the object of interpretation is to discover the intention of the law maker from the language used in the legislation, the court is not expected to introduce its own words into the enactment (p.95 L20)
8. In construing a statutory provision, its object which is of paramount importance is always important. For this reason, the mischief aimed at by the provision construed is relevant to explain, but not change what was said by the law maker. (p.95 L24)
9. The reason for prescribing periods within which Appellant is to file his brief of argument is to accelerate the hearing of appeal and avoid delays. Hence, in construing the words of O.6r 2, where a reliance on the ordinary plain words will result in a meaning not intended and in absurdity, the court's duty in such a situation is to adopt a construction that will give effect to the provision. (p.95 L30)
10. It is a canon of Interpretation to construe a provision *ut res magis quam pereat*, that is, to save it and avoid making nonsense of the statute by interpretation, in order not to defeat the manifest intention of the law. (p.95 L38)
11. Although Appellant's advocacy that time for filing brief of argument should run as from the date of collection of record of proceedings is clearly the rule. Where in the instant case, Appellant collected the records six months after he was invited to collect it, to hold that time will run from the date of collection will leave the time to run at the whims of the Appellant thereby making nonsense of the rule and defeat the mischief the rule is

designed to prevent. (p.96 L5)

12. It is a reasonable formulation to postulate that the 60 days time for Appellant to file his brief of argument should begin to run from the actual date of receipt of the record of proceedings, or from the date of receipt of the invitation to collect it. And reasonable allowance will be made in the latter case for the period between the receipt of notification and the date Appellant ought reasonably to have collected the proceedings. (p.96 L16)
13. The grant of adjournment in a cause is a matter entirely within discretionary jurisdiction of the court, which it can exercise in accordance with the particular facts and circumstances of the case. (p.96 L40)
14. Where, as in the instant case, the court was not satisfied that there were facts before it to enable grant of adjournment and Appellant has not shown that the lower court exercised its discretion on wrong grounds or on materials not before it, it cannot be said that the Appellant was denied fair hearing in respect of refusal of his application for adjournment. (p.97 L2)
15. The Court of Appeal having decided the application to dismiss or strike out the appeal on a ground not relied upon by the Appellant, and without supporting evidence was wrong to have dismissed the appeal on such ground. (p.97L8)

REPRESENTATION

Felix Azeta, for the Appellant

K.O. Longe, for the Respondent

CASES REFERRED TO

1. Falobi v. Falobi (1976)1 NMLR 169
2. N.P.A. v. Constr. G.F.C. SPA & Anor (1974)1 ALL NLR (p. 4) 47
3. Awolowo v. Shagari & ors (1979) 6-9 SC 51
4. Okumagba v. Egbe (1965)1 All NLR 62
5. Ifezue v. Mbadugha (1984) 1 SCNLE 427
6. Mobil v. Federal Board of Inland Revenue (1977) 3 SC. 53
7. Nabham v. Nabham (1967)1 All NLR 74

8. Customs v. Barau (1982) 10 SC 48
9. Osho v. Phillips (1972) 4 SC 259
10. Consortium M.C. v. N.E.PA (1992) 6 NWLR (pt. 246) 132
11. Ilona & ors v. Dei & ors (1976) 1 NMLR, 5
12. Odusole v. Odusole (1971) All NLR 223
- 5 13. Amadi v. Thomas Aplin & Ltd. (1971 - 1972) NSCC vol. 7, 262
14. Adigun v. A-G of Oyo State. (1987) 1 NWLR (pt.53) 678
15. Unosi v. Ochonma (1965) NMLR 321 5
16. Ajani v. Giwa (1986) 3 NWLR (pt.32) 796
17. Queen v. Onuegbe (1957) 5 FSC 10

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RULES REFERRED TO

Court of Appeal Rules 1981 0.3 rr. 24 & 25, 0.6 rr. 2 & 10

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LEAD JUDGMENT BY KARIBI-WHYTE JSC

On the 9th of November, 1987, the Court of Appeal Division, Benin City, on the application of the respondent, pursuant to Order 3 rule 25, Court of Appeal Rules 1981 dismissed the Appeal of the appellants for
 20 want of diligent prosecution. Appellant has, with leave of this court, appealed to this court against the decision. The Court of Appeal had earlier refused appellant leave to appeal.

The facts of this case are not in dispute. Appellant was the plaintiff in the High Court. On the 3rd April, 1980, appellant brought an action
 25 against the respondent, as defendant seeking (i) Declaration of title to land, (ii) perpetual injunction (iii) N750 damages for trespass and (iv) possession. On the 3rd of May, 1982, J.A.P. Oki J of the High Court of Bendel State, in a considered judgment dismissed plaintiff's claims in its entirety. Plaintiff filed notice of appeal against the judgment of the High Court, on the 31st
 30 day of May, 1982.

The High Court wrote to the parties in April, 1987 informing them that the record of proceedings was ready for collection. The Defendant/Respondent promptly collected the record of proceedings. Appellant did not collect his copy of the proceedings until 21/10/87. In a motion dated
 35 28th October, 1987, and heard on the 9th November, 1987 respondent sought for an order dismissing appellant's Appeal for lack of diligent prosecution. He relied for this application on Order 3 rule 25 Court of Appeal Rules 1981. The motion was supported with an affidavit which after stating the facts as above averred in paragraphs 5 and 6 as follows -

"5. That from all indications it does not appear that the plaintiff/appellant/respondent is willing or any longer interested in prosecuting this appeal.
6. That I am advised by my Counsel K.O. Longe, Esq. and I verily believe that in the circumstance it is necessary for me to apply to this Honourable court to dismiss this appeal in view of the apathy displayed by the plaintiff/appellant/respondent."

