

**SUPREME COURT OF NIGERIA**  
 16TH JULY, 1993. SC.265/1989  
**CORAM:- A. G. KARIBI-WHYTE, S. M. A. BELGORE,**  
**A. B. WALI, O. OLATAWURA, I. L. KUTIGI, JJSC**

1. FAWOLE AJAYI

... .. APPELLANTS

2. D. M. AJAYI

AND

IGIEROBO OMOROGBE ... .. RESPONDENT

*APPEALS* - Appellant's brief - prescribed period within which to file brief - Registrar's notice for parties to collect record of appeal - purpose thereof.

*APPEALS* - Record of appeal - duty of an appellant - in respect of the record - when the appellant is deemed tardy in the prosecution of the appeal.

*BRIEFS* - Appellant's brief - prescribed period within which to file the brief - whether computation of time starts from the time the record of appeal was collected by appellant - or the time the Registrar's notice was issued.

*COURTS* - Court of Appeal's discretion - to dismiss an appeal for want of prosecution - things that the court will take into consideration - Contention that the court failed to consider counter - affidavit - whether correct.

*LITIGANTS* - Non-prosecution of a case - not occasioned by solicitor's fault but by the litigant - in disregard of rules of court - whether court's favour can be received - whether illness and poverty of litigant - can justify delay.

***FACTS***

In a case for a declaration of title against the Appellants in respect of a land in dispute, judgment was given in favour of the Respondent by the High Court, Benin City. The Appellants filed a notice of appeal, failed to comply with the condition of appeal until Respondent filed a motion for the dismissal of the appeal. The High Court Registrar served notice on the parties inviting them to come and collect their own copies of the record of appeal which has been forwarded to the Court of Appeal. The Respondent promptly collected his own record whilst the Appellants failed to collect their records until 6 months after the receipt of the Registrar's said notice. That was after the Respondent had filed an Application to dismiss the Appeal for want of prosecution. The Court of Appeal dismissed the Appellants' appeal as prayed, for want of prosecution. Being dissatisfied, the Appellants appealed to the Supreme Court. The apex court had to determine inter alia, whether the time to file the Appellants' brief will start to run from the time of service of the Registrar's notice of dispatch or from the time the Appellants received the record of appeal.

***HELD*** (unanimously dismissing the appeal)

1. It is not disputed that an appellant shall within 60 days of the receipt of the record of appeal file the appellant's brief and the consequences for not filing briefs during the prescribed period are clearly set down under 0.6 r. 10 of the Court of Appeal Rules. (p. 127 L35).
2. Appellants' Counsel's suggestion that the receipt of the record of appeal is synonymous with the collection thereof is the beginning of the counsel's error that has led to the wrong interpretation of the court rules. (p.128 L10).
3. The purpose of the Registrar's notice is to enable parties collect the record of Appeal. It is not until an Appellant has collected his own record of appeal that he can know whether the record has been compiled accurately, and he may also decide to file additional grounds of appeal. (p. 128 L26)

4. It is the duty of an Appellant to ensure that the record of Appeal reaches the appellate court on time and also to ensure the accuracy of the said record. (p. 128 L30)
5. From the printed record, it is obvious that the Appellants were tardy in the prosecution of the appeal. Their filing of the notice of appeal was merely used as a stop-gap. (p. 129 L5)
6. The time to file the Appellants' brief started to run when they were notified of the dispatch of the Record of Appeal and not from the time they chose to collect the record as contended by them. For if the observance of the rules of court depends on when a party decides to obey the rules, the work of the courts will be paralyzed and it will lead to chaos and confusion. (p. 129 L29)
7. Where the court of Appeal has a discretion to dismiss an appeal for want of prosecution, it can look into the conduct of the defaulting party right from when the writ of summons was issued. The court will take into consideration the totality of the conduct of the party in breach of the Rules, in exercising its discretion. (p. 130 L2)
8. The Appellant's conviction that the lower court did not consider the facts stated in the counter - Affidavit is not correct as can be deduced from the record. (p. 130 L12)
9. Where the conduct of party is responsible for the non-prosecution of the case or appeal, as opposed to a fault occasioned by the Party's solicitor, the party will have himself to blame. A Litigant who deliberately, wantonly or carelessly disregards the rules of court cannot expect the discretion of the court to be exercised in his favour. The reliance placed on illness and poverty as reason for delay in this case cannot avail the Appellants. (p.130 L23)

### **REPRESENTATION**

N. Echie (Miss), for the Appelants

U.E. Bazuaye, for sthe Respondent

### **CASES REFERRED TO**

1. Obiamalu & ors v. Nwosu & ors (1973) NSCC (vol. 8) 60

2. Uwechia v. Obi & ors (1973) NSCC (vol. 8) 56
3. Daniel Omoregie v. Gabriel Emovon (1982) NSCC (vol. 13) 145
4. Western Steel workers Ltd v. Iron Steel Workers Union (1986) 3 NWLR 617
5. Ogbechie v. Onochie (1986) 2 NWLR (pt. 23) 484
- 5 6. Ojeme & ors v. Momodu II & ors (1983) SC 173
7. Erisi v. Idiko (1987) 4 NWLR (pt. 66) 503
8. Nwadike v. Ibekwe (1987) 4 NWLR 718
9. Metal Construction (W.A) Ltd v. Migliore (1990) 1 NWLR. 299
- 10 Azeez v. The state (1986) 2 NWLR 23
- 10 11. Nneji v. Chukwu (1988) 3 NWLR 84
12. State v. Gwonto (1983) 1 SCNLR 143
13. Dr. Okonjo v. Mudiaga Odje & ors (1985) 10 S.C 267
14. Afolabi v. Adekunle (1983) 8 SC 98
15. Allen v. Sir Alfred Mac Alphine & Sons (1986) 1 All E.R
- 15 16. Word v. James (1978) AC 297
17. Thorpe v. Alexander Fork lift Trucks Ltd (1975) 3 All E.R 579
18. Ariori & ors Elemo & co (1983) 1 SCNLR 1.
19. Mohammed v. Kano NA (1968) 1 All NLR
20. Consortium M.C V. N.E.P.A. (1992) 6 NWLR (pt. 246) 132

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**STATUTES AND RULES REFERRED TO:**

1. Court of Appeal Rules Order 3 Rule 8, Order 3 rr. 13 (2), 20 (0(3), 25(1)
2. Court of Appeal (Amendment Rules) (1984), Order 6 rr, 2, 9(e)
- 25 and 10, Order 7 Rules 3
3. Constitution of the Federal Republic of Nigeria (1979), ss 213 (3), s 33

**LEAD JUDGMENT BY OLATAWURA JSC**

30 It will be necessary to refer briefly to the history of this case in order to appreciate the issue involved. The appeal is not on the merit of the issues decided by the High Court of Justice in the former Mid-Western State of Nigeria, (now Edo State) of the Benin Judicial Division.

