

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 1996. SC. 26371993
CORAM:- M. L. UWAI CJN, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC

THOMAS ENIYAN OLUMESAN APPELLANT
AND
AYODELE OGUNDEPO RESPONDENT

APPEAL - *Brief of appeal - Where it covers argument from the original - And additional grounds of appeal without leave - Whether the Appellant's brief is incompetent.*

APPEALS - *Blunders - Whether any blunders were committed by the appellant - To justify dismissal of his appeal without any hearing.*

APPEALS - *Delay - Whether appellant had exhibited any delaying tactic in the prosecution of his appeal - To warrant refusal of his application for adjournment.*

CONSTITUTIONAL LAW - *Fair hearing - Application for dismissal of Failure to hear the other party before granting the application - Is a violation of the right to fair hearing.*

CONSTITUTIONAL LAW - *Fair hearing - Breach thereof nullifies any - Whether party denied fair hearing must establish that he suffered any injury.*

COURTS - *Ruling - Court is bound to rule one way or the other - In respect of application for adjournment properly made before it.*

FACTS

The Plaintiff/Respondent and the defendant/Appellant had a land a land dispute before the high court Ibadan. The trial court found for the plaintiff and dismissed the defendant's counter claim. The defendant appealed to the Court of appeal. Before the Court of Appeal, defendant argued five original ids of appeal plus seven additional grounds. He indicated in his brief that he will secure leave of Court for the said additional grounds before the hearing of the appeal.

Upon a move to argue his motion for leave of court, a tip flowing from the court made the defendant to withdraw the motion and he applied for adjournment to regularize his papers filed before the court. The plaintiff opposed this application for adjournment and applied for the defendant's appeal to be dismissed for want of prosecution. Without ruling on the application for adjournment, and without hearing the defendant oil plaintiff's application for dismissal of his appeal, the lower court dismissed the defendant's appeal without any hearing. Being dissatisfied the defendant has now appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION

"(1) Whether the Appellant was accorded hearing or fair hearing before the oral application of the Respondent for the dismissal of the appeal (in the Court of Appeal) was granted and the effect of same?"

(2) Whether the learned Justices of the Court of Appeal followed or adopted the right procedure in dealing with and dismissing the appeal of the Appellant? Etc see p. 323

HELD (Unanimously allowing the appeal per lead judgment of ***IGUH JSC***)

Failure to hear the other party

1. In the present case, it is crystal clear that the Court of Appeal was in grave constitutional error when it failed to hear the appellant on the respondent's application for the dismissal of the appeal for want of prosecution before it proceeded to grant the application. Without doubt, such conduct on the part of the court below constitutes a definite infringement of the appellant's right to fair hearing entrenched in section 33(1) of the 1979 Constitution which not only entails the right to hear a party on any issue which could be resolved to his prejudice but also to ensure that the hearing is fair and in accordance with the *audi alteram partem* and *nemo iudex in causa sua* principles. (p. 325 H)

Fair hearing - Breach thereof

2. The right to fair hearing is a fundamental constitutional right guaranteed by the 1979 Constitution and its breach in any trial nullifies, without doubt such trial. In the second place, the law is settled that it is unnecessary for any person alleging a denial of fair hearing to establish any injury or prejudice to himself before he may invoke his right to fair hearing. In the present case, however, there can be no doubt that the appellant suffered definite injury or prejudice as a result of the failure by the court below to afford him a hearing. This is because his appeal was dismissed as a result and his constitutional right of appeal was thus denied him. (p. 326 E)

Court is bound to rule one way or the other

3. It was therefore the duty of the Court of Appeal before deciding to dismiss appellant's appeal to have disposed of the application for an adjournment properly made to it by the appellant by ruling that the same was granted or refused. If it was refused, it was the further duty of the court to give the appellant an opportunity to decide whether or not to go on with his appeal. This, the Court of Appeal failed to do. It is therefore my view that the dismissal of the appellant's appeal in the circumstances explained above without giving him an opportunity to proceed with the appeal if he so desired is, with great respect, a grave procedural error which, without doubt, occasioned a miscarriage of justice and constituted a definite breach of the audi alteram partem rule. (p. 328 A)

Appeals - Delay

4. It cannot in the circumstances be seriously suggested that the appellant had exhibited any conduct which could be described as delaying tactic in the Appeal. It seems to me that the appellant found himself in an unexpected and unenviable situation where he needed an adjournment to regularize his appeal. I think he ought, in the interest of justice to have been obliged to enable the court determine the appeal which concerned land on its merits. It is clear that because of the failure by the Court of Appeal to grant the appellant's application for an adjournment, injustice was meted out to him as his appeal was thereby summarily dismissed because of only the inadvertence on the part of his counsel. It is my view that the Court of Appeal on the particular circumstances of this case, in error to have failed to it the adjournment applied for by the appellant and as a result of which he suffered injustice by the dismissal of his appeal without any hearing. (p. 329 C)

Appeals - Blunders

5. It has to be restated that although blunders may occur from time to time, it may amount to injustice to insist that because a blunder during interlocutory or in the course of proceedings has been committed, the party blundering must necessarily incur the penalty of not having the dispute between him and his adversary determined upon the merits. The extreme measure of the imposition of such penalty by the court needs only arise in cases where having regard to all the circumstances of the case, it is in the best interest of justice so to order. In the present case, it cannot be said that the appellant's conduct by not filing his application for leave to regularize his appeal early enough amounted, on the particular facts of the case,

to any blunder on his part. It was a case of an isolated act of inadvertence on the part appellant's counsel. Considered against the background of the appellant's exhibition of vigour and unmistakable seriousness in the prosecution of his appeal right from the moment his appeal was filed up to the 5th March 1993, it cannot be said that the above conduct, without more, amounted conclusively to calculated attempt to delay the end of justice. It did not also amount to lack of genuine belief in the success of his appeal as suggested the respondent. (p. 330 G)

Brief of appeal

6. With profound respect to the court below, it cannot be the law that once a brief which covers argument flowing from issues arising from the original grounds of appeal incorporates further argument on issues arising from additional grounds of appeal in respect of which no leave to file the same had been obtained, such an appellant's brief ipso facto becomes incompetent. I am in full agreement with the learned counsel for the appellant that it is only so much of the argument in the appellant's brief that was not anchored on the original grounds of appeal that may be treated as going to no issue therefore to be discountenanced. Accordingly, notwithstanding the admission of appellant's learned counsel to the effect that the appellant's brief was incompetent, the court below was entitled in law to examine the records and to hold that the entire appellant's brief was not altogether incompetent (p. 331 D)

