

SUPREME COURT OF NIGERIA
24TH FEBRUARY, 1995, SC.85/1994
CORAM:- **M. BELLO CJN, S. M. A. BELGORE, I. L.**
KUTIGI, M.E. OGUNDARE, A.I. IGUH, JJSC

ATTORNEY-GENERAL OF ... APPELLANT/APPLICANT/RESPONDENT
THE FEDERATION

AND

A.I.C. LIMITED ... RESPONDENT/APPLICANT

1. AERMACCHI S.P.A.)
2. MARIO MARASS) DEFENDANTS
3. GIOVANNI CATTANEO)

APPEALS - *Competing motions - When granting of appellant's motion - Is held to render respondent's motion useless.*

APPEALS - *Extension of time to appeal - Where issues raised in the grounds of appeal - Were quite substantial - Extension of time and leave to appeal will be granted.*

APPEALS - *Leave to file additional documents - Where appeal was arguable - Whether leave will be granted in the interest of justice.*

LEGAL PRACTITIONERS - *Authority of litigant - Appeals - Affidavit evidence - When found to show that counsel had no authority - Of the appellant to file or withdraw appeal.*

LITIGANTS - *Negligence of counsel - Appellant not to be penalized thereby - Three changes within one year in the appellant - Militated against prompt action.*

FACTS

The appellant by a motion on notice prayed the Supreme Court for various orders totalling eight on the whole. The orders sought included setting aside the purported Notice of Appeal, and notice of withdrawal of that appeal filed by counsel without the consent or authority of the appellant. Appellant also prayed for extension of time to appeal, leave to appeal, leave to raise a new issue and leave to file some additional documents. The motion was supported by affidavit and three further affidavits.

The respondent had earlier filed a motion seeking a striking out of the said purported Notice of Appeal filed without the appellant's authority. Appellant's prayer 8 was withdrawn and struck out accordingly. The Supreme Court had to determine whether to grant the orders prayed for by the appellant/applicant.

HELD (Unanimously granting the appellant's prayers per ***KUTUGI JSC***)

Counsel had no authority of appellant

1. The affidavit evidence patently tilted the scale in favour of the appellant that Mr. Jegede was not authorised by him to file an appeal nor withdraw the one filed without authority. Mr. Jegede himself had sworn that he neither brought the judgment of the Court of Appeal to the attention of the appellant nor did he obtain his authority to file the appeal let alone to withdraw it. The respondent in its own 1st Counter-Affidavit above has also admitted in para. 9 that Mr. Jegede was not the counsel who at any stage whatsoever represented the appellant in the High Court or in the Court of Appeal. I had no doubt in my mind that affidavit evidence and the surrounding circumstance clearly point to the only conclusion that Mr. Jegede had no authority whatsoever to have filed the Notice of Appeal and the Notice of withdrawal by Agreement (P. 541 C).

Negligence of counsel - Appellant not to be penalised thereby

2. I agree with Mr. Ayode that the appellant should not be penalised for the negligence of Mr. Jegede vide *DOHERTY v. DOHERTY* (supra). Added to that was the fact that the affidavits in support show that there had been three changes within one year in the appellant which militated against taking a prompt action in the matter. (P. 542 D)

Extension of time to appeal

3. I had closely studied the judgments of the lower courts and the proposed

Notice and Grounds of Appeal above. I was clearly of the view that all the three Grounds of Appeal were arguable. The issues involved were quite substantial which would require a careful examination by this Court. Prayers 3, 4 and 5 therefore succeeded and they were granted. (P. 542 H)

Leave to file additional document

4. I had ruled that ground 3 of the proposed Grounds of Appeal above was arguable. I thought the Italian Judgment (Exhibit P) if made to form part of the records would further advance that point. In the light of all I have said above and in the interest of Justice I granted prayer 7 as prayed. (P. 543 D)

Appeals - Competing motions

5. There was no more in existence the purported Notice of Appeal or the purported Notice of Withdrawal by Agreement both filed by Mr. Jegede. Both had been struck out or set aside as prayed for by the appellant (see prayers i ft 23 thereof). In addition, the appellant had been granted extension of time to appeal and to seek leave to appeal. In the circumstances therefore the respondent's motion was not capable of any consideration. It was rendered useless having lost its only foundation which was the purported Notice of Appeal filed by Mr. Jegede already set aside. The application therefore was for this reason struck out (P. 543 G)

NOTABLE POINTS OF INTEREST

KUTIGI JSC

1. Adversely competing motions - Which one will be taken first

I would have thought that Professor Kasunmu ought to have been aware of the general practice by now that where in the same case there are two adversely competing motions before a court, one “*constructive*” and the other potentially “*destructive*”, the court will normally proceed to take the former motion first unless it will be inequitable to do so, so that if it succeeds, there would be no need for the latter motion which will then be withdrawn and struck out accordingly. (P. 535 F)

