

SUPREME COURT OF NIGERIA
12TH JULY, 1996. SC. 242/1993
CORAM:- M. L. UWAI S CJN, A. B. WALI, I. L. KUTIGI,
M. E. OGUNDARE, E. O. OGWUEGBU,
S. U. ONU, A. I. IGUH, JJSC.

GODWIN CHIME & ANOTHER PLAINTIFFS/APPELLANT/
(For themselves for and on behalf of APPLICANTS
Umuota family of Okpobeze Nachi
in Udi L.G.A. Enugu State)

AND
NELSON UDE & TWO ORS DEFENDANTS/RESPONDENTS
(For themselves for and on behalf
of Umuakwali family of Okpobeze
Nachi in Udi L.G.A. Enugu State)

APPEALS - *Striking out proceedings - The Supreme court has inherent power - To strike out any proceedings for want of prosecution.*

CONSTITUTIONAL LAW - *Fair hearing - Whether non notification of appellants - That an order dismissing their appeal is to be made - Is an infringement of their right to fair hearing.*

JURISDICTION - *Supreme Court - Has no jurisdiction - To set aside its order - Made under Order 6, rule 3(2).*

RULES OF COURT - *Dismissal of appeal - Non notification of appellants thereof - Where Supreme Court acts under Order 6 rule 3(2) - To dismiss appellants appeal - Whether any infringement of right of fair hearing.*

RULES OF COURT - *Inconsistency - Whether there is any inconsistency in rule 9 and rule 3(2) of Order 6 Supreme Court Rules.*

RULES OF COURT - *Misconception of rule - It is misconception of rule 7 and rule 3(2) - To submit that one rule overrides the other.*

FACTS

The appellants brought an application before the Supreme Court praying for restoration to the court's cause list of their appeal against the judgment of the Court of Appeal Enugu Division given in 1993. The appel

lants having obtained leave of the Supreme Court to appeal against the said decision of the Court of Appeal failed to file any brief of argument well after the statutory period of 10 weeks for so doing has elapsed. Whereupon, the Supreme Court acting pursuant to Order 6, rule 3 (2) of the Supreme Court Rules 1985, in chambers dismissed the appellants appeal for want of prosecution.

This appeal is in respect of the application of the appellants for the restoration of that appeal and in it, the appellants/applicants have set down 2 questions as calling for determination by the court.

ISSUES FOR DETERMINATION:

"(a) Is this Court competent to set aside its decision shown to be invalid, or null and void or in breach of the provisions of the constitution or in error?"

(b) Was the dismissal of the applicants' appeal in their absence and suo motu by the Court constitutional and in consonance with the rules of natural justice and the rules of this Court as amended in 1991?"

HELD (Dismissing the application per lead Ruling of **OGUNDARE JSC**, **KUTIGI JSC** dissenting)

Striking out proceedings

1. With profound respect to learned counsel for the appellants, I do not share his views. The rules of Court apart, this Court, like all courts of record, has an inherent power to strike out any proceedings for want of prosecution. This power is based on the principle sit finis litium. The appellants in the present proceedings showed such a complete apathy to the prosecution of their appeal as to amount to an abandonment of it. They received the records of appeal and did nothing for fifteen months to prosecute it by filing their brief within time or, in default, applying for extension of time to do so. They went to sleep. The respondents who might have woken them from their slumber by applying to have the appeal struck out for non-prosecution, did nothing either. In a situation such as this, the Court would have no choice but to fall back on its power if it is to decongest its list of 'dead ' cases. This inherent power of the Court is given constitutional force by section 6(6)(a) of the 1979 Constitution. The inherent power of the Court to strike out appeals for want of prosecution is further strengthened by Order 6 rule 3(2) which provides for a dismissal, rather than a striking-out. (p. 1501 E)

Right of fair hearing

2. The argument that non-notification to the appellants that an order of dismissal was to be made prior to the making of the order was an infringe

ment of their fundamental right to fair hearing is, in my respectful view, without any substance. As was held in *Oyeyipo*, the appellants having failed to file their brief within time, have not satisfied the conditions necessary for the hearing of their appeal in court and were, therefore, not entitled to a hearing, oral or written. There could be no infringement of a right they have not earned. (p. 1502 B)

Non notification of appellants

3. The rule does not provide for notification being given to an appellant before the Court exercises its power to dismiss under the rule. Can it be correctly argued that where the Court dismisses under rule 8(1) of Order 8 it is infringing the fundamental right of the appellant to fair hearing? I rather think not. By the same reasoning, I would not say that non-notification to an appellant where the Court acts under rule 3(2) of Order 6 to dismiss an appeal for want of prosecution is an infringement of his fundamental right to fair hearing. He is not entitled to any hearing having failed to fulfil that condition which would entitle him to the right, that is, having failed to file his brief of argument as required by the rules of Court (p.1502E)

No inconsistency in rules 9 and 3(2) of Order 6

4. With respect, I find no substance in this submission. Rule 9 provides for a situation when an application is made to the Court by a respondent who alleges that the appellant has failed to file and serve his brief of argument within time, Rule 3(2) deals with a completely different situation where the initiative is taken by the Court itself. And the Court will normally take the initiative where the appeal has become dormant and the parties have lost interest in it and there is need to decongest the cause list of such dead-woods. The two rules are clear and unambiguous. I can find no inconsistency except that the words "subject to the proviso to rule 9 of this Order" appearing in rule 3(2) have become otiose in view of the deletion of the proviso to rule 9 by the 1991 amendment. (p. 1503 E)

Misconception of the Rules

5. The appellants contend that in view of the 1991 amendment to the Rules prescribing for payment of penalty in Order 6 rule 7 for late filing of briefs of argument, Order 6 rule 3(2) (an earlier rule) could not over-ride rule 7 of Order 6. This submission, in my respectful view, is based on a misconception of the provisions of the Rules, particularly Order 6 thereof. Where an appellant is in default of filing of his brief of argument within time but acts timeously by applying for extension of time he pays a penalty for late filing of his brief if his application for extension of time is granted