On the 5th November, appellant brought a motion for the following Orders

- "(i) An order granting leave to amend the Notice of Appeal filed in this matter by including therein additional grounds of appeal, the additional grounds of appeal having been set out in the proposed amended Notice of Appeal attached to this motion paper and marked as Exhibit 'A', the additional grounds of appeal having also been ruled marginally in red ink; 10
- (ii) An order deeming the proposed Amended Notice of Appeal duly filed and served, the appropriate filing fees having been paid; 15
- (iii) Such other order or orders as this Honourable Court may deem fit to make in the circumstances."

In this affidavit in support of this motion, he averred in paragraphs 2, 3, 4, 5, 6, 7, 8, 9 as follows-

- "2. That judgment was delivered by the Honourable Mr. Justice J.A.P. Oki, sitting at High Court 3, Benin City, on the 3rd day of May, 1982, and that my claims were dismissed. 25
- 3. That I filed a notice of appeal in the above-mentioned matter on the 31st day of May, 1982.
- 4. That following the notice of appeal filed as aforesaid, my solicitor Mr. Felix Azeta informed me, and I verily believed him, that he followed up repeatedly the compilation of the record of proceedings in this trial Court 30
- 5. That the record of proceedings at the trial court was recently made available to me by the High Court Registry, Benin City.
- 6. That the said record of proceedings was in turn available to my Solicitor, Felix Azeta Esq., by me.
- 7. That my said Solicitor, Felix Azeta, Esq., after having studied the said record of proceedings informs me, and I verily believe him, that it is necessary in the interest of justice to file an amended Notice of Appeal and argue additional grounds of appeal.
- 8. That the said amended Notice of Appeal including the additional ground

of appeal are incorporated in the brief of argument filed on behalf of the appellant in this matter.

9. *That the said amended Notice of Appeal and the additional grounds of appeal are annexed to the motion papers herein and therein marked exhibit "A".*

5 Both the respondent's application to dismiss the Appeal and the motion of leave to amend appellant's notice and grounds of appeal come up for hearing on the 9th November, 1987. K.O. Longe, Esqr. for the respondent moving the motion to dismiss the appeal pointed out that appellant has not filed a counter affidavit in opposition to the facts relied upon
10 by the respondent in support of the motion to dismiss the Appeal. Counsel relied on his affidavit and prayed that the appeal be dismissed.

In his reply, Mr. Azeta for the appellant admitted that he received the notice to collect the record of proceedings in April 1987, but that he collected the record of proceedings on the 21/10/87. He sought for an adjournment to the Motion to dismiss the application.
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The Court of Appeal rejected his application for adjournment and granted the motion to dismiss the appeal, in a short ruling which I herein below reproduce.

20 RULING

*"There is no doubt that the appellant is not interested in this appeal. He filed the appeal in 1982 and did nothing to get it ready for hearing until records were finally available for collecting in April, 1987. Despite an invitation by the Registrar of Court to collect same he did not do so until six
25 Months later in October 1987. After collecting the records he did not file an application for extension of time to file his brief and did not even do so after the present motion was served on him. All he did was to file this morning a Motion which is said to be for leave to file and argue additional grounds. I agree with applicant's Counsel that there is a clear failure in the
30 circumstance to prosecute the appeal. Time within which the appellant's brief is to be filed must in the circumstances (sic) that to me from April, May, 1987 and it has expired. Accordingly, this appeal is hereby dismissed for want of prosecution. Costs to applicant assed at N100.00 only."*

35 Appellant has appealed against this ruling. He has relied on the following grounds of appeal. The grounds of appeal without particulars are as follows

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GROUND OF APPEAL

- "1 *It was wrong in law for the Court of Appeal to have dismissed the appellant's appeal without giving him an opportunity to be heard, when the respondent's affidavit purportedly supporting his motion seeking the order the Court of Appeal for dismissal of the appellant's appeal under Order 3 Rule 25 of the Court Appeal Rules 1981 (as amended) was at variance with and not in support of the order sought under the said Order 3 rule 25.* 5
2. *The ruling and or order of dismissal of the Court of Appeal was erroneous in law in that the ruling and or order overlooked appellant's Counsel oral information to the Court of Appeal that the appellant's brief of argument has been prepared following the receipt of the record of appeal on 21/10/87 and that a motion has been filed praying for an order of the Court of Appeal to file and argue additional grounds of appeal, so as to regularise the said additional grounds of appeal which had been incorporated in the brief of the Appellant's argument dated 5th November, 1987.* 10 15
3. *The Court of Appeal was in error in dismissing the appellant's appeal without giving any consideration to appellant's counsel's oral representation in Court that the record of proceedings having been collected on 21st October, 1987 the appellant's time for filing brief in accordance with the provisions of order 6 rule 2 of Court of Appeal (Amendment) Rules 1984 has not expired. The receipt for the payment of additional N224 on 21st October, 1987 before the record of appeal was collected on the said 21/10/87 is attached to the affidavit in support of the motion for an enlargement of time to file this appeal.* 20 25
4. *The ruling and or Order of Court of Appeal offends the rule of Audi Alteram Partem especially so that the appellant's Counsel's application for adjournment to enable him file a Counter Affidavit was not considered, still less entertained by the learned Justices of the Court of Appeal.*
5. *The judgment, ruling and or order of the Court of Appeal is against the weight of evidence on record."* 30

