

**SUPREME COURT OF NIGERIA**  
26TH MARCH, 1993. SC. 108/1990

**CORAM:- M. L. UWAIS, S. KAWU, A. B. WALI,  
E. O. OGWUEGBU, S. U. MOHAMMED, JJSC**

CO-OPERATIVE & COMMERCE

BANK (NIGERIA) LIMITED ..... APPELLANTS

AND

EMEKA OGWURU ..... RESPONDENT

**APPEALS** - failure to appeal within statutory period - when extension of time will be granted - whether good reason for delay avails - whether proposed grounds of appeal show good cause.

**CIVIL PROCEDURE** - practice and procedure - when court's discretion will be exercised in favour of an applicant.

**FACTS**

In the High Court of Onitsha, Anambra State the Plaintiff/Appellant obtained judgment against the Defendant/Respondent. The Respondent appealed against the judgment to the Court of Appeal, Enugu Division. Three years thereafter, the present Appellant brought an application before the Court of Appeal praying inter alia, for order for extension of time within which to file its Notice and Grounds

76 C.C.B. LTD. V. OGWURU (1993) 4 KLR 75; (1993) 3 NWLR  
of Cross-appeal. The Court of Appeal in a two to one judgment refused the application for extension of time to file the Notice of Cross-appeal and dismissed it.

The Appellant, dissatisfied with the decision appealed to the Supreme Court. The learned Counsel for the Appellant contended that the learned Justices of the Court of Appeal failed to consider all the reasons deposed to in the supporting affidavit to the application before they declared the reasons preferred as unsubstantial. The Supreme Court, therefore, has to determine whether having regard to the materials placed before it, the Court of Appeal rightly interpreted the provisions of 0.3 r. 4 (2) of the Court of Appeal Rules, 1981, in refusing the Appellant's application for extension of time within which to Cross-appeal.

**HELD** (unanimously dismissing the Appeal)

- 1 *.From the provisions of 0.3 r. 4 (2) Court of Appeal Rules 1981, two conditions viz:-*
  - (a) *an affidavit stating good and substantial reasons for failure to appeal within the time, and*
  - (b) *grounds of appeal which prima facie show good cause why the appeal should be heard;*

*must be conjunctively satisfied before the Court can exercise its discretion in favour of an applicant to grant his prayer for extension of time within which to appeal. (p.82-83)*
2. *The relevant paragraphs of the two affidavit filed by the Appellant in Support of his application have fallen far short in explaining the reasons for not cross-appealing within the statutory period. (p. 86)*

*3. In order to enable the Court of Appeal to decide on whether the proposed grounds of Cross-appeal should be heard, the alleged documents and authorities referred to on the affidavits would be very essential in determining whether the grounds of appeal are prima facie arguable so as to warrant its granting the extension of time to file Cross-appeal out of time.(p. 87)*

*4. Appellant's application to file appeal out of time should have contained the following three prayers:-*

*(a) Extension of time within which to apply for leave to appeal.*

*(b) Leave to appeal; and*

*(c) Extension of time to file the Notice and grounds of appeal.*

In the instant case, the only prayer dealing with leave to appeal is prayer (a) which is extension of time within which to file Cross-appeal. The Appellant's prayers not being complete, the application is therefore incompetent.(P. 87 - 88)

5. It was the duty of the Appellant as applicant in the Court of Appeal to present before that court whatever was essential to the clear and adequate consideration of its application, and failure to do so would be sufficient reason for refusing its application. The Appellant had woefully failed to do so in this case. (p. 88)

6. The application to Cross-appeal out of time is replete with lapses and inadequacies and the court of Appeal is right in refusing it. This appeal is devoid of any merit and is accordingly dismissed. (P. 90)

***PER WALI JSC.*** *"It is desirable to make it clear that neither in Re-Adewunmi's nor in Yesufu's cases referred to (supra) did this Court say that the length of delay is immaterial where*

*the ‘grounds of appeal prima facie show good cause why the appeal should be heard’, this is a clear misunderstanding of the decisions in the two cases referred to above..” (P. 88)*