(Rule 7). And such application is only granted where good cause is shown; it is not automatic. Where the application fails the appeal stands dismissed. Where the appellant is in default and has failed to apply for extension of time, the respondent may apply that the appeal be struck out for want of prosecution (rule 9). Where, however, the appellant is in default and neither party makes any move, the Court may dismiss the appeal for want of prosecution (rule 3(2)). There is, therefore, no question of any rule overriding the other; each provides for a different situation. (p. 1503 G)

Court has no jurisdiction

C 6. The appellants' appeal having been dismissed under rule 3(2) of Order 6, this Court has no jurisdiction to set aside that order and restore the appeal to the cause list - (see: Iro Ogbu v. Urum (supra), Yonwuren v. Modern Signs Ltd. (supra); Oyeyipo & Anor v. Oyinloye (supra)). Consequently, this application must therefore fail and it is accordingly refused. (p. 1504 B)

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NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. When a court can set aside its own judgment

E The general rule is that any court of record has an inherent power to set aside its judgment or order which is a nullity - see Sken Consult (Nig) Ltd. v. Ukeh (1981) 1 SC. 6. (p. 1497 F)

2. Failure to invite Supreme Court to depart from its past judgment

F We have not been invited in the present proceedings to depart from Oyeyipo & Anor. v. Oyinloye (supra). We are therefore bound to follow it. And it provides a complete answer to grounds 3 and 5 upon which this application is predicated. (p. 1501 C)

UWAIS CJN

3. Constitutional validity of Supreme Court Rules

G The Supreme Court Rules, 1985 were made by the Chief Justice of Nigeria pursuant to these provisions and were also amended by him in 1991. Therefore, the constitutional validity of the rules is not in question. As a matter of fact, the provisions of the Rules enabling the Supreme Court to sit in chambers and hear matters without argument were challenged in Oyeyipo & Anor. v. Oyinloye, and this Court, sitting as a full Court, held that it is not unconstitutional for the Supreme Court to sit in chambers and deal with applications without orally hearing the parties thereto. Furthermore,

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since it is constitutional for the Court to sit in chambers under the specific provisions of section 213 subsection 2 (4) of the 1979 Constitution and deal with an application without oral hearing, then, I do not see the reason or the logic why similar procedure under the Supreme Court Rules, 1985, and in particular under Order 6 rule 3 (2), can be said to be unconstitutional for being inconsistent with the provisions of section 33 subsection B (13) of the Constitution. (p. 1505 E)

4. Order 6, rules 3(2) is to deal with a mischief

The initiative under Order 6 rule 9 rests with the Respondent, while the initiative to act under Order 6 rule 5(7) rests with either the defaulting Appellant or the Court, as the case may be. However, Order 6 rule 3 (2) C stands clearly different. The initiative thereunder is given to the Court alone. The intendment of the rule is to enable the Court to decongest its Cause List. An appellant may choose to forestall the enforcement of a judgment given against him by the lower Courts or Court below simply by filing a notice of appeal and doing nothing. To deal with such mischief, D Order 6 rule 3 (2) bestows on the Court the power to deal with the case in chambers without hearing oral argument. The issue to be determined in such cases is always very simple. It is whether the Appellant has filed and served his brief of argument within the time prescribed, that is, 10 weeks. If the brief had been filed it would be found in the file if not it would not be E there. It is a case of open and close! And with this, it is most unlikely that the Court would go wrong. Hence the practice of the Court to deal with the omission suo motu. Serving a hearing notice on the parties will serve no useful purpose since the rule in question does not allow them to appear at the hearing in chambers and talk less of arguing any excuse that they F might have or indeed not have for the default. (p. 1506 F)

KUTIGI JSC (Dissenting)

5. Rules of natural justice to apply in hearing in Chambers

There is clearly in my view therefore, no precedent of this Court to cover G the present situation where the Supreme Court suo motu and on its own volition, decided to list an appeal for dismissal for want of prosecution, when the respondent who is also empowered to do so (see Order 6 Rule 9) had not made an application to that effect, and when the appeal was not listed for hearing in open court. And more importantly, when the parties, H particularly the appellant, had received no notice or intimation from the court that the appeal would be so dismissed. I am inclined to agree with the applicants' counsel that the dismissal of the appeal without any notifi

cation to them that the said order was going to be made, was an infringement of their fundamental right to fair hearing and completely contrary to the principles of the administration of justice which rendered the dismissal null and void. The rules of natural justice are applicable to hearing of the court whether in open court or in Chambers and a violation of these rules as in this case, will undoubtedly result in the nullification of the proceedings. The service of process on the appellants so as to enable them know and or defend the relief sought by the court against them and their reaction thereto must be those fundamental conditions required before the Supreme Court could have competence and jurisdiction to have dismissed the appeal in Chambers. (p. 1515 F)

6. Hearing notice is to be sent before suo motu dismissal

In the case of the Supreme Court deciding to dismiss an appeal suo motu under order 6 rule 3(2) above, it is my view that Hearing Notices must be sent to the parties. If that is done, the appellant in particular would be able to react to such a proposal to dismiss the appeal for want of prosecution. Did I hear you say that the appellant has gone to sleep for failing to file his brief in time, and that it is not the duty of the court to wake him up from sleep? My short answer to that is that there is no harm in waking up someone who has over-slept. But if you decide not to wake up the sleeping appellant, please do not kill him in his sleep! By suo motu dismissing his appeal without any notification and then turning round to say that you cannot relist the appeal dismissed for want of prosecution, you have literally killed him as you have thereby prevented him from having his appeal decided on merit and, for ever too. That, in my view is an unjust "justice." (p. 1516 E)

7. Compliance with requirements of administration of justice

But I say the issue of nullity is involved in the present suit which was ably raised by the learned counsel for the appellants/applicants and with whom I agree. It has given me serious concern. If the Supreme Court must continue to dismiss appeals for want of prosecution under order 6 Rule 3(2) of the rules, it must comply with the basic elementary requirements for the administration of justice before it could have competence and jurisdiction. The Supreme Court cannot properly in my view pretend to dismiss appeals for want of prosecution on merit when we all know that it was not on any merit. All previous dismissals were on merit as the judgments or orders show. The rules which permit the court to sit in chambers to transact certain matters, I believe, do not envisage that due issuance and service of

process would be thrown to the wind and that the court will be "secretly" (Courtesy) of Chief G.O.K. Ajayi SAN in the on-going Abiola Treason Trial), dismissing appeals in Chambers suo motu and without notification to any of the parties. That is clearly unsupportable. (p. 1517 H)

