

SUPREME COURT OF NIGERIA

8TH JULY, 1994. SC. 207/86

**CORAM:-M.I.UWAIS,E.O.OGWUEGBU,
U. MOHAMMED, Y. O. ADIO, A. I. IGUH, JJSC.**

ISAIAH OJO ASORE & ANOTHERS APPLICANTS
AND
SULE OGUNDIMULEMOMU & 13 OTHERSRESPONDENTS

APPEALS – Application for enlargement of time to appeal – Where the filed motion paper is not found – When drawn up order is held to throw light on what was prayed for.(H1)

APPEALS – Competency of appeal – Grant of extension of time to appeal – Where notice and grounds of appeal were filed 4 days outside the extended time – Whether the appeal is competent.(H2)

FACTS

The plaintiff/Appellants instituted an action against the Respondents before the Oyo State High Court Osogbo, claiming title to the land in dispute. The trial court delivered judgment in favour of the Appellants. Respondents appeal to the Court of Appeal was allowed. On appeal to the Supreme Court, Appellant sought the Court of Appeal's leave to appeal on 5 grounds of mixed law and facts. The application was struck out by the Court below for being out of time.

The Appellants then sought leave of the Supreme Court to appeal against the Court of Appeal's judgment. The Supreme Court in chambers, granted the Appellants' motion giving them 30 days extension of time within which to appeal. The Appellants filed their appeal 4 days after the expiration of the extended period. The respondents have now raised a preliminary objection contending that the appeal is not competent.

HELD (unanimously striking out the appeal)

1. Lost motion paper – More light from drawn up order

Learned counsel may not be right on the wordings of the application which was

considered in chambers on 19th November, 1986. It is unfortunate, because the motion paper is missing from the main file concerning this appeal. Nevertheless, the Drawn up Order of the Court on the decision has thrown light on what was prayed for in the motion.

2. Whether appeal filed out of time is competent

The appellants however failed to comply with Court's order, to wit, by filing their papers within 30 days from the 19th November, 1986, when the order was made. Instead they filed the notice and grounds of appeal on 23rd December, 1986, four days outside the time extended for them to appeal. Accordingly, their appeal is incompetent and it is struck out (P.436 L.11)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. *Filing appeal out of time – Court is deprived of jurisdiction thereby*

It cannot be over-emphasised that failure to comply with statutory requirements such as the filing of an appeal within the specified period of time allowed by law from the date of judgment or within such further extended period of time as may be granted by an order of Court deprives the appellate court of jurisdiction to entertain or hear such an appeal. The irregularity cannot be regarded as a mere technicality but constitutes a fundamental defect which renders the proceedings and judgment of the appellate court in respect of such purported appeal incompetent and consequently null and void. (P.439 L. 2)

2. *Irregularity – Acquiescence cannot confer jurisdiction*

“An irregularity that renders proceedings incurably defective null and void may not be waived as acquiescence cannot confer jurisdiction. In the present case, the appeal is manifestly irregular and incurably defective as it was filed out of time without the leave of court for an extension of time in accordance with the provisions of the Rules. In my view therefore it is grossly incompetent” (P.439 L.15)

REPRESENTATION

Chief Oladiti Akande for the Appellants

Chief Makanjuolo Esan for the Respondents.

CASES REFERRED TO

Bowaje v. Adediwura (1976) 6 SC. 145

Amudipa v. Arijodi (1978) 9/10 SC. 27

F.I. Oranye v. Jibowu 13 W.A.C.A 41

Moore v. Tayee 2 W.A.C.A 43

Kudabor v. Kadanu 6 W.A.C.

Skencounsult (Nig) Ltd and Another v. Godwin Ukey (1981) 1 SC. 6 at 26

Management Enterprises Ltd v. Otusanya (1987) 2 N.W.L.R (Part 55) 179

Obimonuwe v. Erinoshio (1966) 1 AIN.L.R. 250

STATUTES REFERRED TO

Supreme Court Act 1960 s.16

Supreme Court Act Cap. 424, Laws of the Federation of Nigeria, 1990 s.27 (4)

LEAD JUDGMENT BY MOHAMMED JSC

The plaintiffs who are appellants, in this appeal, instituted an action against the respondents at the Osogbo High Court, Oyo State. In the writ, the appellants claimed jointly and severally against the respondents for the following declaration and ancillary reliefs:

“(a) Declaration to a Statutory Right of Occupancy to piece or parcel of land situate, lying and being at Faji more particularly shown and delineated on Plan No. J.F.A. 1134 drawn by Chief Ososami Licensed Surveyor on the 20th day of January, 1980 and thereon edged Brown.