Appellant's application to the Court below for leave to appeal to this Court was rejected. In the affidavit in support of that application deposed to the following facts in paragraphs, 5, 6, 7, 8, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25

"5. *Immediately after the appeal was filed on 31st May, 1982, I diligently pursued it at the High court registry, Benin city until late 1985. The Registry always complained that there was no stationery for the compilation of the record of proceedings.*

6. *When the record of proceedings were eventually compiled, my counsel in this case was sick hence he did not collect the record of proceedings until 12/10/87.*
7. *After collecting the record of proceedings on 21/10/87, my said Counsel promptly prepared my brief of argument.*
- 5 8. *In the mean time and unknown to him that my Counsel and I have taken steps, the respondent herein filed a motion praying the Court of Appeal to dismiss my appeal for an alleged lack of diligent prosecution.*
- 15 15. *I am informed by my Counsel in this case Felix U. Azeta, Esq. and I verily believe him, that the said motion papers referred to in the preced*
- 10 *ing paragraph were served on his clerk on the 2nd day of November, 1987 when he was away to the High Court Ubiaja, Bendel.*
16. *My counsel in this case Felix U. Azeta, Esq., further informed me, and I verily believe him that at the end of his matter at the High Court Ubiaja on the 2nd day of November, 1987, he went to his Ewohimi residence,*
- 15 *near Ubiaja, and met that his house had been burgled a few days before.*
17. *My Counsel also informed me and I verily believe him that the incident deposed to in the preceding paragraph kept him in his home town until Thursday the 5th of November, 1987, when he returned to Benin City.*
18. *My Counsel, Felix U. Azeta, Esq. finally informed me, and I verily*
- 20 *believe him, that he saw the motion papers earlier referred to in paragraph 8 of this affidavit on 5th November, 1987.*
19. *Between the 1st of November, 1987 and the 4th of November, 1987, I was away in Lagos, at the Head Office of my business Mekios Limited located at 15 Catholic Mission Street, Lagos.*
- 25 20. *I did not swear to a counter affidavit to the motion for dismissal filed by the respondent herein and heard on 9th November, 1987 because the fact of the motion was not brought to my notice by my Counsel who was himself not aware of the motion until it was too late for him to do anything regarding physical contact with me.*
- 30 21. *My failure to swear to a counter affidavit to the motion for dismissal was neither due to lack of diligence nor spite on this Honourable Court.*
22. *My Counsel informed me and I verily believe him that he collected the record of proceedings from the High Court Registry on the 21st of October, 1987 and the receipt evidencing this fact is attached hereto as*
- 35 *Exhibit 'E'.*
23. *My Counsel also informed me and I verily believe him that he has already prepared the brief of argument which he dated 5th November, 1987. A copy of the brief of argument has been shown to me and it is attached to his affidavit as Exhibit 'D'.*

24. I am willing to prosecute my appeal in the Court of Appeal"

It could be seen on a comparison of the two affidavits of the appellant relating to this matter that there are significant and different reasons why appellant could not prosecute the appeal before respondent brought the application for dismissal. These differences were brought out and emphasised in the counter-affidavit sworn to by the respondent. The averments in paragraphs 6, 7, 8, 9, 10, 14, reproduced hereunder are not contained in the affidavit in support of the motion seeking an order to amend the grounds of appeal. They are as follows-

- 6. That the applicant's counsel did not tell the court that he did not collect the record of appeal because he was sick.*
- 7. That all he said was that when the case first came up on 7th April, 1987 he gave this Honourable Court an assurance that he would go and collect the record immediately.*
- 8. That I recall that Mr. Azeta told the court that he could not do so because he had not seen the appellant for a long time.*
- 9. That Mr. Azeta even said that he had not been paid by his client and that he was in fact using his money to file papers.*
- 10. That Mr. Azeta told this Honourable Court that his client is a business man who travels about and was never in one place and had not seen him for a long time inspite of messages he sent to him.*
- 14. That Mr. Azeta held himself out at all times as Counsel for the appellant and never told the court on 9th November, 1987 that his house at Ewohimi was burgled."*

I have already reproduced the grounds of appeal in this judgment. In summary, the ground of appeal relate to the violation of the principles of natural justice, namely the rule relating to fair hearing. There is a general ground of appeal against the weight of evidence.

A careful reading of the first ground discloses that it contains two grounds of challenge to the correctness of the judgment. It challenges the ruling, alone on the grounds of fair hearing, and also on the ground that the ruling is not supported by the provisions of the rules relied upon. It could be said that this ground is bad for duplicity and is likely to embarrass the respondent. A ground of appeal must clearly and unequivocally contain the ground of error of fact on which the judgment is challenged. I consider it confusing to allege more than one error in the same ground.

The substance of grounds 2, 3 and 4 is a complaint of the violation of the principle of audi alteram partem.

