

SUPREME COURT OF NIGERIA

4TH JUNE, 1993. SC.302/90

**CORAM:- A. G. KARIBI-WHYTE, S. M. A. BELGORE,
O. OLATATAWURA, I. L. KUTIGI, JJSC**

1. AKANKE OLOWU & ORS. APPELLANTS
AND
1. AMUDATU ABOLORE & ANOR RESPONDENTS

APPEALS - *Court of Appeal - dismissal of appeal for failure to file brief of argument within stipulated time - whether court has jurisdiction to relist an appeal so dismissed by it - when court is declared to be functus officio*

COURTS - *preliminary finding that motion for dismissal of appeal was served on appellant - subsequent finding that there was no service - implications thereof*

COURTS - *Exercise of inherent and statutory powers - exercise of discretion - how validly done*

LEGISLATION - *Manifest intention of - construction of statute - deliberate unambiguous omission in the Rule of Court - whether to be tampered with*

FACTS

The Respondents filed an appeal whilst the Appellants filed a cross-appeal before the Court of Appeal. The Appellants filed and served on the Respondents their brief of argument in respect of the cross-appeal well within time. Time granted to the Respondents to file their brief expired for over 114 days without their filing any brief. Appellants filed and served a motion on the Respondents for the dismissal of the appeal for want of prosecution since no brief of argument was filed. The Court of Appeal dismissed the said appeal upon its finding that the Respondents though served, were absent and unrepresented.

The Respondents' subsequent application that their dismissed appeal be restored on the cause list was granted by the Court on the ground of some special circumstances. The Appellants being dissatisfied appealed to the Supreme Court. The ultimate Court had to decide whether the Court of Appeal had jurisdiction to exercise its discretion in relisting the appeal which it had earlier dismissed.

HELD (unanimously allowing the appeal)

1. An appellate court *stricto sensu*, does not exercise any inherent powers other than those of courts of records, nor does it exercise any jurisdiction other than that conferred by statute. (P.73 L15)

2. After a final determination of a matter before it, the Court of Appeal becomes *functus officio* and lacks jurisdiction to deal with the matter. This is because the Court cannot sit on appeal on its own decisions without any such vested power. (P. 73 L22)

3. Under the Court of Appeal rules, there is no provision enabling the relisting of an appeal dismissed for failure to file appellant's brief of argument. But there are provisions enabling the relisting of appeal dismissed for non-compliance with conditions of appeal and non-appearance of the appellant. (P.76 L27)

4. The Court of Appeal cannot rely on *Sken Consults* case in asserting that there was a failure of service on Appellant which rendered the earlier dismissal a nullity since it made a preliminary finding of fact that there was service on the Appellant of the motion that led to dismissal of the appeal. (P. 77 L34)

5. A cross-appeal being an appeal in its own right, dismissal of the substantive appeal in this case does not affect the court's jurisdiction with respect to the cross-appeal. (P.78 L 29)

6. The Court will have no alternative but to dismiss the appeal where the Respondent in his application on grounds of failure to file the brief has satisfied the Court that Appellant failed to file brief within the time, has not applied for extension of time and there is no explanation for failure to comply with the rules (P. 81 L8)

7. An appeal dismissed on the ground of failure to file appellant's brief of argument being final, cannot be revived. (P84 L17)

8. Since there was no intention to give powers to the Court to relist an appeal dismissed for failure to file the brief within time, no provision was made for it under the rules. And in construing Statutes, it is not the function of the Court to supply omissions therein. (P 84 L21)

9. In order not to defeat the manifest intention of the legislation, it is a cardinal rule of interpretation to avoid judicial legislation and making nonsense of the statute. (P84 L31)

10. The omission to provide for relisting an appeal dismissed for failure to file appellant's brief suggests that the dismissal was to be regarded as final. Accordingly, failure to file appellant's brief should not be regarded as a hearing that ought to result in final determination of the appeal. (P84 L34)

11. The Court of Appeal having finally determined the appeal had neither statutory nor inherent jurisdiction to relist it in the absence of any provision to that effect. (P85 L13)

REPRESENTATION

Appellants absent not represented.

Respondents absent not represented.

CASES REFERRED TO

1. Ogbu & Ors. v. Urum & Anor. (1981) 4 SC 1
2. Yonwuren v. Modern Signs (Nig) Ltd (1 985) 1 NWLR (Pt.2) 245
3. Chukwuka & Ors. v. Ezulike (1986) 5 NWLH (Pt. 45) 892
4. Sodeinde Brothers Ltd. v. A.C.B. Ltd. (1982) 6 SC 137
5. Sken Consult (Nig) Ltd v. Ukeh (1981) 1 SC 1
6. Court of Gongola State v. Tukur (No. 2) (1987) 2 NWLR 308
7. Nneji v. Chukwu (1983) 3 NWLR 184
8. Odogwu v. Odogwu (1992) 7 NWLR 344

(PT. 293) 255

9. Obiora v. Osele (1989) 1 NWLR (Pt.97) 279

10. Customs v. Basail (1982) 10 SC 48

11. Osho v. Phillips (1972) 4 SC 259

12. Barraclough v. Brown (1897) AC 622

STATUTES & RULES

1. Court of Appeal Rules 1981 0.3 rr. 10, 11, 20(1), (3), (4), 25(1), (2); 0.6 rr. 2, 10

2. Supreme Court rules 1985 0.6 r. 9(1)

3. Supreme Court rules 1977 0.9 r. 7

4. Constitution of the Federal Republic of Nigeria S. 6(6) (c).

LEAD JUDGMENT BY KARIBI-WHYTE JSC

On the 5th December 1989 the Court of Appeal, on the application of the respondent dismissed the appeal of the appellant for want of prosecution. The specific ground for the application was the failure of the appellant to file his brief of argument under Order 6, rule 10 of its rules 1981. The respondent to this appeal, who was the appellant in the court below on a motion dated 5th February, 1990 sought to set aside the order of the 5th December, 1989 dismissing the appeal for want of prosecution as aforesaid.