5 **PER OGWUEGBU JSC** “I am satisfied that by the application, the appellants are trying to repair their case and be encouraged in their indolence. If this type of application is allowed, there will be no end to litigation”. (P. 92)

10 **REPRESENTATION**

Chief Chidube Ezebilo For the Appellants  
Ben O. Anyaduba For the Respondents

**CASES REFERRED TO**

- 15 1. Kate Enterprises Ltd. v. Daewoo (Nig.) Ltd (1985) 2 NWLR (pt. 5)116  
2. Wulchem v. Gudi (1981) 5 S.C. 291  
3. University of Lagos v. Aigoro (1985) 1 NWLR (pt. 1)  
20 143  
4. Ibodo & Ors. v. Enarofia & ors. (1980) 5 -7 S.C. 42  
5. Yesufu v. Co-operative & Commerce Bank (Nig.)  
25 Ltd. (1989) 2 NWLR (Pt. 110) 483.  
6. Egbuna v. Egbuna (1989) 2 NWLR (pt 106) 773  
7. Alegbe v. Abinbola (1978) 2 S.C. 39  
30 8. Re-Adewunmi & ors (1988) 2 NWLR (pt. 83) 483  
9. Holman Bros. Ltd v. Kigo (Nig.) Ltd (1980) 8 -11 S.C. 43.  
35 10. Co-operative Bank of Eastern Nigeria v. Emeka Ogwuru (1991) 1 NWLR (pt. 168) 463.  
11. University of Lagos & Ors. v. Olaniyan & ors. (1985) 1 S.C. 295.  
12. Lauwers Import - Export v. Jozebson Industries Ltd (1988) 3 NWLR 429.

13. Williams & Ors v. Hope Rising Vol. Society (1982) ALL NLR 1.

14. Yonwuren v. Modern Signs Nig. Ltd (1985) 2. S.C . 86.

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### **STATUTES & RULES**

1. Constitution of the Federal Republic of Nigeria 1979 S. 258(2)

2. Supreme Court Rules 1985 order 6. rule 2.

3. Court of Appeal Rules 1981 order 3. rule 4 (2)

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### **LEAD JUDGMENT BY WALI JSC**

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In the High Court of Justice, Onitsha Judicial Division the present appellant as plaintiff obtained judgment against the present respondent as defendant for the sum of N56, 410.25 with interest at 5% from the date of judgment. The respondent appealed against the judgment. Three years thereafter, the present appellant brought an application before the Enugu Division of the Court of Appeal praying for-

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*"(a) Order for extension of time within which the plaintiff/applicant in the above appeal can file its Notice and Grounds of Cross-Appeal,*

*(b) regard the notice and grounds of Cross-Appeal, Exhibit B, filed on 21st January 1987 and already served on the defendant/respondent as duly filed and served on the defendant/respondent the necessary fees having been paid;*

*(c) to amend the name of the plaintiff/cross-appellant bank in the Notice of the Cross-Appeal and other processes filed in this appeal to read Co-operative & Commerce Bank (Nig.) Ltd."*

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In a two to one judgment, the Court of Appeal (Uwaifo and Oguntade JJ.C.A.) refused the application for extension of time to file the Notice of Cross-appeal and dismissed it.

5 The present appellant who will henceforth be referred to as the appellant, has now appealed to this court.

10 In compliance with Order 6 rule 2 of the Supreme Court Rules, 1985, the parties filed and exchanged briefs of argument. In the appellant's brief the following three issues were formulated for consideration and determination by this court-

15 *i. Whether it was proper for the Justices of Court of Appeal at this premature stage in their majority decision to have delved into the merits and demerits of cross appeal in order to ascertain whether the appeal will succeed or fail before determining whether it was just to grant the appellant's prayer for extension of time within which to file its notice and grounds of cross appeal.*

20 *ii. Whether it was right for the learned Justices of the Court of Appeal in their majority decision to have gone to adopt the reasoning of the trial Judge in his judgment with regards to the indemnity contract as it affects the claim for 9% interest without relating it to the proposed grounds of cross-appeal and its particulars therein before declaring that the proposed notice and grounds of cross appeal were not arguable.*