Parties formulated issues for determination. Appellant formulated the following three issues -

"(1) Whether the Court of Appeal, Benin City, was right in dismissing the appellant's appeal, pursuant to an application by the respondent under order 3 Rule 25, Court of Appeal Rules, 1981 (as amended) when:

5 *(a) the appellant was not given an opportunity of representing his case, and*

(b) the affidavit deposed to by the respondent in support of the application for dismissal under the said order 3 Rule 25, Court of Appeal Rules 1981 as amended was palpably at variance with the situation and circum
10 *stance contemplated by the provisions of the said Order 3 Rule 25 - Grounds 1, 2 and 4 of appeal.*

(2) Whether the Court of Appeal was right in coming to its conclusion that time within which the appellant's brief is to be filed must be deemed to run from April/May, 1987, being the date the Registrar of the trial Court
15 *wrote to the appellant requesting him to make additional payment of N224 as cost of compiling the records, contrary to the clear provisions of order 6 Rule 2 of Court of Appeal (Amendment) Rules 1984 Ground 3 of Appeal.*

(3) Whether the Audi Alteram Partem rule was not breached by the Court
20 *of Appeal when it proceeded to hear and determine the respondent's application for dismissal of the appellant's appeal without giving the appellant an opportunity of being heard Ground 4 of Appeal.'*

On his part Respondent agreeing with appellant's formulation formulated the following issues -

25 *"1. Whether on the unchallenged facts in the respondent's affidavit in support of his application for the dismissal of the appeal, the Court of Appeal did not exercise its discretion rightly in dismissing the appellant's appeal for want of prosecution.*

2. Whether the Court of Appeal was not right in the absence of contrary
30 *evidence in saying that in the circumstances time to file appellant's brief would start to run from when he was served with notice to collect his record of appeal.*

3. Whether the Court of Appeal has not got the discretion to dismiss a case for want of prosecution based on the facts before the court.

35 *4. Whether the Court of Appeal has to wait for the convenience of a tardy appellant before disposing of an appeal".*

Respondent's formulation borders excessively on the exercise by the Court of Appeal on its inherent jurisdiction to dismiss an appeal for want of prosecution. There is no ground of appeal. It is therefore not an issue in this

appeal challenging the exercise of discretion. It is therefore not for determination. Accordingly issues 1, 3 and 4 of the respondent are irrelevant.

The formulation of the issues for determination in this appeal contain certain objectionable features. It is accepted that the issues formulated without regard to the grounds of appeal are not issues which could be said to arise from the appeal.

An ordinary construction of the ruling challenged within the context of the ground of appeal filed suggest that the following issues only are deducible. These are the issues of fair hearing, the computation of when time will run in respect of filing of briefs, and the issue whether the Court of Appeal was right in its construction of the provisions of Order 3 rule 25 Court of Appeal Rules, 1981.

I have attempted a reconstruction of the issues in line with the grounds of appeal to give meaning and expression to them and the formulation of the issues. The grounds of appeal are clearly inelegantly formulated, and drafted. They do not seem to me to follow closely the record of proceedings, but rely on material not discoverable on the face of the record. For instance, there is no additional evidence in support of the particulars of error to grounds 2.

Again the particulars to ground 3 speak of the Court of Appeal interpreting Order 6 rule 2 Court of Appeal Rules, 1981. There is no reference to that rule in the Ruling.

I consider it sufficient to decide this appeal in the three issues I have formulated from the grounds of appeal filed. These are-

"(a) Whether on the facts of this case, the Court of Appeal was correct in its construction of Order 3 r. 25 as applicable.

(b) Whether the Court of Appeal was right in its computation of time to file brief of argument in accordance with Order 6 r. 2.

(c) Whether in the facts of this case appellant was given fair hearing."

The issues for determination thus formulated are ad idem with the first three issues formulated by the appellant. I do not regard the fourth issue formulated as relevant for independent consideration, since the issue will necessarily be considered in the other issues formulated.

I shall now proceed to consider this appeal in the light of the arguments of learned Counsel. I begin with issue (a).

In his brief of argument, learned counsel to the appellant Mr. Azeta referred to the Motion for dismissal of the appeal of the appellants. He submitted that the motion was brought pursuant to Order 3 rule 25 Court of Appeal Rules 1981 as amended in 1984. The provision relied upon, it was submitted, contemplates a situation where both appellant and his coun-

sel are absent in court when an appeal is called. Order 3 rule 25 cannot be invoked merely because appellant in that appeal has not filed his brief of argument, within time, if his counsel is present in Court, as in this case.

Learned Counsel argued that in the instant case appellant's Counsel was present in Court. He submitted that it was not true, as was sworn to by
 5 respondent, that appellant had not up to 29th October, 1987 collected the record of proceedings. The record of proceedings was collected on 21st October, 1987. He also pointed out that appellant's brief of argument was ready before 9th November, 1987 when the appeal was dismissed. This fact was brought to the Notice of the Court of Appeal. In the circum-
 10 stances, it was not justified to dismiss the appellant's appeal on the ground of want of diligent prosecution. It is also inappropriate to rely on the ground of absence of the appellant.

In his reply, learned counsel to the respondent conceded that the application was brought under the wrong rule, but nevertheless, the Court
 15 of Appeal can in the exercise of its inherent jurisdiction dismiss the appeal. It was pointed out that the affidavit in support of the application to dismiss the appeal did not depose to the fact that appellant was absent in Court. The ground relied upon was that the appellant had not collected his record of proceedings six months after he was aware it was ready for collection. He
 20 therefore could not be regarded as interested in the prosecution of the appeal.

Learned Counsel submitted that the Court of Appeal could ignore the wrong rule under which the application was brought and proceed to exercise its discretion on the unchallenged facts deposed to in the affidavit
 25 before the Court. The Court of Appeal, it was submitted, was right in dismissing the appeal for want of prosecution.

The substance of the first issue is the correct construction of Order 3 rule 25, the Court of Appeal Rules, 1981 in its application to the facts of this case. It is pertinent for a proper appreciation of the essential elements
 30 of the provision to set it out. It reads -

"25(1) If the appellant fails to appear when his appeal is called on for hearing and has not taken action under Rule 24 of this Order, the appeal may be struck out or dismissed with or without costs."