2. Appeal to be deemed pending though it be a defective one

The fact that Mr. Jegede had no authority to file the appeal I may add did not stop the appellant telling a London Court that an appeal was filed and pending in the case. Because until that Notice of Appeal was set aside as we did on 5/12/94, there was an appeal pending albeit a defective one. (P- 542 A)

BELLO C.J.N*3. When counsel's conduct smells some element of fraud*

The conduct of Mr. Jegede, the former Deputy Director of Civil Litigation in the Ministry of Justice, in his failure to inform the Attorney-General of the judgment of the Court of Appeal confirming the award of \$8,194,300 against the Federal Government, his filing of improper appeal against the judgment without taking instruction from the Attorney-General and his withdrawal of the appeal by giving false information to the court when he filed "*Notice of Withdrawal of Appeal by Agreement*" knowing there was no such agreement, clearly discloses more than negligence. It smells some element of fraud and in the interest of justice the Federal Government should not suffer such a huge loss from it. (P. 544 C)

OGUNDARE J.S.C*4. General authority of counsel to conduct a case*

The apparent authority with which a counsel is clothed when he appears to conduct a case is to do everything which in the exercise of his discretion he may think best in the interest of his client in the conduct of the case and if within the limits of this apparent authority he enters into an agreement with the opposite counsel as to the case on every principle, this agreement should be held binding on his client. But this general authority of counsel is predicated on the existence of a counsel/client relationship. Where there is no such relationship, an act done by a legal practitioner on behalf of a party to a case cannot be said to be binding on that party. (P. 545 G)

F

REPRESENTATION

M.A. Ayoade (Director of Civil Litigation)

with J.K. Ehicheoya (Legal Officer I)

E.O. Ononowa (Legal Officer)

G G.A. Fan (Legal Officer)

C.C. Ibe (Legal Officer)

for the appellant/applicant.

Prof. A.B. Kasunmu SAN, with Mrs. G.O. Omoigui for the respondent/applicant.

H

CASES REFERRED TO

Adekeye v. Olugbade (1987) 2 NWLR (Pt.60) 214

Doherty v. Doherty (T964) 1 ANLR 292

Edozien v. Edozien (1993) 1 KLR 90

RULES REFERRED TO

Supreme Court Rules 1985 0.6 r.2 (l), 0.8 r.6 (5)

LEAD JUDGMENT BY KUTIGI JSC

B

The appellant by Motion on Notice dated the 2nd November, 1994 prayed as follows:-

- “1. *AN ORDER setting aside the purported Notice of Appeal dated 21st June, 1993 and filed on 3rd day of August, 1993.* C
2. *AN ORDER setting aside the purported Notice of withdrawal by Agreement dated 27th day of October, 1993 and filed on the 28th October, 1993.*
3. *AN ORDER for an extension of time within which to apply for leave to appeal.* D
4. *AN ORDER for leave to appeal.*
5. *AN ORDER for extension of time to file the Notice and Grounds of Appeal.*
6. *AN ORDER seeking leave of this Honourable Court to raise a new issue on appeal as reflected in the proposed Grounds of Appeal and Brief.* E
7. *AN ORDER seeking leave of this Honourable Court to file the following additional documents to wit -*
 - (a) *a copy of the agreement between the Federal Government of Nigeria and the 1st defendant for the supply of MB 339 Advanced Jet Trainers (Exhibit D) annexed to this Affidavit.* F
 - (b) *a copy of the Counter Affidavit dated 1st December 1988 and filed the same day by the appellant at the Registry of Lagos State High Court in the proceedings of the judgment in default of filing of the Statement of Defence by the applicant before Mr. Justice Hunponu- Wusu (Exhibit F.I. annexed to this Affidavit).* G
 - (c) *A copy of the judgment of the Civil and Criminal Court of La Spezia in the Republic of Italy, dated 18th October, 1990 between the 1st defendant and the Plaintiff.*
8. *AN ORDER for a stay of Garnishee proceedings at the High Court of Lagos presided over by Mr. Justice Hunponu- Wusu pending the determination of the appeal if reliefs Nos. 1 - 5 above are granted. And for such orders or further orders as this Honourable Court may deem fit to make in the circumstance.”* H

The motion was supported by an Affidavit of urgency and another affidavit in support of the motion both sworn to by one Emmanuel Omonowa, a legal practitioner in the Chambers of the Attorney-General of the Federation, the applicant. The following documents were annexed to the affidavit as exhibits:-