30 *iii. Whether it was right for the Justices of the Court of Appeal in their majority decision not to have considered all the reasons averred by the appellant in their affidavit and further affidavit for failing to file their notice and grounds of*

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*cross-appeal within time before declaring the reasons insub*

*stantial and exercising their discretion based on the same.*  
*Kate Enterprises Limited v. Daewoo (Nig) Ltd (1985)2 NWLR*  
*(Pt.5) 116 Woluchem v. Gudi (1981) 5 SC 291 Applied*  
*University of Lagos v. Aigoro (1985) 1 NWLR (Pt.1) 143"*

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In the brief filed by the defendant/respondent who will from now on be referred to as the respondent, six issues were formulated for determination. These are -

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*"3.01. Whether the appellant has complied with the provision of Order 3 rule 4(2) of the Court of Appeal Rules 1981 which specifically stipulates that:*

*'Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard'.*

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*3.02 Whether on the correct interpretation of Order 3 rule 4(2) of the Court of Appeal Rules 1981 the reason given by the appellant at page 10 of the record in paragraphs 8 and 9 in support of the application for failing to appeal as of right within the 3 months statutory period allowed by Order 3 rule 4(2) of the Court of Appeal Rules 1981 constitute good and substantial reasons for the failure to appeal within the prescribed period.*

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*3.03. Whether the Court of Appeal adopted the correct approach when it refused to grant leave to cross-appeal.*

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*3.04. Whether the grounds of appeal in the notice of appeal*

*dated 20th January 1987 referred to as Exhibit 'B' in pages 25-26 of the record prima facie showed good cause why the appeal should be heard.*

3.05. *Whether the plaintiff/appellant has made out a case of some miscarriage of justice or a violation of some principles of law or procedure which would justify the Supreme Court to intervene or disturb concurrent findings of fact by the High Court and Court of Appeal on the issue of 9% interest rate.*

3.06. *Whether the Notice of Appeal dated 20th January 1987 and filed on 21st January 1987 well outside the prescribed period of 3 months be regularised by an Order of Court."*

The main issue arising in this appeal is whether, having regard to the materials placed before it, the Court of Appeal rightly interpreted the provision of Order 3 rule 4(2) of the Court of Appeal Rules, 1981 when it refused the appellant's application.

The rule provides that -

*"Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed time, and by grounds of appeal which prima facie show good cause why the appeal should be heard."*

It is quite clear from the provision of the rule above that two conditions must be conjunctively satisfied before the court can exercise its discretion in favour of the applicant to grant his prayer. These two conditions, as culled out from the rule (supra) are

(a) an affidavit setting forth good and substantial reasons for



failure to appeal within the prescribed time, and  
 (b) grounds of appeal which prima facie show good cause  
 why the appeal should be heard.

It is pertinent to state that Order 3 rule 4 (2) of the Court of  
 Appeal Rules, 1981 is in pari materia with Order 7 rule 4(2) of the 5  
 Supreme Court Rules, 1977. This provision was interpreted by this  
 court in Ukpe Ibodo & Ors v. Enarofia & Ors, (1980) 5 - 7 S.C. 42.  
 As for (a) above, in the affidavit sworn to on 17th April 1989 by  
 Gregory Azih, the accountant in the applicant's Bank, particularly 10  
 paragraphs 4,6,7,8 and 9, he deposed that-

*"4. That on the 10th day of April 1986 the plaintiff obtained  
 judgment against the defendant in the above suit No.0/52/  
 78 for the sum of N56,410.25k (fifty-six thousand four hun 15  
 dred and ten Naira, twenty five kobo) out of the sum of  
 N125,040.24 (one hundred and twenty five thousand, forty  
 Naira, twenty four kobo) claimed made up of the principal  
 sum (debt) and interest therein. The said judgment is hereby 20  
 exhibited and marked Exhibit 'A'.*

*6. That the plaintiff being dissatisfied with that part of the  
 judgment disallowing the payment of interest to the plain 25  
 tiff, cross-appealed against the part of the judgment and  
 filed their notice and grounds of cross-appeal on 21st Janu  
 ary, 1987.*

*7. That as at 21st January 1987 when the plaintiff/applicant  
 filed their notice and grounds of cross-appeal they were al 30  
 ready out of time.*

*8. That before the plaintiff bank filed their notice and grounds  
 of cross-appeal they vigorously searched and dug deep into 35  
 the bank's archives to get at certain documents and authori*

*ties specifying the mode of payment of interest on any kind*

*of facility granted to a customer.*

9. *That the said search took the bank quite some time.*" (italics supplied).