Appellant also sought in the same application for an order restoring the appeal on the list. Appellant to regularize his position sought for an order for enlargement of time within which to file appellant's brief, and to deem as properly filed the Notice and amended grounds of appeal filed on Tuesday the 23rd day of January, 1990. The 3rd and 4th prayers are not relevant in this appeal. The only prayer in issue is the prayer restoring the appeal on the list for hearing.

The application was heard on Tuesday the 30th October 1990.

Learned counsel to the respondent, the appellant before us opposed the application. He submitted that the court lacked the jurisdiction to relist any appeal struck out or dismissed for failure to file appellant's brief. He relied on *Yonwuren v. Modern signs (Nig) Ltd* (1985) 1 NWLR (Pt. 2) 244 for this submission. Mr. Animashaun for the ap-
5 appellant/applicant's, who is the respondents now before us, submission was that there was no service on the appellant of the motion to dismiss the appeal. The order to dismiss was therefore a nullity. The court below granted the application to relist the appeal.

10 In a short ruling which I reproduce in full in the interest of clarity, the court below stated as follows:

*"Court: There is both statutory power and inherent power for this court to reenter any appeal struck-out or dismissed: See e.g. Order 3 rule 25(2) of the Court of Appeal Rules. Also Order 3 rule
15 20(4). There must however be special circumstances shown by the appellant before the court can exercise its discretion in favour of the appellant. The affidavit in support of this application shown substantial reason and exceptional circumstances why I should exercise my discretion in favour of the appellant since there was the death of the
20 counsel formerly handling the case; there was the allegation of non service of part of the process on the appellants counsel. What is more, the appellant acted timeously in bringing this application. There was no counter affidavit to allegations in the affidavit in support of the
25 application. The Supreme Court's attitude these days is that actions should be heard on merit instead of being sacrificed on the claw of technicalities. The appeal dismissed on 5/12/89 is hereby restored to the court list. Time within which to file the appellant's brief is extended till today.*

30 *Brief dated 8th January, 1990 filed is deemed properly filed. Prayer (iv) is struck out as Mr. Animashaun confirms that it had not been included in brief dated 8th January, 1990, N50.00 costs to the respondent."*

35 It is clear from the ruling that the court below assumed jurisdiction and exercised their discretion to relist the appeal earlier dismissed by them. They relied on the grounds of the death of counsel formerly handling the case, and the allegation on the part of appellant that process was not served on his counsel, as substantial reasons and exceptional circumstances why the court should exercise its dis-

cretion in his favour to relist the appeal.

The court added that appellant/applicants acted timeously and that there was no affidavit challenging applicant's depositions. Umaru Kalgo, Niki Tobi JJ.C.A. agreed entirely with the reasoning and conclusion. 5

S.B. Candide Johnson, learned counsel to the respondents, now the appellants, dissatisfied with the ruling appealed to this court. There is only one ground of appeal which with the particulars is as follows: 10

"Grounds of Appeal

1. *The learned Court of Appeal erred in law when it held that it had jurisdiction to set aside its earlier order dismissing an appeal for want of prosecution for failure to file Brief and thereafter restore the said appeal to the cause list.* 15

Particulars of Error

(i) *The order of dismissal had been made for failure to file a brief and in the face of the proof of service in the court's file evidencing service on the respondent of the relevant application for dismissal.* 20

(ii) *The order of dismissal of the appeal for want of prosecution for failure to file a brief was a dismissal on the merits and is final.* 25

(iii) *The Court of Appeal after its order of dismissal ceased to have jurisdiction to sit on appeal over or otherwise review (in these circumstances) its own decision as it had become functus officio.*

(iv) *In the premises, the decision of the learned Court of Appeal complained of has the practical effect of over-ruling the decisions of the Supreme Court in Iro Ogbu & ors. v. Ogburu Urum & anor. (1981) 4S.C. 1; T.A. Yonwuren v. Modern Signs (Nig) Ltd (1985) 1 NWLR (pt. 2) 244. and John Chukwuka & ors v. Ndubueze Gregory Ezulike (1986) 5 NWLR (Pt. 45) 892."* 30

The only question for resolution in this appeal therefore is whether the court below had jurisdiction to exercise its discretion to relist the appeal which it had earlier dismissed. 35

It is important to observe that the court below relied on Order

3 rule 25(2) of the Court of Appeal Rules 1981, and Order 3 rule 20(4) of the same Rules. It follows therefore that a valid exercise of jurisdiction and proper exercise of discretion must be predicated on the correct interpretation of the applicable rules.

5 Learned counsel to the appellant has formulated three issues for determination, as follows:

"Questions for determination

10 The appellant respectfully submits that the questions for determination in this appeal may be formulated as follows:

(i) Whether having regard to the state of its record the decision of the Lower Court complained against was justified.

15 (ii) Whether, after making its earlier order of 5/12/89 dismissing the appeal for want of prosecution for failure to file Brief, the lower court was competent and/or justified, thereafter, to set aside the said order and restore the appeal.

