

SUPREME COURT OF NIGERIA
4TH JULY, 1995. SC. 97/1989
CORAM: M.L. UWAI, I.L. KUTIGI,
E.G. OGWUEGBU, Y.O. ADIO, A.I. IGUH, JJSC

NIGERIAN AIRPORTS AUTHORITYAPPELLANT
AND	
CHIEF CELESTINE OKORO	
(Trading under the name and style) RESPONDENT
Ikjof Juaner Kay Enterprises)	

APPEALS - Discretion of lower court - To grant or refuse extension of time - When appellate court will interfere.

JUDICIAL PRECEDENTS - Supreme Court's decisions - Will bind the court of Appeal.

PRACTICE & PROCEDURE - Application for extension of time - Grant thereof by court of Appeal - Whether discretionary.

PRACTICE & PROCEDURE - Grant of application for extension of time - What applicant must show - As exceptional circumstances - To warrant a grant.

FACTS

The appellant appealed to the Court of Appeal, Lagos Division against a ruling of the High Court. The court of Appeal granted the appellant 30 days on the 9th day of February, 1988, within which to file its brief of argument. The appellant much later (ie 4/10/88) brought an application for an order enlarging the time within which to file its brief of argument and deeming the brief already filed as properly file. This, the Court of Appeal refused to grant.

Appellant dissatisfied with the ruling of the Court of Appeal, brought this interlocutory appeal to the Supreme Court raising one issue for determination.

ISSUE FOR DETERMINATION

“Whether having regard to the provisions of Order 3 rule 4 (1) and Order 6 rule 10 of the court of Appeal Rules, 1981, (as amended) the Court of Appeal was right in refusing the application before it for reasons, among (sic) others, of noncompliance with the Practice Direction of 26/1/82 issued by the Chief Justice of Nigeria with respect to practice and procedure in the Supreme court.”

HELD (Unanimously dismissing the appeal per lead judgment of **UWAIS JSC**)

Application for extension of time

1. It is very clear from the wordings of Order 3 rule 4 sub-rule (1) of the Court of Appeal Rules, 1981, that in granting an application for extension of time the lower court has a discretion, as imported by the word “may”, whether to grant or reject the application. If the application is for enlargement of time in which to appeal, the Court of Appeal is required by the Rules to be guided by the provisions of Order 3 rule 4 sub-rule (2). That is, it must be satisfied that “good and substantial reason” has been shown for the failure to appeal within the time prescribed and the proposed grounds on which the applicant intends to apply show good cause why the intended appeal should be heard. In all other cases the rule leaves the exercise of discretion by the Court of Appeal open and unfettered. (p. 1350 F)

Judicial precedents - Supreme Court’s decision

2. It, therefore, follows that ordinarily the decisions of the Supreme Court on the application of Order 1 rule 5 of the Supreme Court Rules, 1977 will be binding on the Court of Appeal by virtue of the doctrine of precedent, when the Court of Appeal and, indeed, this Court, come to interpret or apply the provisions of Order 3 rule 4 sub-rule (1) of the Court of Appeal rules, 1981, since the provisions of both rules are mutatis mutandis the same. (p. 1351 B)

Extension of time - What applicant must show

3. Consequently, the judgments of this Court pertaining to the provisions of Order 1 rule 5 of the Supreme Court Rules, 1977, which had been influenced by the Practice Directions, are binding on the Court of Appeal when it comes to deal with applications brought under Order 3 rule 4 sub-rule (1) of the Court of Appeal Rules, 1981. In other words, for the applications to succeed, the applicants must show, amongst other things, that exceptional circumstances exist to warrant the granting of the applications. (p. 1353 A)

Appeals - Discretion of lower courts

4. The power given to the Court of Appeal under Order 3 rule 4 sub-rule (1) of the Court of Appeal Rules, 1981, to grant application for extension of time, is discretionary. It is a well established principle of law that an appeal Court will not interfere with the exercise of the discretion by a lower court when such discretion has been exercised judicially. It is only when the lower court exercised the discretion upon a wrong principle or mistake of law or under a misapprehension of the facts or has taken into account irrelevant

matters or on the ground that justice could arise or has arisen that the appeal court will interfere. I see no reason here whatsoever to justify any interference with the decision of the court of Appeal not to grant the Appellant's application since it exercised its discretion correctly and no miscarriage of justice has been occasioned. (p. 1354 A)