The same deponent swore to a further affidavit on 21st June 1989 in which he stated in paragraph 7 thereof as follows -

*"7. That at the time the judgment was delivered in April, 1986 apart from the search for certain documents which delayed the plaintiff in filing the cross-appeal, within time, the managing director of the bank who would have authorised the filing of the cross-appeal was on overseas official tour-and by the time, he came back and gave the approval the plaintiff bank was already out of time in filing their cross-appeal."*

(Italics supplied for emphasis).

In further support of the paragraphs of affidavits quoted above, learned counsel for the appellant submitted that the learned Justices of the Court of Appeal in the majority judgment failed to consider all the reasons deposed to by the appellant in the supporting affidavits to the application before they declared the reasons proffered as unsubstantial, thus erring in law. He also submitted that the paragraphs of the affidavits were not controverted by the respondent. Learned counsel quoted and relied on several decisions of this Court amongst which are Yesufu v. Co-operative & Commerce Bank (Nig.) Ltd. (1989) 3 NWLR (Pt.110) 483. University of Lagos v. Aigoro (1985) 1 NWLR (Pt.1) 143; Egbuna v. Egbuna (1989) 2 NWLR (Pt.106) 773 and Alagbe v. Abimbola (1978) 2 S.C 39 at 40.

On the issue relating to "grounds of appeal which prima facie show

good cause why the appeal should be heard", it was the submission of learned counsel for the appellant that the applicant was required to show at that stage that the proposed grounds of appeal disclose an arguable issue, and that where such a condition is satisfied, the length of delay in bringing the application is immaterial.

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He submitted that the Court of Appeal in its majority judgment was in serious error to have adopted the erroneous reasoning of the learned trial Judge in coming to the conclusion that the proposed grounds are not arguable. In support of these submissions learned counsel referred to and relied on *Yesufu v. Co-Operative & Commerce Bank (Nig.) Ltd.* (supra). In *Re: Adewunmi & Ors.* (1988) 3 NWLR (Pt.83) 438 and *Holman Bras Ltd v. Kigo (Nig.) Ltd* (1980) 8-11 S.C. 43.

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He urged the Court to allow the appeal and grant his application with orders as prayed.

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In answer to the submissions of learned counsel for the appellant, learned counsel for the respondent submitted, on the issue relating to substantiality of good reasons for not appealing within the prescribed time, that the appellant not only failed to state the documents he said he was looking for from the bank's archives, but also did not say whether he had discovered any and what they were. He said it was unreasonable for the appellant to say that for almost three years since the delivery of the judgment, he was searching for documents in support of his proposed appeal.

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On the issue relating to "grounds of appeal which prima facie show good cause why the appeal should be heard", learned counsel submitted that the reasons contained in the lead ruling of the Court of Appeal by Uwaifo J.C.A., are cogent and unimpeachable. He con

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tended that the Notice of Cross-appeal filed was irregular and could

not be regularised. He tried to support his argument by relying on Co-Operative Bank of Eastern Nigeria v. Emeka Ogwuru (1991) 1 NWLR (Pt.168) 458; Ibodo & Ors v. Iguasi Enarofia & Ors. (1980) 5-7 S.C 42 at 51. He further submitted that learned counsel for the appellant was wrong in his reliance on the cases Yesufu v. Co-operative & Commerce Bank and Re: Adewunmi & Ors.(supra) in support of his application. He urged this Court to dismiss the appeal.

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As I said earlier in this judgment, the provision of Order 3 Rule 4(2) of the Court of Appeal Rules, 1981 must be considered conjunctively if an application under it is to succeed.