The application of this rule is predicated on the appellant having not filed a
 35 declaration in writing in accordance with Rule 24 that he does not wish to be present, at the hearing, and serving same on the respondent and every other party who has filed an address for service. It does not apply to cases of failure to file briefs of argument.

Otherwise it applies when the appellant has failed to appear when

his case is called on for hearing. In the instant case, there is no evidence that appellant has not given the notice in accordance with Rule 24. The twin conditions of absence when the case is called on for hearing, and not filing the declaration in accordance with Rule 24 are essential to the application of Order 3 rule 25. Both must be satisfied. But in the instant case appellant was present when the case was called on for hearing. The two conditions therefore for striking out or dismissing an appeal under the rule have not been satisfied in this case. The Court of Appeal cannot therefore rely on Order 3 rule 25 to strike out or dismiss the appeal. Indeed the Court of Appeal did not do so.

Learned Counsel to the respondent has conceded, and properly too, that the application was brought under the wrong rule. He has urged us nevertheless to apply the appropriate law. I agree that the principle is now well established that where a relief or remedy claimed under a wrong law is supported by facts establishing the remedy, the claim will not be denied merely because of the wrong law relied upon.....See *Falobi v. Falobi* (1976) NMLR. 169. This principle is founded on justice and common sense. But in order to benefit from the principle the facts relied upon must support the correct law to be applied. This is the critical issue in the application before us.

I have already reproduced the orders sought by Respondent to dismiss the appeal, and on which the Court of Appeal dismissed the appeal. I have also set out the affidavit in support of the motion. A careful reading of the supporting affidavit discloses that the delay to prosecute the appeal attributed to appellant was not laid on the door of any particular fault other than that of general apathy. Paragraph 2, 3, 4, 5 which depose to the facts relied upon are as follows -

"2. That the plaintiff/appellant/respondent filed his Notice of Appeal in this Suit on 31 May, 1982.

3. That the lower Court wrote to the parties in April, 1987 to collect their record of appeal and that the defendant/respondent applicant promptly collected his copy but that the plaintiff/appellant/respondent had not up till now collected his own copy.

4. That I recalled that Felix Azeta, Esq. appeared as Counsel for the appellant on 7th April, 1987.

5. That from all indication it does not appear that the plaintiff/appellant/respondent is willing or any longer interested in

prosecuting this appeal."

The Court of Appeal can only exercise its judicial discretion, where the facts relied upon by the applicant are such as will enable it to exercise such discretion.

- The ruling of the Court of Appeal challenged, clearly state the reasons
- 5 for dismissing the appeal on grounds of failure to prosecute the appeal. The following reasons would seem to have been relied upon by the Court-
 1. The records of proceedings was ready and appellant was invited to collect them in April, 1987. Appellant did not collect the records until six months later in October, 1987.
 - 10 2. After collecting the Record of proceedings, appellant did not file an application for extension of time to file his brief and did not do so after the present motion was served on him.
 3. Appellant filed in the morning of hearing the motion in this ruling, a motion for leave to file and argue additional grounds of appeal.'
 - 15 To what extent these reasons are borne out by the facts relied upon by the applicant will depend on the supporting affidavit.

I have compared the facts deposed to in the affidavit and the above reasons of the Court below. I have not been able to find any correlation between them. By this I mean the reasons do not follow from the facts

20 deposed to in the affidavit.

- I do not think that merely because a record of proceedings was not collected till six months after the appellant was invited to do so could be regarded as evidence of laxity. Surely, that fact alone, without more is not in my opinion, sufficient to dismiss an appeal.
- 25 Failure to file brief of argument is a ground for dismissal under Order 6 r. 10. But appellant did not rely on his application on that ground. The Court cannot make for the applicant the case he did not consider reasonable to make or on which there is no evidence on which the case can be supported. - *Unosi v. Ochonma* (1965) NMLR 321. There is nothing in the
 - 30 affidavit suggesting that he was relying on the appellant's failure to file brief of argument or extension of time to do so.

I do not think it is right or reasonable to hold that an appellant who has filed a motion for leave to file and argue additional grounds of appeal lacks the will to prosecute his appeal. I regard it as preposterous and an

35 abuse of language to so hold. The application may be misconceived, and the wrong step to take in the circumstances. It is certainly not evidence of apathy towards the prosecution of the appeal or tardiness in doing so. It is certainly in my opinion the opposite. An appellant who has in court an application to file additional grounds of appeal cannot be said to be apa-

thetic to the prosecution of the appeal the grounds of which he is seeking to add to.

The Court of Appeal has criticized the approach adopted by appellant. The court commented as follows -

"After collecting the records he did not file an application for extension of time to file his brief and did not do so after the present motion was served on him. All he did was file this morning a Motion (sic) is said to be for leave to file and argue additional grounds." 5

The criticism is of the choice by appellant to file and argue additional grounds of appeal rather than to apply for extension of time to file his brief of argument. With due respect to the court below, the choice of filing additional ground of appeal rather than applying for extension time to file brief of argument cannot by any stretch of the' imagination support the conclusion of apathy towards the prosecution of the appeal.. Apathy connotes inaction towards the prosecution of the appeal. 15
Either step in the appeal is towards its prosecution.