NOTABLE POINTS OF INTEREST

UWAIS JSC

1. Practice Directions - Scope and effect

Whilst the Practice Directions in question, in this case, do not bind or apply to the court of Appeal, they nevertheless represent the views of the Justices of the Supreme Court and do influence their decisions in appropriate cases. Such decision once given are, by the doctrine of stare decisis, binding on all are subordinate to the Supreme Court, including the Court of Appeal. The decisions of this Court in all the cases followed by the Court of Appeal, in the present case, were influenced by the Practice Directions. (p.1352 G)

IGUH JSC

1. Extension of time - Exercise of court's discretion

It is beyond argument that the discretion of the court in granting an extension of time within which to file a brief of argument, or indeed, a process of court, out of time is clearly unfettered. It is however, a discretion that must be judiciously and it ought to be exercised in favour of an applicant if an exceptional circumstance for his being out of time is established to the satisfaction of the court. I entertain no doubt that on the particular facts of the present case, the reasons adduced by the appellant for invoking the discretionary jurisdiction of the court in the matter of its application for extension of time within which to file its brief of argument cannot be regarded as amounting to exceptional circumstance upon which the application may be granted. (p. 1355H)

3. Extension of time - Duplication of issues - Effect

It seems to the court below in the exercise of its equitable jurisdiction, rightly took into consideration this duplication or the inclusion of the very issues for determination in the interlocutory appeal in the substantive appeal in dismissing the application in issue. After all, equity, like nature, will do nothing in vain and it will be idle and may amount to an abuse of legal process to duplicate the same arguments before the same court in respect of both the interlocutory and substantive appeals when the same issues

could conveniently be disposed of at the hearing of the substantive appeal. I therefore endorse fully the observation of the court below that the appellant would suffer no detriment or miscarriage of justice as a result of the dismissal of its application as, at all event, the applicant's grievances would still be looked into at the hearing of the substantive appeal. (p. 1356 E)

B

REPRESENTATION

Chief T. A. Ezeobi with P. Ezeobi for appellant

Chief L. Adenekan for respondent

C **CASES REFERRED TO**

Demuren v. Asuni (1967) 1 All N.L.R. 94

Williams v. Hope Rising Voluntary Funds Society (1982) 1 - 2 S.C. 145 at page 152-153

Echeazu v. Akwa Community Council, Suit No. SC. 18/1983

Natterman International Ltd. v. Defola Chemist Ltd suit No. SC 105/

D 1984

Akiwu Motors v. Dr. Sangonuga Suit No. SC. 97/1983

Kudoro v. Alaka (1956) 1 F.S.C.A 82

Enekebe v. Enekebe (1964) 1 All N.L.R. 102

Saffiedden v. C.O.P. (1965) 1 All N.L.R. 54

E Odusote v. Odusote (1971) 1 All N.L.R. 219

Awani v. Erejuwa 11 (1976) 11 S.C. 307

Demuren v. Asuni (1967) All N.L.R. 101

Ntukidem v. Oko (1986) 5 N.W.L.R. (pt. 45) 909

F **STATUTES AND RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria 1979, s. 227

Court of Appeal rules, 1981, 0.3, r.4(l); 0.6, r.10; 0.7, r.3

Court of Appeal (Amendment) Rules, 1984, S. 1. 26

Supreme Court Rules, 1961, L.N. 96 of 1961

G Supreme Court Rules, 1977, L.N. 48 of 1977

BOOKS REFERRED TO

Halsbury's Laws of England, 4th Edition vol. 10

Osborn's concise Law Dictionary, 7th Edition.

H

LEAD JUDGMENT BY UWAIS JSC

This is an interlocutory appeal arising from the ruling of the Court of Appeal on an application brought before it by the appellant.

In the application the appellant asked for an order:-

- “1. Extending time within which to file the defendants/applicants’ brief.
2. Deeming the defendants/appellants’ brief already filed as properly filed:”

The application was supported by an affidavit which was initially considered by the lower court to be inadequate in explaining the cause of delay in filing the brief. And so a further affidavit sworn to by one Okechukwu Agbonu was filed by the appellant and it reads thus:-

“1. That I am a Solicitor in Ezeobi & Company, Legal Practitioners to the defendants/appellant and therefore I am familiar with the facts and circumstances of this appeal. B

2. That on 9/2/88, this Honourable Court granted the defendants/appellants 30 days within which to file their brief of argument.