20 (iii) Whether, if questions (i) and (ii) (supra) are answered in the negative, the decision of the lower court is supposable in law particularly in view of case law on the point."

25 I think the second issue alone covers the only ground of appeal filed. The facts of this case go a long way in elucidation of the issue and for determining whether the court below had jurisdiction, whether they exercised their discretion judicially when they made the
30 order relisting the appeal hitherto dismissed by them for failure of diligent prosecution, in this case, to file appellant's brief of argument in the court below.

35 The facts of this appeal stated comprehensively are as follows: Plaintiffs brought an action against the defendants in the High Court. In the judgment of the High Court two of his four claims were dismissed. He appealed to the Court of Appeal against the High Court decision.

On 11/7/89, the court below on the application of the defen-

dant seeking a departure from the court's rules gave directions for the filing of briefs in respect of the appeal and cross-appeal before it. On the same day, the court below directed parties to file their briefs of argument in respect of the appeal and cross-appeal, on a time schedule of 60 days and 45 days respectively.

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The respondent/cross-appellant filed his brief of argument within 23 days of the making of the order. Appellant did not file his brief of argument on the 2/11/89, 114 days after the making of the Order for filing of briefs, made on 11/7/89 respondent/cross-appellant applied for the dismissal of the appeal, as he was entitled to do under Order 6 rule 10. The ground relied upon was the failure of the appellant to file his brief of argument. It is pertinent to observe that the Motion brought by respondent to dismiss the appeal was as averred in the supporting affidavit served on the appellant on the 3/11/89. The Court of Appeal heard the motion and dismissed the appeal, as has been earlier stated on the 5/12/89.

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The Court of Appeal in an application to relist the appeal relied on Order 3 rule 25(2) and Order 3 rule 20(4) Rules of the Court of Appeal 1981 for their statutory power to relist the appeal earlier dismissed. They also relied on an alleged inherent power.

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For a fuller understanding of the issue in this appeal and at the risk of tedious repetition, but in the interest of clarity, it is appropriate to begin with the application of the respondent in the court below herein the appellant, to dismiss the appeal of the appellant in that court on the grounds of failure to file their brief of argument.

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On motion dated 1st November, 1989 and filed on the 2nd November, 1989, respondent in the court below herein the appellant sought an order of the court below.

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"1.....pursuant to order 6 rule 10 Court of Appeal rules dismissing the appeal by the appellant for want of prosecution.

2. Directions as to the hearing of the cross -appellant's appeal.

3. Such further and/or other orders as this Honourable Court may deem fit to make in the circumstances."

In the affidavit in support of the motion it was averred in paragraphs

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3,4,5,6,7 as follows-

"3. *I also know that this Honourable Court gave directions as to the filings of briefs in respect of both the appeal and the cross-appeal herein.*

5 4. *I know that the cross-appellants brief was filed on 3/8/89 within 23 days of the order of 11/7/89 granting 60 days to the cross-appellants.*

10 5. *I verily believe that the respondents were duly served on 4/8/89 but are yet to file and serve their cross-respondent's brief.*

15 6. *I verily believe Samuel Babajide Candide Johnson Esq, Solicitor in control of this matter that in respect of their own appeal (distinct from the cross-appeal) the appellants herein have failed to file any appellants brief since the Court Order of 11/7/89.*

20 7. *In the premises I verily believe the earlier-mentioned solicitor that the order of 11/7/89 in respect of time to file briefs has not been complied with by the persons described on one hand as appellants and on the other hand as cross-respondents."*

25 There is the affidavit of service of this motion on the appellants/respondents dated 6th November, 1989 that service was effected on S.A. Animashaun on 3rd November, 1989 at 12.45 p.m. by delivering the process personally to M.O. Dawadu, clerk in the Chambers of appellants at No. 1 Lawani Street, off Ishaga road, Surulere.

30 On the 5th December, 1989 when the Motion came up for hearing, appellant/respondent was absent Applicant/respondent moved the motion for dismissal. Ademola J.C.A. granted the application and dismissed the appeal. The cross appeal was fixed for 21/3/90 for hearing.

35 It is important and pertinent to what will be said hereafter in this judgment to reproduce the drawn up order which is as follows:

"UPON READING the motion before the court and the affidavit of Yisa Aderopo sworn to on the 2nd day of November, 1989 and

after hearing S.C. Nwakwu Esq. of counsel for the respondents and appellants/applicant being served but absent and unrepresented.

It is ordered as follows:

1. *That the appeal of the respondents be and is hereby dismissed.*
2. *That the cross-appeal be fixed for 21/3/90 for hearing.*
3. *That costs assessed at fifty (N50.00) naira be awarded in favour of the respondents."*

It is significant that the court found that respondents who were the appellants in the court below were served with the motion to dismiss the appeal but were absent and unrepresented. The appeal of the appellants having been dismissed only the cross-appeal survived.

The appeal raises the issue of the relisting of an appeal or an application struck out or dismissed by the court. *Stricto sensu* an appellate court does not exercise any jurisdiction other than that conferred by statute. It does not exercise any inherent powers other than those of courts of record. The exercise of appellate jurisdiction is statutory. In this case it is limited to that prescribed by the Court of Appeal Act 1976 and Court of Appeal Rules 1981 as amended in 1984.

It is well settled, and it is unnecessary citing of decided cases that after finally deciding a matter before it, the Court of Appeal becomes functus officio, and lacks jurisdiction to deal with the matter. This is essentially because the court cannot sit on appeal on its own decisions, having not been vested with any power so to do.