NOTABLE POINTS OF INTEREST ***IGUH JSC***

1. Need to hear both sides

It is a basic principle of law that where a person's legal rights or obligation are called into question, he should be accorded full opportunity to be heard before any adverse decision is taken against him with regard to such rights or obligations. Put differently, it is an indispensable requirement of justice that an adjudicating authority, to be fair and just shall hear both side giving them ample opportunity to present their case. Accordingly, a hearing can only be said to be fair when, inter alia, all the parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused or denied a hearing or is not given an opportunity of being heard, such hearing cannot qualify as a fair hearing under the audi alteram partem rule. (p. 325 E)

OGWUEGBU JSC

2. Reaching a correct decision on any dispute

A judge before he comes to a decision against a party, must hear and consider all that he has to say and the only fair way of reaching a correct decision on any dispute is for the judge to hear all that is to be said on either side and then come to his conclusion. A hearing cannot be said to be fair if one of the parties is refused a hearing or not given an opportunity to be heard. In addition, he should decide the case not by caprice but in accordance with some rules or doctrines. (p. 335 H)

REPRESENTATION

Mr. L. O. Fagbemi for the appellant
Alhaji Y. A. Agbaje for the respondent

CASES REFERRED TO

Mohammed v. Olawunmi (1990) 2 N.W.L.R. (Part 133) 458
Adigun v. Attorney-General of Oyo State (1987) 1 N.W.L.R. (Part 50) 678 at pages 707 - 709
Onifade v. Olayiwola (1990) 7 N.W.L.R. (Part 161) 130 at page 168
Gukas v. Jos Int. Breweries Ltd (1991) 6 N.W.L.R. (Part 199) 614 at page 623
Oladoyimbo v. Adewunmi (1990) 6 N.W.L.R. (Part 154) 98
Otapo v. Summonu (1987) 2 N.W.L.R. (Part 58) 587
Nalsa & Team Associates v. N.N.P.C. (1991) 8 N.W.L.R. (Part 212) 652 at pages 667 - 685
Ceekay Traders Limited v. General Motors Ltd. (1992) 2 N.W.L.R. (Part 222) at pages 147- 148, 156-157
Ilona v. Dei (1971) N.M.L.R. 5 at 7- 8
Harrods Limited v. Anifalaje (1986) 5 N.W.L.R. (Part 43) 603
Solakwe v. Ajibola (1986) 1 All N.L.R. 46
Awani v. Erejuwa 11 (1976) 11 S.C. 307
Anisiuba v. Emodi (1975) 2 S.C. at 13

LEAD JUDGMENT BY IGUH JSC

This is an appeal against the decision of the Court of Appeal, Ibadan Division dated 9th day of March, 1993 dismissing the appellant's appeal in a dispute concerning title to land situate at Ibadan.

The respondent, as plaintiff, had in the Ibadan Judicial Division of the High Court of Justice, Oyo State instituted an action against the defendant, who is now the appellant, claiming as follows:-

B “1. *The plaintiff’s claim against the defendant is for the sum of N10,000.00 (Ten thousand Naira) being damages for trespass when the defendant unlawfully entered the land in the possession of the plaintiff situate at Lagos - Ijebu Road, near Niger West, Challenge Area, Ibadan sometime in 1987 which trespass is still continuing.*

2. *Perpetual injunction restraining the defendant, his servants or agents from entering the land in dispute or from committing further acts of trespass thereon.*”

C The defendant, in his Statement of Defence, counter-claimed against the plaintiff as follows:-

D “(i) *Declaration of Titleship/Ownership of the land Verged RED on Survey Plan No. RADS/OY/651/89 drawn by A.A. Adeyemi, Licensed Surveyor, and Survey Plan NO.ISO/OY/121/88 drawn by F.U. Iyawe, Licensed Surveyor, both survey plans covering the SAME LAND (that is the LAND-IN-DISPUTE).*

E (ii) *Court’s Confirmation Order of the Grant of the Certificate of occupancy, dated 25/8/88 and Registered as an Instrument No. 47, Page 47, Volume 2869 in the Land Registry at Ibadan, to which was attached survey plan No. ISO/OY/121/88 drawn by EU. Iyawe, Licensed Surveyor, the defendant having been in effective prior possession before the grant.*

F (iii) *A perpetual Injunction restraining the plaintiff from ever going unto the land or laying any claim unto the land.*”

G At the subsequent trial, both parties testified on their own behalf and called witnesses. The learned trial Judge, Adekola, J. (as he then was) in a reserved judgment at the conclusion of trial on the 18th day of July, 1990 found for the plaintiff holding that he had established a better title to the land in dispute than the defendant. Consequently, he awarded to the plaintiff against the defendant the sum of N2,000.00 being general damages for trespass. He also granted perpetual injunction against the defendant as claimed. The defendant’s counter-claim was dismissed in its entirety.

H Being dissatisfied with the said judgment of the trial court, the defendant who hereinafter will be referred to as the appellant lodged an appeal against this decision of the Court of Appeal on the 20th day of July, 1990. Conditions of appeal were given on the 16th of August, 1990 and the appellant promptly complied with and perfected the said conditions imposed on him on the 24th day of August, 1990.

