

SUPREME COURT OF NIGERIA
30TH SEPTEMBER, 1993 SC. 199/1988
CORAM:- M. L. UWAIS, S. KAWU, A. B. WALI,
I. L. KUTIGI, U. MOHAMMED, JJSC

PRINCE LANRE ADEYEMI APPELLANT

AND

Y.R.S. IKE-OLUWA & SONS LTD. RESPONDENT

*FAIR - Failure to appeal within prescribed period - need to show good
HEARING and substantial reasons for such failure - need to show grounds
of appeal disclosing good cause why appeal should be heard.*

*APPEALS - Where Appellant cannot get in touch with his counsel due to
sickness and confinement - failure to appeal within time for
the same reason - whether sufficient explanation for his delay
in bringing appeal*

*APPEALS - Where questions of fact or mixed law and fact are raised in a
proposed grounds of appeal in an application for extension of
time - whether prayer for leave to appeal must be added.*

*FAIR HEARING - Court of appeal dismissing Appellant's application -
Appellants not given opportunity to address Court on it -
whether Appellant's right of fair hearing is thereby infringed -
whether the trial is therefore a nullity.*

FACT

The Appellant brought an application before the Court of appeal praying for an order extending the time within which to file an appeal against the judgment of Lagos High Court. From the record of proceedings, it was clear that the Court of Appeal did not hear the Appellant's counsel before refusing as well as dismissing the appeal. Dissatisfied with this ruling, the appellant appealed to the Supreme Court on one ground namely, whether the Court of Appeal was right in dismissing the Application without hearing Applicant's counsel. In the Supreme Court, both the parties and their counsel were absent nevertheless the Supreme Court invoking the provisions of Order 6 rule 8(6) of the Supreme Court Rules had to determine whether failure of the Applicant to file his appeal within the prescribed period could be excused by the fact of his being in confinement due to sickness and so

could not get in touch with his counsel as deposed to in the Applicant's affidavit.

HELD (allowing the application with Kutigi JSC dissenting)

1. The Court of Appeal acted wrongly in dismissing the Appellants application without giving him the opportunity to address it. And where an infringement of the Constitutional right to fair hearing occurs, the consequence is that the trial so affected is a nullity by reason of the infringement. (P23 L14)

2. To satisfy the provisions of Order 3 rule 4(2) of the Court of appeal Rules, 1981, one has to show good and substantial reasons for failure to appeal within the prescribed period and grounds of appeal which prima facie show good cause why the appeal should be heard. (P25 L30)

3. The reason given by the Appellant in his affidavit for failing to appeal within time is that he fell sick shortly after the hearing of the case in the High Court and was in confinement for 10 months which led to his not getting in touch with his counsel. This is sufficient reason for his delay in bringing the appeal against the decision of the High Court. (P26 L3)

4. Where proposed grounds of appeal in an application for extension of time to appeal raise questions of fact only or mixed law and fact, it is imperative for a prayer for extension of time and any other necessary prayer to be added to the prayer for leave to appeal, since failure to do so renders the application incompetent. The same requirement will not apply where the proposed grounds are grounds of law alone in which case the appeal is as of right. (P27L8)

REPRESENTATION:

Parties absent and unrepresented.

CASES REFERRED TO

1. Amadi v. Thomas Aplin & Co. Ltd (1972) 4 SC 228
2. Adigun v. A-G of Oyo State (1987) 1 NWLR (pt. 53) 678
3. In re Adewunmi & Co (1988) 3 NWLR (pt.83) 483
4. Ibodo v. Enarofia (1980) 5-7 SC. 42
5. Solanke v. Ajibola (1969) NMLR 253
6. Odusote v. Odusote (9171) NMLR 228
7. University of Lagos v. Aigoro (1985) 1 NWLR (pt.l)143

8. University of Lagos v. Olaniyan (1985) 1 NWLR (pt.1) 156
9. Mobil Oil (Nig) Ltd v. Agadaigho (1988) 2 NWLR (pt.77) 283
10. In Re Adewumi & Ors (19881) 3 NWLR (pt.83) 483
11. Morturie v. Gambo (1979) 3-4 SC. 54
12. Ojukwu v. Governor of Lagos State (1986) 3 NWLR (pt.26)
13. Bowaje v. Adediwura (1976) 6 SC 143
14. Amudipe v. Arijodi (1978) 9-10 SC. 27
15. Lamai v. Orbih (1990) NSCC Vol.12, 188
16. C.C.B. (Nig) Ltd v. Ogwuru (1993) 3 NWLR (Pt.284) 630
17. Akinwinu Motors Ltd v. Dr. Sangonuga (1984) ALL NLR 309
18. A-G of Imo State v. A-G of Rivers state (1983) 8 S.C. 10
19. Okotie-Eboh v. Okotie-Eboh (1986) 1 NSCC 183
20. Sweye v. Iyomahan (1983) NSCC (vol. 14)393
21. Akinwinu Motors Ltd v. Sangonuga (1984) NSCC (vol. 15)352
22. Ojeme v. Momodu III (1983) 3 SC 173
23. Oke v. Eke (1982) 12 SC 218
24. Akpasubi v. Unwen (1981) 11 SC 132
25. Oranye v. Jibowu 13 WACA 41

STATUTES AND RULES REFERRED TO

1. High Court Law Cap 52 - Laws of Lagos State
2. Court of Appeal Act No. 43 of 1976 ss 24(4), 25, 25(1) & (2)(a)
3. Supreme Court Act - 1960 s. 31(2)(a)
4. Constitution of the Federal Republic of Nigeria 1979-ss 220, 221(1), 222(6)
5. High Court of Lagos (Civil Procedure) Rules 1972, O.4 and O.32 or 2 and 4
6. Court of Appeal Rules Or. 1 & 20(5)
7. Supreme Court Rules Or. 8 & 12(5), Or. 8 & 6.

LEAD JUDGMENT BY UWAIS JSC

The only issue for determination in this appeal has been formulated by the appellant to be thus -

“whether the lower court exercised its discretion judicially when it dismissed the appellant’s application without tearing.”

The appellant brought an application in the Court of Appeal in which he prayed for an order -

“Extending the time within which to file an appeal against the judgment of Mr. Justice Hotonu of Lagos High Court in respect of the above mentioned case delivered on 20th March, 1987.”