The respondent issued a writ of summons against 3 defendants:  
35 (1) Chief Ajayi (2) Mr. D.M. Ajayi and (3) Madam Rali Kadiri on 6th April, 1974. The latter has since died. The reliefs claimed are as follows:

- "(a) A declaration of title in accordance with Bini Customary Law to the land in dispute as shown coloured pink on

Plan No.ER 2238 filed with this Amended Statement of Claim.

- (b) N200.00 being damages for trespass.
- (c) An injunction restraining the defendants, their servants and or agents from further acts of trespass upon the said land.

The matter proceeded to trial after several amendments to the pleadings. On 3rd May, 1980, Omosun, J. (as he then was) gave judgment in favour of the plaintiff as follows:

*"In view of Section 40 of the Land Use Decree 1978, the proper order to make is that the plaintiff is entitled to the Statutory Right of Occupancy, Benin City having been designated an urban area. There will be damages of N 120.00 against the defendants jointly and severally and injunction to restrain the defendants from committing further acts of trespass on the land in dispute verged pink in Exhibit C."*

On the 3rd of June 1980, the defendants filed Notice and Grounds of Appeal against the said judgment. Undated Civil Form 6, i.e. Summons to parties by the Registrar of the High Court to settle record of appeal in accordance with Order 3 rule 8 of the Court of Appeal Rules was issued, but curiously the parties were not expected to attend the settlement of the record of appeal before 7th day of January, 1985 i.e. more than 4 years after Notice and grounds of appeal were filed! On that day, i.e. 7th February, 1985, the appellants were neither present nor represented. The plaintiff/respondent was present. The conditions for appeal were given and were to be perfected within 30 days from that day. It was on 15th day of October, 1985 that the application for enlargement of time within which to perfect the conditions given by the Registrar of the trial court was granted by the Court of Appeal.

On 10th December 1987, the Assistant Chief Registrar of the High Court of Justice, Benin City issued a Certificate to the effect that the conditions of appeal had been complied with.

It was on 15th April, 1988 that the motion dated 13th April, 1988 asking for the dismissal of "the defendants/appellants' appeal for want of prosecution" was filed. There was an affidavit in support of the application. The material paragraphs 4-21 of the said affidavit read as follows:

- 4. That judgment was given in my favour on 30th May, 1980.
- 5. That the defendants/appellants/respondents filed Notice of Appeal against the judgment on 3/6/80. A copy of the

*said Notice of Appeal is hereby attached and marked Exhibit "A".*

6. That I received the said Notice of appeal on 6th June, 1980.

7. That on 7th February, 1985, the conditions of appeal  
5 were given in this matter by the Assistant Chief Registrar,  
High Court of Justice, Benin City.

8. That the appellants/respondents were given 30 days from  
7th February, 1985 to comply with the said conditions.

9. That the defendants/appellants/respondents defaulted in  
10 complying with the said conditions of appeal within the  
specified time.

10. That thereupon, I instructed my Solicitors to file a Mo  
tion for the dismissal of this appeal for failure to comply  
with conditions of appeal.

11. That the said Motion for dismissal was filed on 11/10/85  
15 and dated on the same day.

12. That the defendants/appellants/respondents filed on that  
same date 11/10/85 a Motion for extension of time to  
comply with the conditions of appeal.

13. That the defendants/appellants/respondents' Motion for  
20 extension of time was moved and granted by this  
Honourable Court and in the interest of justice, the Mo  
tion filed on my behalf by my Solicitors Messrs J.O. Sadoh  
& Co. was withdrawn and N150.00 (One hundred and  
25 Fifty Naira) costs was awarded by this Honourable -Court  
against the appellants/respondents.

14. That the Assistant Chief Registrar of the High Court, Benin  
City served, a Notice on me on the 7th of December,  
1987 that the record of appeals had been sent to this  
30 Honourable Court and invited all the parties i.e. myself  
and the appellants/respondents to collect copies of the  
record of appeal from the High Court Registry. A copy of  
the said Notice is attached herewith and marked Exhibit  
"B" 15. That I have since collected a copy of the said  
35 record of appeal.

16. That on enquiry at the High Court Registry, my Solicitor,  
Chief J. O. Sadoh informed me and I verily believe him  
that the despatch books of the Bailiff in the correspon  
dence Section showed that the defendants/appellants/re

spondents were served with the Notice referred to in paragraph 14 of this affidavit (Exhibit "B") since the 17th of December, 1987.

17. My Solicitor above referred also informed me and I verily believe him that on further enquiry, he found that up till today, the 31st day of March, 1988, the appellants have neither paid for nor collected their records of appeal from the High Court Registry. 5
18. That the defendants/appellants/respondents are not interested in prosecuting this appeal.
19. That the defendants/appellants/respondents have no arguable grounds of appeal. 10
20. That their notice of appeal was filed to prevent me from enjoying the fruits of my litigation.
21. That I swear to this affidavit in good faith believing its contents to be true and correct to the best of my knowledge, information and belief." 15

The appellants now before us filed a counter-affidavit wherein Daniel Mese Ajayi, the second appellant deposed in paragraphs 1-19 as follows:

1. *That I am the second defendant/appellant in this suit.*
2. *That I have the consent of the 1st defendant/appellant to depose to this affidavit.* 20
3. *That the 3rd defendant is dead.*
4. *That on the 9th of May, 1988, the former counsel handling this matter sent this motion urging this court to dismiss this action for want of prosecution to me.* 25
5. *That the facts deposed to in paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12 and 13, of the affidavit in support of the motion are true.*
6. *That I actually received the Notice to parties of despatch of record on the 17/12/87.* 30
7. *That I have been seriously affected by diabetic mellitus since 1981. Attached is the Medical Certificate for my treatment marked as Exhibit "A".*
8. *That since December, 1987 I have been seriously ill, which has impaired all my physical activities. Attached is the Medical Certificate for my treatment marked as Exhibit "B".* 35
9. *That I am still receiving treatment for the said illness.*
10. *That the illness impaired my physical activities preventing*