The appellant had originally filed a five ground notice of appeal against the said decision of the High Court. In his brief of argument which was duly filed on the 14th March, 1991, the appellant indicated that he would before the hearing of the appeal seek the leave of court to

amend his

notice of appeal and proffer arguments in respect of seven additional grounds of appeal, the particulars of which were fully set out. He had proposed to raise arguments at the trial in connection with the said additional grounds of appeal along with the five original grounds of appeal already filed. He then proceeded to present arguments in his brief on the six issues formulated by him as touching on both the original and the additional grounds of appeal. B

The respondent, for his own part, adopted the six issues set out in the appellant's brief for the determination of the court in the appeal and fully replied to them in his respondent's brief of argument. The appeal, in the mean time, was fixed for the 9th March, 1993 for hearing. C

On the 5th March, 1993, an application was duly filed by the appellant to regularise his position by seeking for leave to amend his Notice of Appeal in terms indicated in his brief of argument, to deem his amended notice of appeal which had then been filed as properly filed and served and for leave to file an amended brief of argument. D

The relevant paragraphs of the affidavit in support of this application which was sworn to by one Iyadunni Isiaka, Administrative Secretary of Emmanuel Chambers, 80, Fajuyi Road, Ibadan deposed as follows:-

"4. That Mr. R.A. Aladesanmi counsel formerly in the office of Chief Afe Babalola, SAN & Co., formerly handling this appeal had prepared the appellant's Brief of argument. E

5. That Mr. L.O. Fagbemi has now taken over the prosecution of the appeal.

6. That the Brief of argument which has been filed gave an indication that additional grounds of appeal would be filed. F

7. That however, there is no evidence that leave has been sought.

8. That Mr. L.O. Fagbemi informed me and I verily believe him that having gone through the record of proceedings in this case and the Notice of Appeal, he is of the view that the Amended Notice of Appeal ought to be amended.

9. That Mr. L.O. Fagbemi has now prepared an amended Notice of Appeal. A copy of the said further amended notice of appeal is attached herewith and marked Exhibit "A". Receipt for filing the Notice is attached as Exhibit "B". G

10. That what was done in Exhibit "A" was to restructure the original grounds and include additional grounds. H

11. That Mr. L.O. Fagbemi informed me and I verily believe him that leave of this court is required to file an Amended Notice of Appeal and a Brief to incorporate the new grounds of appeal contained in the Further Amended Notice of Appeal.

12. That it is in interest of justice to grant this application."

It is necessary to observe that no counter-affidavit was filed in opposition to this application.

When this application and the appeal came up for hearing on the 9th day of March, 1993, the former application according to the appellant's brief, had to be withdrawn when the Court of Appeal observed that it was not properly couched, although, the amended notice of appeal had already been paid for and was before the court. The appellant claimed that he was ready and prepared to move his said application to which no counter-affidavit in opposition was filed when, following hints from the court that the prayers were not properly framed, he was obliged to withdraw it. In the circumstance, he had no option than to apply for an adjournment of the appeal to regularise his position by bringing a better worded application.

In response to this application, learned counsel for the respondent applied orally for the dismissal of the appeal for want of prosecution. Learned counsel stressed that no opportunity was offered to the appellant to reply to the respondent's application for the dismissal of the appeal before the court below granted the same and dismissed the appeal for want of prosecution.

The respondent, for his own part, claimed in his own brief that on the said 9th March, 1993, the appellant withdrew his application and applied for an adjournment to regularise the appeal, admitting that his brief of argument was incompetent. The respondent stated that he opposed the application and asked that the appeal be dismissed on the grounds, apart from the incompetence of the brief, that the conduct of the appellant showed a failure to demonstrate genuine interest in the appeal by failure to do all that were necessary before the hearing date. He argued that this amounted to an attempt to delay the end of justice and an exhibition of lack of genuine belief in the success of the appeal.

As already stated, the court below without ruling on the appellant's application for an adjournment and apparently without affording the appellant an opportunity to reply to the respondent's application for the dismissal of the appeal proceeded peremptorily to dismiss the appeal, upholding the respondent's submission that the appellant had failed to show genuine interest in the appeal. The court below was of the view that it must be assumed, as submitted by respondent's learned counsel, that the appellant had no genuine belief in the success of his appeal. Accordingly the appeal was dismissed.

It is against the above decision of the Court of Appeal that the appellant has now appealed to this court.

Both the appellant and the respondent filed and exchanged their respective written briefs of argument. In the appellant's brief, the under-mentioned issues were submitted for the determination of this court, namely

"(1) Whether the appellant was accorded hearing or fair hearing before the oral application of the respondent for the dismissal of the appeal (in the Court of Appeal) was granted and the effect of same?" B

(2) Whether the learned Justices of the Court of Appeal followed or adopted the right procedure in dealing with and dismissing the appeal of the appellants?"

(3) Whether in the circumstances of this case, the Court of Appeal ought not to have considered and granted an adjournment to the appellant to regularise his appeal?; and C

(4) Whether in the peculiar circumstances of this case, the Court of Appeal was right in dismissing the appellant's appeal for want of prosecution?"

The respondent, on the other hand, identified three issues in his brief for resolution. These are as follows:- D

"1. Whether the conduct of the appellant is consistent with a person not pursuing a genuine and bona fide appeal, who is merely stalling for time by not being diligent in prosecuting his appeal and who is asking for adjournment with a view to delaying the hearing of a frivolous appeal?"

2. If "yes", whether or not the Court of Appeal has materials before it which shows that the appeal of the appellant is prima facie without merits and frivolous and was right in exercising its discretion to dismiss the appeal summarily for want of prosecution?" E

3. Whether in the light of the realities of this case, the appellant has shown any good ground why the Supreme Court should interfere with the Court of Appeal's exercise of discretion to dismiss an appeal which is hopeless, frivolous and without any merits." F

I have closely examined the two sets of issues formulated in the respective briefs of the parties and it is clear to me that the four issues raised in the appellant's brief are sufficiently comprehensive for the determination of this appeal. I shall therefore adopt, in this judgment, the set of questions formulated in the appellant's brief for my consideration of this appeal. G

The appellant's argument in respect of the first issue is that not having been offered any opportunity by the court below to reply to the respondent's application for the dismissal of his appeal before the same was dismissed, he was given no hearing, much less, a fair hearing in the matter of the respondent's said application. He cited, in support, the decisions of Alhaji Sulaimon Mohammed & Another v. Lasisi Sanusi Olawunmi (1990) H

2 NWLR (Pt.133) 458 at page485 and *Yaya Adigun and others v. Attorney-General of Oyo State* (1987) 1 NWLR (Pt.53) 678 at pages 707-709. He stressed that it is the principle of lack of fair hearing that is the main basis of the appellant's complaint in this appeal. He submitted that the Court of Appeal was in gross error by failing to rule on the appellant's application for an adjournment before proceeding summarily to grant the respondent's application for the dismissal of the appeal without affording the appellant an opportunity to reply to the latter application.