8. Attitude of Supreme Court in dismissing appeals

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The attitude of this Court, I believe, has always been that whenever it is possible to determine a case on its merit, the Court should not cling to technicalities to refuse a complainant the opportunity of being heard. It is also I believe, the judicial stand of this Court, not to dismiss an appeal for want of prosecution unless the court is satisfied that the appeal has no merit anyway. Furthermore, the appellants/applicants have exhibited to this motion their Brief of Argument for the appeal. In addition, learned counsel for the applicant, Mr. Ebue has also fully accepted responsibility for the delay in filing the applicants, brief. That is as it should be. It has always been the attitude of this Court not to punish applicants for the mistake or negligence of counsel. The court will normally overlook such lapses and accommodate such applicants in the overall interest of justice. (p. 1518 C)

OGWUEGBU JSC

9. Right to be heard

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Although the right to be heard is of wide application and great importance, it must be confined within proper limits and not allowed to run wild. (p. 1522 E)

ONU JSC

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10. Whether Rules of Court can be said to be inconsistent with Constitution

In view of my earlier conclusion that like all laws and subsidiary enactments which found their existence and sustenance from the Constitution, rules of court being themselves also products of the Constitution, cannot stricto sensu be said to be inconsistent with a section of the Constitution e.g Section 33 thereof. The Constitution from which they both emanate being one and the same document, the situation here is not to be likened to provisions of two statutes which are at variance one with the other. While section 33 of the Constitution provides for fair hearing - a genus of which is the audi alteram partem rule or the rule of natural Justice, Order 6 Rule 3(2) (ibid) is a creation of the Constitution emanating from its section 216. It is a cardinal rule of construction that in seeking to interpret a particular section of a statute or a subsidiary legislation, one does not take the section in isolation, but one should approach the question of interpretation on the

footing that the section is part of a greater whole. (p. 1529 G)

IGUH JSC

11. Enforcement of clear words of an Act

- B With profound respect , I am unable to find any substance in these submissions. In this connection, the point must be stressed that if words of an Act or provision are clear, one must without doubt follow them even though they lead to some manifest absurdity. The court cannot be concerned with the question whether the law makers had committed some absurdity or not. Accordingly where by the use of clear and unequivocal language
C capable of only one meaning, anything , is enacted by the law makers, it must be enforced, even though it be absurd or mischievous. (p. 1536 C)

What calls for decision in this application

- D 12 .The final point I desire to stress is that what calls for decision in this application is not an interpretation of what the Rules of this court ought to be but an interpretation of what the Rules in fact state. What those Rules ought to be must, in my opinion, wait until they are appropriately amended or revised. (p. 1538 F)

E **REPRESENTATION**

H. C. F. Ebue, for the Appellants/Applicants
Respondent absent and not represented

CASES REFERRED TO

- F OYEYIPO & ANOR. V. OYINLOYE (1987) 1 NSCC 183, (1987) 2SC.148
Iro Ogbu v. Urum (1984) 4 SC 1
Sodeinde Bros. Ltd. v. ACB Ltd. (1982) 6 SC. 137
Remington v. Scoles (1897) 2 Ch 1
Shitta-Bey v. FPS.C. (1981) 1 SC 40 at 56
G Ogbu v. Urum (1981) SC 1
Craig v. Kansen (1943)1 AER 108
Skenconsult v. Ukey (1981) 1 S.C. 6
Bowaje v. Adediwura (1976) 6 S.C. 143
Agunbiade v. Okunuga & Company (1961) All N.L.R. 110
Yonwuren v. Modern Signs (Nig.) Ltd (1985) 16 N.S.C.C. (Pt. 1) 243
H Sodeinde Bros Ltd v. A.C.B Ltd (1982)6 S.C. 137
Williams v. Hope Rising Voluntary Funds Society (1982) A.N.L.R. 1

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979, Cap. 62 L.F.N. 1990, ss. 6 (6), 33(1)d (13), 213, 216.

Supreme Court Rules 1985 (as amended in 1991), Order 6, rule 3(2), rules, 5, 7, & 9(1), Order 7, rule 3; Order 8, rules 8 (1) d 16.

LEAD JUDGMENT BY OGUNDARE JSC

The Appellants, who are Applicants in the application before us, being dissatisfied with the judgment of the Court of Appeal given on 18/1/93 appealed to this Court after obtaining the leave of the Court of Appeal so to do. The record of appeal was received in this Court on 8/12/93. By the rules of this Court, they had ten weeks within which to file their Brief of Argument, that is, the Appellants should have filed their Brief of Argument on or before 16/2/94. They did not do so neither did they apply for extension of time within which to do so. On 8th of March 1995, this Court sitting in Chambers *suo motu* dismissed the appeal for want of prosecution pursuant to Order 6 rule 3(2) of the rules of the Court.

On 6th November 1995 the Appellants brought their present application seeking the following orders:

"(a) to set aside its order of the 8th day of March 1995, made in chambers dismissing the applicants' appeal and to restore the appeal in Court's Cause List

(b) On the appeal restored to enlarge the time prescribed by rules of Court for filing the appellants brief subject to payment of the penalty for late filing.

upon the following grounds:

"1. The dismissal of the appellants' appeal without any notification to them that the said order was going to be made was in infringement of their fundamental right to fair hearing and contrary to the principles for the administration of justice which rendered the dismissal null and void.

2. The said dismissal of the appellants' appeal in chambers which thereby confirmed the judgement of the court below in favour of the respondents offended the fundamental principle of justice, namely, awarding to a party in litigation that which he did not ask for, which rendered the same null and void and liable to be set aside by this court which made it,

3. Order 6 Rule 3(2) under which the order of dismissal was made is inconsistent with S.33 of the Constitution and is to that extent null and void

4. Order 6 Rule 3(2) is inconsistent with order 6 Rule 9 as amended in 1991, and is by virtue of the said amendment impliedly repealed to the extent of the inconsistency.