*me from obtaining the record of appeal from the lower court or briefing a counsel to handle this appeal on my behalf.*

11. *That I paid for the record of appeal at the High Court Registry, Benin City on the 1/6/88 vide receipt No. 417829 of 1/6/88. Attached is the said receipt marked as Exhibit "C".*

12. *That my failure to obtain the record of appeal was not deliberate or out of spite for this Honourable Court but due to my poor state of health.*

13. *That I am informed by the 1st defendant/appellant, who is the son of my late brother and I verily believe same that he could not obtain the record of appeal or brief a counsel because he is unemployed.*

14. *That I briefed a law firm by name IGHODALO IMADEGBELO & CO. to handle the appeal for me and the 1st defendant/appellant on the 27/5/88.*

15. *That paragraphs 18, 19, 20 and 21 of the affidavit in support of the motion are untrue.*

16. *That the 1st and 2nd defendants/appellants/respondents are interested in prosecuting this appeal.*

17. *That the defendants/appellants have arguable grounds of appeal.*

18. *That the solicitors representing me and the 1st defendant/appellant IGHODALO IMADEGBELO & CO. informs me and I verily believe same that he would file and argue additional grounds of appeal in this suit.*

19. *That my solicitors IGHODALO IMADEGBELO & CO. are presently settling the brief of argument of the 1st and 2nd defendants/appellants."*

20. The application was forcefully argued that the Court of Appeal granted the application and found as follows:

"1. *That the appellants were called upon since 17/12/87 to collect the record of appeal.*

2. *That the appellants chose to wait until 1/6/88 to collect the record.*

3. *That right from the lower court (i.e. the court of trial) the appellants had not shown any diligence in prosecuting the appeal.*

4. *That it was when the application to dismiss the appeal*



*was filed and served that the appellants chose to collect the record of appeal."*

The appeal was therefore dismissed for want of prosecution. The appellants have now appealed to this Court.

Briefs were filed by the appellants and respondent. The appellants have raised three issues as arising from the appeal. They are:

- (1) *WHETHER the learned Justices of the Court of Appeal were right in dismissing the appellants' appeal on the 6th day of June, 1988 when the appellants only received or collected the Record of Appeal from the lower court on the 1/6/88.*
- (2) *WHETHER the learned Justices of the Court of Appeal were right to-holding (sic) by their interpretation of Order 6 rule 1 (Court of Appeal Amendment Rules 1984) that time would commence to run when the appellants were served with the notice of despatch of Record of Appeal by the lower court on 17/12/87 Instead of 1/6/88 when the appellants' collected or received the Record of Appeal as prescribed by the Court of Appeal Rules.*
- (3) *WHETHER the learned Justices of the Court of Appeal were right in only considering the facts stated in the respondent's affidavit without considering the facts stated in the appellants' Counter-Affidavit before exercising its discretion to dismiss the appellants' appeal for want of prosecution."*

The only issue raised by the respondent is:  
*"Whether on the affidavit evidence before the Justices of the Court of Appeal, the Court exercised its discretion judiciously in dismissing the defendants/appellants' appeal for want of prosecution."*

The consequences for not filing briefs during the prescribed period are clearly set down under Order 6 rule 10 of the Court of Appeal (Amendment) Rules 1984. It is not disputed that an appellant shall within 60 days of the receipt of the record of appeal file the appellant's brief. The sum total of the argument put forward by the appellants in this Court is that, although they knew as far back as 17/12/87 that the record of appeal was ready for collection, time shall only start to run when they decided to collect the record.

I will at this stage refer to Order 6 rule 2 of the Court of Appeal (Amendment) Rules 1984 on which the appellant anchored his entire submissions. The said rule reads:

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

In the settlement of issues raised by the appellants, learned counsel has in a way suggested that receipt of the record is synonymous with the collection of the record. This in my view is the beginning of the error on the part of the learned counsel, and which error has led to the wrong interpretation of Order 6 rule 2 of the Court of Appeal (Amendment) Rules 1984. Before the Rules were amended, and which amendment was meant to introduce filing of briefs to the Court of Appeal and to expedite the hearing of the appeals, parties were notified of the compilation and transmission of the record of appeal so that each party can collect the record of appeal. Order 3 rule 13(2) of the Court of Appeal Rules (1981) reads:

20 *"The Registrar of the Court below shall also cause to be served on all parties mentioned in the notice of appeal who have filed an address for service a notice that the record has been forwarded to the Registrar of the Court who shall in due course enter the appeal in the cause list."*

The purpose of the notice vide Civil Form 10 under this rule is to enable parties to collect the records of appeal. Until an appellant has collected his own record of appeal, he cannot know if the record has been compiled accurately; he may also then decide to file additional grounds of appeal. It is the duty of any appellant to ensure the accuracy of the record of appeal forwarded to the appellate Court. Not only this duty is imposed on an appellant, he must also ensure the record of appeal reaches the Appellate Court on time. These were made clear by this Court in these two cases:

- (1) Obiamalu & ors v. Nwosu & ors. (1973) N.S.C.C. (Vol. 8) 60.
  - (2) Uwechia v. Obi & Ors (1973) N.S.C.C. (Vol. 8) 56.
- 35 In Obiamalu & Ors v. Nwosu & Ors. (Supra) the Supreme Court again reiterated the observation and the ratio in Uwechie's case:

*"Furthermore, it is the duty of an appellant to produce before the Court of Appeal the records which he seeks to challenge in that Court."*

Incidentally both decisions were given the same day - 9th February, 1973.

It is apparent from the printed record that the appellants were tardy in the prosecution of the appeal. The filing of the Notice of Appeal was used as a stop-gap. It appears to me a dereliction of duty on the part of the Registrar of the High Court of Justice Benin City not to call on the parties to settle the record of appeal more than four years after the Notice of Appeal has been filed. In the whole of the affidavit evidence, there was no averment that the appellants before us complained about the inexcusable delay in settling the records of appeal. That delay, if not of their own making, suited them admirably. It promoted their cause in the delay of the hearing of the appeal. As at the time the respondent applied to the Court for the dismissal of the appeal for want of diligent prosecution of the appeal, for the failure of the appellants to file their brief, there was no application for extension of time to file the appellant's brief. The consequences of failure to file a brief are clearly stated under Order 6 rule 10 of the Court of Appeal (Amendment) Rules 1984:

*"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 points or issues arising from the respondent's brief."*

25

I therefore hold that the time to file the appellants' brief started to run when they were notified of the despatch of the record of appeal on 17th December, 1987 as against their contention that the time started to run on 1st June, 1988 when they chose to collect the record.