The application came up before the Court of appeal (Ademola

J.C.A., Babalakin J.C.A. - as he then was and Awogu J.C.A.), on the 27th day of February 1988. The record of the proceedings before the Court is very brief, and it reads (per Ademola J.C.A.) as follows -

“Lagun Sanusifor Applicant.

5 *Respondent served but absent.*

Court: Refers to judgment and told counsel that the would be appellant got the money and did not supply the rice. His counsel in the court below did not see him. Grounds of Appeal raised no issue of flaw.

10

*Ruling:- Application refused.
Prayer dismissed.”*

It is quite clear from this that the applicant’s counsel was not
15 heard. The Court simply made remarks and delivered its ruling refusing as well as dismissing the application.

In this Court, the parties and their counsel were absent. Since
briefs of argument were filed by both the appellant and the respondents, we followed the provisions of Order 6 rule 8 of the Supreme Court Rules, 1985
20 which states -

*“When an appeal is called and no party or legal practitioner for him appears to present oral argument, but Briefs have been filed by all the parties concerned in the appeal, the appeal will be treated
25 as having been argued and will be considered as such.”*

In his brief of argument, the appellant complains that his counsel was not heard by the Court Of Appeal before it refused his application and by dismissing the application he was denied the right to appeal Reference is
30 made to the provisions of s.33 of the Constitution of the Federal Republic of Nigeria 1979, which guarantees the right to fair hearing; and the decision of this Court in Amadi v. Thomas Aplin & Co. Limited (1972)4 S.C. 228. It is further argued that the Court of Appeal did not consider the requirements of Order 3 rule 4 of the Court of Appeal Rules, 1981 under which the
35 application was brought.

The respondents formulated 2 issues for determination in their brief of argument but I prefer the issue presented by the appellant because it is more akin to the sole ground in this appeal. The respondents rely on the provisions of Order 4 and Order 32 rules 2 and 4 of the High Court of

Lagos (Civil Procedure) Rules to justify the failure of the Court of Appeal to hear the applicant before dismissing his application.

There is no doubt that the respondents missed the point. The provisions of the High Court of Lagos (Civil Procedure) Rules have no relevance here because the application in the Court of Appeal was brought under the Court of Appeal Rules, 1981.

On the Submissions contained in the appellant's brief there is no doubt that the appellant did not have a fair hearing. A similar situation arose in Amadi's case (supra) and this Court (per Udoma, JSC) observed as follows-

".....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 and direct infringement of the fundamental maxim audi alteram partem, which, in effect, is a denial of a fair trial."

It follows, therefore, that the Court of Appeal acted wrongly in dismissing the appellant's application without giving him the opportunity to address it. Where an infringement of the Constitutional right to fair hearing occurs, the consequence is that the trial so affected is a nullity by reason of the infringement - see Adigun v. A.-G. of Oyo State. (1987) 1 N.W.L.R. (Part 53) 678 at p.709 F per Obaseki, J.S.C. As a result, I declare the proceedings before the Court of Appeal null and void.

However, the application by the appellant remains before the Court of Appeal. The question is: should this Court order that the application be taken again by the Court of Appeal or are we in a position to deal with the application in order to avoid further delay in the interest of justice? The application was filed in the Court of Appeal on the 6th day of January, 1988, that is, more than seven years ago.

By the provisions of section 22 of the Supreme Court Act. cap.424 of the Laws of the Federation of Nigeria, 1990 -

"The Supreme Court... generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted as a court of first instance."

The necessary papers on which to consider the appellant's application are all before us, viz the motion on notice and the affidavits in support, exhibits to the affidavits including the judgment of the High Court and the proposed grounds of appeal to the Court of Appeal. I think, in the

interest of justice and eliminate further delay in hearing the application, this is a proper case in which this Court can exercise its powers under section 22 of the Supreme Court Act to hear the application - see In re Adewunmi & CO. (1988) 3 N.W.L.R. (Part 83) 483 at p. 501 H per Nnamani, J.S.C. and Order 6 Rule 3(1) of the Supreme Court Rules, 1985.

5 Now, the appellant's application before the Court of appeal was for an order -

"Extending the time within which to file an appeal against the judgment of Mr. Justice Hotonu of Lagos High Court in respect of the above-mentioned case delivered on 20th March, 1987"

10 The application which was brought under Order 3 rule 4 of the Court of Appeal Rules, 1981 is supported by an affidavit to which the following proposed grounds of appeal are exhibited -

15 *"(1) The learned trial judge erred in law and misdirected himself on facts when he found the 1st defendant liable for the sum of N106,000.00 for purchase of rice when on the evidence it was clear that the money or part of it was handed over to the 3rd defendant as directed by the Plaintiff.*

20 PARTICULARS

(a) Paragraph 11 of the Statement of claim showed that the 1st P.W. followed the 1st Defendant to the office of the 3rd Defendant where a sum of N30,000.00 was handed over to the Chairman of 3rd Defendant Corporation - Mr. G. O. Abe.

(b) P.W. 1 also gave evidence that he followed the first Defendant to the office of Mr. G. O. Abe the Chairman of the Corporation- 3rd Defendant where the said N30,000.00 was handed over to Mr. G. O. Abe.

(2) The Learned trial judge erred in law and misdirected himself when he found that the 1st Defendant collected a sum of N106,000.00 for the purchase of rice but failed to supply the rice when from the evidence before the Court there was no agreement by the 1st Defendant to supply rice to the Plaintiff.

PARTICULARS

(a) The 1st P.W. gave evidence that the Plaintiff was to supply rice to the 3rd Defendant as confirmed by the Chairman of the 3rd

Defendant when the 1st P.W. and 1st Defendant went to the office of the 3rd Defendant.

(b) The 1st Defendant introduced the Plaintiff through its solicitor, as the supplier of rice to the 3rd Defendant.

5

(c) The 1st P.W. in his evidence stated that the 3rd Defendant demanded for a performance Bond from the Plaintiffs Bankers which was supplied.

(3) The Learned trial judge erred in law and misdirected himself on the facts in finding that the 1st Defendant collected a sum of N106,000.00 from the Plaintiff and failed to refund same when demanded, when there was no evidence or admissible evidence that the plaintiff paid any money to the 1st Defendant for purchase office.