5. *The said Order 6 Rule 3(2) coming immediately after the rule dealing with application for leave to appeal or extension of time to appeal or to ask for leave to appeal and before the rule dealing with preparation and filing of briefs of argument in appeals is inappropriate for failure to file brief within the prescribed period.*

B 6. *The rules of this Court as amended in 1991 having prescribed a penalty in order 6 Rule 7 for late filing of briefs the said order 6 Rule 3(2) which preceded the rule providing for the said penalty cannot override the later rule as the law-maker could not have intended to provide double sanctions for the same default."*

C Upon the application coming before us for hearing, the Respondents were absent and were not represented by counsel. On being satisfied that their counsel was served, we proceeded to hear arguments from learned counsel to the Applicants. Mr. Ebue learned counsel moved the court in terms of the motion paper and relied on the affidavit in support of the application and also on the Brief of argument he annexed to the motion
D papers.

In the affidavit in support of the application sworn to by learned counsel for the Appellants, Mr. Ebue deposed Inter alia as follows:

E "3. *That I did not file the appellants' brief within ten weeks from the receipt of the copy of the record of proceedings transmitted to this Court and had not filed it by the 8th of March 1995, when this Court dismissed my clients' appeal in chambers, for want of prosecution.*

F 10. *That as the Appellants won in the Trial Court but the decision was reversed by the Court of Appeal, I had, in spite of all I had been through, to take my time in preparing the Appellants' brief knowing that this Court is the Court of last resort in the land.*

11. *That I was lulled to a false sense of security by the provision of the rules of this Court for payment of N5 for everyday I was out of time in filing the appellants brief.*

G 12. *That the draft of the appellants' brief was in its final stage of preparation when I received through the post the ruling of this Court dismissing my Clients' appeal for want of prosecution.*

H 13. *That I verily believe that the dismissal of my clients' appeal suo motu by the Court in Chambers was a breach of the fundamental rule of natural justice of hearing a party before an order is made against him and of the provisions of the Constitution and was not in accord with notable pronouncements of this Court in regard to courts making an Order against a party without giving him notice that the Order was going to be made.*

14. *That I verily believe that this Court was influenced by its deci-*

sions in *Chief Ogbu Vurum (SIC) (1981) 4 SC 1* and other appeals which were made before the amendments to the rules of this court made in October 1991 *Vide G.N. No.111 of 1991.*

15. That I verily believe that the facts and circumstances of the said cases referred to in 14 *supra* are different from the facts and circumstances of the instant case in that in the said cases applications for dismissal for non-prosecution were made by the respondents in the presence of the appellants who had prior notice of the hearing date. B

16. That I have prepared a brief of argument in respect of this application. The same is attached hereto and marked Exhibit A.

17. That I have also prepared the appellants' brief in the substantive appeal which I shall file, paying any penalty required, the same day the instant application is granted and the appeal restored. " C

Notwithstanding the averment in paragraph 17 above the Appellants filed a Brief on 6/12/95 at a time when the appeal had not been restored to the Court's List. In the applicants Brief which contains the arguments in support of this application, the following two questions are set down as calling for determination: D

"(a) Is this Court competent to set aside its decision shown to be invalid, or null and void or in breach of the provisions of the constitution or in error?"

(b) Was the dismissal of the applicants' appeal in their absence and *suo motu* by the Court constitutional and in consonance with the rules of natural justice and the rules of this Court as amended in 1991?" E

Question (a) does not need much argument as rightly observed in the Brief. The general rule is that any court of record has an inherent power to set aside its judgment or order which is a nullity - see *Sken Consult (Nig) Ltd. V. Ukeh* (1981) 1 SC. 6. But is the Order of this Court made on 8/3/95 dismissing Appellants' appeal a nullity? That takes me to a consideration of Question (b) For unless Question (b) is answered in the Appellants' favour, this Court would have no jurisdiction to set aside its Order of 8/3/95 Question (b) F

This Court dismissed the Appellants' appeal pursuant to Order 6 rule 3(2) of the Supreme Court rules, that is, the Rules of this Court. That Rule reads: G

"(2) Where the appellant has failed to file a Brief within the period prescribed by this order and there is no application for extension of time within which to file the Brief the Court may, subject to the proviso to Rule H

9 of this Order, proceed to dismiss the appeal in chambers without hearing

argument."

This rule has come for consideration by this court (Full court) in OYEYIPO & ANOR. V. OYINLOYE (1987) 1 NSCC 183, (1987) 2SC.148; (1987) 1 NWLR 356 where this court upheld the validity of the rule. There the appellants lodged an appeal to this Court against the decision of the Court of Appeal. On 2nd May 1986 the records of appeal were delivered to the Supreme Court. Under the rules of the Court the appellants had ten weeks from the date of service of record on them to take necessary steps in the Supreme Court in prosecution of their appeal by filing and serving their brief of argument. By computation of time they had up to 11th July 1986 to file their brief. They did not do so. On a proper application made by the appellants under Order 2 rule 31(1) the Court could extend the time for filing briefs. The appellants did not apply either for extension of time within which to file their brief.

On 27th October 1986, the respondent filed a motion pursuant to Order 6 rule 9 (1) praying for a dismissal of appellants' appeal for want of prosecution. The appellants were served with the motion papers and yet did nothing. On 12th November 1986 the Court sat in Chambers, considered the application (the parties not being present nor heard in oral argument) and being satisfied that the appellants had failed to file their brief as required by the rules of Court, dismissed the appeal for want of prosecution. The appellants thereafter brought an application seeking to set aside the judgment of the Court dismissing the appeal and to reopen the appeal. They contended, as the applicants in the present proceedings have now done -

(1) that the rules of natural justice (audi alteram partem) for fair hearing had been breached, and

(2) that the decision of the Court given on 12th November 1986 contravened the provisions of section 33(13) of the 1979 Constitution in that the proceedings leading to the decision were not held in open court.