- B A. Agreement between the Federal Republic of Nigeria and Aermacchi S.P.A. dated 6/5/83.
- B. Exclusive Agreement between Aermacchi S.P.A. (1st defendant) and A.I.C. Ltd., (plaintiff/respondent) dated 22/5/91
- C. The writ of summons dated 21/6/83
- C D. Statement of Claim dated 21/6/83
- E. A copy of the Order discharging the Interim Injunction dated 19/8/83
- F. The High Court judgment dated 28/10/89.
- FI. A copy of the Counter Affidavit filed by the applicant in the High Court proceedings leading to the judgment.
- D G. The Notice of Appeal against the judgment of the High Court dated 3/9/90.
- H. Judgment of the Court of Appeal dated 13/5/93
- J. The purported Notice of Appeal against the Court of Appeal judgment dated 21/6/93 but filed 31/8/93.
- E K. Purported Notice of Discontinuance dated 28/10/93.
- L. Notice of proposed Grounds of Appeal by the Applicant.
- M. Copy of the Order for registration of judgment at Queen's Bench Division in London dated 29/11/93.
- F N. Garnishee Order to show Cause in Queen's Bench London dated 21/7/94
- O. Notice of Garnishee Proceedings in Lagos High Court dated 11/11/93.
- P. Judgment of the Court of La Spezia dated 18/10/90
- G Q. Letter from the Ministry of Trade dated 1st February, 1990.
- R. Brief of argument.

Also in support of the motion were a Further Affidavit, Second Further Affidavit and a Third Further Affidavit. The plaintiff/respondent in opposition filed 1st Counter Affidavit while the applicant in reply filed a H reply to the 1st Counter Affidavit.

The respondent had earlier by motion on notice filed on 20/7/94 sought an order -

"Striking out the Notice of Appeal filed by the appellant/respondent and dated the 21st day of June, 1993 on the grounds set out in the schedule to

this motion. And for such order or further orders as this Honourable Court may deem fit to make in the circumstances.

The Schedule

- (a) *By a Notice of Discontinuance dated the 27th day of October, 1993 and filed on the 28th day of October, 1993 the appellant/respondent has withdrawn its appeal against the decision of the Court of Appeal dated the 13th day of May, 1993.* B
- (b) *In the alternative the Notice of Appeal dated the 21st day of June, 1993 is incompetent in that all the grounds of appeal contained therein are grounds of fact and of mixed law and fact and no leave of the Court of Appeal or of the Supreme Court was obtained as required by section 213(3) of the 1979 Constitution."* C

The motion was supported by an affidavit sworn by one Olabanjo Fasonu, a Litigation Officer in the Chambers of Prof. A.B. Kasunmu SAN, solicitors to the applicant. The appellant/respondent filed a counter affidavit in opposition. The judgment of the Court of Appeal, the Notice of Appeal and the Notice of withdrawal of Appeal were amongst others exhibited to the motion. D

When the two motions came before us for hearing on 5th December, 1994 Professor Kasunmu learned senior counsel for the respondent/applicant insisted that his motion must be taken first since it was earlier in time and if granted there would be no further need for the appellant's motion. It was then pointed out to him that since the appellant's motion which was wider in scope also clearly covered his own, the two motions would be taken together beginning with the appellant's counsel. E

I would have thought that Professor Kasunmu ought to have been aware of the general practice by now that where in the same case there are two adversely competing motions before a court, one "*Constructive*" and the other potentially "*destructive*", the Court will normally proceed to take the former motion first unless it will be inequitable to do so, so that if it succeeds, there would be no need for the latter motion which will then be withdrawn and struck out accordingly. F G

Now, Mr. Ayoade learned Director of Civil Litigation moving the motion on behalf of the appellant referred to prayers 1 & 2 seeking to set aside the Notice of Appeal dated 21/6/93 (Exhibit J.) and the Notice of Withdrawal of Appeal by Agreement dated 27/10/93 and filed on 28/10/93 (Exhibit K.) He said that having regard to the totality of the affidavit evidence before the court, Mr. Oladele Jegede, the former Deputy Director of Civil Litigation acted without the authority and consent of the Attorney-General when he purported to file both the Notice of Appeal and the Notice H

of Withdrawal of the Appeal. He relied on the following:-

1. Affidavit of Emmanuel Omonowa dated 2/11/94 particularly the documents listed in para. 49 of the affidavit.
2. Further Affidavit of Olusegun Omotola dated 4/11/94, and Exhibit HI attached thereof.
- B 3. Second Further Affidavit of Jimoh Adamu dated 8/11/94 particularly para. 6 exhibiting Exhibit "S", *"Notice of meeting of personnel Management Board"*.
4. Third Further Affidavit of Oladele Jegede dated 9/11/94.

C Referring to prayers 3, 4 & 5 learned counsel said he relied on his brief which he filed in support of those prayers as required under Order 6 Rule 2(1) of the Supreme Court Rules 1985 (as amended). He said the delay in filing the appeal was due to negligence of Mr. Jegede who failed to bring the judgment of the Court of Appeal to the attention of the applicant. He

D referred to the cases of Adekeye v. Akin Olugbade (1987) 2 NWLR (Pt. 60) 214 at 223 - 224, Doherty v. Doherty (1964) 1 All NLR 292 at 294 Ajayi v. Omoreghe (1993) 6 NWLR (Pt. 301) 512 at 528 amongst others. It was also submitted that the three proposed grounds of appeal are substantial and Weighty and that they require a careful examination by this Court.