Besides, it is preferable to obtain leave to file additional grounds of appeal which would be incorporated in the brief of argument to be filed. Application for Extension of time to file brief of argument could be brought later, and if satisfactory reasons are given to excuse the delay, the application could still be granted. It is my opinion and I hold that the Court of Appeal was wrong in the view that applying for leave to file and argue additional grounds of appeal, instead of applying for extension of time to file brief of argument is ipso facto evidence of apathy for the prosecution of the appeal. It is a matter of the exercise of professional judgment. It may be an unwise course of action to pursue. As I have already said, it is certainly no evidence of apathy toward the prosecution of the appeal. 25

This issue is therefore resolved in favour of the appellant. The second issue relates to the computation of time to file brief of argument. 30

Learned Counsel to the appellant in his brief of argument referred to Order 6 rule 2 of the Court of Appeal Rules 1981 as amended in 1984 which governs the filing of briefs of argument. He pointed out that the rule provides that appellant shall file his brief of argument within 60 days from the date of receipt of the record from the Court below. It was submitted that the emphasis is on the date of the receipt of the record from the court below. Learned Counsel argued that it is common ground that appellant was notified that the record of proceedings was ready for collection in April, 1987. It is also agreed that appellant collected that record of proceedings 35

after payment of the N224 additional fees on the 21st October, 1987. The appellant therefore received the record of proceedings on that date.

It was submitted that it will be contrary to the intent and purpose of Order 6 rule 2 to hold as the Court of Appeal has done, that the record of proceedings was received in April, 1987 when appellant was notified that it
 5 was ready for collection. This is that appellant must be deemed to have received the record of proceedings on the date he was notified that it was ready for collection. It was submitted that to hold otherwise than that time to file the brief of argument began to run as from the 21st October, 1987, will be unjust.

10 Learned Counsel submitted that the Court of Appeal was itself not sure of the operative commencement date when it stated it to be from April/May. This it was argued is void for uncertainty. It was submitted that the application of Order 6 rule 2 is not subject to the exercise of discretion.

15 In his rely to appellant's submission on this issue, learned Counsel to the respondent submitted that the Court gave to Order 6 r.2 a construction consistent with the particular peculiar circumstances of the case. It was submitted that the peculiar circumstances of this case relied upon by the Court in the interpretation of the rule was the fact that the parties were
 20 invited in April, 1987 to collect their copy of the record of appeal. The parties were in court on 7th April, 1987, and Felix Azeta, learned Counsel to the appellant represented appellant on that day. Again, no brief of argument had been filed by the appellant when the motion to dismiss the appeal was filed and heard. It was also submitted that appellant did not file
 25 counter affidavit in rebuttal of the facts averred in the affidavit in support of the motion. The only conclusion, counsel argued from the facts is that if appellant was serious in the prosecution of the appeal, he would have filed his brief of argument within 60 days of the date he received the letter from the lower court to collect his record. On the computation of the period, it
 30 was submitted that 60 days had undoubtedly elapsed however it was reckoned from the date of the receipt of the letter to collect the record of appeal.

Learned Counsel submitted that the court was under no obligation in the circumstances of the case to grant an adjournment to the appellant. It was clear that on 18th November, 1987 when the appeal was dismissed,
 35 the appeal could not have been heard, and appellant did not show good cause why an adjournment should be granted. Counsel relied on Nigerian Ports Authority v. Constr. G.F.A.L SPA & anor. (1974) 1 All NLR (Pt.4) 47; (1974) 12 SC 81 and Ajani v. Giwa (1986) 3 NWLR (Pt. 32) 796.

The issue to be determined is a very narrow and precise one, it is

whether time to file appellant's brief of argument should run from the date appellant received the letter inviting him to collect the record of appeal of from the date he actually collected or received the record of appeal.

I have already pointed out in this judgment that appellant's failure to file his brief of argument is not one of the reasons relied upon by the applicant in his application to dismiss the appeal. The Court of Appeal was therefore not entitled to rely on that ground. However, be that as it may, the issue of the computation of time to file brief of argument is an important and crucial question. I shall therefore deal with the issue in this appeal.

It is important to refer to the rule which provides as follows -

"The appellant shall within sixty days of the receipt of the record of appeal from the Court below file in the Court a written brief, being a succinct statement of his argument in appeal."

It is fairly clear and unambiguous that the dominant expression in the rule is "within sixty days of the receipt of the record of appeal from the Court below."

It is an important principle for the construction of the provisions of a statute, that where the words are clear and unambiguous, they must be given their ordinary meaning. See *Queen v. Onuegbe* (1957) 2 FSC 10, (1957) SCNLR 130. In the instant case there is nothing in the rule to qualify or modify the words used, which must be given their ordinary literal meaning.

The object of interpretation is to discover the intention of the law maker from the language used in the legislation. Hence, once the words are clear and unambiguous effect must be given to them. The Court is not expected to introduce its own words into the enactment - See *Awolowo v. Shagari & ors.* (1979) 6-9 SC. 51, *Okumagba v. Egbe* (1965) 1 All NLR. 62. It has long been accepted that in construing a statutory provision, its object which is of paramount importance; is always relevant. It is for this reason that the mischief aimed at by the provision construed is relevant to explain, but not to change what was said by the law maker - See *Ifezue v. Mbadugha* (1984) 1 SCNLR 247.