3. That at the time, the Chambers had as its Law Clerk one Samuel Amajor whose duty it was to record and diarise all engagements and fixtures of the Chambers. C

4. That the said Law Clerk did not diarise this item and thus never brought up the relative appeal file for action by our principal, Theodore Ezeobi. D

5. That in the meantime, the substantive case was proceeded with at the Ikeja High Court and that entirely absorbed the attention of our said principal. Theodore Ezeobi, who has been handling this matter personally.

6. That it was only during a general check of our records after the said Law Clerk left our employment in early October, that the error was discovered and the brief was then immediately settled, filed and served. E

7. That the inability to file the said brief within the time ordered by the Honourable Court was thus entirely inadvertent and deeply regretted:”

A counter-affidavit sworn to by one Latiff Adenekan, a Legal Practitioner, was filed by the respondent. Paragraphs 3 to 7 of the counter-affidavit state as follows:- F

“3. That on 20th June, 1988, the substantive case was decided in favour of the plaintiff/respondent.

4. That on 27th June, 1988 the defendants/appellants filed a notice and 14 Grounds of Appeal. G

5. That Grounds 1,4 and 5 are the same grounds for determination in the appeal against the interlocutory application. I attach herewith a copy of the Notice and Grounds of Appeal filed by the defendants/appellants on 27/6/88 and marked Exhibit LA “A”.

6. That the defendants/appellants have complied with the judgment of the High Court by handing-over the keys of the premises to the plaintiff/respondent. H

7. That this application for extension of time within which to file the brief of argument of the grounds which will be determined when the

appeal in the substantive action is eventually heard will be a duplication of arguments and an abuse of legal process."

It is instructive to note that the appellant did not file a further affidavit in reply to the above counter-affidavit. With this state of the affidavit evidence, the application came up for hearing on the 23rd day of January, 1989, by the Court of Appeal. Counsel for the respondent opposed the application on the ground that the appellant had failed to show exceptional circumstances which would warrant the Court of Appeal to grant the application. He cited *University, of Lagos v. Aigoro* (1985) 1NWLR (Pt. 1) 143; (1984) 11 S.C 152 at Pages 156 and 166 and *Chief T.O, Benson v. Nigerian Agip Oil Ltd.* (1982) 5 S.C. 1 to support his submission. In reply, counsel for the appellant stated that the application was brought under Order 3 rule 4(1) of the Court of Appeal Rules 1981 and argued that the conditions applicable to such application in the Supreme Court do not apply to similar applications in the Court of Appeal. He buttressed his contention with the case of *Alhaji Balarabe Musa v. Hamza D* (1982) 3 NCLR 229; (1982) 5 S.C 172.

Counsel for the appellant was asked by the lower court (Babalakin, J.C.A as he then was, Awogu and Kalgo. J.J.C.A.) Whether the issues raised in the interlocutory appeal before it in which the appellant failed to file brief within time, had been included in the substantive appeal against the judgment of the High Court. The question was answered in the affirmative and counsel for the appellant stated further that he did not mind if both the interlocutory and substantive appeals were taken together by the Court of Appeal.

In dismissing the application, the lower court held as follows, as per Babalakin, J.C.A.:

"Now, to the present application before us, I have reproduced above the reasons given for failure to file the appellants' brief in this case within time. The order of this court to file brief was made on 9/2/88. The application for extension of time was not filed until 4th October, 1988. The applicants were then asked to set out the reasons for this delay as a result of which a further affidavit referred to above was filed and the most important reason for the delay was given at paragraph 5 of the said further affidavit thus:-

"That in the meantime, the substantive case was proceeded with at the Ikeja High Court and that entirely absorbed the attention of our said principles (sic) Theodore Ezeobi, who has been handling this matter personally."

This was after the file dealing with the case has (sic) been discovered.

To my mind, this paragraph and indeed the reasons averred in the whole of the further affidavit do not disclose exceptional circumstance that could warrant the exercise of my discretion in favour of the applicant.