E

Also referring to prayer 7, learned counsel submitted that documents (a) & (b) sought to be filed were in fact part of the documents forming part of the application for Departure from the Rules in the Court of Appeal which were only inadvertently left out when the records to this

F Court were being compiled. He said although the document in para. (c) came into existence after the judgment of the High Court, it would be in the interest of justice to make available to this Court, the record of judicial proceedings between the respondent and the 1st defendant in the Court of La Spezia in the Republic of Italy over the interpretation of Exhibit B referred to in para. 49 of the affidavit of Omonowa in support.

G

Mr. Ayoade said he was withdrawing prayer (8) for stay of garnishee proceedings at the Lagos High Court because that court has since ruled in their favour. The Court was urged to grant all the remaining prayers.

H

As for the respondent's motion, learned counsel said he was relying on the affidavit in support of his own motion and also the Counter Affidavit of Emmanuel Omonowa dated 2/11/94 and Reply to First Counter Affidavit of Olabanjo Fasonu dated 2/12/94. He referred to para. 27 of

Exhibit “7A” 1 - 6 therein which listed the documents filed in the Court of Appeal. We were asked to dismiss respondent’s motion.

Professor Kasumu in reply vigorously opposed the appellant’s motion. His arguments may be summarised as follows -

B

1. That although the Attorney-General was a named party he was just like any other party in the suit and that since he chose to brief Mr. Jegede to appeal on his behalf, the ordinary principles of Counsel Client relationship should prevail.

2. That the Notice of Appeal in this case was filed on behalf of the Attorney-General by counsel appointed by him and as such the Attorney-General could not claim ignorance of same.

3. That Mr. Jegede for reasons best known to him decided to withdraw the appeal after the respondent had filed its own motion dated 6/1 0/ 93 in this Court asking this Court to strike out the Notice of Appeal on grounds of incompetence. And that this Court on 2/2/94 declined to strike out the appeal because the Notice of Appeal was not’ exhibited to the motion.

4. That although the Notice of Withdrawal of appeal (Exhibit K) filed by Mr. Jegede was headed Notice of Withdrawal of appeal by Agreement” E it was not with the consent of the respondent and that Mr. Jegede who signed Exh. K acted on his own throughout. He referred to Order 8 Rule 6 of the Supreme Court Rules 1985 (as amended) and Forms 19 & 20 therein.

5. That in a related application in a London High Court, the Attorney General had admitted that an appeal had been filed in this case in Nigeria F and that he could not claim again not to be aware of the Notice of Appeal.

6. That Mr. Jegede did not need the consent or approval of the Attorney-General to withdraw the appeal as he had done and therefore the Notice of Withdrawal (Exhibit K) was validly filed and the appeal should be deemed to have been dismissed under Order 8 Rule 6(5) Supreme Court G Rules 1985. He cited in support the cases of - Adewumi v. Plastex Nigeria Ltd. (1986) 3 NWLR (Pt. 32) 767. Edozie & Ors. V. Edozie (1993) 1 NWLR (Pt. 272) 678 at 710.

7. That prayers 3, 4 & 5 could not be granted when the original Notice of Appeal (Exh. J) was still subsisting or when the appeal was deemed to H have been dismissed. Alternatively it was submitted that the applicant had not explained the delay for failing to appeal in time and that the proposed Grounds of Appeal were not substantial to warrant the grant of the reliefs sought.

The Court was urged to grant the respondent's motion striking out the Notice of Appeal and dismissing the appeal as well as the appellant's application.

I thought the most important issue to be resolved then was whether or not Mr. Oladele Jegede, the former Deputy Director of Civil Litigation B had the authority of the Attorney-General, the appellant/applicant, to file the Notice of appeal (Exh. J) and to withdraw same by filing the "*Notice of Withdrawal of Appeal by Agreement*" (Exhibit K). The decision on that issue in my view determined the fate of prayers 1 & 2 herein. The applicant said the judgment of the Court of Appeal was not even brought to his C attention, let alone authorizing anybody (including Mr. Jegede) to file a notice of appeal. Professor Kasunmu contended otherwise.