The constitutional and statutory jurisdiction of the Court of Appeal is to hear appeals from lower court. It cannot hear appeals from its own decisions. Thus having finally decided a case before it, it becomes functus officio as to that case.

The Court of Appeal Rules provide for dismissing an appeal in the following circumstances. First, where there is non-compliance with conditions of appeal, See Order 3 rules 20 sub-rule (1). Secondly, if the appellant fails to appear when his appeal is called on for hearing - See Order rule 25, sub-rule (1). Thirdly, Where an appellant fails to

file his brief of argument within the time as extended by the court - Order 6 rule 10. In the first two situations the rules have made provision enabling relisting the appeal so dismissed. I hereunder reproduce the relevant provisions of Order 3 rule 20(1) (3), (4) Order 3 rule 25 sub-rule (1) (2), and Order 6 rules 2 and 10.

5 Order 3 rule (20) (1) provides as follows:

"If the appellant has complied with none of the requirements of Rules 10 and 11 of this Order, the Registrar of the court below shall certify such fact to the court, which shall thereupon order that the
10 *appeal be dismissed either with or without costs, and shall cause the appellant and respondent to be notified of the terms of its order."*

Order 3 rule 20(3)

"If the respondent alleges that the appellant has failed to com-
15 *ply with a part of the requirements of Rules 2, 10 or 11 of this Order, the court, if satisfied that the appellant has so failed, may dismiss the appeal for want of due prosecution or make such other order as the justice of the case may require.*

Order 3 rule (4)

20 *"An appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored. Any such application may be made to the court and the court may in its discretion for good and sufficient cause order that such appeal be*
25 *restored upon such terms as it may think fit."*

Order 3 rule 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
30 *appeal may be struck out or dismissed with or without costs.*

(2) When an appeal has been struck out owing to the non-appearance of the appellant the court may, if it thinks fit, and on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for hearing."

35 The dismissal of the appeal under this rule is usually at the instance of the court, on account of the inability or failure of the appellant to pay the deposit sum fixed by the Registrar and required to cover the estimated cost of making up and forwarding the

record of appeal (See Order 3 rule 10), or in accordance with Order 3 rule 11 inability or failure to deposit the sum directed by the registrar or to give security by bond to prosecute the appeal and for the payment of the costs which may be ordered.

Order 3 rule 20(4) provides for restoration of an appeal dismissed under rule 20(1) that is for non-compliance with rules 10 and 11 of Order 3. An appellant whose appeal is dismissed under this rule is allowed by Order 3 rule 20(4) to apply by notice of motion that his appeal be restored. Where the appellant shows sufficient and good cause why the appeal should be restored, the court may exercise its discretion to restore the appeal upon such terms as to costs as it may think fit. The good and sufficient cause must give satisfactory explanation for (the failure to pay the deposit for records as ordered by the registrar, and if also the failure to make the deposit or give security for costs.

The respondent is also entitled to apply for the dismissal of the appeal on the same grounds. The enabling provision is sub-rule 3 of rule 20 of Order 3.

"(3) If the respondent alleges that the appellant has failed to comply with a part of the requirements of Rules 2, 10 or 11 of this Order; the court if satisfied that the appellant has so failed, may dismiss the appeal for want of due prosecution or make such order as the justice of the case may require."

It follows therefore that an appeal may be dismissed by both the court acting suo motu under rule 20(1) and the respondent, for want of due prosecution under rule 20(3). In each of such cases appellant can apply to restore the appeal on to the list under rule 20(4).

An appellant's appeal may have been dismissed for non-appearance of the appellant under rule 25(1) which provides as follows:

"If the appellant fails to appear when the 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."

An appellant is allowed by rule 24 to be absent at the hearing of the appeal if at any time before the hearing he files a declaration in writing that he does not wish to be present in person or by his representative. This declaration must be served on every person who has filed an address for service. Having complied with this rule the appeal will
 5 be dealt with as if appellant had appeared: See rule 24. An appeal struck out by virtue of the non-appearance in rule 25, sub-rule (1) may be relisted and entered for hearing on the application of the appellant, if the court thinks fit, and on such terms as to costs or
 10 otherwise as it may deem just.

The implication of providing in the rules for restoring an appeal dismissed or struck out is that the matter is regarded as having not been finally determined and can be reopened for final adjudication. Order 6 rules 2 and 10 of the Court of Appeal Rules 1981 as
 15 amended in 1984 also makes provision for the dismissal of an appeal for want of prosecution. In this case it is dismissal for failure to file appellant's brief of argument. The provision is as follows:

*"2. The appellant shall within sixty days of the receipt of the record of appeal from the court allow file in the court a written brief,
 20 being a succinct statement of his argument in appeal."*

The relevant part of sub-rule 10 reads:

*"10 Where an appellant fails to file his brief within the time
 25 provided for in rule 2 above, or within the time extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution....."*

Now, the three situations enabling application for the dismissal of an appeal are different. Non-compliance with conditions of
 30 appeal is different from non appearance of the appellant. The two are different from failure to file appellant's brief of argument. Whereas there are provisions for an appeal dismissed under the first two, to be relisted, there is no provision In Order 6 enabling re-listing an appeal dismissed for failure to file appellant's brief of argument under sub-
 35 rule 10.

The issue in this appeal is whether the court below has the jurisdiction to restore on the list for hearing the appeal dismissed on the 5th December 1989 for failure to file appellant's brief of argument. The answer to this question will depend upon the grounds for

dismissing the appeal, and the circumstances surrounding the dismissal. I have already set out the ruling of the court below relisting the appeal for hearing.