The respondent, in his reply, argued that the appellant could not be heard to say that he was not given a fair hearing in that the appellant was given an opportunity to file his brief of argument in the appeal but he failed or neglected to file a proper brief before the court. He submitted that the appellant after the withdrawal of his application which, *inter alia*, was for leave to amend his notice of appeal rendered the hearing of his appeal that day impossible as a result of which the Court of Appeal dismissed the same for want of prosecution. Relying on the decision in *Onifade v. Olayiwola* (1990)7 NWLR (Pt.161) 130 at page 168 A - D, it was submitted on behalf of the respondent that since the appellant failed to establish any prejudice to himself by this dismissal, such as that the appeal had a chance of succeeding, there could be no question of denial of fair hearing as the appellant complains.

There can be no doubt that where an appellant fails to file his brief within the time provided for by Order 6 Rule 2 of the Court of Appeal Rules, 1981 or within such time as is extended by the court below, the respondent may apply to the court for the appeal to be dismissed for want of prosecution pursuant to the provisions of Order 6 Rule 10 of the Court of Appeal Rules. The position in the present case was however different. It was not that of failure to file the appellant's brief of argument. It was a case where the appellant had promptly and duly filed his brief of argument on the 14th March, 1991 as required by the Rules. In that brief, as *aforsaid*, it was indicated that he would before the hearing of the appeal seek the leave of court to amend his notice of appeal to enable him proffer arguments in respect of seven new or additional grounds of appeal not contained in his original notice of appeal. He had advanced full arguments in respect of the said seven additional grounds of appeal in the brief which he had filed to cover the issues arising therefrom. These issues were fully replied to by the respondent in his own brief of argument.

The appellant's application with a view to regularising his position, as indicated in his brief, was duly filed and served on the 5th March, 1993, four days to the hearing date of the appeal. This application,

appar ently following hints from the court below that the prayers were improperly couched, was withdrawn when it came up to be heard on the 9th March, 1993. The same was dismissed by the Court of Appeal whereupon learned counsel for the appellant applied for an adjournment to regularise the appeal in the interest of justice.

From the record of proceedings, it is quite clear that when learned counsel for the respondent was called upon to reply to the appellant's application for an adjournment, he made no reply thereto. Instead, he made a fresh oral application for the dismissal of the appeal for want of prosecution on grounds, firstly, that there was no competent appellant's brief in the appeal and, secondly, that it must be assumed the appellant had no genuine belief in the success of his appeal. The appellant's application for an adjournment was not ruled upon but the respondent's latter application for the dismissal of the appeal for want of prosecution was granted. The court below in granting the respondent's application held that the appellant had failed to take proper steps to demonstrate that he had genuine interest in the appeal and that it must be assumed he had no genuine belief in the success of the appeal. It was no where indicated in the record of proceedings that the appellant was accorded the opportunity of meeting the new development which clearly affected his constitutional right of appeal. The Court of Appeal instead of calling on the appellant to reply to the new development involved in the respondent's application seemed to be in a haste to dismiss and did infact dismiss the appeal even without ruling on the application of the appellant for an adjournment.

It is a basic principle of law that where a person's legal rights or obligations are called into question, he should be accorded full opportunity to be heard before any adverse decision is taken against him with regard to such rights or obligations. Put differently, it is an indispensable requirement of justice that an adjudicating authority, to be fair and just shall hear both sides, giving them ample opportunity to present their case. See *Gukas v. Jos Int. Breweries Ltd.* (1991) 6 NWLR (Pt.199) 614 at page 623 and *Alhaji Mohammed and Another v. Lasisi Olawunmi* (1990) 2 NWLR (Pt.133) 458 at page 485. Accordingly, a hearing can only be said to be fair when, inter alia, all the parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused or denied a hearing or is not given an opportunity of being heard, such hearing cannot qualify as a fair hearing under the audi alteram partem rule. See *Aladetoyinbo v Adewunmi* (1990) 6 NWLR (Pt.154) 98; *Otapo v. Sunmonu* (1987) 2 NWLR (Pt.58) 587 etc.

In the present case, it is crystal clear that the Court of Appeal was

in grave constitutional error when it failed to hear the appellant on the respondent's application for the dismissal of the appeal for want of prosecution before it proceeded to grant the application. Without doubt, such conduct on the part of the court below constitutes a definite infringement of the appellant's right of fair hearing entrenched in section 33(1) of the 1979 Constitution which not only entails the right to hear a party on any issue which could be resolved to his prejudice but also to ensure that the hearing is fair and in accordance with the *audi alteram partem* and *nemo iudex in causa sua* principles.

In *Alhaji Mohammed and Anor v. Lasisi Olawunmi*, *supra*, a motion for stay of proceedings was filed before the trial court. The respondent in that application raised a preliminary objection to the motion. The said preliminary objection was dismissed by the trial court which proceeded to grant the motion for stay of proceedings without calling on the respondent, as in the present case, to reply to the application. On appeal, this court held that the application for stay having been granted without hearing both parties, the appellants were entitled to complain that they were not given a hearing, much less, a fair one.

Learned counsel for the respondent has submitted that since the appellant failed to establish any prejudice to himself by the dismissal of his appeal, such as that the appeal had a chance of succeeding, there is no denial of fair hearing. The straight answer to this submission is that the right to fair hearing is a fundamental constitutional right guaranteed by the 1979 Constitution and its breach in any trial nullifies, without doubt such trial. In the second place, the law is settled that it is unnecessary for any person alleging a denial of fair hearing to establish any injury or prejudice to himself before he may invoke his right to fair hearing. See *Yaya Adigun v. Attorney-General, Oyo State and Ors.* (1987) 1 NWLR (Pt.53) 678 at pages 707-708. In the present case, however, there can be no doubt that the appellant suffered definite injury or prejudice as a result of the failure by the court below to afford him a hearing. This is because his appeal was dismissed as a result and his constitutional right of appeal was thus denied him. In my view, the first issue which must be resolved in the appellant's favour is enough to determine this appeal. I will however consider the other issues canvassed in this appeal.

The second issue poses the question whether the Court of Appeal adopted the right procedure in dealing with and dismissing the appeal of the appellant. The contention of the appellant is that the Court of Appeal was in error to have refused to rule on the application of the appellant for an adjournment before it granted the respondent's application for the dismissal

of the appeal. The respondent, on the other hand, contended that the appellant's appeal was frivolous, vexatious, hopeless and lacked merit, that it was such that it could not possibly succeed and that the court below rightly dismissed it.