Another important reason why this application should be refused is the fact that the matter on which this application is brought, has been overtaken by events in that the trial of the substantive action in which this interlocutory appeal arose has been completed in the lower court and counsel for the applicant informed us that he had included in his grounds of appeal in respect of that substantive case the existing grounds of appeal on which the brief of argument now sought to be filed are based. B

It will, therefore, be better to take these issues together in the substantive appeal coming before us.

I do not see the rationale in learned counsel for the appellants insisting on this appeal being heard together with the appeal in the substantive case on precisely the same points. C

For the above reasons, this application is dismissed with N150.00k costs to the respondent.

I am satisfied that the applicants have suffered no detriment because of their counsel's inaction as a result of this ruling as in any event their grievances will be looked into at an appropriate time." D

It is against this ruling that the appellant brought this interlocutory appeal to this Court. Only one issue has been raised in the appellant's brief of argument for determination by this Court. It reads:-

"Whether having regard to the provisions of Order 3 rule 4(1) and Order 6 rule 10 of the Court of Appeal Rules, 1981, (as amended) the Court of Appeal was right in refusing the application before it for reasons, among (sic) others, of non-compliance with the Practice Direction of 26/1/82 issued by the Chief Justice of Nigeria with respect to practice and procedure in the Supreme Court." E

The respondent also formulated only one issue for determination in his brief of argument. The issue states;- F

"Whether having regard to the provisions Order 3 rule 4(1) and Order 7 rule 3 of the Court of Appeal Rules, 1981, (as amended) the Court of Appeal was wrong in refusing the application for extension of time to file a brief having regard to the reason for the delay, the circumstances of the case and the fact that the appellant will not suffer any injustice as a result of the refusal." G

It is contended in the appellant's brief of argument that it is Order 3 rule 4(1) of the Court of Appeal Rules, 1981 that gave the lower court the jurisdiction to entertain application for enlargement of time. The rule provides:- H

"4(1) The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply."

Therefore, the Court of Appeal in entertaining such application must exercise its discretion within the confines of the rule alone. It is then submitted on the authority of the decision of this Court in *Demuren v. Asuni & Anar* (1967) 1 All NLR 94 that the Court of Appeal should have concerned itself with whether there was some materials in the appellant's affidavits in support of the application explaining the delay in complying with the court's order for the appellant to file its brief of argument within 30 days. It is further canvassed that the Court of Appeal accepted the explanation for the delay when it made the following remarks in its' ruling:-

"At the hearing of the application it was discovered that the affidavit in support did not explain the delay in filing the application between 10/3/88 when it ought to have been filed and 4/10/88 when the application to extend time to file the same was filed. The defendant/appellants then filed a further affidavit explaining the delays."

It is submitted that the italicised words in the above quotation constitute a finding by the lower court that the delay had been explained.

A further point of argument in the appellant's brief is that the counter affidavit filed by the respondent did not challenge any of the depositions in the affidavits in support of the application. Therefore, it is submitted that since the lower court found the delay explained, it could only exercise its discretion in one direction and that is to grant the application as prayed. The case of *Williams & Ors. V. Hope Rising Voluntary Funds Society* (1982) 1-2 S.C. 145 at Pages 152-153 is cited in support to show that the Court of Appeal in granting an application for extension of time ought to bear in mind:-

(1) That Rules of Court to do anything within a prescribed period must prima facie be obeyed.

(2) That to justify the exercise of the Court's discretion in extending the time within which a procedural step has to be taken there must be some material upon which to base the exercise of that discretion.

(3) That non-compliance with Rules of Court do not prima facie invalidate proceedings unless reasons for such non-compliance are not advanced to the court and, in addition, the party in breach fails to put before the court sufficient materials upon which to exercise its discretion to waive or overlook the omission.

It is also contended that instead of exercising its discretion judicially and according to law as provided under Order 3 rule 4 (1) of the Court of Appeal Rules, 1981, the lower court based its decision on the Practice Directions issued on 26/4/82 by the Chief Justice of Nigeria in respect of practice and procedure in the Supreme Court and the line of

cases decided by the Supreme Court after the issuance of the Practice Directions. The cases are Benson's case (supra) Alhaji Balarabe Musa's case (supra) and University of Lagos & Anor v. Aigoro (supra) Finally, it is argued that section 227 of the Constitution empowered the President of the Court of Appeal to make rules regulating the practice and procedure in that court and that the Court of Appeal Rules, 1981 were made pursuant to that provision. Therefore it is those rules and any practice direction issued by the President of the Court of Appeal that should be observed by that Court and not those of the Supreme Court made for this Court by the Chief Justice of Nigeria. B