Now, para. 1, 2, 3, 13, 15, 17, 18 - 25 of Emmanuel Omonowa's Affidavit in support of the Appellant's Motion reads

D "*1. That I am one of legal practitioners in the Chambers of the Hon. Attorney-General of the Federation who is the appellant in this case.*

2. That by virtue of my position as aforesaid and schedules of duty, I am familiar with the facts of this case.

E *3. That I have the authority, consent and permission of the applicant to swear to this affidavit.*

13. That on 28th October, 1989 Hon. Justice S.O. Hunponu-Wusu made a ruling in an application for judgment in default of statement of defence by the applicant whereby the Judge ordered the applicant to pay to the F respondent, "the amount due to the 1st - 3rd defendants pending with the said Ministry of Defence in satisfaction of this judgment debt of U.S. Dollars \$8,194,300.00 (or its equivalent in Nigerian Currency)". A copy of the said ruling of 28/10/89 is hereby attached and marked as Exhibit F'. A copy of the Counter Affidavit filed by the applicant in the same proceedings is G also attached and marked Exhibit 'F'.

15. That after the Ruling of 28/10/89, the applicant appealed to the Court of Appeal. A copy of the Notice of Appeal is hereby attached and marked as Exhibit "G"

17. That I know as a fact from the case file records Mr. Oladele Jegede H who was then a Deputy Director in Civil Litigation Department of the Federal Ministry of Justice failed to bring the judgment of the Court of Appeal (Exhibit 'H') to the notice of the then Hon. Attorney-General of the Federation. Mr. C.O. Akpamgbo (S.A.N.).

18. That the said Mr. Jegede filed a purported Notice of Appeal dated

31/8/93 and later, on 28/10/93, filed a purported Notice of Withdrawal of the Appeal, all without the consent and authority of the applicant. A copy each of the said purported Notice of Appeal and Notice of Withdrawal are hereby attached and marked Exhibits 'J' and 'K' respectively.

19. That the then Attorney-General of the Federation, Mr. C.O. Akpamgbo (SAN), was neither briefed by the said Mr. Jegede of the purported Notice of Appeal nor its withdrawal. B

20. That before the said Mr. C.O. Akpamgbo (SAN) could take any action on the matter, he was removed from office and a new Attorney-General of the Federation in the person of Dr. Olu Onogoruwa was appointed. C

21. That when Mr. Jegede was transferred from the Civil Litigation Department in November, 1993, he failed to hand over the case file to any person in the Ministry.

22. That when the said Dr. Onogoruwa became aware of the negligent manner the officer (Mr. Jegede) handled the entire appeal process he directed that disciplinary proceedings be initiated against him in accordance with the provisions of the Civil Service Re-Organisation Decree 1988. D

23. That as a result of the political crises in the country, the said Attorney-General in paragraph 22 could not act further on the matter before he was removed from office and a new Attorney General of the Federation in the person of M.A. Agbamuche was appointed. E

24. That within one year there has been three changes in the post of the Attorney-General of the Federation.

25. That the applicant is dissatisfied with the judgment of the Court of Appeal and is desirous of appealing against it." F

In the Third Further Affidavit in support of the appellant's motion, Mr. Oladele Jegede stated thus

"1. That I was a Deputy Director and Head of Civil Litigation Department of the Federal Ministry of Justice from June, 1993 to June, 1994 when I retired voluntarily. G

2. That during the aforesaid period, I filed the Notice of Appeal to the Supreme Court of Nigeria in Suit No. CA/L/291/90 without any consultation with the Attorney-General of the Federation.

3. That I later discovered that I filed the appeal without the leave of the Court of Appeal.

4. That I later decided to withdraw the Notice of Appeal without the consent or authorisation of the Applicant.

5. That I also later discovered another error that the Notice of With-

drawal of Appeal itself dated 27th October, 1993 was erroneously headed "Withdrawal of Notice of Appeal by Agreement".

6. That the Notice of Appeal and the Notice of withdrawal are referred to in paragraph 18 of the Affidavit of Emmanuel Omonowa dated 2nd November, 1994 as Exhibits J and K respectively.

B *7. That the Personnel Management Board of the Federal Ministry of Justice is currently investigating my role in relation to the Suit with a view to taking disciplinary action against me.*

8. That I make this further affidavit in conscientiously and in good faith."

C The respondent in the 1st Counter Affidavit sworn to by one Olabanjo Fasonu a Litigation Officer in the Chambers of Professor A.B. Kasunmu also had this to say.

"2. That I have authority of the plaintiff/respondent to depose to this Counter Affidavit.

D *4. That judgment was entered in favour of the plaintiff against all the defendants by the High Court of Lagos State on the 20th of October, 1989.*

5. That the Applicant was sued for as a party to the Agency Contract between the plaintiff and the 1st to 3rd defendants but as holder of the contract sum out of which the plaintiff was making a claim.

F *8. That it is not correct as stated in the applicant affidavit in support of its motion that the Attorney-General was not aware of the judgment of the Court of Appeal delivered on 13th day of May 1993 and that he did not give instructions to Mr. O. Jegede to appeal against the said decision and also to discontinue the said appeal.*

9. That Mr. Jegede was not the Counsel who represented the Attorney-General at any stage of the proceedings in the High Court or the Court of Appeal.