On (1) the appellants contended that although they were served with the motion papers for the dismissal of their appeal they had not been served with the notice of the hearing date of the motion and that whether the Court sat in Chambers or in open court the rule of fair hearing applied; they relied on section 33 (1) of the Constitution.

This Court unanimously held:

(1) That the Court has no jurisdiction to review its own order or judgment except as provided in order 8 rule 16 - the 'slip Rule' or under its inherent power to set aside a judgment of its own that is a nullity or to correct or

modify its own order on the ground that the order or judgment does not

represent what it had intended to record Iro Ogbu v. Urum (1984) 4 SC 1; Chukwuka & Ors V. Ezulike (1986) 5 NWLR 893; Minister of Lagos Affairs, Mines and Power & Anor. V. Akin - Olugbade & Ors (1974) 1 ALLNLR (Pt.2) 226, 235; Sodeinde Bros. Ltd. V. ACB Ltd. (1982) 6 SC 137; Yonwuren v. Modern Signs Ltd. (1985) 1 NWLR 244; followed.

2. That the exercise of the right of appeal and of the practice and procedure thereto, enables the Chief justice to determine when there will be hearing and the form the hearing should take. Hence it has been provided that a party who has not filed his brief of argument is only entitled to oral hearing by leave of court - order 6 Rule 5(5). Oral argument is only allowed at the hearing where brief of argument has been filed to emphasize and clarify the written argument. Accordingly, as in this case, where no written brief had been filed and there was no leave of the court to dispense with the requirement, appellants have not brought themselves within the scope of being heard by the court. Applicants had not satisfied the conditions necessary for the hearing of their appeal in court and were, in fact, not entitled to a hearing, oral or written. The provisions of section 33(1) relied upon by applicants is applicable to proceedings in court for determination of a right. Having not submitted their case for consideration as required by the Rules of the Court there is clearly no inconsistency between the power exercised by the court in this case and the provisions of section 33(1) of the Constitution.

3. That the rules of natural justice are applicable to hearings of the court whether sitting in Chambers or in open court. Where the rules of natural justice are properly applicable, a violation of the rules will result in the nullification of the proceedings. However, the rules are applicable to a party whose case is properly before the court and not where a party has not satisfied the conditions of being heard. Where as in this case, the party has not satisfied the conditions required for hearing his case, the court will not be competent to hear him. The right to be heard having not been earned, cannot be exercised. There is therefore, no question of the breach of a non-existent right. For a party who has failed or neglected to submit his case for consideration cannot complain of a denial of hearing. The failure or neglect *per se* tantamounts to an abandonment of the appeal.

4. That as to the contention that the determination of the application to dismiss the appeal was unconstitutional for having been heard in chambers and not in open court, and therefore contrary to section 33(13) of the Constitution, 1979, the enabling rule of court, i.e., Order 6 Rule 3(1) of the Supreme Court Rules, provides that where an appellant has failed to file a

brief in respect of his appeal or having failed to do so within the time

stipulated, had also not sought an extension of time within which to do so, an application to dismiss the appeal on the grounds of failure to file a brief of argument may be heard in Chambers without hearing argument - order 6 Rule 3(2). The court is also empowered to dismiss an appeal in Chambers without hearing argument where an applicant had filed a motion of withdrawal, and even where briefs of arguments had been filed by both parties. The court therefore has powers to dismiss an appeal in chambers in those cases where it is clearly unnecessary to hear argument or where appellant cannot insist on being heard.

5. That the purpose of hearing in Chambers is to enable hearing of the application before the court on the materials before it. Where it is required to hear argument from the parties, the application would be adjourned into the open court. In the instant case, the application to dismiss the appeal was sufficient notice to the applicant who was aware of the fact that he had not filed his brief of argument and had not even sought the leave of court for extension of time to do so. The possibility that the applicant may have intended to oppose the application as contended on his behalf is no answer to the exercise by the court of the powers vested in it to hear in Chambers, application to dismiss an appeal on grounds that appellant had failed to file his brief of argument, when in addition, applicant had not applied for extension of time to do so.

6. That the Rules of Court, i.e., Supreme Court Rules, 1985 in its format and provisions set out the mode of achieving fair hearing. The rules basically, give opportunity to both an appellant and a respondent, of setting out their arguments in the appeal in writing instead of putting them forward orally for the consideration of the court. It does not need to be an oral hearing to constitute a hearing by a court. The application for leave to appeal receives a hearing under s. 213(4) when it is considered on the written briefs and record of proceedings without an oral hearing. Similarly, the consideration of an application for dismissal for want of prosecution is no less fair because it is granted after considering the record of proceedings.

The service of the record of proceedings on the appellant is notice to the appellants that they should set down their argument in the appeal in writing. The service of the notice of motion is notice to the appellants that not having argued their appeal in writing and utilized the opportunity of being heard, albeit in writing, the appeal will be dismissed unless they take steps to save it. The failure to notify the appellants of the date when the court will sit to dismiss it is of no constitutional importance, and since the rules made in pursuance of the power given by the Constitution prescribe sanc-

tion for failure to file brief, and since the Constitution decrees compliance

with the rules, the action of court sitting in Chambers to consider and dispose of the application by applying the sanction is constitutional. When a court sits in Chambers, all that it means is that the Judges of the court are transacting the business of the court in Chambers instead of open court. It does not mean that the court is not sitting in public. A court can sit in open court and yet exclude members of the public other than the parties or their legal representatives from the hearing in exercise of its statutory powers. See proviso to section 33(13), 1979 Constitution. A judge may sit in Chambers without excluding members of the public. It is therefore not unconstitutional to sit in Chambers. B

We have not been invited in the present proceedings to depart from Oyeyipo & Anor, V . Oyinloye (supra). We are therefore bound to follow it. And it provides a complete answer to grounds 3 and 5 upon which this application is predicated. C