In reply it is contended in the respondent's brief that a distinction should not be drawn between a failure to file a brief of argument within time in the lower court and a failure to do the same thing in this court. This is so because in both cases it is a failure to comply with the Rules of Court irrespective of whether the rules are made by a statute or practice direction. It is further argued that Benson's case (supra) is an authority for the rule that the reasons given for failure to file a brief of argument in time must be cogent and special. In this case, the Clerk alleged to have caused the delay has not sworn to an affidavit to confirm so, nor is it stated if there were other clerks apart from him, if so, what did they do in respect of the filing or the brief. Furthermore, if there were no other clerks, what did the new clerk in place of the defaulting one do to alleviate the delay. Entry in the diary kept by the appellant's counsel's chambers has not been produced as an Exhibit to the affidavit in support of the application to show that particulars about the case had not been entered as alleged in the affidavit in question. It is next submitted that by the principle of stare decisis the Court of Appeal is bound to follow the decision of the Supreme Court in Benson's case (supra) as well as University of Lagos & Anor v. Aigoro (supra) where reasons for failure to file appellant's brief of argument within time were given and it was held that the reasons must be exceptional. In refusing to grant the application for extension of time no miscarriage of justice had been occasioned since the appellant had repeated in the notice of appeal in the substantive case the same grounds of appeal filed in the interlocutory appeal to the lower court. Finally it is contended that the word "*may*" in Order 3 rule 4(1) of the Court of Appeal Rules 1981 import the exercise of discretion. Where reasons have to be given for delay the Court of Appeal is entitled to examine the reasons to see if they are satisfactory. Therefore the fact that the appellant gave reasons in the further affidavit for his delay is not sufficient unless the reasons are cogent and exceptional. H

Now for the provisions of the Court of Appeal Rules, 1981, pertaining to application for enlargement of time to be properly understood

the provisions of Order 3 rule 4 thereof must be read as a whole instead of those of sub-rule (1) thereof alone Order 3 rule 4 reads:-

"4(1) The Court may enlarge the time provided by these Rules for the doing of anything to which these rules apply.

B (2) 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. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

C When this rule was enacted in 1981 the filing of brief of argument was not part of the practice and procedure of the Court of Appeal. However, the 1981 Rules were later amended in 1984 by the Court of Appeal (Amendment) Rules, 1984, S.1.26 Of 1984, to incorporate Order 6 thereunder, which deals with the filing of brief. Order 6 rule 2 of the Court of Appeal Rules, 1981 (as amended) provides:-

"2. 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."

E So that when the appellant was granted 30 days on the 9th day of February, 1988 to file the appellant's brief, he must have made the application out of time. The application now in question must have been a second application for extension of time. This deduction is arrived at from the facts deposed in the further affidavit and counter-affidavit by the parties as well as stated in the parties' briefs of argument filed in this court.

F It is very clear from the wordings of Order 3 rule 4 sub-rule (1) of the Court of Appeal Rule, 1981, that in granting an application for extension of time, the lower court has a discretion, as imported by the word "*may*", whether to grant or reject the application. If the application is for enlargement of time in which to appeal, the Court of Appeal is required by G the Rules to be guided by the provisions of Order 3 rule 4 sub-rule (2). That is, it must be satisfied that "*good and substantial reasons*" has been shown for the failure to appeal within the time prescribed and the proposed grounds on which the applicant intends to apply show good cause why the intended appeal should be heard. In all other cases, the rule leaves the exercise of H discretion by the Court of Appeal open and unfettered.

Order 3 rule 4 sub-rules (1) and (2) of the Court of Appeal Rules, 1981, has its genesis in Order 1 rule 5 and Order 7 rule 4(2) of the now repealed Supreme Court Rules, 1977, L.N. 48 of 1977, which stated as follows:-

“5. The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interest of justice.”

“4(2) Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal.”

It therefore, follows that ordinarily the decisions of the Supreme Court on the application of Order 1 rule 5 of the Supreme Court Rules, 1977 will be binding on the Court of Appeal by virtue of the doctrine of precedent, when the Court of Appeal and, indeed, this Court, come to interpret or apply the provisions of Order 3 rule 4 sub-rule (1) of the Court of Appeal Rules, 1981, since the provisions of both rules are mutatis mutandis the same.