G *19. That although in the present application to the Supreme Court the Attorney-General is now denying any knowledge of the judgment of the Court of Appeal and the papers filed on his behalf by Mr. O. Jegede, yet he is relying on this same Notice of appeal to challenge the registration of the judgment in London.*

H *22. That a Record of Appeal has been compiled and forwarded to the Supreme Court at the instance of the Attorney-General which record was prepared on the strength of the Notice of Appeal filed by Mr. O. Jegede which Notice is now being disowned by the Attorney-General.*

23. That the name of Mr. O. Jegede only surfaced when the No

tice of Appeal was filed and I am informed by Professor Kasunmu that he had no dealing with Mr. Jegede either officially or otherwise in respect of the filing of the Notice of appeal or its discontinuance.

26. That the Affidavit of Mr. O. Jegede is false in so far as he states that the Attorney-General knew nothing of all he did and it is understandable that he should so swear in that:

(a) having retired from the service for matters not connected with this case, he was recalled from retirement to answer queries in respect of this matter and he is also yet to be paid his pension and gratuity.

Clearly I thought the affidavit evidence patently tilted the scale in favour of the appellant that Mr. Jegede was not authorised by him to file an appeal nor withdraw the one filed without authority. Mr. Jegede himself had sworn that he neither brought the judgment of the Court of Appeal to the attention of the appellant nor did he obtain his authority to file the appeal let alone to withdraw it. The respondent in its own 1st Counter-Affidavit above has also admitted in para. 9 that Mr. Jegede was not the counsel who at any stage whatsoever represented the appellant in the High court or in the Court of Appeal.

It would therefore appear rather strange for Mr. Jegede who had never participated in the case in the two lower courts, to suddenly surface at this late stage of filing an appeal to the final Court of the land unless he was in fact instructed or authorised by the applicant to appeal and he was not. It was not sufficient for the respondent to have merely stated that Mr. Jegede's affidavit was false simply because he had retired from service for matters connected with this case and was yet to collect his pension and gratuity. If anything, I thought the retirement would have made him say what actually transpired having ceased to be an employee under the appellant. I had no doubt in my mind that the affidavit evidence and the surrounding circumstance clearly point to the only conclusion that Mr. Jegede had no authority whatsoever to have filed the Notice of Appeal and the Notice of withdrawal by Agreement. The respondent in the 1st counter Affidavit above also made it clear that it had no dealing with Mr. Jegede in respect of the filing of the Notice of Appeal or its withdrawal. Mr. Jegede did not say so either. Having come to the conclusion as I have done that Mr. Jegede had no authority of the appellant to file the Notice of Appeal, it is hardly necessary to consider the cases of *Adewumi v. Plastex Nig. Ltd* (supra) and *Edozie & Ors. V. Edozie* (supra) cited by Professor Kasunmu to buttress his submission that counsel retained to prosecute an appeal has a general authority to consent to the withdrawal of the appeal. That is quite correct. But in the two cases cited the foundation first and foremost was counsel's authority and every other thing was based on that authority or

foundation. In the instant case, there was no such foundation because Mr. Jegede had no authority of his client, the appellant. The matter therefore ended there. The fact that Mr. Jegede had no authority to file the appeal, I may add did not stop the appellant telling a London Court that an appeal was filed and pending in the case. Because until that Notice of Appeal was set aside as we did on 5/12/94, there was an appeal pending albeit a defective one.

I had therefore no difficulty whatsoever in granting prayers 1 & 2 of the appellant's motion.

I then turned to consider prayers 3, 4 & 5. The Affidavit of Urgency and the Affidavit in support of the motion both sworn to by Mr. Omonowa of the appellant's Chambers show clearly that the judgment of the Court of Appeal to be appealed against was not brought to the attention of the appellant in good time by Mr. Jegede. That much was admitted by Mr. Jegede himself in the Third Further Affidavit. Instead of alerting the appellant when the Court of Appeal delivered its judgment against the appellant, Mr. Jegede as already explained, proceeded to file an unauthorised Notice of Appeal. I agree with Mr. Ayoade that the appellant should not be penalised for the negligence of Mr. Jegede vide *Doherty v. Doherty* (supra). Added to that was the fact that the affidavits in support show that there had been three changes within one year in the appellant which militated against taking a prompt action in the matter.

Now, proposed grounds of appeal without their particulars read thus-

GROUND ONE

The learned Appeal Judges of the Court of Appeal erred in law by affirming the decision of the Lagos High Court which granted a relief which was not claimed either in the Writ of Summons or in the Statement of Claim.

GROUND TWO

The learned Justices of the Court of Appeal erred in law by holding that the applicant is a party to the exclusive representation agreement sought to be enforced by the plaintiff because of his failure to file a Statement of Defence.

GROUND THREE

The learned Justices of the Court of Appeal erred in law in affirming the award of a payment of commission under a null and void contract.