The facts in the present case are not too dissimilar to the facts in Oyeyipo V. Oyinloye (supra) except in one respect. In Oyeyipo the decision to dismiss was at the instance of the Respondent. In the present case it was the Court acting *suo motu* that dismissed the appeal of the appellants. It is contended that the Court has no such power and, if it has, it should have put the appellants on notice of its intention to do so and give them the opportunity of making any representation to the contrary, before dismissing the appeal. It is further suggested that by so doing, without prior notice to the appellants, it has acted Unfairly and its decision amounts to a nullity. D E

With profound respect to learned counsel for the appellants I do not share his views. The rules of Court apart, this Court, like all courts of record, has an inherent power to strike out any proceedings for want of prosecution (- See: Krakauer v. Katz (1954) 1 WLR 278, Remington v. Scoles (1897) 2 Ch 1) This power is based on the principle *sit finis litium*. The appellants in the present proceedings showed such a complete apathy to the prosecution of their appeal as to amount to an abandonment of it. They received the records of appeal and did nothing for fifteen months to prosecute it by filing their brief within time or, in default, applying for extension of time to do so. They went to sleep. The respondents who might have woken them from their slumber by applying to have the appeal struck out for non-prosecution, did nothing either. In a situation such as this, the Court would have no choice but to fall back on its power if it is to decongest its list of 'dead ' cases. This inherent power of the Court is given constitutional force by section 6(6)(a) of the 1979 Constitution which provides: F G H

"The judicial powers vested in accordance with the foregoing provisions of this section -

(a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law."

(underlining is mine for emphasis)

The inherent power of the Court to strike out appeals for want of prosecution is further strengthened by Order 6 rule 3(2) which provides for a dismissal, rather than a striking-out.

The argument that non-notification to the appellants that an order of dismissal was to be made prior to the making of the order was an infringement of their fundamental right to fair hearing is, in my respectful view, without any substance. As was held in *Oyeyipo*, the appellants having failed to file their brief within time, have not satisfied the conditions necessary for the hearing of their appeal in court and were, therefore, not entitled to a hearing, oral or written. There could be no infringement of a right they have not earned.

Another instance where an appellant may disentitle himself to being heard is provided in Order 8 rule 8(1) which states:

"If the appellant has complied with non of the requirements of rule 3 of Order 7, the Registrar of the court below shall certify such fact to the Court, which shall thereupon order that the appeal be dismissed with or without costs, and shall cause the appellant and the respondent to be notified of the terms of its order."

The rule does not provide for notification being given to an appellant before the Court exercises its power to dismiss under the rule. Can it be correctly argued that where the Court dismisses under rule 8(1) of Order 8 it is infringing the fundamental right of the appellant to fair hearing? I rather think not. By the same reasoning, I would not say that non-notification to an appellant where the Court acts under rule 3(2) of Order 6 to dismiss an appeal for want of prosecution is an infringement of his fundamental right to fair hearing. He is not entitled to any hearing having failed to fulfil that condition which would entitle him to the right, that is, having failed to file his brief of argument as required by the rules of Court

It is further argued that with the amendment of rule 9 of Order 6, rule 3(2) of the same order is impliedly repealed to the extent of the inconsistency in the two rules. Rule 9(1) in its original form as contained in the supreme Court Rules, 1985 provided:

"If an appellant fails to file his Brief within the time provided for in rule 5 of these Rules, or within the time as extended by the Court, the respondent may apply to the Court for the appeal to be dismissed for want of prosecution. If the respondent fail to file his Brief, he will not be heard in

oral argument except by leave of the Court . A dismissal of an appeal

under this rule whether on the application of the respondent or not, where the appellant fails to file his Brief shall amount to a dismissal on the merit:

Provided that such dismissal on the merit shall be only where the Court is satisfied, prima facie, on the papers before it, that the appeal has not merit."

This was the rule in force when Oyeyipo was decided. Rule 3(2) was already in existence at the time. By Government Notice No 11 of 1991 made in October 1991, the Chief justice of Nigeria pursuant to the powers conferred on him by section 16 of the 1979 Constitution, amended the 1985 Rules. By the amendment rule 9 now reads:

"9 If an appellant fails to file and serve his Brief within the time provided for in rule 5 of these Rules, or within the time as extended by the Court, the respondent may apply to the Court for the appeal to be struck out for want of prosecution. If the respondent fails to file his Brief, he will not be heard in oral argument except by leave of the Court."

Rule 3(2) is not affected by the amendment. It is the contention of the appellants that because rule 9 now speaks of "striking-out", rule 3(2) which provides for "dismissal" is inconsistent with the new rule 9 and is deemed, to the extent of that inconsistency, repealed.

With respect, I find no substance in this submission. Rule 9 provides for a situation when an application is made to the Court by a respondent who alleges that the appellant has failed to file and serve his brief of argument within time, Rule 3(2) deals with a completely different situation where the initiative is taken by the Court itself. And the Court will normally take the initiative where the appeal has become dormant and the parties have lost interest in it and there is need to decongest the cause list of such deadwoods. The two rules are clear and unambiguous. I can find no inconsistency except that the words "subject to the proviso to rule 9 of this Order" appearing in rule 3(2) have become otiose in view of the deletion of the proviso to rule 9 by the 1991 amendment.

The appellants contend that in view of the 1991 amendment to the Rules prescribing for payment of penalty in Order 6 rule 7 for late filing of briefs of argument, Order 6 rule 3(2) (an earlier rule) could not over-ride rule 7 of Order 6. This submission, in my respectful view, is based on a misconception of the provisions of the Rules, particularly Order 6 thereof. Where an appellant is in default of filing of his brief of argument within time but acts timeously by applying for extension of time he pays a penalty for late filing of his brief if his application for extension of time is granted (Rule 7). And such application is only granted where good cause is shown;

it is not automatic. Where the application fails the appeal stands dismissed.

Where the appellant is in default and has failed to apply for extension of time, the respondent may apply that the appeal be struck out for want of prosecution (rule 9). Where, however, the appellant is in default and neither party makes any move, the Court may dismiss the appeal for want of prosecution (rule 3(2)). There is, therefore, no question of any rule overriding the other; each provides for a different situation.