I think I need to add further that Order 1 rule 5 and Order 7 rule 4(2) of the Supreme Court Rules, 1977 were in turn lifted from the provisions of Order 1 rule 5 and order 7 rule 4(2) of the Supreme Court Rules, 1961 L.N 96 of 1961, respectively. Therefore, any decision of the Supreme Court on the 1961 rules will, similarly, be binding on the Court of Appeal and this Court when applying or interpreting the provisions of Order 3 rule 4 sub-rules(1) and (2) of the Court of Appeal Rules, 1981.

The practice of filing briefs of arguments in this Court was introduced by the Supreme Court Rules, 1977, which came into force on the 1st day of September, 1977. Being an innovation, this Court was very lenient with lapses, such as filing briefs of argument within time, in following the requirements of the rules applicable to brief filing. After the initial period of 4 years of the application of the practice, the then Chief Justice of Nigeria issued Practice Directions (See (1982) 4S.C. 76) in which it was inter alia stated that the Supreme Court would be strict in dealing with non-compliance with the provisions of the Supreme Court Rules, 1977, particularly in civil cases. The Practice Directions read as follows:-

Supreme Court of Nigeria

Practice Directions

Issued on Monday, 26th April, 1982

1. *The Supreme Court Rules, 1977, came into force on 1st September, 1977,*

2. *Because its provisions were new and in order to give both counsel and litigants ample time to familiarize themselves with them, this Court, over the last 4 years, has been very lenient with both counsel and litigants*

in the application of its mandatory provisions.

3, *It cannot be emphasised, however, that all Rules of Court are statutory and are, therefore, meant to be complied with, notwithstanding the provisions of Order 10 of the 1977 Rules which give the Court the power to direct that any non compliance with the Rules may be remedied by either the appellant or the respondent as the case may be. Such a remedy, as is well known, may be by way of waiver or by the granting of extension of time within which to comply.*

4. *After four years of leniency by this Court, we think the time has now arrived for the Court to be more strict in cases of non-compliance with the provisions of the Rules, particularly in civil cases.*

5, *Accordingly, both appellants and respondents in civil matters are hereby informed that, except in very exceptional circumstances the Court will no longer direct or order that any non-compliance with the Rules, such as failure to appeal within the time allowed, may be remedied either by extension of time or by any other means whatsoever.*

6. *With these Directions it is hoped that parties and/or their counsel will comply promptly with the provisions of the Rules and thereby make the hearing of cases in this Court possible on the dates for which they are fixed for hearing. As the saying goes, justice delayed is justice denied.*

A. FATAYI-WILLIAMS
Chief Justice of Nigeria”

. *“Practice Directions” have been defined by Osborn’s Concise Law Dictionary, 7th Edition, to mean statements by the judiciary, usually noted in the law reports, intended to guide the courts and the legal profession on matters of practice and procedure. Though, practice directions do not have statutory authority which statutory rules have, they represent the view of Judges of the court issuing them on particular matters of practice and procedure. See paragraph 909 of Halsburys Laws of England, 4th Edition, Volume 10. Hence parties and counsel cannot afford to ignore Practice Directions and if they do so, it will be at their peril. The same cannot be said of courts subordinate to the Supreme Court since the Practice Directions are not likely to apply to them directly.*

Whilst the Practice Directions in question, in this case, do not bind or apply to the Court of Appeal, they nevertheless represent the views of the Justices, of the Supreme Court and do influence their decisions in appropriate cases. Such decisions once given are, by the doctrine of stare decisis, binding on all the courts which are subordinate to the Supreme Court, including the Court of Appeal. The decisions of this Court in all the cases followed by the Court of Appeal, in the present case, were influenced by the Practice Directions. These are Benson’s case (supra); Echeazu v. Akwa

Community Council Suit No. SC 18/1983 (unreported) judgment delivered on 19/3/84; Natterman International Ltd. v. Defola Chemist Ltd. Suit No. Sc. 105/1984 (unreported) judgment delivered on 18/6/84; Akwiwu Motors v Dr. Sangonuga Suit No. Sc. 97/1983 (unreported) judgment delivered on 2/7/83 and University of Lagos v. Aigoro (supra). Consequently, the judgments of this Court pertaining to the provisions of Order 1 rule 5 of the Supreme Court Rules 1977, which had been influenced by the Practice Directions, are binding on the Court of Appeal when it comes to deal with applications brought under Order 3 rule 4 sub-rule (1) of the Court of Appeal Rules, 1981. In other words, for the applications to succeed, the applicants must show, amongst other things, that exceptional circumstances exist to warrant the granting of the application.