15

PARTICULARS

(a) There was no evidence to establish the receipt of any money from the Plaintiff by the 1st Defendant even when it was alleged that the Plaintiff wrote to demand receipts for three instalmental payments.

(b) The alleged letter of demand for a receipt for the payment was not tendered.

20

(4) Additional grounds of appeal will be filed on receipt of record of proceedings."

Now Order 3 rule 4 (supra) provides -

4-1 The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply

25

(2) Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal"

It is settled in a number of cases cited in the appellant's brief of argument including *Ibodo v. Enarofia*, (1980) 5 - 7 SC.42 that to satisfy the provisions of Order 3 rule 4(2) of the Court of Appeal Rules, 1981 one has to show -

(a) Good and substantial reasons for failure to appeal within the period prescribed by law; and

(b) Grounds of appeal which prima facie show good cause why the appeal should be heard.

The reason given in the affidavit in support of the application, for
 5 the failure to appeal within time is that the Appellant fell sick shortly after
 he was referred by his doctor on 20th February, 1987 to the University
 College Hospital, Ibadan but his relatives decided to take him to a hideout
 where he could be treated by a native doctor. That he was in confinement
 for 10 months. That he was unable during that time to get in touch with his
 10 counsel who did not know his whereabouts. That in the meanwhile judg-
 ment was entered by the High Court on 20th March, 1987 against him and
 execution was levied against his movable property.

I am satisfied that this is sufficient reason for the delay in bringing
 the appeal against the decision of the High Court.

15 The grounds of appeal quoted above all raise questions of mixed
 law and fact. None of the grounds raises any question of law alone. Granted,
 (for the case of argument only but without admitting) that the grounds of
 appeal show *prima facie* good cause why the appeal should be heard.
 There is a vital constitutional issue which follows by reason of the fact that
 20 the appellant is not entitled to appeal to the Court of Appeal on facts or
 mixed law and fact without leave sought and obtained from the Court of
 Appeal under section 221 of the 1979 Constitution, which provides in sub-
 section (1) thereof as follows -

25 *“221 (1) Subject to the provisions of section 220 of this Constitution, an
 appeal shall lie from decisions of a High Court to the Court of Appeal with
 the leave of that High Court or the Court of Appeal.”*

If the appellant had intended to appeal on law only he would not by virtue
 30 of the provisions of s.220 of the Constitution, need to seek leave to appeal.
 Therefore, in the present circumstances, it is not enough for the Appellant
 to merely pray for leave to appeal on the grounds of appeal exhibited to his
 affidavit in support of the application.

The provisions of Order 3 rule 4(1) of the Court of Appeal Rules,
 35 1981 which contain the word “may” are in my opinion directory and not
 mandatory. Therefore, in considering any application brought under Order
 3 rule 4, the Court of Appeal will be obliged to exercise its direction judi-
 cially. In this context it follows then that in granting the application for
 extension of time to appeal, the Court of Appeal cannot ignore the signifi-

cant and fundamental constitutional requirement that the Appellant can only appeal on the grounds proposed, which raise questions of facts or mixed law and fact. If leave to appeal was sought and obtained from either the High Court or the Court of Appeal in accordance with the provisions of section 221 subsection (2) of the Constitution. The implication of simply granting to the applicant, in the present case, leave to appeal out of time in the absence of a prayer for leave to appeal is that the court would unwittingly allow him to file an appeal that is incompetent. Surely courts do not act in vain.

Therefore, where proposed grounds of appeal in an application for extension of time to appeal raise questions of fact only or questions of mixed law and fact, it is imperative for a prayer for extension of time and any other prayer that is deemed necessary by the applicant, to be added to the prayer for leave to appeal. Failure to do so renders the application incompetent. I need, however, to stress that the same requirement would not apply where the proposed grounds of appeal are merely grounds of law alone because in such a case the appeal to the Court of Appeal is of right by virtue of the provisions of section 220 of the 1979 Constitution and no leave to appeal is necessary.

Perhaps it is pertinent to point out that although Order 3 rule 4(2) of the Court of Appeal Rules, 1981 provides the conditions to be satisfied in an application for enlargement of time to appeal, those conditions will only be exhaustive if the proposed ground or grounds of appeal raise question of law only. Otherwise, the conditions are not exhaustive for the reasons given above, if the proposed grounds of appeal raise question of fact or mixed law and fact since the leave to appeal under s.221 of the Constitution would have to be obtained. It is interesting to mention that the application in *Ibodo's* case (*supra*) contained both prayers for extension of time within which to appeal and extension of time within which to apply for leave to appeal - see p.43 thereof.

In view of the aforesaid, I am satisfied that the application before the Court of appeal and now before us does not contain sufficient prayers for the Court to grant it. Accordingly, the application is incompetent. I, therefore, refuse to grant it and it is hereby struck out.

In the result the appeal succeeds and it is hereby allowed with N1,000.00 costs to the appellant against the Respondents.

WALI JSC

I have read in advance a copy of the lead judgment of my learned brother, Uwais, JSC with which I entirely agree. I however want to make the following contributions -

As shown in the judgment of the trial court, the plaintiff's claims
5 against the defendants are as follows:-

- “(a) *Jointly and severally from the defendants a total sum of
N106,000.00 and a further sum of N26,500.00 the former being
money had and received between August and September, 1984
by the 1st and 2nd defendants from the plaintiffs in Lagos; and
10 supposedly paid to the 3rd defendant by the 1st and 2nd
defendants at Ibadan to the plaintiffs account on a consideration
that has totally failed (to wit: for the sale and delivery of rice
consignment to the plaintiffs in Lagos) whilst the latter being the
25% anticipated loss of profits thereon; as liquidated damages.*
- 15 (b) *Alternatively, the plaintiff claims the aforesaid amounts jointly and
severally from the 1st and 2nd defendants being money had and
received by the 1st and 2nd defendants at Lagos and Ibadan
between August and September, 1984 from the plaintiffs on a
consideration that has totally failed (to wit: for the sale and
20 delivery of rice to the plaintiff in Lagos).*
- (c) *Further, and still in the alternative, the plaintiff claims from the 1st
defendant alone, the sum of N106,000.00 with interest thereon at
14% bank rate compound interest from September, 1984 until
25 payment or judgment whichever is earlier being money had and
received by the 1st defendant from the plaintiff at Lagos between
August and September, 1984 for a consideration that has totally
failed.*
- (d) *and for such further and/or other reliefs as to the court may seem
30 just.*

These claims were denied by the defendants. As it is evident from the judgment, pleadings were filed and exchanged and issues joined.