In a very well written brief Mr. Candide-Johnson for the appellant summarized the facts of the case and gave an integrated history of the applications resulting in the dismissal of the appeal. Learned counsel then summarized the position when he concluded as follows:

"In a nutshell, on 5/12/89 when the appellant's motion on notice dated 1/11/89 was determined, the court's record disclosed that the respondent had not complied with the direction of 11/7/89 as to the filing of briefs; that on 3/11/89 the Bailiff of the Court of Appeal had duly served the motion on notice dated 2/11/89 for dismissal on the respondent's solicitor's Law Clerk (see pp. 5-5A of the record); and that in spite of proper service on the respondents they were absent from and unrepresented in the lower court"

Learned counsel went on to refer to the certified copy of the drawn up order of the proceedings, where the court observed that the appellant was served, but was absent and unrepresented and submitted that appellant in the court below was duly served with the motion for dismissal. Learned counsel finally submitted that having regard to the record of the lower court on 5/12/89 which was available to the court as at 30/12/90 the decision to relist the appeal dismissed was made without jurisdiction. Mr. Candide-Johnson cited and relied on *Chief Ira Ogbu & Ors v. Chief Ogburu Urum & anor* (1981) 4 S.C.1; *Yonwuren v. Modern Signs (Nig) Ltd* (1985) 1 NWLR (Pt. 2) 244; *Sodeillde Brothers (Nig) Ltd v. African Continental Bank Ltd* (1982) 6 S.C. 137; *Chukwuka & ors v. Ezulike* (1986) 5 NWLR (pt. 45) 892. Relying on the above cases learned counsel submitted that there is no statutory or inherent power authorising the relisting for hearing in the Court of Appeal of an appeal dismissed for want of prosecution by virtue of Order 6 rule 10, of the Court of Appeal Rules 1984.

It was submitted that the court having made a preliminary finding of fact that there was service on the appellant for the motion to dismiss the appeal there was no basis in the decision of the Court of Appeal relying on *Sken Consult (Nig) Ltd v. Godwill Ukey* (1981) 1 SC 1 in asserting that there was a failure of service of process on the appellant, thereby rendering the earlier dismissal a nullity. I agree with this submission.

On his part learned counsel to the respondent who was the appellant in the court below formulated three issues for determination. Apart from the first issue, the other issues are different from the issues formulated by the respondents. They are as follows:

(i) Whether on the application and affidavit evidence before
5 the lower court, the lower court's decision to set aside the order of 5/12/89 was justified.

(ii) Whether since the cross-appellant's appeal existed as at
5/12/89 when the appeal was dismissed, the Court of Appeal can be
10 referred to as *functus officio* or the appeal can be properly termed as extant.

(iii) What was the ambit and how could the Court of Appeal
order of 5/12/89 be properly interpreted and whether on a proper
analysis of the authorities there is a difference in effect from an ap-
15 peal dismissed for want of prosecution and an unmeritorious appeal dismissed for want of prosecution.

This court has advised counsel on several occasions against
the proliferation of issues for determination. The only ground of ap-
20 peal has been set out in this judgment. The ground of appeal is chal-
lenging the jurisdiction of the Court of Appeal to set aside an appeal
earlier dismissed for failure to file brief of argument. Accordingly, only
the first issue for determination is relevant to the ground of appeal.
As the appeal did not challenge the cross-appeal, it seems to me
25 unnecessary to consider it in this appeal.

It is well settled that a cross-appeal is an appeal in its own
right, and does not depend for its existence or survival on the sub-
stantive appeal. Hence the dismissal of the substantive appeal does
30 not affect the cross-appeal. The court by dismissing the substantive
appeal comes *functus officio* thereto. The jurisdiction with respect to
the cross-appeal is not affected. The second issue is therefore irrel-
evant.

It is quite convenient and proper to consider issues (i) and (iii)
35 together. The question of the interpretation of the order of 5/12/89
will inevitably arise, and the issue of the dismissal of an appeal for
failure to file brief of argument will undoubtedly be an important and
relevant consideration.

In his brief of argument, Mr. Animashaun for the respondent

laid considerable emphasis on the question of non-service on the appellant with notice of the motion seeking to dismiss the appeal for want of prosecution, namely, failure to file appellant's brief of argument. His submission was that the Bailiff delivered the hearing notice to a fourteen years old secondary school student, the son of another tenant, who was on the premises on a day visit from the boarding house. The notice was not delivered to respondent. The dismissal of the appeal was discovered by respondent subsequently on inquiry at the registry of the Court of Appeal. Thus, the contention of the respondent was that they were not served with the notice of the motion to dismiss the appeal. In effect the contention is that the Order of the 5th December, 1989 was a nullity, having been made in the absence of notice on the respondent.

It is interesting to consider the application seeking to set aside the ruling of the 5th December, 1989. It sought extension of time to file appellant's brief and to file notice and grounds of appeal. The first was exactly the reason why the appeal was dismissed. It is therefore confirming the justification for the ruling of 5th December, 1989.

The contention of non-service would appear to me to have ignored the contents of the drawn up order of the ruling of the 5th December, 1989. The order having recited that the appellant was served with the notice of motion to dismiss the appeal, but was absent and unrepresented, went on to dismiss the appeal.

The court granting the application and dismissing the appeal referred to the affidavit in support of the motion dated 2nd November, 1989 the averments of which have been reproduced in this judgment. The effect of the court below relying on the affidavit dated 2nd November, 1989 in support of the motion to dismiss the appeal is that the court accepted that there was service of the motion on the appellant.