I had closely studied the judgments of the lower Courts and the proposed Notice and Grounds of Appeal above. I was clearly of the view that all the three Grounds of Appeal were arguable. The issues involved were quite substantial which would require a careful examination by this Court. Prayers 3, 4 and 5 therefore succeeded and they were granted.

We were then left with prayer 7 only which sought leave of this Court to file three additional documents as set out above. The documents, a copy of the agreement between the Federal Government of Nigeria and the 1st defendant (Exhibit A) and a copy of the Counter Affidavit dated 1st December, 1988 (Exhibit F1), actually formed part of the records in the Court of Appeal but were inadvertently left out when the records for this Court were being compiled. The judgment of the Civil and Criminal Court of La Spezia in the Republic of Italy (Exhibit P) dated 18th October, 1990 came into being after the Lagos High Court judgment of 20/10/89. But interestingly the Italian judgment was about the interpretation of the exclusive agreement (Exhibit B) made between the respondent herein and the 1st defendant (Aermacchi S.P.A.) under which the respondent was entitled to 10% contract price of Exhibit A. It is therefore doubtless that the Italian judgment is relevant to these proceedings where the respondent had been awarded the same 10% claim under the same contract

I had ruled that ground 3 of the proposed Grounds of Appeal above was arguable. I thought the Italian Judgment (Exhibit P) if made to form part of the records would further advance that point. In the light of all I have said above and in the interest of justice I granted prayer 7 as prayed.

Prayer 8 as indicated above had been withdrawn. It was struck out accordingly.

The question then was what to do with the respondent's motion as set out above. The motion sought to strike out the Notice of Appeal dated 21/6/93 filed by Jegede and to deem the appeal dismissed under Order 8 Rule 6(5) of the Supreme Court Rules 1985 by virtue of the Notice of withdrawal of Appeal dated 27/10/93 also filed by Mr. Jegede. I had said enough about the purported Notice of Appeal and Notice of Withdrawal already. I have also said enough about the part played by Mr. Jegede in the entire episode. It will be observed that I have in my consideration of the appellant's motion above stated the reasons for granting all the reliefs claimed by him except prayer (8) which was withdrawn and struck out. That being so it appeared clearly at that point in time that there was no more in existence the purported Notice of Appeal or the purported Notice of Withdrawal by Agreement both filed by Mr. Jegede. Both had been struck out or set aside as prayed for by the appellant (See prayers 1 & 2 thereof). In addition, the appellant had been granted extension of time to appeal and to seek leave to appeal. In the circumstances therefore the respondent's motion was not capable of any consideration. It was rendered useless having lost its only foundation which was the purported Notice of Appeal filed by Jegede already set aside. The application therefore was for this reason struck out.

Above are my reasons for granting prayers 1, 2, 3, 4, 5, 6 and 7 and striking out prayer (8) of the appellant's motion as well as for striking out the respondent's application when the two applications/motions came before us on the 5th day of December, 1994.

B

BELLO CJN

I had the advantage of reading in advance the reasons for ruling delivered by my learned brother, Kutigi, J.S.C. I agree. The applicant, the Attorney-General of the Federation, showed good and substantial reasons for the failure to appeal within time and the grounds of appeal prima facie show good cause why the appeal should be heard.

The conduct of Mr. Jegede, the former Deputy Director of Civil Litigation in the Ministry of Justice, in his failure to inform the Attorney-General of the judgment of the Court of Appeal confirming the award of \$8,194,300 against the Federal Government, his filing of improper appeal against the judgment without taking instruction from the Attorney-General and his withdrawal of the appeal by giving false information to the court when he filed "*Notice of Withdrawal of Appeal by Agreement*" knowing there was no such agreement, clearly discloses more than negligence. It smells some element of fraud and in the interest of justice the Federal Government should not suffer such a huge loss from it.

Furthermore, each of the three grounds of appeal prima facie shows good cause for the appeal to be heard. Ground one complains of the error in law of the court of appeal by affirming a relief which was not claimed while ground two complains of error in law by making the Federal Government liable to a contract of which it was not a party. The third ground states that the court of appeal erred in law in affirming the award of payment of commission under a null and void contract. Indeed in the interest of justice, the parties should be given the opportunity to canvass these issues.

BELGORE JSC

On 5th day of December, 1994 made a ruling granting some prayers to the appellant and striking out respondent's motion.

The notion that a counsel is briefed to argue a matter is a rebuttable presumption. In the instant case, it is very clear the appellant has no notice of what was going on in the two courts below. Without prejudice to the issues to be canvassed in the substantive appeal I agree with Kutigi, J.S.C. that prayers 1,2,3, 4,5,6 and 7 ought to be granted and prayers 8

ought to be struck out. It is for the full reasons in the ruling of Kutigi, J.S.C. which I also adopt as mine that I also on 5th day of December, 1994 made the orders now give.