Hearing of the case commenced on 26th November 1986 and the plaintiff on that day adduced evidence in support of his case. At the re-
35 quest of learned counsel for the defendants, the case was adjourned to
19th February 1987 for him to present his defence. On 19-2-87, neither the
defendants nor their counsel appeared in court with no reason given. Learned
counsel for the plaintiff asked that the case be adjourned to 25th February
1987 with a proviso that if on that day the defendants failed to appear, he

Brought under Order 3 Rule 4, Court of Appeal Rules, 1981 AND THE INHERENT JURSDICTION.

.....

TAKE NOTICE that this Honourable Court will be moved on the
5 day of 1988 at the hour of 9 o'clock or so soon thereafter as Counsel may
be heard on behalf of Defendant/Appellant for an order extending the time
within which to file an appeal against the judgment of Mr. Justice Hotonu
of Lagos High Court in respect of the above mentioned case delivered on
20th March, 1987.

10 AND FOR such further or other orders as this Honourable Court
may deem fit to make in the circumstances.

Dated this 5th day of January 1988."

The motion was supported by an affidavit explaining why he was late for
15 nine (9) months. Also exhibited with it are three proposed grounds of ap-
peal and a copy of the judgment of the trial court.

On 17th February 1988, the motion came up for hearing before
the Court of Appeal, Lagos (Quorum: Ademola, Babalakin and Awogu,
J.J.C.A.), and on that date one Lagun Sanusi appeared for the appellant
20 (then applicant). In refusing the application, it was recorded:-

*"CT: Refers to judgment and told counsel that the would be appellant
got the money and did not supply rice. His counsel in the court below did
not see him. Grounds of appeal raise no issue of law.*

25 *Ruling: Application refused. Prayer dismissed."*

It is against this ruling that the appellant is now appealing.

Both counsel filed briefs and by virtue of Order 6 rule 8(6) of the
Supreme Court Rules, 1985, the appeal was deemed to have been argued,
30 since none of them appeared in court on the day the appeal was heard.

In the appellant's brief, one issue was formulated. It reads:-

*"whether the lower court exercised its discretion judicially when it
dismissed the appellant's application without any hearing."*

The respondent raised the following two issues in his brief -

35 *01. In the light of paragraphs 16, 17, 18 and 19 of the appellant's affidavit
in support of his application at page 5 of the records, was the lower court
not justified in peremptorily dismissing the application due regard being
had to the provisions of Order 4 and Order 32 rules 2 and 4, High Court of
Lagos (Civil Procedure) Rules 1972 made pursuant to High Court Law, cap*

52 Laws of Lagos State and which is an existing law within the provision of Section 274, Constitution of the Federal Republic of Nigeria, 1979; and more so when the appellant's application and all its supporting affidavits and exhibits have been read prior to the hearing by the lower court?

02. Both the appellant and the respondent having been treated to the same measure in the lower court, neither party having been offered an oral hearing during the lower Court's consideration of the appellant's application, can it therefore be rightly contended that there has been a miscarriage of justice or breach of the rule on fair hearing due regard being had to paragraphs 16, 17, 18 and 19 of the appellant's affidavit at page 5 of the records and the Court's desire to bring finality to litigation on transactions entered into since 1984 as borne out at page 10 of the records?

In my view the solitary issue raised by the appellant covers the appeal. It was the contention of learned counsel for the appellant that on the day the application came up for hearing and after he had announced his appearance, the court in limine proceeded to consider his application, refused it and dismissed his solitary prayer. He submitted that that was an infraction of his right to fair hearing as provided in Section 33(1) of the 1979 Constitution.

Learned counsel for the respondent (who was not in court on that day) referred in his brief to paragraphs 16, 17, 18 and 19, and 19 of the appellant's affidavit and the provisions of Order 4 and Order 34 rules 2 & 4 of the High Court of Lagos Civil (Procedure) Rules, 1972 and submitted that courts of justice must be credited with every degree of assiduity and preparation in the discharge of their onerous duty and which includes that they had, prior to hearing the application, read and comprehended all materials placed before them as the learned justices of the Court of Appeal did in this case before giving their Ruling. He also submitted that from the materials placed before the Court of Appeal not only did the Court judiciously apply its discretion in refusing the application, but also that the application was basically incompetent as it did not include a prayer for extension of time within which to appeal.

Learned counsel finally submitted that in the given situation, the appellant should have applied to this Court under Order 2 rule 28 of the Supreme Court Rules, 1985 within fifteen days of the Court of Appeal refusal for extension of time within which to appeal. He said there was no infringement of Section 33 of the Constitution and urged that the appeal be dismissed.

The main complaint by the appellant is that the Court of Appeal

did not hear him before ruling against his motion and therefore he was denied fair hearing.

The right to appeal to the Court of Appeal as of right from a decision of the High Court is as stated in Section 220(1) of the 1979 Constitution. It reads:-

- 5 *“220 - (1) An appeal shall lie from decisions of a High Court to the Court of Appeal as of right in the following cases –*
- (a) final decisions in any civil or criminal proceedings before the High Court sitting at first instance;*
- (b) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings;*
- 10 *(c) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;*
- (d) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be, contravened in relation to any person;*
- 15 *(e) decisions in any criminal proceedings in which the High Court has imposed a sentence of death;*
- (f) decisions made on any question whether any person has been validly elected to any office under this Constitution, or to the membership of legislative house or whether the term of office of any person has ceased*
- 20 *or the seat of a person in a legislative house has become vacant;*
- (g) decisions made or given by the High Court -*
- (i) where the liberty of a person or the custody of an infant is concerned,*
- 25 *(ii) where an injunction or the appointment of a receiver is granted or refused,*
- (iii) in the case of a decision determining the case of a creditor or the liability of a contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise,*
- 30 *(iv) in the case of a decree nisi in a matrimonial cause or a decision in an admiralty action determining liability, and*
- (v) in such other cases as may be prescribed by any law in force in Nigeria”*

Other than under the circumstances supra, leave of either the trial court or 35 the Court of Appeal is necessary.