It is a strain on the interpretation of Order 6 rule 2 of the Court of Appeal (Amendment) Rules 1984 to say that the time for filing of brief shall start to run at the pleasure of a party or when the party chooses to collect the record of appeal. If the observance of the rules of Court depends on when a party to a litigation decides on when to obey the rules of the Court, the work of the Courts will be paralysed and will lead to chaos and confusion where there are more than one plaintiffs or defendants. It has been repeated in this Court that rules of court are made to be obeyed. The rules bind all parties before them. Where the court has a discretion to dismiss an appeal for want of diligent prosecution, the Court of Appeal can look into

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the conduct of the party in breach of the rule right from when the writ was issued as the appeal in law is a continuation of the original cause of action. It is the totality of the conduct of the party in breach of the rules that the Court will take into consideration in exercising its discretion. The conduct of the appellants right from the time they were served with the writ of  
5 summons showed a consistent and deliberate disregard of the rules of both Courts (the High Court and the Court of Appeal). This must be taken into account in exercising the Court's discretion.

It is not correct as canvassed in Issue No.3 by the appellants that the  
10 lower court did not consider the facts stated in the Counter-Affidavit. The Court per Ogundare, J.C.A. (as he then was) said:

"I am satisfied from the affidavits and the Counter-affidavits that the appellant (sic) was called upon since 17/12/87 to collect the record of appeal but chose to wait until 1/6/88. This cannot be  
15 described as the conduct of a diligent appellant."

Paragraph 6 of the Counter-affidavit strengthens the opinion of the court below to the effect that the appellant was not diligent. It read:

"6 *That I actually received the Notice to parties of dispatch of the record of 17/12/87.*"

20 There must be a line drawn between the fault of a party's solicitor (none was alleged in this appeal) and the fault of the party himself. In the former case the court has consistently refused to visit the fault of the solicitor on the client. But where the conduct of the party is responsible for the non-prosecution of the case or appeal, the party will have himself to blame.  
25 A litigant who deliberately, carelessly or wantonly disregards the rules of Court cannot expect the discretion of the Court to be exercised in his favour. Justice, after all said and done, is for both parties. Delay tactics can lead to a miscarriage of justice; witnesses may no longer be available; in the case of an appeal not filed or prosecuted within time, the rights of a third party  
30 may be affected.

Reliance placed on illness and poverty cannot avail the appellants: Daniel Omeregbe v. Gabriel Emovon (1982) N.S.C.C Vol. 13 p. 145.

On the whole, I will dismiss this appeal. It is hereby dismissed. Costs of N1,000.00 in favour of the respondent.

**KARIBI-WHYTE JSC**

This appeal raises the question of the correctness of the dismissal of an appeal on grounds of want of diligent prosecution by the exercise of the inherent jurisdiction of the Court.

**The Facts:**

Appellants before us were the defendants in the action brought by the respondent as plaintiff in the High Court Benin City. Respondent was on 30/5/80 granted in accordance with the claim (i) a statutory right of occupancy of the land in dispute, (ii) damages for trespass (iii) perpetual injunction. Defendants filed an appeal to the Court of Appeal on the 3rd day of June, 1980. On the 17th December, 1987, appellant was informed by the Registrar of the High Court that the record of proceedings of the case was ready for collection. Appellant did not go to collect the record of proceedings till the 1st June, 1988.

Meanwhile, on the 15th April, 1988, respondent brought a motion seeking to dismiss the appeal on the grounds of want of prosecution. In his affidavit in support of the motion he deposed to having received the notice of appeal on 30th June, 1980. He further deposed to the fact that the copy of the record of proceedings had been ready for collection since 17th December, 1987 and that respondent had collected his own copy. He further deposed that appellants were served with notice to collect their own copy on the 17th December, 1987. He went further to depose to the fact that as on the 31st March, 1988, appellants had not paid for and collected the record of proceedings from the High Court Registry. (See paragraphs 14, 15, 16 and 17 of the supporting affidavit at p. 126 of the record of proceedings).

In further affidavit sworn to on behalf of the respondent by Bolarinde Omoluabi, Appellants Notice of Appeal dated 30th May, 1980 and letter of invitation to collect copies of the records of Appeal in this Suit No. B/46/73 signed by the Assistant Chief Registrar High Court of Justice, Benin City were exhibited.

In a Counter affidavit sworn to by Daniel Mese Ajayi, the 2nd appellant, it was admitted as true that the appellant actually received the notice to the parties of despatch of the record of proceedings on the 18/12/87. He went further to depose about his ill health and attached a Medical Certificate of Treatment that he was still receiving treatment for the said illness - (See paragraphs 6, 7,8,9 of p. 129 of the record of proceedings).

He attributed his inability to obtain the record of appeal and to file the brief of argument by counsel, to his illness.

Again that the 1st defendant died, and whose son who was unemployed, could not also obtain the record of proceedings or brief counsel.

He also deposed to the fact that appellant paid for the record of appeal at the High Court Registry, Benin City on the 1st June, 1988, and that he briefed the law firm of Ighodalo Imadegbello & Co. on behalf of the  
5 appellants on the 27th May, 1988.

Finally, appellant deposed to the fact that they were still interested in prosecuting the appeal, and that counsel was proposing to file additional grounds of appeal, and was in the process of settling appellants brief of argument.

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### ***Arguments in the Court of Appeal***

On the 6th June, 1988, when Mr. Bawaye for the applicant, who are the present respondents, moved the motion for dismissing the appeal for want of prosecution, he relied on the affidavits filed and on the exercise  
15 of the inherent jurisdiction of the Court.

Mr. Imadegbello for the respondent opposed the motion. He submitted that appellants received the record of appeal only on 1/6/88. He referred to the illness of the 2nd appellant. Relying on Order 6 rule 2 Court of Appeal Rules (1981) (as amended in 1984 he cited *Western Steel Workers Ltd v. Iron Steel Workers Union* (1986) 3 NWLR (Pt.30) 617 and urged  
20 the Court of Appeal to give appellants time and chance to prosecute their appeal. It was submitted that time to file appellant's brief of argument began to run as from 1/6/88 when appellants collected the record of proceedings.

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### ***The Ruling in the Court of Appeal***

The Court of Appeal granted the applicant's prayer, and dismissed the appeal on the ground of want of diligent prosecution. It is helpful to indicate the combination of factors relied upon by the Court in the exercise  
30 of its inherent jurisdiction to dismiss the appeal.