There is no doubt that the reason for prescribing periods within which appellant is to file his brief of argument is to accelerate the hearing of appeal and avoid delays in the hearing of the appeal. Hence in construing the words of Order 6 r. 2, such a construction that will advance that intention and avoid a construction that will encourage delays should be adopted. Accordingly where reliance on the ordinary plain words will result in a meaning not intended by the provision and an absurdity, the duty of the Court in such a situation is to adopt a construction that will give effect to the provi-

sion. - See *Mobil v. Federal Board of Inland Revenue* (1977) 3 SC. 53. It is a canon of interpretation that a provision should be construed *ut res magis valeat ofuam pereat*. This is to say that a judicial interpreter must construe a provision to save it, and should by interpretation avoid making nonsense of the statute so as not to defeat the manifest intention of the law. - See 5 *Nabham v. Nabham* (1967) 1 All NLR 74.

It seems to me that the construction advocated by the appellant which is that time for filing brief of argument should run as from the date of the collection of the record of proceedings is clearly the rule. But it will 10 seem to me absurd to adopt the same construction in the instant case where appellant was aware that copy of proceedings was ready in April, when appellant was invited to collect it but failed to do so. He did not collect the record till November of the same year. Accordingly to hold that time should run from the date of collection will leave the time to run to the 15 whims of the appellant and thus make nonsense of the rule and defeat the mischief the rule is designed to prevent. See *Customs v. Barau* (1982) 10 S.C. 48; *Osho v. Phillips* (1972) 4 SC 259, *Mobil v. F.B.I.R.* (1977) 3 SC 53.

I think it is a reasonable formulation of the applicable rule to postu- 20 late that time for appellant to file his brief of argument for 60 days should begin to run from the actual date of the receipt of the record of proceedings, or from date of the receipt of the invitation to collect the record of proceedings. Reasonable allowance will be made in the latter case for the period between the receipt of notification and the date appellant ought 25 reasonably to have collected the record of proceedings. The third issue is concerned with the question of fair hearing. Appellant's contention was that he was not given an opportunity to be heard before the Court below dismissed his appeal. This contention was based on the fact that the Court below refused his application for adjournment to enable him file a counter- 30 affidavit to contradict and or controvert the affidavit evidence relied upon by the respondent. It was submitted that respondent could have been adequately compensated in costs if the adjournment had been granted. Learned Counsel to the respondent in his reply to the above referred to the history of the case and the appeal and submitted that appellant was not denied fair 35 hearing. It was submitted that both parties were heard on the application resulting in the dismissal of the appeal. I think learned Counsel to the appellant had misconceived the nature of the matter before the Court. It was an application to dismiss or strike out the appeal. It is clear from the record of proceedings that both parties were heard on the application.

Appellant's application for adjournment was refused because the Court below formed the view on the facts before it, that "*Appellant is not interested in this appeal.*" The grant of adjournment in a cause is a matter entirely within discretionary jurisdiction of the court; which it can exercise in accordance with the particular facts and circumstances of the case. In the instant case, the court was not satisfied that there were facts before it to enable the exercise of discretion to grant an adjournment. Appellant has not shown that the Court below exercised its discretion on wrong grounds or on material not before them. It cannot be said that appellant was denied fair hearing in respect of the application. There is no merit in the contention.

In conclusion therefore the Court below having decided the application to dismiss or strike out the appeal on a ground not relied upon by the applicant, and without supporting evidence was therefore wrong to have dismissed the appeal on such ground. The appeal therefore succeeds on this ground.

The appeal is accordingly allowed. The Ruling of the Court below is set aside.

Respondent shall pay N1,000.00 as costs to appellants.

KAWU JSC

I have read, in draft, the lead judgment of my learned brother, Karibi-Whyte, J.S.C. which has just been delivered. I am in complete agreement with him that there is merit in this appeal and that it should be allowed. For all the reasons set out in the lead judgment, I too will allow the appeal. Costs assessed at N1000.00 to be paid by the respondent to the appellant.

BELGORE JSC

I read the judgment of Karibi-Whyte, J.S.C. before hand and I am in full agreement that his appeal must succeed. For the reasons and conclusion arrived at in the said judgment, which I adopt as mine, also allow this appeal with N1,000.00 as costs to the appellant against the respondent.

WALI JSC

I have read in advance a copy of the lead judgment of my learned brother, Karibi- Whyte, J.S.C. and I agree with it. For those same
5 reasons ably stated, I also allow this appeal and adopt the consequential orders made in the lead judgment.

10 **KUTIGI JSC**

By motion no notice, the defendant/respondent at the Court of Appeal Benin-City prayed thus-
15 *"An order dismissing the appeal filed in this case for lack of diligent prosecution. AND for such order or further order as this Honourable court may deem fit to make in the circumstance."*

The motion was supported by an affidavit of eight paragraphs. He
20 averred in paragraphs 2, 3, 4, 5 & 6 as follows -

- "2. That the plaintiff/appellant/respondent filed his Notice of Appeal in this suit on 31st May, 1982.
- 3. That the lower court wrote to the parties in April 1987 to collect their record of appeal and that the defendant/respondent/ applicant promptly collected his copy but that the plaintiff/ appellant/respondent had not up till now collected his own copy.
- 4. That I recollect that Felix Azeta Esq. appeared as counsel for the appellant on 7th April, 1987.
- 5. That from all indication it does not appear that the plaintiff/ appellant/respondent is willing or any longer interested in prosecuting this appeal.
- 6. That I am advised by my counsel K. O. Longe Esq., and I verily believe that in the circumstance it is necessary for me to apply to this Honourable Court to dismiss this appeal in view of the apathy displayed by the plaintiff/appellant/respondent.