Since the matter is civil and none of the proposed grounds of appeal is a ground of law, the appellant is not covered by Section 220(1) supra. He comes under Section 221(1) of the Constitution which provides as follows:-

“221. (1) Subject to the provisions of section 220 of this Constitution,

an appeal shall lie from decisions of a High Court to the Court of Appeal with the leave of that High Court or the Court of Appeal.”

The right to appeal to the Court of Appeal is subject to Section 222(b) of the Constitution which provides:-

“(b) shall be exercised in accordance with Assembly and rules of court for the time being powers, practice and procedure of the Court of Appeal.”

The Relevant Act is the Court of Appeal Act, 1975. Section 25 of the Court of Appeal Act, 1976, provides:-

“25.(1) Where a person desires to appeal, shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this section that is applicable to the case.

(1) xxxxxxxxxxxxxxxxxxxxxxxxx

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(2) The periods of the giving of notice of appeal or notice of application for leave to appeal are -

(a) in an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision;

(b) in an appeal in a criminal cause or matter ninety days from the date of the decision appealed against.

25

(3) where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to the period prescribed by subsection (2) of this section, be allowed a further period of fifteen days, from the date of determination of the application by the court below, to make another application to the of Appeal.

30

(4) The Court of Appeal may extend the period prescribed in subsection (2) and (3) of this section.”

The application was brought under Order 3 rule 4 of the Court of Appeal Rules, 1981 which is also the relevant Rule made pursuant to section 222(b) of the Constitution, 1979. Rule 4 of Order 3 stipulates that -

“The court may enlarge the time provided by these Rules for doing of anything to which these Rules apply.”

Section 24(4) of the Court of Appeal Act 1976 requires that where a person desirous of appealing against a decision outside the prescribed period (as in this case), he must seek for extension of time and leave of the Court of Appeal, and file the Notice of Appeal within the period extended.

Also Order 3 rule 3(6) speaks in the same vein. Where he is out of time, he must obtain extension of time and also leave to appeal. See TUNJI BOWAJE v. ADEDIWURA (1979) 6 SC 143, where this Court, in interpreting the provision of s.31(2)(a) of the Supreme Court Act, 1960 which is in par materia with Section 25(1) and (2)(a) of the Court of Appeal Act, 1976, said at pages 146-147:-

10 *"...in a case where leave to appeal is required to be obtained, a party must not only file his application for leave to appeal within the period prescribed by the subsection but must also file his notice and grounds of appeal, after having obtained leave within the same period. The appellant/plaintiff in the present case failed to file his notice of appeal and the grounds of appeal*
 15 *within three months as he ought to do."*

See also AMUDIPE v. ARIJOBI (1978) 9 & 10 SC 27.

As I have said earlier, having looked at all the grounds of appeal, I found them to be of fact or at best mixed law and fact. In order to have a competent application therefore, the appellant requires the following prayers
 20 since the appeal is on issues of fact and/or mixed law and fact:-

1. *Extension of time within which to seek leave to appeal;*
2. *Leave to appeal on fact and/or mixed law and fact, and*
3. *Extension of time within which to file the Notice of Appeal.*

Where the grounds of appeal are either of fact and/or mixed law and fact,
 25 the application must contain the three prayers otherwise, it will be incompetent and be struck out. See SWEYE & ORS. v. IYOMAHAN & ORS. (1983) NSCC (VOL.14) 393 at 395; AKWIWU MOTORS LTD. v. S A (1984) NSCC (VOL.15) 352; OJEME v. MOMODU III (1983) 3 SC 173; OKE v. EKE (1982) 12 SC 218 and AKPASUBI v. UNWEN (1981) 11 SC
 30 132.

To appeal out of time without taking steps to have the time within which to do so extended is an incurable irregularity that cannot be regarded as a mere technicality: See ORANYE v. JIBOWU 13 WACA 41.

The appellant only prayed for extension of time within which to
 35 file an appeal. He did not pray for extension of time within which to seek leave to appeal and leave to appeal. The Notice of Appeal can only be properly filed when leave to appeal is granted and time to do so extended.

As I have earlier said the main complaint of the appellant is that he was not heard by the Court of Appeal before it summarily dismissed his

application, though he was present in court and announced his appearance. I think there is substance in this complaint as a perusal through the Court of Appeal proceedings of 18-2-88 will confirm that. This in my view, is a violation of the mandatory provision of Section 33(1) of the 1979 Constitution which renders the proceedings a nullity and I so declared.

But this notwithstanding, I entirely agree with the reasons given by my learned brother, Uwais JSC, that since all the necessary papers on which the Court of Appeal could consider the application are before us and having regard to the observations made that the application is per se incompetent, it will only cause further delay in sending the same back to the Court of Appeal for hearing. I also subscribe to his view that in order to eliminate such further delay, the interest of justice requires that this Court exercise its power under Section 22 of the Supreme Court Act, 1960 to hear and dispose of it I therefore agree with and adopt the conclusion and final order made by him in the lead judgment that -

“the application before the Court of Appeal and now before us does contain sufficient prayers for that court to grant it.

Accordingly, the application is incompetent. I therefore refuse to grant it and it is hereby struck out.”

The appeal succeeds and is allowed with N1,000.00 costs to the appellant against the respondent.

KUTIGI JSC

The defendant/applicant by a motion on notice dated the 5th day of January 1988 and filed in the Court of appeal Lagos Division prayed for an order -

“Extending the time within which to file an appeal against the judgment of Mr. Justice Hotonu of Lagos High Court in respect of the above mentioned case delivered on 20th March 1987.

AND for such further or other orders as This Honourable Court may deem fit to make in the circumstances.”

The motion was supported by an affidavit, a further affidavit, a medical report (Exhibit A), the proposed Notice of Appeal (Exhibit B), and a certified true copy of the judgment of the High Court (Exhibit C). Because of the nature of the order I intend to make finally I do not wish to reproduce any part of the affidavits or exhibits here.