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I have quoted the relevant paragraphs of the two affidavits filed by the appellant in support of his application. I have carefully examined them and have found them to have fallen far short in explaining the reasons for not cross-appealing within the statutory period. In my view, it is not sufficient to say that from the date the trial court delivered its judgment in April, 1986 to 17th April, 1989 when the application for leave to cross-appeal was filed, the appellant was still vigorously searching and digging deep into its archives to get certain documents and authorities it was searching for, nor did it state how long the search took. Paragraph 7 of the better affidavit stated that the appellants were not able to appeal within time because their Managing Director who was to authorise the filing of the cross-appeal was away on overseas official tour and that by the time he came back, the cross-appeal was out of time. Here again, it was not stated for how long the Managing Director was out of the country. Was it for the whole period - April 1986 to 17th April 1989 or any part thereof?

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The reasons given in these affidavits are not only inadequate

but also vague to satisfy the first leg of Order 3 rule 4(2) of the Court of Appeal Rules, 1981. See Ukpe Ibodo & Ors v. Iguasi Enarofia & Ors. (1980) 5 - 7 SC. 42. I may add here that although this Court in University of Lagos v. Olaniyan (1985) 1 NWLR (Pt.1) 156 did say that -

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Ibodo's case did not lay down a fast and rigid rule as to fetter the discretion of the court but it did say that -

"Each case must be decided on its facts and circumstances"

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The present case is one of such that, in order to enable the Court of Appeal to decide on whether the proposed grounds of cross-appeal show good cause why the cross-appeal should be heard, the alleged documents and authorities referred to in the affidavits would be very essential in determining whether the grounds of appeal are prima facie arguable. It seems to me that, although these documents and authorities were not specified, they were equally not made part of the appellant's case in the trial court. This would mean adducing additional evidence. Also, although on the face of it, the proposed grounds of appeal appear to contain arguable points but nonetheless, they are devoid of necessary supporting documentary exhibit; and the authorities the appellant searched for in its archives for almost three years. They appear to be grounds of at least, mixed law and facts.

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Looking at the application before the Court of Appeal which was filed on 17th April, 1989, the prayers therein are not complete, thus rendering it incompetent. Since the appellant is out of time to appeal, it needs the following three prayers in its application -

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1. Extension of time within which to apply for leave to appeal;
2. Leave to appeal, and

3. *Extension of time to file the Notice and grounds of appeal.*

The only prayer dealing with leave to appeal is prayer (a) which is

*"an order for extension of time within which the plaintiff/applicant in the above appeal can file his Cross-appeal."*

This is far inadequate to what is required by the applicant to enable it successfully move its application in the Court of Appeal.

It was the duty of the appellant as applicant in the Court of Appeal to present before the court, whatever was essential to the clear and adequate consideration of its application, and failure to do so would be a sufficient reason for refusing its application. The appellant had woefully failed to do so in this case.

It is desirable to make it clear that neither in *Re: Adewunmi's* nor in *Yesufu's* cases referred to (*supra*) did this Court say that the length of delay is immaterial where the "grounds of appeal *prima facie* show good cause why the appeal should be heard", this is a clear misunderstanding of the decisions in the two cases referred to above. Even Kutigi, J.C.A. (as he then was) agreed that good and substantial reasons explaining the delay must be given, when he said in his dissenting ruling -

*"The principle as I understand it has always been that in considering the application of this nature, the length of the delay in bringing the application is itself immaterial, so long as good*

*and substantial reasons justifying the delay is proffered."*

(italics supplied for emphasis).

The two other learned Justices of the Court of Appeal considered as unsubstantial the reasons proffered by the appellant and the ground of appeal inadequate to enable them grant the application.