The want of diligence in the prosecution of the appeal was discerned in the delay between 17/12/87 when appellant was notified that the copy of the record of proceedings was ready for collection and 1/6/88 when appellant actually collected the record of proceedings.

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Again, the Court of Appeal relied on the fact that it was evident on the record that appellant had not shown diligence in the prosecution of the appeal right from the High Court. The Court also observed that appellant only went to collect his record of appeal after this motion to dismiss the appeal had been brought by the respondent. Finally, it was

observed that appellant did not even apply for extension of time within which to file his brief of argument. It seems to me very clear from application for dismissal of the appeal, on the failure of appellant to file his brief of argument alone. Rather it relied on its inherent jurisdiction.

### ***In the Supreme Court***

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Appellant has now appealed to this Court. He filed three grounds of appeal. The first two grounds challenged the dismissal of the appeal on the grounds of failure to file appellants' brief of argument within time on the 6th June, 1988. These two grounds raised the question of the construction of the provisions of Order 6 rule 2 Rules of the Court of Appeal, 1981. The third ground concerns the scope of the exercise of inherent jurisdiction in the dismissal of the appeal on the grounds of want of diligent prosecution.

Learned counsel to the parties filed briefs of argument. Counsel relied on the briefs of argument before us. Learned counsel to the appellant was absent. Having filed brief of argument the brief was accepted as argument of the appellant See Order 6 rule 9(e).

### ***Issues for determination***

Learned counsel to appellant formulated three issues for determination from the three grounds of appeal. They are as follows:

- "(1) *WHETHER the learned justices of the Court of Appeal were right in dismissing the appellants' appeal on the 6th day of June, 1988 when the appellants only received or collected the Record of Appeal from the lower Court on the 1/6/88.*
- (2) *WHETHER the learned Justices of the Court of Appeal were right to holding by their interpretation of Order 6 rule 2 (Court of Appeal Amendment Rules 1984) that time would commence to run when the appellants were served with the notice of despatch of Record of Appeal by the lower court on 17/12/87 instead of 1/6/88 when the appellants collected or received the Record of Appeal as prescribed by the Court of Appeal rules.*
- (3) *WHETHER the learned Justices of the Court of Appeal were right in only considering the facts stated in the respondents affidavit without considering the facts stated*

*in the appellants' Counter Affidavit before exercising its*

*discretion to dismiss the appellants' appeal for want of prosecution."*

On his part, learned counsel to the respondent relied on only one issue for determination which he formulated as follows:

- 5           *"...WHETHER on the affidavit evidence before the Justices of the Court of Appeal, the Court exercised its discretion judiciously in dismissing the defendants/appellants' Appeal for want of diligent prosecution."*

***The Preliminary Objection:***

- 10           Learned counsel to the respondent raised a preliminary objection in his brief of argument. He challenged the competence of the appeal. He submitted that there was no competent appeal. Since all the grounds of appeal relied upon were grounds of mixed law and facts, and leave of the Court in accordance with Section 213(3) of the Constitution 1979 having  
15 not been obtained. Learned counsel relied on *Ogbechie v. Onochie* (1986) 2 NWLR (Pt. 23) 484; *Ojeme & Ors v. Momodu* 11 & Ors (1983) S.C. 173 at p. 211.

- It was submitted that this Court accordingly lacked the requisite jurisdiction to hear the appeal- *Erisi v. Idika* (1987) 4 NWLR (Pt. 66) 503  
20 was cited in support of this proposition.

- It is true appellant has christened each of the grounds of appeal as errors in law. This is not what makes the ground of appeal that of law. - See *Ogbechie v. Onochie* (1986) 2 NWLR (Pt.23) 484. It has been stated on several occasions and in several cases decided by this Court, that a ground  
25 of law is exemplified by the conclusions from undisputed facts. Thus where the facts are not disputed, challenge of the conclusion is one of law. - See *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 718. But when the facts are disputed as between the parties, the conclusion which follow from the application of the law to such disputed facts are characterized as those of  
30 mixed law and facts. Hence grounds of appeal challenging such conclusions are grounds of mixed law and fact.

- Where the conclusions are founded on evaluation or inferences of facts, grounds of appeal based on such conclusions are grounds of facts, however, they are described as grounds of law - See *Metal Construction*  
35 *(W.A.) Ltd. v. Migliore* (1990) 1 NWLR (Pt.126) 299. Whereas leave of the Court is not required, and there is appeal as of right on appeals founded on grounds of law, simpliciter, there is constitutional provision for leave of the Court in the other two cases - See S.213(3) Constitution 1979.



A careful analysis of the grounds of appeal by subjecting the grounds of appeal to the tests indicated above clearly discloses that ground one is without doubt a ground of law. This is because since the question whether the failure to file appellants' brief of arguments within time results in the dismissal of the appeal is not challenged, what was being challenged is whether in the instant case this was done within time. - See Metal Construction (W.A.) Ltd v. Milgiore (supra). The second ground challenges the computation of the period when time should begin to run. This is a question of mixed law and fact because the application of the law is based on the computation of the time reckoned either from 17/12/87 or from 1/6/88.

The third ground which question the exercise of the inherent jurisdiction of the Court challenges the exercise by the Court of the exercise of its discretion. This is purely a question of fact to be determined on the facts and circumstances of each particular case. There is therefore a competent appeal based on the first ground of appeal. I will therefore overrule this preliminary objection.

### **Consideration of the Issues:**

I shall now consider the issues for determination in this appeal. I have already reproduced them in this judgment. I have also pointed out that the Court below relied on its inherent jurisdiction to dismiss the appeal. Its reference to delay by and consequent failure of appellant to file brief of argument was merely an example of the lack of diligence to prosecute the appeal. It therefore cannot be a ground of appeal and not an issue arising from the ruling. It is important to observe that there was no attempt to construe the provisions of the Rule regulating filing of briefs of argument. Hence, the formulation of the issues by the appellant is not consistent with the grounds of appeal as disclosed by the ruling challenged.

The broad formulation of the issue by the respondent seems to me consistent with the Ruling of the court of Appeal and the issues arising therefrom. I shall therefore adopt respondents' formulation of the issue. This formulation of the issue has taken into account all the issues formulated by the appellant. I now turn to the argument of Counsel on this appeal.