The appellants' appeal having been dismissed under rule 3(2) of Order 6, this Court has no jurisdiction to set aside that order and restore the appeal to the cause list - (see: Iro Ogbu v. Urum (supra), Yonwuren v. Modern Signs Ltd. (supra); Oyeyipo & Anor. v Oyinloye (supra)). Consequently, this application must therefore fail and it is accordingly refused. The respondents being absent, I make no order as to costs.

UWAIS CJN

I have had the opportunity of reading in draft the ruling read by my learned brother Ogundare, JSC I entirely agree.

By Order 6 rule 3 (2) of the Supreme Court Rules, 1985 -

"(2) Where the appellant has failed to file Brief within the period prescribed by this Order and there is no application for extension of time within which to file brief the Court may, subject to the proviso to Rule 9 of this Order, proceed to dismiss the appeal in chambers without hearing argument."

In the present motion on notice, the Appellants were served with the record of appeal on 29th December, 1993. They are enjoined by Order 6 rule 5 (1) (a) of the Supreme Court Rules, 1985 (as amended) to file and serve on the Respondents a written brief of argument within ten weeks from the date of their receipt of the record of proceedings. In other words, the filing and service of the brief were to take place not later than 9th March, 1994. This the Applicants failed to do up to the 8th March, 1995 when this court, in exercise of its power under Order 6 rule 3 (2) sat in chambers and suo motu dismissed their appeal. The motion on notice, which was filed on 6th November, 1995, prays for the following orders.

"(a) To set aside its Order of the 8th day of March, 1995, made in chambers dismissing the applicants' appeal and to restore the appeal in Court's Cause List.

(b) On the appeal restored to enlarge the time prescribed by rules of court for filing the appellants, brief subject to payment of the penalty for late filing."

Amongst the reasons given for bringing the application are -

(i) *That the Appellants were not given notice that the appeal was going to be dismissed, thus infringing their fundamental right to fair hearing under the 1979 Constitution.*

(ii) *That by the dismissal of the appeal the judgment of the Court of Appeal was confirmed in favour of the Respondents when the Respondents did not ask for such judgment.*

(iii) *That Order 6 rule 3 (2) is inconsistent with Section 33 of the 1979 Constitution.*

(iv) *That Order 6 rule 3 (2) is inconsistent with Order 6 rules 5 (7) and 9 (as amended).*

It is then contended that, on those grounds both Order 6 rule 3(2) and the order of dismissal of the appeal made by this Court suo motu are null and void.

To start with, Order 6 rule 3 (2) was made in accordance with the provisions of section 216 of the 1979 Constitution (as amended) which provide -

"216. Subject to the provisions of any Act of the National Assembly or a Decree, the Chief Justice of Nigeria may make rules for regulating the practice and procedure of the Supreme Court."

The Supreme Court Rules, 1985 were made by the Chief Justice of Nigeria pursuant to these provisions and were also amended by him in 1991. Therefore, the constitutional validity of the rules is not in question. As a matter of fact, the provisions of the Rules enabling the Supreme Court to sit in chambers and hear matters without argument were challenged in Oyeyipo & Anor. v Oyinloye. (1987) 1 NWLR (part 50) 356 and this Court, sitting as a full Court, held that it is not unconstitutional for the Supreme Court to sit in chambers and deal with applications without orally hearing the parties thereto. Furthermore, since it is constitutional for the Court to sit in chambers under the specific provisions of section 213 subsection 2 (4) of the 1979 Constitution and deal with an application without oral hearing, then, I do not see the reason or the logic why similar procedure under the Supreme Court Rules, 1985, and in particular under Order 6 rule 3 (2), can be said to be unconstitutional for being inconsistent with the provisions of section 33 subsection (13) of the Constitution.

Now, while Order 6 rule 3(2) provides that an appeal can be dismissed for want of prosecution, Order 6 rule 9 provides for the striking out of the appeal for the same reason, that is, want of prosecution. It has been contended that the two Rules are inconsistent with Order 6 rule 5 (7).

Order 6 rule 9 provides:-

"9 If an appellant fails to file and serve his Brief within the time provided for in rule 5 of these Rules, or within the time as extended by the Court, the respondent may apply to the Court for the appeal to be struck out for want of prosecution. If the respondent fails to file his Brief, he will not be heard in oral argument except by leave of the Court."

B and Order 6 rule 5(7) reads:-

"(7) Notwithstanding the provision of Rule 9 hereof any party who failed to file its brief within the time prescribed here in before shall be liable to pay penalty for non-compliance as provided in the Second Schedule to these Rules."

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From the foregoing provisions of Order 6 rule 3 (2), Order 6 rule 9 and Order 6 rule 5 (7) of the Supreme Court Rules, 1985 it is quite clear that each rule is intended to achieve a different result. Where a party is late in filing or serving his brief of argument, he may apply for extension of time within which to file and or serve the brief. In granting the application, the Court may impose, as a condition for granting such application, the payment of the penalty prescribed by Order 6 rule 5(7). Therefore, this has no bearing whatsoever on the provisions of Order 6 rule 3 (2) which deals with the situation where the Appellant has ignored making any move to file and serve his brief of argument, as in the case here. Again, where an Appellant has defaulted in filing and serving his brief within the prescribed period, the Respondent in the case is entitled to bring an application under Order 6 rule 9 to have the appeal struck out for want of prosecution. If this happens, the appellant is at liberty to apply for extension of time to file and serve his brief and ask for the case to be relisted. The initiative under Order 6 rule 9 rests with the Respondent, while the initiative to act under Order 6 rule 5(7) rests with either the defaulting Appellant or the Court, as the case may be.