Now, the appellant's complaint is predicated on the fact that explanation had been given in the further affidavit in support of his application and that the lower court had accepted the explanation. Therefore, it is asserted that the appellant had satisfied the requirement of Order 3 rule 4 sub-rule (1) of the Court of Appeal Rules, 1981. I am unable to find, in the judgment of the Court of Appeal, where it is stated that the explanation given in the further affidavit had been accepted by the Court. The words "*The defendants/appellants then filed a further affidavit explaining the delay*" underlined in the quotation made earlier in this judgment, do not convey to me the acceptance of the explanation given for the delay as contended by the appellant. Rather, the words merely show that an explanation was proffered by the applicant for the delay. The question whether the explanation is accepted or is found to amount to exceptional circumstance for the application to be granted was for the Court of Appeal to decide. This it did by holding, as quoted above, thus:

"To my mind, this paragraph and indeed the reasons averred in the whole of the further affidavit do not disclose exceptional circumstances that could warrant the exercise of my discretion in favour of the applicant."

Apart from the fact that no exceptional circumstances had been shown to enable the Court of Appeal grant the application, the court went further to give additional reasons why the application would not be granted. It said, again as quoted above:-

"Another important reason why this application should be refused is the fact that the matter on which the application is brought. Has been overtaken by events in that the trial of the substantive action in which this interlocutory appeal arose has been completed in the lower court and counsel for the appellant has informed us that he has included in his grounds of

appeal in respect of that substantive case the existing grounds of appeal on which the brief of argument now sought to be filed are based."

I need to stress that the power given to the Court of Appeal under Order 3 rule 4 sub-rule (1) of the Court of Appeal Rules, 1981, to grant application for extension of time, is discretionary. It is a well established principle of law that an appeal court will not interfere with the exercise of discretion by a lower court when such discretion has been exercised judicially. It is only when the lower court exercised the discretion upon a wrong principle or mistake of law or under a misapprehension of the facts or has taken into account irrelevant matters or on the ground that injustice could arise or has arisen that the appeal court will interfere. See *Kudoro v. Alaka* (1956) 1 F.S.C. 82; (1956) SCNLR 225; *Enekebe v. Enekebe* (1964) 1 All NLR 102; *Saffiedden v. C.O.P.* (1965) 1 All NLR 54; *Odusote v. Odusote* (1971) 1 All NLR 219; *State v. Gali* (1974) 5 SC67; *Awani v. Erejuwa* 11 (1976) II SC 307 and *Omadide v. Adajero* (1976) 12 SC 87. I see no reason here whatsoever to justify any interference with the decision of the Court of Appeal not to grant the appellant's application since it exercised its discretion correctly and no miscarriage of justice has been occasioned.

In the result, this appeal has failed and it is hereby dismissed with N1,000.00 costs to the respondent.

E **KUTIGI JSC**

I read in advance the judgment delivered by my learned brother Uwais, J.S.C. and with which I agree. The Court of Appeal rightly exercised its discretion in refusing appellant's application before it. We have no reason to interfere. The appeal therefore fails and is dismissed with N1,000.00 costs to the respondents.

OGWUEGBU JSC

I have had a preview of the judgment of my learned brother, Uwais, JSC and I am in complete agreement with him that this appeal should be dismissed.

This appeal is against the ruling of the Court of Appeal, Lagos Division refusing the application of the appellant for an order enlarging the time within which to file its brief of argument and deeming the brief already filed as properly filed. The court below considered the application on the basis of the affidavit in support of the application a counter-affidavit of the respondent and a further affidavit of the appellant.

In dismissing the application, the Court of Appeal referred to paragraph 5 of the further affidavit of the appellant which reads:-

"That in the meantime, the substantive case was proceeded with at the Ikeja High Court and that entirely absorbed the attention of our said

principal Theodore Ezeobi who has been handling this matter personally."