***Arguments of Counsel***

(a) Appellants'

Learned counsel to the appellant referred to the fact that the Court below confused the two separate issues of the notification to the parties of the record of proceedings being already for collection and the fact of the collection by the appellant of the record proceedings. He argued that in computation of time to file appellant's brief of argument that punctus temporis when time should begin to run is from the date of the collection of the record of proceedings. It is not as from the date when parties are notified that the record of proceedings is ready for collection. Learned counsel referred to Order 6 rule 2 Rules of the Court of Appeal 1981 as amended in 1984. He also cited *Western Steel Work Ltd v. Iron & Steel Workers Union* (1986) 3 NWLR (Pt.30) 617, *Azeez v. The State* (1986) 2 NWLR (Pt.23) 54. It was submitted that the appeal could only have been dismissed if the appellants were out of time for want of prosecution for failure to file brief of argument under Order 6 rule 10. Learned counsel submitted that the Court should have considered the guideline in Order 7 rule 3, which stipulates that in enforcing non-compliance of the Rules, the Court should consider that such non-compliance was not wilful, and that waiver is in the interest of the justice *Nneji v. Chukwu* (1988) 3 NWLR (Pt.81) 84.

It was submitted that the crux of applicants complaints was failure of the appellant to collect the record of proceedings from 17/12/87 when he was notified, till the application to dismiss the appeal was made. Appellant had denied the charge of disinterestedness in the prosecution of the appeal, having obtained their record of proceedings on 1/6/88 and indicated their readiness to prosecute the appeal. It was submitted that the Court of Appeal was in the circumstances wrong to dismiss the appeal, since appellant was within time to file his brief of argument.

It was argued that failure to file a brief ipso facto did not automatically mean that the appeal must be dismissed. - See *Nneji v. Chukwu* (supra).

Learned Counsel referred to the inclination of this Court to do substantial justice and avoid technicalities in the determination of a cause before it on its merits. Counsel cited and relied on *State v. Gwonto* (1983) 1 SCNLR 143; *Dr. Okonjo v. Mudiaga Odje & Ors* (1985) 10 S.C. 267; *Afolabi v. Adekunle* (1983) 8 S.C. 98. It was submitted that since that Court can grant leave to argue appeal without appellant filing a brief of argument, the Court of Appeal should not have attached a lot of weight

to appellants' failure to file a brief. Learned counsel to the appellant re-

ferred to the dismissal of the Appeal by the exercise of the Court below of its inherent jurisdiction. He criticised the Court for relying only on the applicants affidavit, without referring to the averment in the appellant affidavit. He referred to the averments in appellants affidavit of the excuses why appellant was unable to collect his record of proceedings before 1/6/88. He also referred to the averments of appellants preparedness to prosecute the 5 appeal.

Finally, citing and relying on the English Court of Appeal decision of *Allen v. Sir Alfred MacAlpine & Sons* (1968) 1 All ER 543 and *Ward v. James* (1978) AC 297, he submitted that there was no evidence that there has been an inexcusable inordinate delay in the prosecution of the appeal, 10 and that the respondent would suffer serious prejudice if the case was continued in the circumstance. At the point where appellant had collected the record of proceedings and was ready to prosecute the appeal, it was a wrong exercise of discretion to dismiss the appeal on the ground of want of prosecution. 15

(b) **Respondents**

In his reply to the above submissions learned counsel to the respondent supported the finding of the Court of Appeal that appellant had not been diligent in the prosecution of this appeal. He submitted that the finding was after a careful examination of the situation as a whole based on 20 the affidavit evidence before the Court. He pointed out that appellant admitted the averments in respondent affidavit alleging that they were not desirous in prosecuting their appeal. The Court below, it was submitted, rightfully relied on these admissions.

Learned counsel referred to the computations of the period prescribed by the rules to file appellants' brief of argument and pointed out that the provisions of Order 6 Rule 2 of the Court of Appeal Rules 1981 was not applicable to the facts of this case. It was also submitted that no where in the ruling of the Court below did the Court substitute notice of 30 compilation and despatch of record of appeal for the receipt of the record of appeal.

It was submitted on the authority of *Omeregbe v. Emovon* (1982) 6 S.C. 6 that where the only reason given for the delay in prosecuting an appeal as in the instant case is ill health or poverty. The appeal will be 35 dismissed on the application of the respondent. Appellant had deposed to the ill-health of the 2nd appellant, and the impecuniosity of the son of the 1st appellant.

Learned counsel referred to the invitation to appellant to collect their record of proceedings on the 17th December, 1987, and the fact that ap-

pellant did not actually collect the record of proceedings until 1st June, 1988. This was a period of 120 days after the notification. Respondent filed the motion to dismiss the appeal for want of prosecution of 15/4/88. This was 45 days before appellant went to collect the record of proceedings. Appellant on his own deposition admitted he briefed Solicitors for the  
 5 prosecution of the appeal on 27/5/88. Learned counsel distinguished the decision of Nneji v. Chukwu (1988) 7 NWLR (Pt.81) 184 from the instant case, on the ground that that was the case where the default arose from the mistake of the Solicitor that time did not run during vacation. Whereas in the instant case appellant was notified of the readiness of the record of  
 10 proceedings for collection, but deliberately declined to collect same for more than six months.

Counsel referred to the contention that the Court would in the interest of doing substantial justice condone non-compliance with the rules of Court, and submitted that there is no hard and fast rule in the obser-  
 15 vance of that policy. It depended on the facts and circumstances of each case and the considerations of justice. It was finally submitted that dismissing the appeal for want of diligent prosecution in the exercise of its inherent jurisdiction, meets the justice of this case.

Learned counsel referred to Allen v. Sir Alfred Mac Alfred (supra)  
 20 relied upon by the appellant and submitted that, that case was distinguishable. In Allen's case the delay was attributed to the fault of the Solicitor. In the instant case, it was due to the fault of the litigant. The delay in the instant case was intentional and the Court below was right in dismissing the appeal.