The first point that must be made is that the appellant's appeal was never argued before the Court of Appeal. It was terminated on a technical ground and was not dismissed on the merits. It cannot therefore be said, and indeed, I am unable to identify with any degree of certainty, any issues which justifies the hard adjectives used by the respondent to describe the appellant's appeal. B

In the second place, the court below summarily dismissed the appeal of the appellant for want of prosecution without first ruling on the appellant's earlier application for an adjournment to regularise his appeal. With profound respect, it is my view that the manner adopted by the court below in dismissing the appellant's appeal summarily was irregular and constituted a grave error of procedure. I agree with Mr. Fagbemi that the rule as to priority of hearing of two opposing applications, such as an application for an adjournment and a counter application for dismissal is that the court ought to take the course which will best ensure the doing of substantial justice to the parties where the facts and circumstances of the case so warrant and there are no inhibiting factors against such a course of action. In the circumstances of the present case, it seems to me that the application which ought to have been heard first and ruled upon was that seeking for an adjournment of the appeal to enable the appellant to regularise his appeal. That was the earlier of the two applications before the court. It was also properly made in the course of the proceedings. In my view the court below was in error by failing to take the application for an adjournment first and to rule thereupon before dealing with the application for the dismissal of the appeal particularly as this procedure would have given the appeal a possible chance of being considered and disposed of on the merits rather than on a technicality. See *Nalsa & Team Associates v. N.N.P.C.* (1991) 8 NWLR (Pt.212) 652 at pages 667-668; *Vice Chancellor A.B.U. Zaria v. Ado* (1986) 3 NWLR (Pt.31) 684 etc. C D E F G

However, whether the application for an adjournment would be granted or refused is a totally different matter. What seems to me important in the situation is that the application for an adjournment having been made, the same ought first to have been addressed, considered and ruled upon one way or the other before the application for dismissal would be taken. Even where the application for the adjournment was heard and refused, the power of the court to dismiss the appeal ought not to be H

328 Olumesan v. Ogundepo (1996) 2 KLR Iguh JSC
exercised still unless the appellant was given the opportunity and he refused to proceed with his appeal. The appellant must have been given the opportunity to proceed with his appeal, failing which the Court of Appeal, may, in its discretion, make whatever appropriate orders it may deem fit in the circumstances.

It was therefore the duty of the Court of Appeal before deciding to
B dismiss the appellant's appeal to have disposed of the application for an adjournment properly made to it by the appellant by ruling that the same was either granted or refused. If it was refused, it was the further duty of the court below to give the appellant an opportunity to decide whether or not to go on with his appeal. This, the Court of Appeal failed to do. It is
C therefore my view that the dismissal of the appellant's appeal in the circumstances explained above without giving him an opportunity to proceed with the appeal if he so desired is, with great respect, a grave procedural error which, without doubt, occasioned a miscarriage of justice and constituted a definite breach of the audi alteram partem rule. See too *Ceekay Traders Limited v. General Motors Co. Ltd. (1992) 2 NWLR (Pt.222) 132*
D at pages 147-148, 156-157; *Albert Ilona and Another v. Ojugbeli Dei & Another (1971) NMLR 5 at 7-8* and *Harrods Limited v. Anifalaje (1986) 5 NWLR (Pt.43) 603*. It is my considered opinion therefore that issue number two must again be resolved in favour of the appellant.

The third issue is whether in all the circumstances of this case, the
E Court of Appeal ought not to have considered and granted the adjournment applied for by the appellant to regularise his appeal. The appellant's answer to this issue is in the negative, whilst the respondent contends that the Court of Appeal, having exercised its discretion judiciously in dismissing the appeal, ought not to have granted the adjournment sought.

F In this regard it must be restated that the grant or refusal of an adjournment is entirely within the discretion of the court. A court is not bound to grant every application but may refuse an unreasonable application. An appellate court would not generally question the exercise of discretion by a lower court merely because it would have exercised this discretion
G in a different way if it had been in the position of the lower court. However, such an exercise of discretion would be questioned if, as a result of such exercise, injustice is meted out to either of the parties or, if the discretion is wrongly exercised in that due or sufficient weight was not given to relevant or important considerations. See *Solanke v. Ajibola (1968) 1 All NLR*
H *46; Awaniv. Erejuwa II (1976) 11 S.C. 307; Saffiedine v. Commissioner of Police, Western Nigeria (1965) 1 All NLR 54* etc.

In the present case, what was in controversy between the parties is land which, without doubt, is of unquestionable importance in this country.

There is no evidence from the record of proceedings that the appellant had at any other time previously applied for an adjournment of the case before the court below. There is also no evidence that the application was made in bad faith or that it constituted a definite attempt to delay the hearing of the appeal as suggested by the respondent. It became necessary following the unexpected withdrawal of the appellant's application for leave to amend his original notice of appeal. The judgment of the trial court in the suit was delivered on the 18th July, 1990. Only two days after, the appellant filed his notice of appeal against the said judgment on the 20th July, 1990. B

Conditions of appeal were given on the 16th August, 1990 and these were duly perfected by the appellant on the 24th August, 1990 - seven days thereafter. The records were before the Court of Appeal late in 1990 and the appellant's brief was duly filed on the 14th March, 1991. It cannot in the circumstances be seriously suggested that the appellant had exhibited any conduct which could be described as delaying tactic in the appeal. It seems to me that the appellant found himself in an unexpected and unenviable situation where he needed an adjournment to regularise his appeal. I think he ought, in the interest of justice to have been obliged to enable the court determine the appeal which concerned land on its merits. See *Usikaro v. Itsekiri Communa Lands Trustees* (1991) 2 NWLR (Pt.172) 150 at page 173 and 180. D E

In this regard, it must be borne in mind and it is a well established principle of law that all discretions must be exercised according to common sense and according to justice and, at times, it may be necessary to lean backward over to ensure that parties are not punished for the negligence, inadvertence or error of their counsel. See: *Anisiuba v. Emodi* (1975) 2 S.C. 9 at 13. It is clear that because of the failure by the Court of Appeal to grant the appellant's application for an adjournment, injustice was meted out to him as his appeal was thereby summarily dismissed because only of the inadvertence on the part of his counsel. It is my view that the Court of Appeal was in the particular circumstances of this case, in error to have failed to grant the adjournment applied for by the appellant and as a result of which he suffered injustice by the dismissal of his appeal without any hearing. F G

The last issue poses the question whether in the particular circumstances of this case, the court below was right in dismissing the appellant's appeal for want of prosecution. It is the appellant's case that the Court of Appeal was in error by dismissing the appeal in disregard of established facts which clearly showed that the appellant had been most keen and serious in the prosecution of the appeal. For the respondent, it was argued that the appeal was, in the main, dismissed because the court H

accepted the contention of learned counsel for the respondent to the effect that the appellant had no genuine belief in the success of this appeal.