(b) The sum of Ten Thousand Naira (N10,000.00) being general damages suffered by the plaintiffs as a result of trespass committed by the defendants on the area verged Brown on Plan J.F.A. 1134.

(c) Injunction restraining the defendants, servants, privies, agents or anybody claiming through them from committing any further acts of trespass on the land in dispute.”

At the end of the trial, in a judgment delivered on 23rd August, 1983, the trial High Court declared that the appellants were entitled to a statutory right of occupancy to the land in dispute. It also granted an order of injunction as claimed and awarded the appellants N 1,000.00 as general damages against

the respondents. Dissatisfied with the decision of the High Court, the respondents appealed to the Court of Appeal, Ibadan. The Court of Appeal, in a unanimous decision allowed the appeal and dismissed the claim of the appellants.

On appeal to this court, against the decision of the Court of Appeal, the appellants filed a motion on notice before the Court of Appeal seeking leave of the Court to appeal against their decision on five grounds, all on facts and mixed law and facts. The application was not argued until after three months had elapsed and the Court of Appeal wasted no time in striking it out.

The appellants thereafter came and sought leave of this Court to appeal against the judgment of the Court of Appeal. The motion was argued on 19th November, 1986 and after considering the application in chambers this court extended the time to 30 days within which the appellants could appeal against the judgment of the Court of Appeal. The appeal was not filed until on 23rd December, 1986. four days after the date extended for the appellants to file their appeal had elapsed.

Chief Makanjuola Esan, learned counsel for the respondent raised a preliminary objection that the appeal having been filed outside the period of three months is incompetent. His argument is that on 19th November, 1986, when the appellants' prayers for leave to appeal were granted, they had been out of time to file the appeal. The order of court made on that day was to the effect that the application was granted as prayed. There was no prayer for extension of time to appeal in the application granted by this court in chambers on 19th November, 1986. On these facts the learned counsel submitted that the notice of appeal filed on 23rd December, 1986 is incompetent having been filed outside the period prescribed by section 16 of the Supreme Court Act. 1960. without any order for extension of time to do so. Counsel then referred to *Bowaje v. Adediwura* (1976) 7 S.C. 143 and *Amudipe v. Arijodi* (1978) 9/10 S.C. 27.

With due respect, the learned counsel may not be right on the wordings of the application which was considered in chambers on 19th November, 1986. It is unfortunate, because the motion paper is missing from the main file concerning this appeal. Nevertheless, the Drawn up Order of the court on the decision has thrown light on what was prayed for in the motion. In the Drawn up Order, the opening words are:

"Application for an order;

*(1) for enlargement of time in which to apply for leave to appeal and
(2) for leave to appeal*

After considering the application in chambers this court granted the application as prayed. What was granted has been translated in the ruling of
5 Bello, J.S.C., (as he then was) who wrote the leading ruling. It is as follows:

“Having perused the motion papers, I am satisfied this is a proper case to exercise my discretion to enlarge the time within which to apply for leave and to grant leave to appeal....

*Accordingly, the time within which to appeal is extended to 30 days
10 from today and leave to appeal is hereby granted.”*

The appellants however failed to comply with the court’s order, to wit by filing their papers within 30 days from the 19th November, 1986, when the order was made. Instead they filed the notice and grounds of appeal on 23rd December, 1986, four days outside the time extended for them to appeal.

15 Accordingly, their appeal is incompetent and it is struck out with N1,000.00 costs to the respondents jointly.

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UWAIS JSC

I have had the opportunity of reading in draft the ruling read by my learned brother Mohammed, J.S.C. I entirely agree with it.

25 The appeal being incompetent having been filed out of time is hereby struck out with N I,000.00 costs to the respondents jointly.

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OGWUEGBU JSC

I have had the privilege of a preview of the ruling just read by my learned brother Mohammed, J.S.C. I agree with him that the appeal is incompetent.

35 The plaintiff instituted an action in the former Oyo State High Court, Oshogbo Judicial Division holden at Oshogbo against the defendants claiming statutory right of occupancy to a parcel of land, general damages for trespass and injunction.

Judgment was given in his favour in the High Court. The defendants

who were dissatisfied with the decision, appealed to the Court of Appeal, Ibadan Division. Their appeal was allowed by the court below on 26:5:86. Aggrieved by the decision, the plaintiffs appealed to this court.