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### **Consideration of the submissions**

The above are the submissions pressed on us in this appeal. The only issue for determination is whether the Court of Appeal was right in the circumstances of this case to dismiss the appeal in the exercise of its inher-  
 30 ent jurisdiction for want of diligent prosecution, Counsel has often resorted to the inherent jurisdiction of the Court whenever the grounds for seeking a relief cannot be properly brought under a rule of Court, or any enabling statutory provision. This inherent jurisdiction is the power resident in all courts of superior jurisdiction, which is necessary for the proper and com-  
 35 plete administration of justice and essential to their existence. There are provisions in the Rules of Court enabling the Court to dismiss an action for want of prosecution - See order 6 rule 10, Order 3 rule 20(1)(3), Order 3 rule 25(1) of the Court of Appeal Rules 1981. There is the inherent power to dismiss an action where the default had been intentional and contumelous,

i.e disobedience of a peremptory order amounting to an abuse of the process of the Court. For instance where plaintiff has failed to comply with certain procedural rules, or an appeal where appellant has failed to comply with certain procedural rules such filing briefs of argument, see Order 6 rule 10. The Court has an inherent jurisdiction in addition to dismiss an action for want of prosecution where there is default in compliance with an Order of Court, or where the plaintiff is guilty of inexcusable, inordinate delay in the prosecution of the action. This delay may be on the part of the litigant or his Solicitor. The delay would be decisive in the determination of the application where it is very likely to be prejudicial to the fair trial of the action - See *Thorpe v. Alexander Fork Lift Trucks Ltd* (1975) 3 All ER 579. 10

It seems to me that the exercise by the Court of its inherent jurisdiction to dismiss an action before it is an answer to the risks likely to result from trial of actions where there is inexcusable, inordinate delays. The general experience at the trial of actions is that recollection of the events must have been dim and waned by the effluxion of time -See *Ariori & Ors v. Elemo & Co.* (1983) 1 SCNLR 1. Vital witnesses might have been lost by death or are now outside the jurisdiction and cannot be traced. In some cases apathy have set in and there is the unwillingness or indeed lack of desire of available important witnesses to give evidence. This is the scourge of delay on justice, Hence the aphorism, justice delayed is justice denied. A hearing under such a situation as stated above cannot be described as fair to the parties, and cannot survive the test of fairness under section 33 of our Constitution 1979 - See *Mohammed v. Kano NA* (1968) 1 All NLR 424. 25

Society through the ages has never applauded delayed justice. In England Shakespeare in *Hamlet*, Act 3 S.C.1, ranks it among the whips and scorns of time, Dickens, in *Bleak House*, C.1. explains how it exhausts finances, patience, courage, hope. Our own experience is not in any way different. Delayed justice is regarded as a grievous wrong hard to bear. There have been scathing criticisms of the courts delay in this Country.

It is however important to observe that all essential elements of delayed justice which tend to prejudice a fair hearing of the case are peculiar to the hearing of the case at first instance. These are the waning recollection of witnesses of the event in issue, or their availability at all. 35

Hearing of a case on appeal would appear to be governed by different considerations.

An appeal is determined on the record of proceedings of the trial in the Court below. It is heard on the printed record. Hence, the questions of recollection of witnesses or their availability vital at the trial, is not relevant  
5 and will not affect the hearing of a case on appeal. However this does not, mean that the Court cannot in a proper case, considering the facts and surrounding circumstances, of inordinate delay suggesting the possibility of injustice on a continuance of the case, resort to the exercise of its inherent jurisdiction dismiss an appeal for want of prosecution.

10 I have set out the circumstances enabling the exercise of the inherent jurisdiction to dismiss a cause before it for want of prosecution. The application to dismiss an appeal must establish these principles. The appellant whose appeal is sought to be dismissed must disclose sufficient facts to take his case outside the principles enunciated.

15 In analysing the reasons for dismissing appellants' appeal the Court below would appear to have relied on the following considerations. First, appellant has failed to file his brief of argument within time. Time to file brief of argument having expired, appellant has not applied for extension of time to do so.

20 Secondly, appellant has always not been diligent in the prosecution of this case. He has always been tardy since when the case was in the High Court.

Thirdly, appellant only collected the record of proceedings after the motion to dismiss the appeal had been served on him.

25 Whereas the first and third reasons are concerned with and relevant in the prosecution of this appeal, the second reason seems to me not extraneous to it, and was properly relied upon for the exercise of the Courts discretion.

Now to the argument that the Court below confused notification  
30 of readiness to collect copy of proceedings on the 17/12/87, with the actual collection of the record of proceedings on the 1/6/88, and that time should begin to run as from 1/6/88 when the record of proceedings was actually collected by the appellant.

I concede the contention that the Court did not state the date time  
35 began to run, but merely inferred that appellant was out of time and concluded that there should be an application for extension. Undoubtedly, in this case appellant received the notification on 17/12/87. Otherwise mere forwarding of notification of readiness of the record of proceedings without evidence of its receipt will be an unreliable

guide to the determination whether appellant had been diligent in the prosecution of the Appeal.

The Court of Appeal held the view which can hardly be faulted that to be called upon on 17/12/87 to collect record of proceedings, and to wait until 1st June, 1988 cannot be described as the conduct of a diligent appellant. The Court below did not confuse the situations. In fact it was its separate consideration of them that compelled the conclusion that the conduct was not that of a diligent appellant. Although the Court of Appeal did not specifically refer to the case, I think the reference to the affidavits and counter affidavits in the application was sufficient to show that the court had taken the excuses of appellant into consideration. It was not relying on appellants' failure to file brief argument per se under Order 6 rule 10 of Rues of the Court of Appeal 1981 as amended in 1984.

Learned counsel to the respondent is therefore right in the submission that ill health and impecuniosity relied upon in appellants affidavit, are not sufficient excuses to explain away a period of delay on want of diligent prosecution. See *Omoregbe v. Emovon* (supra). The court was concerned with the delay and want of diligent prosecution. It is pertinent to observe that the question of filing the brief of argument which appellant raised only after collecting the record of proceedings on 1/6/88, was not issue on 15/4/88 when respondent applied to dismiss appellants' appeal. As at 15/4/88 appellant had made no move to collect his record of proceedings.

In his own affidavit 2nd appellant deposed that he only briefed counsel to prosecute this appeal, on the 27/4/88. This was merely five days before he collected his record of proceedings.

An additional reason, is the deposition in paragraphs 7, 8, 9, 10, 11, 12, of respondents affidavit which are expressly admitted in paragraph 5 of appellants counter affidavit.

7. That on 7th February, 1985, the conditions of appeal were given in this matter by the Assistant Chief Registrar, High Court of Justice, Benin City.
8. That the appellants/respondents were given 30 days from 7th February, 1985 to comply with the said conditions.
9. That the defendants/appellants/respondents defaulted in complying with the said conditions of appeal within the specified time.
10. That thereupon, I instructed my Solicitors to file a Motion

for the dismissal of this appeal for failure to comply with

conditions of appeal.