It seems to me quite clear from the record of proceedings that the Court of Appeal dismissed the appeal on two grounds. The first is the court's assumption that the appellant had no genuine belief in the success of his appeal. The second reason is that the appellant's brief of argument was incompetent.

I have already observed with regard to the first stated reason that there is no evidence whatever from the record of proceedings in proof of the assumption by the court below that the appellant had no genuine belief in the success of his appeal. On the contrary notice of appeal against the High Court judgment was filed on the 20th July, 1990, only two days after the delivery of the judgment appealed against. Conditions of appeal imposed on the 16th August, 1990 were promptly perfected by the appellant seven days thereafter. The records transmitted expeditiously to the Court of Appeal by the end of 1990 and the appellant's brief was duly filed since the 14th March, 1991.

The appellant being desirous to proffer arguments in respect of certain additional grounds of appeal he had set out in his brief and had indeed argued and the respondent had in fact replied to the new issues in his own brief, had on his own and without any prompting from any quarters filed an application on the 5th March, 1993 to regularise his position. This application, when it came up to be heard along with the appeal on the 9th March, 1993 was discovered to have been improperly framed and was as a result withdrawn. Speaking for myself, it seems to me difficult in these circumstances to suggest with any degree of seriousness that the appellant had not been serious in the prosecution of his appeal or that he had exhibited no genuine belief in the success thereof. No doubt, his learned counsel did not file the application in issue early enough as he ought to have done. It was only filed and served four days to the hearing date of the appeal and this seems to be the one single and isolated act of inadvertence committed by learned counsel for the appellant all through the prosecution of the appeal.

In this regard, it has to be restated that although blunders may occur from time to time, it may amount to injustice to insist that because a blunder during interlocutory or in the course of proceedings has been committed, the party blundering must necessarily incur the penalty of not having the dispute between him and his adversary determined upon the merits. See *Ojikutu v. Odeh* (1952) 14 WACA 640. The extreme measure of the imposition of such penalty by the court needs only arise in cases where

having regard to all the circumstances of the case, it is in the best interest of justice so to order.

In the present case, it cannot be said that the appellant's conduct by not filing his application for leave to regularise his appeal early enough amounted, on the particular facts of the case, to any blunder on his part. It was a case of an isolated act of inadvertence on the part of the appellant's counsel. Considered against the background of the appellant's exhibition of vigour and unmistakeable seriousness in the prosecution of his appeal right from the moment his appeal was filed up to the 5th March, 1993, it cannot be said that the above conduct, without more, amounted conclusively to calculated attempt to delay the end of justice. It did not also amount to lack of genuine belief in the success of his appeal as suggested by the respondent.

I will now turn to the alleged incompetence of the appellant's brief. The Court of Appeal treated this brief as incompetent as a result of which it proceeded to dismiss the appeal. The court below pronounced the appellant's brief as incompetent by reason of the fact that it incorporated argument on grounds in respect of which leave had not been obtained.

With profound respect to the court below, it cannot be the law that once a brief which covers argument flowing from issues arising from the original grounds of appeal incorporates further argument on issues arising from additional grounds of appeal in respect of which no leave to file the same has been obtained, such an appellant's brief ipso facto becomes incompetent. I am in full agreement with the learned counsel for the appellant that it is only so much of the argument in the appellant's brief that was not anchored on the original grounds of appeal that may be treated as going to no issue and therefore to be discountenanced. See Momodu v. Momoh (1991) 1 NWLR (Pt.169) 608 at page 620-621 and Okonji v. Njokanma (1991) 7 NWLR (Pt.202) 131 at page 153. Accordingly, notwithstanding the admission of appellant's learned counsel to the effect that the appellant's brief was incompetent, the court below was entitled in law to examine the records and to hold that the entire appellant's brief was not altogether incompetent. It was also entitled to call on the appellant to argue such competent issues that were distilled from the original grounds of appeal filed. This the Court of Appeal failed to do. Instead, it proceeded to dismiss the appeal summarily and I entertain no doubt that this was a grave error of law on the part of the court below. Accordingly the fourth issue is hereby resolved in favour of the appellant.

The conclusion I finally reach is that this appeal must succeed and it is hereby allowed. The judgment and orders of the court be

low given on the 9th March, 1993 dismissing the appellant's appeal for want of prosecution are hereby set aside. In substitution thereof, the appellant's application for an adjournment of the appeal in order to regularise his position is hereby allowed. The appeal is remitted to the court below for hearing de novo on its merits before another panel of justices of that court. The appellant is entitled to the costs of this appeal in the sum of N1000.00 in this court and N500.00 in the court below.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother Iguh, J.S.C. I entirely agree with the judgment.

However, for the sake of clarity and emphasis I desire to reproduce the record of the proceeding before the Court of Appeal (Kolawole, Salami and Nsofor J.J.C.A.). It reads as follows:-

"Gboyega Oyewole for the appellant/applicant Alhaji Y.A. Agbaje, S.A.N. with S. Akinyele and A. Agbaje for the respondent. Mr. Oyewole says he seeks leave to withdraw the applicant (sic) Agbaje not opposing

Court: Learned counsel having withdraw the application filed on 5/3/93 the motion is accordingly dismissed with N150.00 costs to the respondent.