The plaintiffs who are the appellants in this court applied to the court below on 28/7/86 for leave to appeal against its decision on five grounds of appeal which were of mixed law and facts. The application was not heard before the statutory period within which to appeal expired. It was accordingly struck out on 22:10:86 by that court. The appellants renewed their application in this court. They prayed this court for the following orders:

- (i) *an enlargement of time within which to apply for leave to appeal* 10
- (ii) *Leave to appeal*

The application was heard in chambers on 19:11:86 pursuant to section 27(4) of the Supreme Court Act, Cap.424, Laws of the Federation of Nigeria, 1990. It was granted as prayed and the appellants were allowed thirty days from that day within which to appeal. The appellants filed their notice of appeal on 23: 12:86. 15

Briefs of argument were filed by learned counsel for both parties. In paragraph three of the respondents' brief of argument, a notice of preliminary objection was given by the respondents. It reads:

"3.1. The respondents hereby give the appellants NOTICE that the respondents will at the hearing of the appeal object to the competence of the appeal on the grounds that it was filed outside the period of three months prescribed for the filing thereof without an order of court extending the time limited for the filing thereof. 20

3.2. The respondents shall contend that as at 19th November, 1986 when the appellants' prayers for leave to appeal were granted, they had been out of time to file the appeal. The order of court made on that day was to the effect that the appeal (sic) was granted as prayed. There was no prayer for extension of time to appeal in the application granted by the court in chambers on 19th November, 1986. On these facts, we submit that the Notice of appeal filed on 23rd December, 1986 is incompetent having been filed outside the period prescribed by section 16 of the Supreme Court Act, 1960 without any order for extension of time to do so. See:- 25 30

(1) Bowaje v. Adediwura (1976) 6 S.C 143.

(2) Amudipe v. Arijodi (1978) 9/10 S.C 27.

3.3 All the grounds of appeal filed are on mixed law and facts. We urge the court to strike out the appeal as incompetent, having been filed out of time.”

This court granted the appellants an extension of 30 days from 19:11:86 within which to file their notice of appeal. The notice of appeal was filed on 23:12:86. It was certainly filed outside the period so extended.

In the result, the preliminary objection taken by the learned counsel for the respondents is upheld. The appeal not being properly before this court is hereby struck out with costs as assessed in the lead ruling of my learned brother, Mohammed, J.S.C

ADIO JSC

I have had the opportunity of reading, in draft, the ruling just read by my learned brother, Mohammed, J.S.C, and I agree with it. The appeal is, for reasons stated in the lead judgment with which I agree, incompetent and it is hereby struck out by me.

I abide by the order for costs.

IGUH JSC

I have the privilege of reading in draft the lead ruling just delivered by my learned brother, Mohammed, J.S.C and I agree with him that this appeal is clearly incompetent and should be struck out.

A close study of the record of proceedings reveals that the notice of appeal in this case was not filed until the 23rd day of December, 1986. This is four days after the date extended for the appellants within which to file their appeal had expired. This court had on the 19th day of November, 1986 granted the appellants an extension of 30 days within which to file their appeal against the decision of the court below in the case.

The extension of time allowed the appellants time within which to appeal expired on the 19th December, 1986. It seems to me clear that the appellants' notice of appeal which was filed on the 23rd December, 1986, four days out of time without an enabling, further court order is improperly before this

court and therefore incompetent.

It cannot be over-emphasized that failure to comply with statutory requirements such as the filing of an appeal within the specific period of time allowed by law from the date of judgment or within such further extended period of time as may be granted by an order of court deprives the appellate court of jurisdiction to entertain or hear such an appeal. The irregularity cannot be regarded as a mere technicality but constitutes a fundamental defect which renders the proceedings and judgment of the appellate court in respect of such purported appeal incompetent and consequently null and void. See F.I. Oranye v. O.T. Jibowu (1950) 13 W ACA 41, Ohene Moore v. Akesseh Tayee (1933) 2 WACA 43 and Kudiabor v. Kudanu (1932) 6 WACA 14.

A simple irregularity in the course of proceedings that are competent and within the jurisdiction of a trial court must be distinguished from proceedings which are manifestly incompetent thereby affecting the proceedings and judgment of the court. An irregularity that renders proceedings incurably defective and null and void may not be waived as acquiescence cannot confer jurisdiction see Skenconsult (Nig) Ltd and Anor. v. Godwin Ukey (1981) J.S.C. 6 at 26, Management Enterprises Ltd & Anor. v. Jonathan Otusanya (1987) 2 NWLR (pt. 55) 179 and Obimonure v. Erinoshio & Anor. (1966) 1 All NLR 250.

In the present case, the appeal is manifestly irregular and incurably defective as it was filed out of time without the leave of court for an extension of time in accordance with the provisions of the Rules. In my view therefore it is grossly incompetent.

It is for the foregoing and the fuller reasons contained in the lead ruling of my learned brother, Mohammed, J.S.C., that I, too, will strike out this appeal. I endorse the order as to costs contained in the lead judgment.