11. That the said Motion for dismissal was filed on 11/10/85 and dated on the same day.

12. That the defendants/appellants/respondents filed on that same date 11/10/85 a Motion for extension of time to

5 comply with the conditions of appeal.

Above averments show that appellant was compelled to comply with the conditions of appeal only when respondent applied to the Court for the dismissal of the appeal. This is clearly not evidence of diligent prosecution. It is rather evidence of want of diligent prosecution.

10 It is important to observe as the Court quite rightly pointed out, that even on the 6th June, 1988 when the motion to dismiss the appeal was being argued. Appellant had not applied for, and did not in fact ask the Court to give him time to apply for extension of time to file the brief of argument. It is quite clear and unambiguous from the depositions in the  
15 affidavit in support of the application to dismiss the appeal that failure to file appellants' brief of argument which was not even referred to therein was not the crux of the application. The crux of the application is as deposed to in paragraphs 18, 19, 20 of the affidavit dated 15/4/88 which are as follows:

20 "18. *That the defendants/appellants/respondents are not interested in prosecuting this appeal*"

19. That the defendants/appellants/respondents have no arguable grounds of appeal.

25 20. That their notice of appeal was filed to prevent use from enjoying the fruits of my litigation."

Order 6 rule 2 therefore is inappropriate and clearly in-applicable to the facts of this case. The many cases cited on the construction of the rule are therefore not relevant.

I should consider the contention of appellants that there had been  
30 no in excusable or inordinate delay in the prosecution of the appeal and that respondent should show the serious prejudice he would suffer were the appeal to be heard in the circumstance. I agree with the submission of learned counsel to the respondent that this case is distinguishable from Allen v. Sir Alfred MacAlpine & Sons (supra) relied upon by the appellant.  
35 In that case the delay which was also inordinate was attributed to negligence of the Solicitor. In the instant case the delay was due to the deliberate and willful act of the appellants, who declined to collect the record of proceedings after being notified that it was ready. This conduct is in my opinion contumelious. Again the period of delay which was traced to the



7th February, 1985 the period when the conditions of Appeal were given to the appellant, his default in compliance, the respondents application to dismiss the appeal which compelled appellant to comply are all cumulative factors in the determination of the question of whether or not there was want of diligent prosecution.

The question whether respondent would suffer any prejudice if appellant were allowed to prosecute the appeal was not considered in the Court below. As I have already pointed out the instant case is different from trials at first instance involving oral testimony. Although the prejudice to the respondent in the case is of a different kind, it will result in injustice to the respondent. The continued denial of respondent of the fruits of his judgment is unjust. The apparent unpreparedness of the appellant to prosecute the appeal, his earlier conduct in the prosecution of the appeal in which he had to be prodded and compelled by motion to dismiss the appeal to be able to take a step in the action, are to me good, and valid reasons why appellant should not be allowed to abuse the process of the court merely appearing to be prosecuting an appeal. The principle applied by the court in cases of inexcusable inordinate or excessive delay is that where there is clear injustice to either or both sides to further prosecute the appeal, the remedy of the court is to exercise its discretion in dismissing the action. See *Allen v. Sir Alfred MacAlpine & Sons Ltd.* (supra). I think the court below was right in the circumstances of this case, to dismiss the appeal.

Appellant had no excuse for the prevarications and delays in prosecuting the appeal.

I therefore agree with the reasoning and conclusions in the judgment of my learned brother Olatawura, J.S.C. for dismissing this appeal. I also will and hereby dismiss the appeal of the appellants against the ruling of the Court of Appeal dismissing the appeal of the appellant for want of diligent prosecution. Appellant will pay N1,000 as costs to the respondents.

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### **BELGORE JSC**

It is the duty of the appellant to prosecute his appeal and in doing so he must not be tardy. The fact that an appeal has been filed should not be exploited to delay the appeal from being heard. The appellant must not only make sure the records are ready for transmission to the appellate Court by settling the records, he must also fulfil all the conditions of appeal. *Obiamalu & ors v. Nwosu & Ors.* (1973) NSCC (Vol. 8) 60; *Uwechia v. Obi & Ors* (1973) (Vol. 8) NSCC 56. While it is the duty of the Court

registrar to get the records ready and notify the appellant and the respondent of the situation, the appellant has an added responsibility and diligently pursuing the timeous and correct preparation, settlement and transmission of the records of appeal. To merely file notice of appeal and do nothing more, thereby sitting back with the judgment against him unexecuted, he is abusing the court process. An appellant who chooses to sit back when notified by the registrar of the Court that the record of appeal is ready for collection must promptly report to collect the record, he is no longer restricted to his choice of time. If he waits inordinately before collecting the record, as in this case when the record was ready and the appellants were so notified on 17th December, 1987, but they chose to go and collect it on 1st June, 1988, time to file their brief of argument would normally be the former date not the latter. By not filing their brief in time, they were caught by Order 6 rule 10 Court of Appeal (Amendment) Rules 1984.

For the foregoing reasons and the reasons advanced in the judgment of my learned brother, Olatawura, J.S.C., which I was privileged to read in advance. I also dismiss this appeal. I award N1,000.00 as costs of this appeal against the appellants in favour of the respondents.

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### **WALI JSC**

I have read in advance a copy of the lead judgment of my learned brother, Olatawura, J.S.C. with which I entirely agree.

For those same reasons detailed in the lead judgment, which I adopt as mine. I too will dismiss this appeal and hereby dismiss it. I abide by the order of costs awarded in favour of the respondent.

### **KUTIGI JSC**

I read before now the judgment of my learned brother Olatawura, J.S.C. which has just been delivered. The affidavit evidence before the Court of Appeal clearly showed that the appellants were notified that the record of appeal was ready for collection on 17/12/87 and they decided to wait until 1/6/88. And even then it was after the motion to dismiss the appeal was served on them. In the case of Consortium M. C. v. N. E. P. A. (1992) 6 NWLR (Pt. 246) 132 this Court held that the time to file appellant's brief ran from the date of

service of the Registrar's notice on the parties that the record was ready for collection, and not from the day that any of the parties decided to collect same. I think this is fair and just because to hold otherwise will be to

encourage indolence.

In the instant case therefore the time for filing appellant's brief started to run from 17/12/87. By the time the appeal was dismissed for want of prosecution on 6/6/88, the appellants had taken no steps about the finding of the brief. Obviously they were not diligent. The Court of Appeal was therefore right when it dismissed the appeal for want of prosecution. For the reasons lucidly stated in the lead judgment I would also dismiss the appeal with costs as assessed.

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