(SGD) Owolabi Kolawole

Presiding Justice 9/3/93

Oyewole asks for adjournment to regularise the appeal. I agree that my brief is incompetent. 'It means I have no brief of argument. Alhaji Agbaje asks that the appeal be dismissed. There is no competent brief in this appeal, secondly, the conduct of the appellant when he filed his brief of 14/3/91 when he stated at para 3.1 that he shall before the hearing of the appeal seek leave of the Court to amend his notice of appeal by substituting fresh grounds of appeal and yet he did nothing. Before today the appeal was listed for hearing on the 20/10/92 for today's hearing notices were served on the parties as far back as 30/11/92. I urge the court to dismiss the appeal, the inference is that the appellant has no genuine brief in the appeal.

RULING

The appellant has failed to take proper steps to demonstrate that he has genuine interest in the appeal. He filed a purported brief on 14/3/91 which he believed was defective and in that brief he stated at paragraph 3.1 page 2 that:

"The defendant shall before the hearing of this appeal seek leave

of Court to amend his Notice of appeal by substituting fresh grounds of appeal."

The appellant filed no application to this effect until 5/4/93, that is a period of two years. The application filed on 5/3/93 has been struck out as being incompetent. It must therefore be assumed that as Alhaji Agbaje said that the appellant has no genuine believe (sic) in the success of the appeal. B

Our duty has been made light by the admission of learned counsel for the appellant that he has no brief of argument. Accordingly the appeal is dismissed for want of prosecution with N400.00 costs to the respondent."

It is quite clear from the foregoing that the Court of Appeal was unduly highhanded in dealing with the application of the appellant for adjournment. As a result, the application was not properly considered nor was the appellant given a fair hearing. I am aware of the dictum of Sir Udo Udoma, J.S.C. in the case of *Odusote v. Odusote* (1971) 1 NMLR 228 at p. 231, where he said:- C D

"The question of adjournment is a matter in the discretion of the court concerned and must depend on the facts and circumstances of each case. For, in matters of discretion, no one case can be authority for another; and the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion - per Kay L.J. in Jenkins v. Bushby (1891) 1 Ch. 484 at p. 495." E

See also *Abeki v. Amboro* (1961) All NLR. 368 and *Evans v. Bartlam* (1937) A.C. 473. However, in *Maxwell v. Keun* (1928) 1 K.B.. 645 at p. 653 Atkin L.J. observed as follows:- F

"I quite agree that Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of trial and it very seldom does so, but, on the other hand, if it appears that the result of the order made below is to defeat the rights of parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court, has power to review such an order, and it is, to my mind, its duty to do so." G

And further, in *Fanz Holdings Ltd. v. Mrs. Lamotte* (1977) NNLR 163 at p. 168, I held thus:-

"The behaviour of a counsel who at a trial resorted to numerous and unnecessary applications as delaying tactics must in no uncertain terms be deprecated and this Court will not lend itself to approving such unbecoming behaviour. Be that as it may, we are of the H

opinion that the application made at the end of the evidence-in-chief given by the respondent should have been granted. It is quite clear from the pleadings that the appellants had intended to rely on a number of documents in support of their defence; if these documents were not available in Court even though due to the carelessness of or lack of diligence by their counsel, the appellants could not have been expected to properly defend the case. The rejection of the application to enable them to produce the documents had the effect of defeating their right to defend the action. This in our view has occasioned miscarriage of justice and is not, with respect to the proper exercise of the discretion of the learned trial Judge under Order 37 rule 1 of the Supreme Court (Civil Procedure) Rules."

In conclusion, I am satisfied that the appeal has merit and that it should be allowed. The ruling of the Court of Appeal is hereby set aside. I abide by the consequential order contained in the lead judgment of my learned brother, Iguh, J.S.C.

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OGWUEGBU JSC

I have had the privilege of a preview of the lead judgment just delivered by my learned brother Iguh, J.S.C. He has dealt very adequately with every point of law arising from the grounds of appeal. I agree with his reasoning and conclusion that this appeal should be allowed.

I will however like to add a few comments on the first issue for determination in this appeal as formulated by the appellant namely:-

"Whether the appellant was accorded hearing or fair hearing before the oral application of the respondent for the dismissal of the appeal (in the Court of Appeal) was granted and the effect of same.?"

The appellant in this court who was the appellant in the court below filed an application under Order 3 rule 2(5) of the Court of Appeal Rules as well as under the inherent jurisdiction of that court for:-

"(i) An order granting leave to the appellant/applicant to further amend his Amended Notice of Appeal by restructuring the existing grounds as well as (by) including additional grounds of appeal.

(ii) Deeming the Amended Notice of Appeal as properly filed and served.

(iii) Leave to file an Amended Brief of Argument."

This application was filed about four days before the date fixed for the hearing of the appeal which was on 9/3/93. It came up for hearing on the same day as the substantive appeal. The excerpts of the notes by the court which appear in the record of proceedings on 9/3/93 read as follows:

"Oyewole says that he seeks leave to withdraw the applicant (sic). Agbaje not opposing

Court: Learned counsel having withdraw (sic) the application filed on 5/3/93 the motion is accordingly dismissed with N150.00 costs to the respondent.

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Sgd. Owolabi Kolawole

Presiding Justice 9/3/93.

Oyewole asks for adjournment to regularise the appeal. I agree that my brief is incompetent. It means I have no brief of argument. Alhaji Agbaje: Asks that the appeal be dismissed. There is no competent brief in this appeal, secondly, the conduct of the appellant when he filed his brief on 14/3/91 when he stated at para. 3.1 that he shall before the hearing of the appeal seek leave of the Court to amend the notice of appeal by substituting fresh grounds and yet he did nothing.....I urge the court to dismiss the appeal.

C

RULING

D

"The appellant has failed to take proper steps to demonstrate that he has genuine interest in the appeal. He filed a purported brief on 14/3/91 which he believed was defective and in that brief he stated at paragraph 3.1 page 2 that:

"The defendant shall before the hearing of this appeal seek leave of court to amend his Notice of Appeal by substituting fresh grounds of appeal".

E

The appellant filed no application to this effect until 5/4/93 (sic), that is a period of two years. The application filed on 5/3/93 has been struck out as being incompetent. It must be assumed that as Alhaji Agbaje said that the appellant has no genuine believe (sic) in the success of the appeal. Our duty has been made light by the admission of learned counsel for the appellant that he has no brief of argument. Accordingly the appeal is dismissed for want of prosecution"

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From the foregoing, it is apparent that the learned respondent's counsel did not reply to the application for adjournment made by the learned appellant's counsel and the court did not rule on it before it proceeded to entertain the application to dismiss the appeal for want of prosecution. The question is: Was this a trial or adjudication free from blemish or disfigurement in the circumstances disclosed by the record?