Appellant failed to appear to defend the application. The court below satisfied itself on the affidavit evidence before it that the respondent was sufficiently put on notice. The court therefore had jurisdiction to make the order dismissing the appeal under Order 6 rule 10; all the essential requirements for the making of the order were in evidence before the court, the next question is whether the order of

dismissal of the appeal was properly made and valid.

The application was made under Order 6 rule 10 of the Court of Appeal Rules 1981 as amended in 1984. I have already reproduced the rules in this judgment. It is clear from the rules that an
5 order of dismissal of an appeal can be made if the respondent is able to satisfy the court that appellant has failed to file his brief within the time provided in rule 2 or within the time extended by the court.

10 In the instant case respondent in his affidavit in support of the motion to dismiss the appeal averred in paragraphs 3, 4, 5 and 6 as follows:

*"3. I also know that this Honourable Court gave directions as to the filing of briefs in respect of both the appeal and the cross-
15 appeal herein.*

4. I know that the cross-appellant's brief was filed on 3/8/89 within 23 days of the Order of 11/7/89 granting 60 days to the cross-appellants.

*5. I verily believe that the respondents were duly served on
20 4/8/89 but are yet to file and serve their cross-respondent's brief.*

*6. I verily believe Samuel Babajide Candide Johnson, Esq. solicitor in control of this matter that in respect of their own appeal (distinct from the cross-appeal) the appellants therein have failed to
25 file any appellant's brief since the court order of 11/7/89."*

It seems to me that under Order 6 rule 10 of the Court of Appeal Rules, an appeal may be dismissed for want of prosecution where the appellant fails to file his brief within time- see, Govern-
30 ment of Gongola State v. Tukur (No.2) (1987) 2 NWLR (Pt.56) 308. The power to dismiss the appeal in such circumstance is discretionary. But this is an exercise of judicial discretion.

35 The court in the instant case had before it all the essential prerequisites enabling it to dismiss the appeal. There were no circumstances requiring the court to do otherwise and to consider whether it should not dismiss the appeal. If appellant had shown that indeed he had complied with the rules as in *Nneji v. Chukwu* (1988) 3 (Pt. 81)

NWLR 184, the order made would be justifiably set aside as having been made without jurisdiction.

Thus where respondent in his application to dismiss an appeal on the grounds of the failure of the appellant to file his brief of argument, has satisfied the court that appellant failed to do so within 60 days of the time indicated by the court and has also not applied for extension of time to do so and there is no explanation for his failure to comply with the rules, the court will have no alternative, but to dismiss the appeal. This was the position in this case. The ipsissima verba of Order 6 rule 10 does not lend support to a construction enabling exercise of discretion: See *Odogwu v. Odogwu* (1992) 7 NWLR 344. 5 10

The principle which governs the court in the exercise of its discretion was lucidly stated in the dictum of Obaseki, J.S.C. in *Obiora v. Osele* (1989) 1 NWLR (Pt.97) 279 where he said; 15

"..... The principle is that it is the duty of the plaintiff's or appellant's counsel in the instant appeal to get on with the case since public policy demands that the business of the courts should be conducted with expedition....."

In *Chukwuka v. Ezulike* (1986) 5 NWLR (Pt.45) 892, appellants appealed to the Supreme Court, but failed to file their brief of argument within the period prescribed. On application made pursuant to order 6 rule 9(1) of its rules, the Supreme Court dismissed the appeal for want of prosecution. It is important to observe an important difference between Order 6 rule 10 of the Court of Appeal rules 1981 and Order 6 rule 9(1) Supreme Court Rules 1985. I have already reproduced Order 6 rule 10. Order 6 rule 9(1) of the Supreme Court, Rules 1985 is as follows: 20 25

"9-(1) if an appellant fails to file his brief within the time provided in rule 5 above, or within the time as extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution, the respondent fails to file his brief he will not be heard in oral argument except by leave of the Court. A dismissal of all appeal under this Rule whether on the application of the respondent or not, where the appellant fails to file his brief shall amount to a dismissal on the merit; 30 35

Provided that such dismissals all the merit shall be only where

82 Olowu v. Abolore (1993) 6 KLR Karibi-Whyte JSC
the court is satisfied, prima facie, on the papers before it that the
appeal has not merit"

The words italicized by me are not in Order 6 rule 10 of the Court of Appeal Rules. Similarly absent in Order 6 rule 9(1) of the Supreme Court Rules (1985), but present in Order 6 rule 10 is the
5 last sentence therein which is as follows

"Where an appellant fails to file a reply brief within the time specified in Rule 5, he should be deemed to have conceded all the
10 *new points or issues arising from the respondent's brief."*

This last mentioned sentence is not relevant to the instant appeal. The passages italicized in Order 6 rule 9(1) are relevant considerations in the exercise of the discretion of the court to grant an
15 application to dismiss an appeal for failure to file appellant's brief. They also affect the exercise of the jurisdiction to relist an appeal which has been dismissed.

I have endeavoured to show that although the two rules are
20 designed to achieve the same objective, the dismissal of an appeal on grounds of failure of appellant to file his brief of argument, they are not in pari materia. Hence each rule should be construed in accordance with its own words and the facts applicable. The dismissal by
25 the Court of Appeal of the appeal on the 5th December, 1989 which complied with the enabling rules is accordingly valid.