The motion came up for hearing on the 17th day of February 1988. The record of proceedings shows on page 18 what actually tran-

spired in court on that day. It is quite short. It reads -

*“Lagun Sanusi for Applicant Respondent served but absent
Court: Refers to judgment and told counsel that the would-be
Appellant got the money and did not supply rice. His counsel in
the court below did not see him. Grounds of appeal raise no issue
of law. Ruling: Application refused.
Prayer dismissed.”*

Dissatisfied with the ruling above, the applicant now appellant, has
appealed to this court. Only one ground of appeal was filed. Briefs were
filed and exchanged by the parties. When the appeal came up for hearing
10 on 5th July, 1993, the parties and counsel on both sides were absent. We
therefore treated the appeal as having been argued in accordance with the
provisions of Order 6 Rule 8(6) of the Supreme Court Rules 1985, briefs
having been filed.

Messrs Akeredolu & Olujinmi counsel for the appellant in their
15 brief submitted one issue for determination in the appeal as follows -

*“whether the lower court exercised its discretion judicially when it
dismissed the appellant’s application without hearing.”*

Learned counsel submitted that although the appellant was repre-
sented by counsel at the hearing, the lower court after observing that “the
20 would-be-appellant got the money and did not supply rice and “that” his
counsel did not see him,” proceeded to dismiss the application without
calling on him (counsel) to move the application. He said the order made
by the court below has the effect of defeating totally the right of the appel-
lant in the case. That the constitutional right of the appellant under section
25 220 of the Constitution to appeal against the decision of the High Court
has been paralysed by the order. The order has therefore occasioned a
serious miscarriage of justice. It was also submitted that by not according
appellant’s counsel any hearing before dismissing the application, the ap-
proach of the court below in the circumstances was a clear breach of sec-
30 tion 33 of the Constitution which guarantees the right of fair hearing. That
although generally a court of appeal is slow to interfere with the exercise of
a discretion by a lower court, it will readily do so where it appears, as in this
case, that the order of the court below is to defeat the rights of the parties.
We were referred to the following cases -

35 SOLANKE v. AJIBOLA (1969) NMLR 253, ODUSOTE v. ODUSOTE
(1971) NMLR 228, UNIVERSITY OF LAGOS v. AIGOR (1985) 1 NWLR
(PT.1) 143, AMADI v. THOMAS APLIN & CO. LTD. (1972) 4 SC.228.

It was further submitted that in dismissing the application the court
below did not even advert to the usual considerations in such an applica-

tion which are –

- (a) *Good and substantial reasons for failure to appeal within the paid prescribed by law; and*
- (b) *Grounds of appeal which prima facie show good cause why the appeal should be heard.*

That the Court of Appeal was in clear breach of its duty for failing to advert at all to these well settled principles regulating an application for extension of time to appeal had therefore not exercised its discretion judicially. The exercise of the discretion by the court below is therefore manifestly wrong, arbitrary, reckless and injudicious and justifies interference by this Court. The following cases were cited in support -

IBODO v. ENAROFIA (1980) 5-7 SC.42, *UNIVERSITY OF LAGOS v. OLANIYAN* (1985) 1 NWLR (PT.1) 156 *MOBIL OIL (NIG)LTD v. AGADAIGHO* (1988) 2 NWLR (PT.77) 283 *IN RE ADEWUMI & ORS* (1988) 3 (PT.83) 483.

We were urged to allow the appeal.

Chief Oyetunde Sobayo in his brief responded thus -

1. *The Court of Appeal having read all the materials placed before it was justified in peremptorily dismissing the application.*
2. *Since neither counsel was heard before the application was dismissed as unmeritorious, the court below rightly exercised its discretion because the court had a choice of whether or not to call for oral arguments or submissions.*
3. *The purported appeal is incompetent. The appellant ought to have filed his appeal within 15 days of the Court of Appeal's refusal on 17/2/88 25 and which time expired on 2/3/88. The court was urged to dismiss the appeal.*

I can answer this last point straight away by stating that the record of appeal shows on page 20 that the appeal was filed on 1/3/88 within time even by counsel's calculation. The appeal was therefore competent.

I have already set out above the proceeding and ruling of the court below on 17/2/88. Clearly the proceeding shows that counsel for the appellant was Present while respondent's counsel, though served, was absent. Under normal Circumstances therefore the appellant's counsel who was present in court, would be entitled to move his application. That did not happen. Instead the court suo motu referred to the judgment (EXH.C), and told counsel that "the would-be-appellant got the money and did not supply rice", and that "his counsel did not see him."

The court then said "Grounds of appeal raise no issue of law". It thereafter proceeded to refuse and dismiss the application. The appellant's

counsel was not allowed to say a word! It appears to me that the procedure adopted by the court below was a curious one. In the first place I think even if the court had wanted to dismiss the application, since counsel was present he ought to have been allowed to move the application or motion and make his submissions.

5 Secondly even if the court had formed the opinion that the application was unmeritorious and after drawing counsel's attention to certain aspect of the application, counsel still failed to take a hint, the court was still duty bound to have asked counsel to move the application. In either case it is only after counsel had moved the application and made his sub-
10 missions (if any) thereon, that the court can legally and properly proceed to dismiss or strike it out as the case may be. Needless to say that these are matters encountered everyday by the courts. I therefore find substance in the submission of the learned counsel for the appellant that the court below erred by proceeding the way it did. The court below clearly had not ac-
15 corded the appellant any hearing. I used the words "any hearing" advisedly, because you can only talk of a "fair hearing" where there has been in fact a hearing and not as-in this case where there had been no hearing whatsoever (see section 33(1) of the 1979 Constitution). There is no provision in the Court of Appeal Rules, 1981, empowering the court below to
20 dispose of an application for extension of time within which to appeal (or any application at all), without affording the party affected a hearing. The commission or omission in the instant case was an aggravated one because appellant's counsel helplessly sat and watched while the court proceeded unilaterally to dismiss his application.