G

A Judge before he comes to a decision against a party, must hear and consider all that he has to say and the only fair way of reaching a correct decision on any dispute is for the Judge to hear all that is to be said on either side and then come to his conclusion. A hearing cannot be said

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to be fair if one of the parties is refused a hearing or not given an opportunity to be heard. See *Otapo v. Sunmonu* (1987) 2 NWLR (Pt. 58) 587 at 605, *Mohammed & Ors. v. Olawunmi & Ors.* (1990) 2 NWLR (Pt.133) 458 at 485. In addition, he should decide the case not by caprice but in accordance with some rules or doctrines.

B I have gone through the record of appeal. The date of the judgment of the High Court was 18/7/90 while the date of the dismissal of the appeal by the court below was 9/3/93. I can say that the appeal was speedily pursued. I am unable to see any lack of diligence on the part of the appellant in the prosecution of the appeal. From the affidavit in support of the application, the counsel who filed the original brief is different from the one who filed the application giving rise to this appeal. When the present counsel inherited the case file, he saw the need to further amend the notice of appeal and the brief of argument to incorporate the additional grounds of appeal.

D It was the duty of the court below before deciding to dismiss the appellant's appeal to have disposed of the application for adjournment and informing the counsel for the appellant accordingly. The question to grant an adjournment is a matter in the discretion of the court and an appeal court is very reluctant to interfere with the exercise of a Judge's discretion. In a matter such as this, it appears to me that the court below did not seem to have taken all the circumstances into account. It will definitely work injustice on the part of the appellant. This court has therefore a duty to interfere. See *Solanke v. Ajibola* (1969) 1 NMLR 253; *Odusote v. Odusote* (1971) NMLR 228 and *Ilona & Ors. v. Ojugbeli Dei Ors.* (1971) 1 NMLR 5 at 9.

F The court below also failed to afford the appellant the opportunity of replying to the respondent's application to dismiss the appeal. The effect of these transgressions by the Court of Appeal is to deny the appellant his fundamental right enshrined in section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979.

G Had the court below examined the record of proceedings from the date of judgment in the High Court to the date it dismissed the appeal, it would have discovered that the appellant was very diligent in the prosecution of the appeal. It was in a haste to get rid of the appeal. It took a line of least resistance. The desire of a court to dispose as many cases as possible is understandable; but in seeking to do that, it should not do so at the expense of giving a party a fair hearing.

H The denial of fair hearing to the appellant is fatal to the judgment of the Court of Appeal. It is a breach of the *audi alteram partem*

principle of the rules of natural justice.

For the reasons stated above and for the more detailed reasons contained in the judgment of my learned brother, Iguh, J.S.C., I allow the appeal and abide by all the consequential orders made therein.

MOHAMMED JSC

I have had the privilege of reading the opinion of my learned brother, Iguh, J.S.C. in the lead judgment just read and I entirely agree with him that this appeal should be allowed. It is hereby allowed. I abide by all the consequential orders made in the lead judgment including the award on costs.

ONU JSC

Having been privileged to read in advance the judgment of my learned brother Iguh, J.S.C. just delivered, I entirely agree with him that this appeal is meritorious and should perforce succeed for the reasons so ably stated therein.

I wish however, to say a word or two on the matter as follows:

When the appellant's counsel on 9th March, 1993 submitted with humility before the lower court that:

"Oyewole asks for adjournment to regularise the appeal. I agree that my brief is incompetent. It means I have no brief of argument."

(Underlining is mine for emphasis)

prompting the learned Senior Advocate, Alhaji Agbaje, for the respondent to ask for the appeal to be dismissed, it ought not to be conceived as the lower court would appear to have done, that the learned counsel for the appellant had thrown in the towel in a contest where he had timeously filed all papers up to that stage from the trial court and had, indeed, vigorously pursued the appeal to ripen for hearing except for the inadvertence that necessitated his withdrawal of his application which was unopposed by the learned S.A.N. Thus, when in the penultimate last sentences of the lower court's Ruling it held that -

"Our duty has been made light by the admission of learned counsel for the appellant that he has no brief of argument. Accordingly the appeal is dismissed for want of prosecution with N400.00 costs to the respondent"

it was not only riding roughshod over the appellant's right to be heard on appeal which, prior to the date of hearing, was very much alive due to its having been strenuously pursued, but crushing under feet or acting in forgetfulness the question of the appellant's request for an adjournment. While I am not unmindful of the fact that an adjournment may

not be obtained just for the asking or as a matter of course, e.g. asking for it by letter or telegram (see *The Administrator, Western Nigeria Exparte Bamgbedu* (1962) WNLR 344), Its grant of refusal being an exercise in equity, to wit: an equitable remedy that is within the discretion of the Court and on which there must be sufficient materials vide *University of Lagos. v. Aigoro* (1985) 1 NWLR (Pt.1) 143 and *Saffieddine v. C.O.P.* (1965) 1 All NLR 54, the court is empowered to exercise it either in favour of an application for adjournment or against it suo motu without reference to counsel. See *Overseas Construction Ltd. v. Creek Enterprises Ltd.* (1985) 3 NWLR (Pt. 13) 407. In the instant case where the learned counsel for the appellant was present albeit that he was handicapped by want of materials, e.g. his Brief of Argument, his oral application for an adjournment ought not to have gone unnoticed, brushed aside or treated with levity as was done on this occasion.

By the dismissal of his case without letting the appellant to regularise his position, the court below had thereby, in my opinion, denied the appellant of his right of fair hearing as enshrined in Section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 - See also *Kotoye v. C.B.N.* (1989) 1 NWLR (Pt.98) 419 at 448 where *Nnaemaka-Agu, J.S.C.* said inter alia as follows:-

“For the rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given an opportunity of hearing.

Once an appellate Court comes to the conclusion that the party was entitled to be heard before a decision was reached but was not given the opportunity of a hearing the order/judgment thus entered is bound to be set aside.”

It is for the above reasons and the fuller ones contained in the judgment of my learned brother Iguh, J.S.C. I, too, allow this appeal and make the same consequential orders inclusive of those as to costs.