The motion was brought under Order 3 Rule 25 of the Court of Appeal Rules, 1981. This rule clearly applies in a situation where both the

appellant and his counsel are absent in court when an appeal is called. The rule does not apply in cases of failure to file briefs of argument. The application was therefore brought under a wrong rule. But it is settled law that where a relief or remedy is provided for by law, the remedy or relief if properly claimed by the party seeking it, cannot be denied to the applicant simply because he has applied for it under the wrong law (see Falobi v. Falobi (1976) 1 NMLR 169). Failure to file a brief of argument within the time allocated is a ground for dismissing an appeal for want of prosecution under Order 6 Rule 10 of the Court of Appeal (Amendment) Rules 1984. So in this case the applicant could not have been denied the relief sought merely because he applied under Order 3 Rule 25 instead of Order 6 Rule 10. The Court of Appeal therefore acted properly. I am in no doubt at all that an application for "an order dismissing the appeal for lack of diligent prosecution" at the level of the Court of Appeal which exercises appellate jurisdiction only could only mean in relation to an appeal failure to file a brief since appeals are ordinarily heard on the briefs filed by the parties. You cannot file a brief unless and until you obtain a copy of the record of proceedings. Where therefore, as in this case, an appellant was invited by the court to come and collect the record of proceedings, and he (appellant) decided to collect same six months after due notice, in my view that kind of behavior is prima facie evidence of laxity or indolence on the part of such an appellant. Certainly an appellant has not got eternity to collect his record and file his brief of argument. I therefore find it reasonable to hold that time for filing appellant's brief began to run from the date he was notified that the record of proceedings was ready for collection and not when, at his convenience, he decided to collect same (see Consortium M.C. v. N.E.P.A. (1992) 6 NWLR (Pt. 246) 132). I am therefore satisfied that "lack of diligent prosecution" on the part of the appellant in this case did not only mean failure to file brief simpliciter but includes failure to collect record of proceedings in time after having been notified by the court to collect same. You need one to be in a position to perform the other.

I now want to go straight to the third issue raised by the appellant in his brief. It is the issue of fair hearing. The appellant said his case was decided without affording him an opportunity to state his own case and that the principle of Audi Alteram Partem had been breached.

Now page 15 of the record of proceedings reads-

"K.O. Longe for appellant.

F.U. Azeta for the respondent.

Applicant present.

Longe moves application for order of court to dismiss the appeal. Relies on Order 3 Rule 25 of Rules. Relies on affidavit. Appellant present counsel appeared on 7/4/87 to represent him in this court and since then filed nothing. There is no counter-affidavit showing why application not
 5 *filed. Says court should dismiss appeal. Azeta: On answer to court, agrees that the registrar notice (sic) his client in April, 1987 to come and collect the record. Says he collected the record on 28/10/87. Finally asks for (sic) court to grant on adjournment.*

10 **RULING**

There is no doubt that the appellant is not interested in this appeal. He filed the appeal in 1982.....
Accordingly, this appeal is hereby dismissed for want for
 15 *prosecution. Costs to applicant assessed at N100 only,"*

It is abundantly clear from the extract above that the appellant was not heard before the court below proceeded to dismiss his appeal. As shown above the court below put certain questions to appellant's counsel, Mr. Azeta, which he answered. Counsel immediately therefore asked to be
 20 granted an adjournment. There is nothing on the record to show that that request was either granted or refused. This is a serious error. The question whether or not to grant an adjournment is a matter in the discretion of the court. But the discretion must be exercised not only judicially but judiciously and it must be patently clear from the record why it exercised one
 25 way or the other. It is clear that in the present case the application for adjournment was not dealt with at all. Moreover it was the duty of the court below before deciding to dismiss appellant's case not only to have disposed of the application for adjournment first but to have afford counsel a hearing on the application to dismiss his appeal and before dismissing
 30 same. (see *Ilona & Ors v. Dei & Ors* (1976) 1 NMLR 5, (1976) 1 All NLR 8 *Oduote v. Oduote* (1971) All NLR 223 (1990 Edition). Obviously appellant's constitutional right as enshrined in section 33(1) of the 1979 Constitution had been breached, which rendered the proceedings null and void. In the case of *Amadi v. Thomas Aplin & Co. Ltd* (1972) 1 NLR (Pt.1) 409;
 35 (1971-1972) NSCC Vol.7 page 262, *Udoma J.S.C.* delivering the judgment of the court said as follows -

"Furthermore, the high handed manner in which the learned trial judge dealt with the application by dismissing it summarily without hearing the plaintiff at all was in our view, a denial to the plaintiff of his right to be

heard, a direct infringement of the fundamental maxim AUDI ALTERAM PARTEM which, in effect is denial of a fair hearing."

Also in Adigun v. Attorney-General of Oyo State (1987) 1 NWLR (Pt.53) 678 at 709 Obaseki, J.S.C. observed thus -

"The right to fair hearing being a fundamental constitutional right guaranteed by the constitution, the breach of it in any trial or investigation or inquiry nullified the trial, investigation or inquiry and any action taken on them is also a nullity." So it is in this case.

It follows that for the reasons and for the other reasons set out in the lead judgment of my learned brother Karibi-Whyte, J.S.C. this appeal succeeds and it is hereby allowed. The order of the court below dismissing appellant's claim together with the order for costs is accordingly set aside. It is ordered that the case be and is hereby restored on the Cause List of the Court of Appeal, Benin-City for the motion to be heard and determined de novo by a fresh panel. The appellant is awarded costs of N1,000.00
Appeal allowed. Hearing de novo ordered.

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