25 It is also my view that the court below was in error when still at the stage of "an application for extension of time to appeal", it was already making observations or findings that "the would-be-appellant got the money and did not supply rice," when the appeal itself was about the receipt of money and supply of rice. Being an interlocutory application, care should
30 have been taken to avoid making any observation which might appear to prejudge the main issue in the appeal itself. (See *MORTUNE v. GAMBO* (1979) 3 - 4 SC 54, *OJUKWU v. GOVERNOR OF LAGOS STATE* (1986) 3 NWLR (PT.26). Under normal circumstances this kind of observation would have disqualified the justices from taking further steps in the hearing
35 of the case. Happily the justices involved in this case have since retired from service. Again needless to say that the observations were unnecessary in an application of this nature. There is also substance in the submission of appellant's counsel that the order made by the court below has the effect of completely defeating the constitutional right of the appellant to appeal

in the case and that the order as it stands has occasioned a serious miscarriage of justice. In the case of AMADI v. THOMAS APLIN & CO. LTD. (1971 - 1972) NSCC vol.7 PAGE 262 AT 267, Udoma J.S.C delivering the judgment of the court said

"Furthermore, the high-handed manner in which the learned 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, direct infringement of the fundamental maxim AUDI ALTERAM PARTEM which, in effect is denial of a fair trial. We are satisfied that the learned trial judge erred in law in refusing to entertain the applicationand this error has been aggravated by his order dismissing the application summarily and has certainly occasioned a miscarriage of justice."

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, investigations or inquiry and any action taken on them is also a nullity."

So it is in this case. Failure to hear appellant's counsel who was present in court before summarily dismissing the application for extension of time to appeal has clearly in my view occasioned a miscarriage of justice. It was a breach of the appellant's constitutional right of a fair hearing which rendered the "hearing" of 17.2.88 a nullity. And so I declare it.

I now take the last reason given by the court below in its ruling refusing the application. The court said *"Grounds of Appeal raise no issue of law."* I say straight away that there was no basis or justification for this statement. Order 3 Rule 4(1) & (2) of the Court of Appeal Rules, 1981 which govern applications of this nature provide thus -

"4. (1) The court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply. (2) Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

The Rule has been judicially interpreted. And it is now settled that an application for extension of time within which to appeal must comply with the

following two conditions -

- (a) *Good and substantial reasons for failure to appeal within the period prescribed by law; and*
- (b) *Grounds of appeal which prima facie show good cause why the appeal should be heard.*

5 *SEE IBODO V.ENAROFIA (supra)*
UNILAG v. OLANIYAN (supra)
MOBIL OIL (NIG) LTD v. ABADAIGHO (supra)
IN RE ADEWUMI & ORS (supra)

Appellant's counsel was therefore right when it was submitted that
 10 the court below never adverted its mind to any of these settled principles before dismissing the application. I have no doubt at all that the exercise of the discretion by the lower court is manifestly wrong and arbitrary. This Court can and must therefore interfere in the circumstances.

Furthermore when the court below said the "grounds of appeal
 15 raise no issue of law", it was probably thinking of the requirement for leave in respect of the proposed grounds of appeal. But with respect, I do not think that the issue of leave did arise at that stage. The appellant was only asking for extension of time within which to appeal. If the two conditions stated above were satisfied, and the time was extended for him, it was up
 20 to the appellant to ensure that he also obtained leave where necessary and file his Notice of Appeal within the time extended for him to appeal. Bello J.S.C. (as he then was) delivering the ruling in BOWAJE v. ADEDIWURA (1976) 6 SC.143 at 146 said -

25 *"Under the provisions of section 31(2)(a) of the Supreme Court Act, (in this case section 25(2) of the Court of Appeal 1976 applies) in a case where leave to appeal is required to be obtained, a party must not only file his application for leave of appeal within the period prescribed by the subsection but must also file his*
 30 *notice and grounds of appeal, after having obtained leave, within the same period."*

This decision was approved and adopted in AMUDIPE v. ARIJODI (1978) 9 -10 SC. 27. So when time within which to appeal is extended by the court, an appellant must, where leave is required, obtain same and file the Notice of Appeal within the extended time. A few examples will suffice.

35 In LAMAI v. ORBIH (1990) NSCC Vol.12 page 188, the motion before the Supreme Court was for an order (1) granting leave to appeal; and (2) extension of time to appeal. The court held that the application was defective in the absence of a prayer for extension of time within which to apply for leave. The motion was clearly a mixed-grill. While praying for

leave, it also prayed for extension of time. That necessitated the requirement for three prayers. It was not a motion merely for extension of time.

In IBODO & ORS v. ENAROFIA & ORS (1980) NSCC Vol. 12 page 195, (1980) 5 - 7 SC. 42, the application was for (1) extension of time within which to appeal, and (2) extension of time within which to apply for leave to appeal. The court held that although the applicants showed good and substantial reasons for failing to appeal within time, they failed to satisfy the second requirement that the grounds of appeal *prima facie* show good cause why the appeal should be heard and *a fortiori* why the court should grant them extension of time within which to apply for leave to appeal. Clearly the application was for extension of time to appeal and for extension of time to apply for leave to appeal. There was no prayer for leave and there was therefore no need for three prayers as laid down in LAMAI v. OBIH (supra).

In C.C.B. (NIG.) LTD. v. OGWURU (1993) 3 NWLR (PT.284) 630 which was an appeal against the decision of the Court of Appeal refusing application for extension of time to cross-appeal, this court applied Order 3 Rule 4(2) of the Court of Appeal Rules as interpreted in OBODO v. ENAROFIA (supra) and came to the conclusion that the two legs of order 3 Rule 4(2) stated above were not satisfied and dismissed the appeal. Here again being an application for extension of time three prayers were not needed as in LAMAI v. ORBIH (supra). I must observe here that I have not succeeded in tracing any authority of this Court or of any other court, where it is laid down that for an application for extension of time to appeal to be competent there must be three prayers. It is certainly not laid down in IBODO v. ENAROFIA (supra). The “three prayer Rule” applies only to applications for leave to appeal out of time as in LAMAI v. OBIH (supra).

The application here was for extension of time. It did not require three prayers. There is no doubt at all that an application for leave to appeal is governed by a totally different consideration from that of enlargement of time. The appellant here did not apply for leave as was the case in LAMAI v. ORBIH (supra) even if he required one, and there was no need to pre-empt him. (See UNIVERSITY OF LAOS & ORS v. OLANIYAN (1985) ALL NLR 122 AT 130, (1985) 1 NWLR (PT.1) 156).