The next question is whether the Court of Appeal had jurisdiction to set aside the Order for dismissal it made on the 5th December. 1989.
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It is in this connection, important to consider the reasons given by the court for setting aside its own ruling of the 5th December, 1989. In the leading ruling, Babalakin J.C.A. held that the court had both statutory power and inherent power to re-enter any appeal
35 struck out or dismissed. He cited and would appear to have relied on Order 3 rule 25(2) and Order 3 route 20(4) of the Court of Appeal rules 1981 for that proposition.

Although Kalgo, J.C.A, in his own ruling did not cite any of the

rules in support, he distinguished the right to re-enter appeals dismissed between those who the dismissal was not on the merits, and where the order of the court was not final. He regarded the instant case as such a case. He went on to grant the application in view of the Court of Appeal Rules and in the interest of justice.

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Niki Tobi, J.C.A. relied on the constitutional right of appeal and on Order 3 rule 20(4) of the Court of Appeal Rules 1981 in granting the application to re-enter the appeal dismissal for hearing.

It is of crucial importance to appreciate the fact that the appeal sought to be re-entered was dismissed under Order 6 rule 10 of the Court of Appeal Rules. All their Lordships of the court below relied on rules other than that on which the appeal was dismissed to re-enter it on the list.

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As I have already pointed out in this judgment, there is statutory power for an appeal dismissed for non-compliance with the conditions of appeal by virtue of Order 3 rule 20(3) to be restored under Order 3 rule 20(4). Similarly where an appellant's appeal has been dismissed for non-appearance under Order 3 rule 25(1), it may be relisted under Rule 25(2). There is no inherent power in any of the situations. In any case the application before the court below was to relist an appeal dismissed for failure to file appellant's brief of argument. It is entirely different and governed by different rule.

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It is well settled that the exercise of appellate jurisdiction is statutory. A court cannot exercise jurisdiction to hear an appeal unless such jurisdiction is conferred by the Constitution or some enabling statute. Hence in the instant case the jurisdiction to relist an appeal dismissed under Order 6 rule 10 should be found in the Rules of the Court. I have not been lucky to discover any in the rules. Mr. Candide-Johnson has in the appellant's brief of argument submitted that Order 9 rule 7 of the Supreme Court Rules 1977 and Order 6 rule 9(1) (excluding the proviso and its legal effect) of the Supreme Court Rules 1985, are replicas of Order 6 rule 10 of the Court of Appeal Rules 1981 which is the relevant rule in the instant appeal.

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I have already analyzed the two rules in this judgment and pointed out the differences. I have come to the conclusion that they are not in pari materia even though the eventual result may be identical in certain respects.

This court has decided several principles in *Chukwuka v. Ezulike* (1986) 5 NWLR (Pt.45) 892. It was held there that it has no jurisdiction under the 1979 Constitution, the Supreme Court Act, 1960 and the Rules of the Supreme Court 1985, or under its inherent jurisdiction or powers to entertain an application for re-entering an appeal dismissed under Order 8 rule 16 of the Supreme Court Rules for want of prosecution: *Ogbu v. Urum* (1981) 4 S.C. 1; *Yonwuren v. Modern Signs (Nig) Ltd* (1985) 2 SC. 86; (1985) 1 NWLR (Pt. 110) 483.

It was also held that it has no inherent jurisdiction to set aside an order of dismissal properly made in the valid exercise of its jurisdiction and re-enter the appeal. An appeal dismissed on the ground of the failure to file appellant's brief of argument is final. The appeal so dismissed cannot be revived.

I have already in this judgment referred to Order 6 rule 10 of the Court of Appeal Rules (1981) and pointed out the differences. It seems to me that there was no intention to give powers to the court to relist an appeal dismissed under Order 6 rule 10, hence no provision was made for it. Since Order 3 rule 20(3) (4) and Order 3 rule 25(2) provided for an appeal dismissed or struck out respectively, the omission to make a similar provision with respect to failure to file appellant's brief inevitably suggests that there was a deliberate omission to make the provision. It is not the function of the court, when construing statutes to supply omissions therein: See *Customs v. Barau* (1982) 10 S.C. 48.

It is one of the cardinal rules of interpretation to avoid judicial legislation and avoid making nonsense of the statute in order not to defeat the manifest intention of the legislation: See *Osho v. Phillips* (1972) 4 SC. 259. In this case therefore the omission to provide for relisting an appeal dismissed for failure to file appellant's brief suggests that the dismissal was to be regarded as final.

Accordingly the failure to file appellant's brief of argument should ordinarily not be regarded as a hearing which ought to result in a final determination of the appeal. The rule might have been guided by the principle of *interest rei publicae ut sit finis litium*. It is however a settled principle of law that where a statute creates a new right which has no existence apart from the statute creating it, and the

statute creating the right at the same time prescribes a particular method of enforcing it, then in the words of Lord Watson in *Barracough v. Brown* (1897) AC 622, "the right and the remedy are given uno flatu, and one cannot be dissociated from the other" So it is in this case. The right to file a brief in Order 6 rule 2, has the consequence of breach of the rule in Order 6 rule 10. Both go together.

Thus, having finally determined the appeal, in the absence of any provision, the Court of Appeal had neither statutory, nor inherent jurisdiction to relist the appeal already dismissed by the court. The court below was therefore manifestly wrong to have applied the provisions of its rules designed for relisting appeals dismissed for non-compliance with conditions of appeal and non-appearance to an appeal dismissed for failure to file appellant's brief. The appellant's appeal is accordingly allowed. The decision of the Court of Appeal setting aside its own decision dismissing the respondent's appeal is hereby set aside. The decision of the Court of Appeal dated 5th December, 1989 dismissing respondent's appeal is hereby restored. Respondent shall pay costs assessed at N1,000 in this court.