OGUNDARE JSC

When this matter came before us on the 5th day of December 1994, I granted the appellant/applicant's application and ordered as prayed in prayers 1-7 and struck out prayer 8 which was withdrawn by the applicant. The respondent's application was struck out by me on that date and I indicated that I would give my reasons on 24/2/95.

I have the privilege of a preview of the reasons given by my learned brother Kutigi J.S.C. for coming to the same decisions as indicated above. I agree entirely with the reasons given by him and I adopt them as mine. I however, need to say a few words on the duties and responsibilities of counsel appearing in a case.

Professor Kasumu S.A.N. learned leading counsel for the respondent, relying on *Edozie v. Edozie* (1993) 1 NWLR 678, 710 and *Plastex v. Adewumi* (1986) 3 NWLR 767 had submitted that Mr. Jegede Who filed, on behalf of the Attorney-General of the Federation that is, the applicant, Notice of Appeal, dated 21/6/93 and filed on 3/8/93 was competent to withdraw the same appeal by the Notice of Withdrawal of Appeal dated 27/10/93 and filed on 28/10/93. The general Authority of counsel retained conduct a case is well spelt out by this Court in the two cases relied on and cited to us by professor Kasumu. There is no dispute about this that a counsel retained to conduct a case has general authority to consent to the withdrawal of the case and a compromise is within his apparent authority and binding on the client notwithstanding that the client may have dissented, unless the dissent was brought to the notice of the opposite party at the time. The apparent authority with which a counsel is clothed when he appears to conduct a case is to do everything which in the exercise of his discretion he may think best in the interest of his client in the conduct of the case if within the limits of this apparent authority he enters into, an agreement with the opposite as to the case on every principle, this agreement should be held binding on his client. But this general authority of counsel is predicated on the existence of a counsel/client relationship. Where there is no such relationship, an act done by a legal practitioner on behalf of a party to a case cannot be said to be binding on that party.

This is the case of the applicant in the matter on hand. The applicant submitted copious affidavit evidence to the effect that Mr. Oladele

Jegede the former Deputy Director of Civil Litigation in the Federal Ministry of justice was not briefed by the Attorney-general of the Federation to file an appeal on his behalf. Indeed, at all times relevant to the matter, he was unaware that the Court of Appeal had given its judgment. This piece of evidence has not been controverted. There is thus no counsel/client relationship existing between Mr. Jegede and the applicant at all times material to the case on hand. The question of the general authority of Mr. Jegede, therefore, does not arise. He had no authority, not having been retained in respect of an appeal to this Court against the judgment of the Court of Appeal. Mr. Jegede swore to this fact in his affidavit. It is interesting to observe that in the first counter-affidavit sworn to by one Olabayo Fasonu on behalf of the Respondent, the deponent tacitly accepted the applicant's position. He deposed in paragraph 9 as follows:

"9. That Mr. O. Jegede was not the counsel who represented the Attorney-General at any stage of the proceedings in the High Court or the Court of appeal"

This piece of evidence strengthens the case of the applicant that at no time was Mr. Jegede briefed by the Attorney-General in respect of this matter. Whatever he did in respect thereof, he did on his own and could not bind the Attorney-General who was at no time his client in the matter. I must, therefore, conclude that the two cases Professor Kasumu relied on are not apposite to the facts of the case on hand.

It is for the above reason and the fuller reasons given by my learned brother Kutigi J.S.C. that I too granted the applicant's prayers 1-7 and struck out the respondents' application.

F

IGUH JSC

On the 5th December, 1994, this motion was heard by this court and after hearing the arguments of learned counsel, I granted prayers 1,2,3,4,5, 6 and 7 of the appellant's application. Prayer 8 of the said application having been withdrawn was accordingly struck out. The respondent's application was also struck out and I then indicated that I would give my reasons for doing so today.

I have since had the privilege of reading in advance, a copy of the lead reasons for ruling of my learned brother, Kutigi, J.S.C. and I agree entirely with them.

With regard to prayers 1 and 2, it is plain that Mr. Jegede failed to bring the judgment of the Court of Appeal. Exhibit H, to the notice of the

appellant. It is also clear that the said Mr. Jegede neither received the consent of the appellant to file the appeal nor to withdraw the same even though the withdrawal was *ex facie* described as “*by agreement*”. On these grounds alone, it is my view that prayers 1 and 2 succeed.

With regard to prayers 3, 4, 5, 6 and 7, it cannot be seriously argued that there do not exist substantial points of law to be canvassed at the hearing of the appeal. On the whole, it is my view that prayers 3,4, 5, 6 and 7 should in the interest of justice be granted.

It is for the above and the more elaborate reasons contained in the lead ruling of my learned brother, Kutigi, J.S.C. that I, too, granted prayers 1, 2, 3, 4, 5, 6 and 7 of the appellant’s application, struck out prayer 8 as well as the respondent’s application.

D

E

F

G

H