The court below held;

"To my mind, this paragraph and indeed the reasons averred in the whole of the further affidavit do not disclose exceptional circumstance that could warrant the exercise of my discretion in favour of the applicant. Another important reason why this application should be refused is the fact that the matter on which this application is brought, has been overtaken by events in that the trial of the substantive action in which this interlocutory appeal arose has been completed in the lower court and counsel for the applicant informed us that he had included in his grounds of appeal in respect of the substantive case the existing grounds of appeal on which the brief of argument now sought to be filed are based. It will, therefore, be better to take these issues together in the substantive appeal coming before us."

On each of the above two grounds for dismissing the application, the court below exercised its discretion judicially and judiciously having regard to the facts placed before it and this court does not see any reason to interfere with the exercise of that discretion. See *Enekebe v. Enekebe* (1964) All NLR 92 (Reprint); *Demuren v. Ashimi Asuni & Ors.* (1967) 1 All NLR 101 (Reprint); *Odusote v. Odusote* (1971) All NLR 221 (Reprint) and *Ntukidem & Ors. V. Oko & Ors* (1986) 5 NWLR (Pt. 45) 909.

The refusal to grant the application will not occasion any miscarriage of justice and since the grounds of appeal in the interlocutory appeal had been incorporated into the grounds of appeal in the substantive appeal, there was no basis for the learned counsel to the appellant to insist on proceeding with the interlocutory appeal or arguing it along with the substantive appeal. To accede to the application would lead to duplication of appeals, increased costs to the parties and waste of the precious time of the court.

For these reasons and the fuller reasons contained in the lead judgment of my learned brother, Uwais, J.S.C. I, too, dismiss the appeal with N1,000.00 costs to the respondent.

ADIO JSC

I have had the opportunity of reading in advance, the judgment just delivered by my learned brother, Uwais, J.S.C., and I agree that this appeal has failed. Accordingly, I too dismiss it and abide by the order for costs.

IGUH JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Uwais, J.S.C. and, for the reasons stated therein, I am in agreement that this appeal lacks substance and should be dismissed.

In the first place, it is beyond argument that the discretion of the

court in granting an extension of time within which to file a brief of argument, or indeed, a process of court, out of time is clearly unfettered. It is however, a discretion that must be exercised judiciously and it ought to be exercised in favour of an applicant if an exceptional circumstance for his being out of time is established to the satisfaction of the court. See Benson v. Nigeria Agip Oil Co. Ltd. (1982) 5 SC 1 at p. 2-5 and University of Lagos & Anor v. M.I. Aigoro (1984) 11 SC 152; (1985) 1 NWLR (Pt.1) 143. I entertain no doubt that on the particular facts of the present case, the reasons adduced by the appellant for invoking the discretionary jurisdiction of the court in the matter of its application for extension of time within which to file its brief of argument cannot be regarded as amounting to exceptional circumstance upon which the application may be granted.

There is a second point of considerable relevance in the determination of this appeal. This is the fact that the substantive action between the parties was determined on the 20th June, 1988 in favour of the respondent. The appellant, on the 27th June, 1988 lodged an appeal against this judgment of the High Court which appeal is pending before the Court of Appeal, Lagos Division.

Of significance is the admission of learned counsel for the appellant before the court below that the issues raised for determination in the interlocutory appeal which is the subject matter of the application in issue are fully covered by the issues raised in the substantive appeal against the said judgment of the High Court. This being the position, it seems to me that the court below in the exercise of its equitable jurisdiction, rightly took into consideration this duplication or the inclusion of the very issues for determination in the interlocutory appeal in the substantive appeal in dismissing the application in issue. After all, equity, like nature, will do nothing in vain and it will be idle and may amount to an abuse of legal process to duplicate the same arguments before the same court in respect of both the interlocutory and substantive appeals when the same issues could conveniently be disposed of at the hearing of the substantive appeal. I therefore endorse fully the observation of the court below that the appellant would suffer no detriment or miscarriage of justice as a result of the dismissal of its application as, at all events, the applicant's grievances would still be looked into at the hearing of the substantive appeal.

It is for the above and the more elaborate reasons contained in the lead judgment of my learned brother, Uwais, J.S.C., that I, too, dismiss the appeal. I abide by the order as to costs therein made.