So that in this case even if the Court of Appeal was of the view that the prayers were incomplete (and they were not), and that the application was therefore incompetent, all it could have done at that stage was to have struck-out the application. An order of dismissal was therefore clearly wrong. The application for extension of time to appeal as I said was quite competent and ought to have been considered on its merit having regard to

established principles. The application was never considered on its merit and should never have been dismissed. It is settled that if an appellant fails to obtain leave to appeal where leave is needed, counsel on the other side and even the court suo motu, can raise the issue at any time and have the appeal struck out as incompetent. (See AKINWINU MOTORS LTD v. DR. SONGONUGA (1984) 5 ALL NLR 309). The court below once erred in dismissing the application. The implication obviously was to bar the appellant from exercising his right of appeal. We must not allow that to happen.

CONCLUSIONS

My conclusions in this judgment are that -

- 10 (1) The appellant was denied a (fair) hearing in breach of section 33(1) of the 1979 Constitution even though his counsel was present in court.
- (2) The decision of the Court of Appeal in breach of section 33(1) of the 1979 Constitution is null and void.
- 15 (3) There is no provision in the Court of Appeal Rules, 1981 empowering the court to hear applications or motions without giving the party or parties affected a hearing. The breach also rendered the decision of the court null and void.
- (4) The Court of Appeal had not exercised its discretion judicially by not adverting to settled principles regulating the application as laid down in IBODO v. ENAROFIA (supra).
- 20 (5) If the appellant needed leave to appeal (and I strongly disagree) and had not asked for one, that would have rendered the application incompetent only. In which case it could only have been struck-out and not dismissed.

25 For all I have said above I think there is merit in the appeal. I will therefore allow it. It is hereby allowed. The case is remitted to the Court of Appeal, Lagos for applicant/appellant's motion for extension of time within which to appeal, to be heard de novo on its merit. The parties should be free to file any other paper they consider necessary before hearing. The
30 appellant is awarded costs of N1,000.00.

MOHAMMED JSC

I have had the privilege of reading both the lead and dissenting judgments of my Lords, Uwais and Kutigi, JJSC., and I agree with their concurrence that the decision of the Court of Appeal, in the matter, is a nullity. The Court of Appeal was unfair and unjudicious to dismiss the application of the appellant without hearing his counsel over the merits of the application. I have nothing more I can usefully add to the respective opinions of my two

learned brothers on this issue.

I have however a little to say on the issue where my brothers has disagreed. The disagreement in the two judgments is over the next step to take after nullification of the ruling of the Court of Appeal. My brother Uwais considered the delay in dealing with the application of the appellant before the Court of Appeal. The application was dormant in the Court of Appeal for seven years due to appeal lodged to Supreme Court against that court's refusal to grant the application extension of time within which to appeal and extension of time within which to apply for leave to appeal. In order to eliminate further delay in hearing the application and in the interest of justice my learned brother, Uwais, resorted to the provisions of section 22 of the Supreme Court Act, Cap. 424, which permits the Supreme Court to have full jurisdiction over the whole proceedings as if the proceedings had been instituted or prosecuted before it as a court of first instance.

Considering the time taken to determine the appeal lodged against the Ruling of the Court of Appeal, delivered on 27/2/88, I will entirely agree with my brother Uwais that, in the interest of justice, the Supreme Court should invoke its powers under section 22 of the Supreme Court Act, Cap. 424 and hear the application. I am strengthened over this resolve when I consider the fact that even if I send the case back to the Court of Appeal, the application filed by the appellant/applicant would be dismissed which would occasion another delay and increase more hardship on the appellant/applicant.

By virtue of section 22 of the Supreme Court Act and section 16 of the Court of Appeal Act, the appellate Courts have been bestowed with full jurisdiction over the whole proceedings and could make any order which the lower court would have made. Similar decision, like the case in hand, was made by this Court in the case of University of Lagos and Ors. v. Olaniyan and Ors. (1985) 1 NWLR, (Part 1) 156. In that case after the Supreme Court had found the Court of Appeal wrong in interpreting a rule of court it invoked its power under section 22 and dismissed the application of the respondent for extension of time to appeal to the Court of Appeal.

In the case of Okotie-Eboh and Ors., v. Okotie-Eboh and Ors. (1986) 1 N.S.C.C. 183, the appellant challenged the validity of a writ of summons filed against him through a preliminary objection. The trial judge allowed the Preliminary objection and dismissed the application for stay of proceedings without hearing further argument

The appellant appealed to the Court of Appeal which allowed the appeal and set aside the judgment of the High Court on the ground that the trial judge ought to have heard the application for stay of proceedings. The

Court of Appeal thereafter exercised its powers under section 16 of the Court of Appeal Act, No.43 of 1976, and dismissed the application for stay of proceedings. On appeal to this Court it was submitted by learned counsel for the appellant that the Court of Appeal had no jurisdiction to hear and determine the application filed in the High Court and purportedly dismissed by the trial judge without a hearing.

5 Karibi-Whyte, JSC., who wrote the lead judgment, opined that the Court of Appeal was right and referred to Order 1, Rule 20(5) of the Court of Appeal Rules which reads:

10 *“The powers of the court under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent’s notice has been given in respect of any particular part of the decision of the court below, or by any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the court may make*
 15 *any order, on such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties”.*

The Supreme Court has similar powers under Order 8 Rule 12(5) of the Supreme Court Rules 1985. For the above reasons, and fuller reasons given by my Lord Uwais, I agree to hear the application and I hold that the
 20 papers filed before the Court of Appeal do not contain enough materials to support the application for extension of time within which to file an appeal to the Court of Appeal against the judgment of Mr. Justice Hotonu of Lagos High Court. I therefore refuse to grant the application and it is hereby struck out. I agree with the assessment and award of N1,000.00 costs to
 25 the appellant for his success in this appeal.

BY UWAIS JSC

30 My learned brother, the Hon. Justice Saidu Kawu who sat with us on the 5th day of July, 1993 to hear this appeal retired on the 10th day of August, 1993. We held a conference on the case on the 7th day July, 1993 at which he was present. During the conference, he expressed the opinion that the appeal should be allowed with N1,000.00 costs to the appellant. He agreed also that the application for extension of time to appeal should be refused.

35 I make this pronouncement in accordance with the proviso to section 180 subsection (2) of the Interim Government (Basic Constitutional Provisions) Decree, no.61 of 1993 and ATTORNEY-GENERAL OF IMO STATE v. ATTORNEY-GENERAL OF RIVERS STATE (1983) 8 SC 10 at pp. 10-12.