KAWU JSC

I have had the advantage of reading, in draft, the lead judgment of my learned brother, Karibi- Whyte, J .S.C. which has just been delivered. I agree entirely with him that this appeal should be allowed. The application to dismiss the appeal for failure on the part of the appellant to file his brief was brought under Order 6 rule 10 of the Court of Appeal Rules (1981) as amended. Under that Order, there is no provision for relisting an appeal dismissed. It follows therefore that the Court of Appeal had no jurisdiction to set aside its order dismissing the respondents' appeal. The decision of the court of Appeal dated 5th December, 1989 dismissing the respondents' appeal is therefore restored. The respondent shall pay costs assessed at N1,000.00 to the appellant.

BELGORE JSC

Once the Court of Appeal has dismissed the appeal for want of prosecution due to appellant's failure to file Brief of Argument, that

court is functus officio on that matter. [See *Orobator v. Mrs. Mercy Amata* (1981) 5 S.C. 276; *Nwaoro v. Nwoukoku* (1985) 2 S.C. 86-167; *Yonwuren v. Modern Signs Ltd* (1985) 1 NWLR (Pt.2) 244 at 245

5 If before the judgment of dismissal was entered and the appellant prayed for extension of time to file his brief, that will be a different matter governed by Order 3 rule 41 (1) Court of Appeal Rules. However, this issue has nothing to do with application of enlargement of time but with a matter dismissed for want of prosecution for which there is no remedy again in the Court of appeal.

For the foregoing reasons and the reasons ably advanced by Karibi- Whyte, J.S.C., in his judgment which I adopt as mine, I also
15 allow this appeal by restoring the earlier order of the Court of Appeal which dismissed the respondents' appeal and award N1,000.00 against the respondent.

20 **OLATAWURA JSC**

I had a preview of the judgment of my learned brother Karibi-Whyte, J.S.C, just delivered, I am in complete agreement with His conclusions, What is in issue in this appeal is the interpretation of Order 6 rule 10 of the Court of Appeal (Amendment) Rules 1984.
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This rule provides:

*"Where an appellant fails to file his brief within the time provided for in Rule 2 above, or within the time as extended by the Court, the respondent may apply to the Court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of the Court. Where an appellant fails to file a reply brief within the time specified in Rule 5, he shall be deemed to have conceded all the new
30 points or issues arising from the respondent's brief"*

The facts and sequence of events which led to the earlier order made by the Court of Appeal and which was subsequently reversed by the same Court have been clearly stated in the judgment of Karibi-Whyte J.S.C. It appears to me that the purported reversal of the

earlier order made on 5th December 1989 and which order was set aside by the court on 30/10/90 was made without jurisdiction. It is clear that the subsequent order of 30/10/90 was made when the court was functus officio. It is clear and from the set up of the courts, that quite apart from minor correction due to slips no court can sit on an appeal on its own judgment. A careful reading of this applicable rule is Order 6 rule 10 of the Court of Appeal Rules already set out above gives no such power. It permits of one order and that is the dismissal of the appeal for failure to file the briefs.

It is the contention of the respondent that once the dismissal was not on the merits that by virtue of S.6(c) of the 1979 Constitution, the court can exercise its inherent jurisdiction. With profound respect to the learned counsel for the respondent, the power conferred by the President to make rules for the practice and procedure of the Court of Appeal is by virtue of section 227 of the 1979 Constitution. The power so exercised by the court as a result of which the amendment came into practice on 1st September, 1984 is not in conflict with section 6(6) of the same Constitution. It is always easy to be carried away by resorting to interest of justice as if justice is meant for only one party to an action. Justice is for both parties. The court having found that the respondent to this appeal was served but absent, he cannot be heard to say that the interest of justice will be called in aid to disregard the rules of court. A party that treats the rules of court with disdain should equally be ready to accept the sanction provided by the rules of court. The lower court was therefore in error to read into Order 6 rule 10 of the Court of Appeal rules provisions not within the contemplation of the rule. By so doing the learned Justices have supplied certain words by implication. The rule is clear: the respondent is entitled under that rule to apply to the court "for the appeal to be dismissed for want of prosecution". There is no any option left but to carry out the letters of the rule. The provision of Order 3 rule 20(4) of the Court of Appeal Rules which allows an appeal to be dismissed for non-compliance to apply for the restoration of the appeal has no similar provision under Order 6 rule 10 of the same Court of Appeal Rules. It is my view that the languages of the rule i.e. rule 10 of Order 6 of the Court of Appeal rules is express and unambiguous. It gives no room for any discretion. Nothing can be read into it and nothing can be implied. It is crystal

clear. It will do violence to this clear provision of the rule to place a different construction on the rules.

It is for these reasons and the fuller reasons given by my learned brother Karibi-Whyte, J.S.C. that I will also allow the appeal, set aside the ruling of the Court of Appeal dated 30/10/90 and restore the
5 order of the same court dated 5th December, 1989. There will be costs of N1,000.00 in favour of the appellant.

As at the time this appeal was heard both counsel were absent from court notwithstanding they were in court in 21st September, 1992 when the appeal was fixed for hearing on 8th March 1993.
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KUTIGI JSC

I have had the advantage of reading in draft the judgment
15 read by my learned brother Karibi-Whyte J.S.C. I agree with his reasoning and conclusion. I will also allow the appeal and restore the order of the Court of Appeal dated 5th December, 1985 dismissing the respondents' appeal. The appellants are awarded N1,000 costs against the respondents.
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