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In his lead ruling (with which Oguntade, J.C.A. agreed) Uwaifo, J.C.A. after considering both Adewunmi's and Yesufu's decisions (supra) concluded thus

*" There is nothing to indicate what were the documents and authorities that had to be searched for in the archives of the bank; it is not indicated when the search commenced and ended; it is not stated whether the documents and authorities were seen or whether they were used for the purpose of drawing up the grounds of appeal. It is quite amazing that the bank took a matter to court in the first instance without ascertaining beforehand what they were entitled to claim from their customer. The reasons for the delay are obviously bad and insubstantial.*

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*I have considered the grounds of appeal proposed on the basis of the principle in The University of Lagos & Ors. v. Olaniyan & ors. (1985) 1 S.C 295 and Lauwers Import-Export v. Jozebson Industries Limited (1988) 3 NWLR (Pt.83) 429. The principle is that the grounds of appeal must be considered in relation to the material brought before the Court. In Olaniyan's case, the Supreme Court rejected the submission of counsel for the respondents that whether grounds of appeal were arguable was to be determined on the face of those grounds."*

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I have not been persuaded by the appellant in his arguments that the Court of Appeal was wrong in its conclusion, so as to differ from it.

The application to cross-appeal is replete with lapses and inadequacies and the Court of Appeal is in my view right in refusing it. The appeal against its decision is devoid of any merit and is accordingly dismissed. It is therefore affirmed. The respondent is awarded  
 5 N1000.00 costs against the appellant.

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***UWAIS JSC***

15 I have had the advantage of reading in draft the judgment read by my learned brother Wali, J.S.C. I entirely agree that the appeal has no merit and that it should be dismissed with N1,000.00 costs to the respondent.

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***KAWU JSC***

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I have had the preview of the lead judgment of my learned brother, Wali, J.S.C. which has just been delivered. I agree entirely with him that there is no substance in this appeal which should be  
 30 dismissed. For all the reasons lucidly stated in the lead judgment, which I adopt as mine, I too would dismiss the appeal with N 1,000.00 costs awarded to the respondent.

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***OGWUEGBU JSC***

I have had the opportunity of reading the draft judgment read by my learned brother Wali, J.S.C. I agree with the reasons and con-



As was rightly stated by Wali, J.S.C. in the lead judgment, this appeal revolved on Order 3, rule 4 (2) of the Court of Appeal Rules, 1981 which provides:-

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"Every application for an enlargement of time shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and the grounds of appeal which prima facie show good cause why the appeal should be heard.

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There was a delay of almost three years before the plaintiff/appellant woke from his slumber and decided to apply for leave to cross-appeal. Order 3, rule 4(2) must be read and interpreted conjunctively and not disjunctively. If the reasons for failure to appeal within the prescribed period are good and substantial, the grounds of appeal must prima facie show good cause why the appeal should be heard. See *Williams & Ors. v. Hope Rising Vol. Society* (1982) All NLR (Pt.1) 1, *Yonwuren v. Modern Signs Nigeria Ltd* (1985) 1 NWLR (Pt.2) 244; (1985) 2 S.C. 86 at 148 and *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt.1) 143; (1984) 11 S.C 152 at 156.

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The application should be supported by an affidavit evidence to the facts which cannot be disputed. This should include the reasons for the delay even if the application is not opposed. The reasons advanced in the affidavits in support of the application are to say the least unsubstantial. The affidavits made no effort to explain the delay. It was not disclosed what documents the appellants were searching

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for in the archives and since the document was in the archives, it means that it was available at the trial. There was no averment that it could not have been obtained with reasonable care and diligence for use at the trial.

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I am satisfied that by the application, the appellants are trying to repair their case and be encouraged in their indolence. If this type of application is allowed, there will be no end to litigation.

5 The first leg of Order 3, rule 4(2) having failed, the second leg hardly calls for consideration since both legs must co-exist. I too dismiss the appeal with N1,000.00 (one thousand naira) costs in favour of the respondent.

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***PRONOUNCEMENT  
BY UWAIS JSC***

My learned brother, the late Mohammed JSC took part in the hearing of this appeal and the conference which we held  
15 immediately thereafter died in a motor accident on Tuesday, the 9th day of February, 1993.

In accordance with the provisions of section 258 subsection (2) of the Constitution of the Federal Republic of Nigeria, 1979, I  
20 hereby pronounce that he was of the opinion that the appeal should be dismissed with N1,000 . costs to the Respondent.

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