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However, Order 6 rule 3 (2) stands clearly different. The initiative thereunder is given to the Court alone. The intendment of the rule is to enable the Court to decongest its Cause List. An appellant may choose to forestall the enforcement of a judgment given against him by the lower Courts or Court below simply by filing a notice of appeal and doing nothing. To deal with such mischief, Order 6 rule 3 (2) bestows on the Court the power to deal with the case in chambers without hearing oral argument. The issue to be determined in such cases is always very simple. It is whether the Appellant has filed and served his brief of argument within the time prescribed, that is, 10 weeks. If the brief had been filed it would be found in the file if not it would not be there. It is a case of open and close! And

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with this, it is most unlikely that the Court would go wrong. Hence the

practice of the Court to deal with the omission suo motu. Serving a hearing notice on the parties will serve no useful purpose since the rule in question does not allow them to appear at the hearing in chambers and talk less of arguing any excuse that they might have or indeed not have for the default. In practice it is cases where the delay by the Appellant in filing brief had taken one year or more that are fixed for hearing in chambers under Order 6 rule 3 (2). B

With regard to whether the Court has the power to deal with the Appellants' default suo motu under Order 6 rule 3 (2) .I think , there cannot be doubt about that whatsoever. The Court has a duty to do away with the congestion of cases filed before it, particularly where those cases are frivolous and are intended to merely over-reach or deny the Respondent the enjoyment of the fruit of the judgement given in his favour by the lower Courts or Court below. The golden rule is that justice delayed is justice denied, I therefore, see nothing wrong or unconstitutional in this Court invoking its inherent jurisdiction to deal with such infections. If authority is required for the exercise of the jurisdiction, recourse should be had to the provisions of Section 6 subsection (6) (a) of the 1979 Constitution which state thus - C D

"(6) The judicial powers vested in accordance with the foregoing provisions of this section

(a) Shall extend, notwithstanding anything to the contrary in this Constitution to all inherent powers and sanctions of a Court of law." E

It follows that neither the provisions of Order 6 rule 3 (2) nor the decision of this Court in dismissing the appeal suo motu can rightly be said to be unconstitutional or null and void. It is only when it is shown that this Court acted under a mistake of fact, such as the brief had in fact been filed within the prescribed time, that it can ex debito justitiae set aside the dismissal of the appeal under Order 6 rule 3(2) . As this is not the case here, the application, therefore, fails in its entirety. Accordingly, I too hereby dismiss it with no order as to costs. F

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WALI JSC

I have had a privilege of reading in draft, the lead ruling of my learned brother Ogundare JSC, and I entirely agree with it. However I like to contribute the following by way of emphasis.

The service of the record of proceedings on the appellants is sufficient notice that they should file brief of argument in support of their ap H

peal in compliance with Order 6 Rule 2 of the Supreme Court Rules 1985 (as amended). The Rules make a provision for them to have the time provided for filing the brief extended if they give good and sufficient reason for the omission. Where however an appellant fails to utilize the procedure provided, the court is not duty bound to wake him up from his slumber by issuing a hearing notice to him before exercising its powers under Order 6 rule 3(2) of the Supreme Court Rules 1985 to dismiss the unattended and impliedly abandoned appeal.

The Supreme Court Rules derive their legitimacy from the Constitution as any other law. The Chief Justice of Nigeria is, by S 216 of the Constitution of Nigeria 1979 conferred with the power to make Rules to cater for the smooth running of proceedings in the Supreme Court. The Supreme Court Rules, 1985 came into existence as a result of exercise of that power by the Chief Justice of Nigeria .See Shitta -Bey v . F P S C. (1981) 1SC 40 at 56. S.213 of the 1979 Constitution vests Supreme Court with the power to dispense with a pending appeal which has been neglected and impliedly abandoned. The subsection reads thus:

"Any right of appeal to the Supreme court from the decisions of the Court of Appeal shall, subject to s. 216 be exercised in accordance with any Act of National Assembly and rules of court for the time being in force regulating the powers practice and procedure.

The Statement of law on the issue has been clearly stated in the lead judgement of a full panel of the Supreme Court by Karibi-Whyte JSC in his lead judgment in Oyeyipo & Anor, v Oyinloye (1987) 1 NSCC 183 as follows:-

"I think the regulation of the exercise of the right of appeal and of the practice and procedure thereto, enables the Chief Justice to determine when there will be hearing and the form the hearing should take. Hence it has been provided that a party who has not filed his brief of argument is only entitled to oral hearing by leave of this Court-See Order 6 rule 5(5) . Oral argument is only allowed at the hearing where brief of argument has been filed to emphasize and clarify the written argument. Accordingly, as in this case, where no written brief has been filed and there was no leave of the Court to dispense with the requirement, appellant has not brought himself within the scope of being heard by the Court. Concisely, stated, applicant has not satisfied the conditions necessary for the hearing of his appeal in Court. He was in fact not entitled to a hearing, oral or written. The provisions of section 33(13) relied upon by the applicant is applicable to proceedings in Court for the determination of right. Applicant has not submitted his case for consideration as he was required by the rules of this Court to do. There is clearly no inconsistency between

the power here exercised and the provisions of S.33(1)."

(underlining supplied by me for emphasis)

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"The purpose of hearing in chambers is to enable the hearing of the application before the Court on the material before it. Where it is required to hear arguments from the parties, the application would be adjourned into the open court. In the instant case, the application to dismiss the appeal was sufficient notice to the applicant who was aware of the fact that he had not filed his brief of argument, and had not even sought an extension to time to do. Applicant's only remedy was to seek leave of this court for an extension of time to do so. Chief Williams has argued that if applicant had been aware of the hearing date of the application to dismiss the appeal, applicant would have opposed the application. That may well be the intention of counsel for the applicant. It is however not an answer to the exercise by the court of powers vested in it to hear in chambers applications to dismiss an appeal on the grounds that appellant had failed to file his brief of argument when in addition, applicant had not applied for extension of time to do so. See Order 6, rules 3, 9,"

Obaseki JSC in his concurring judgment made also the following contribution:-

"Similarly, the consideration of an application for dismissal for want of prosecution is no less fair because it is granted after considering the record of proceedings. The service of the record of proceedings on the appellant is notice to the appellants that they should set down their argument in the appeal in writing. The service of the notice of motion is notice to the appellants that not having argued their appeal in writing and utilized the opportunity of being heard, albeit in writing, the appeal will be dismissed unless they take steps to save it. The failure to notify the appellants of the date when the court will sit to dismiss it is of no constitutional importance. Since the Rules made in pursuance of the power given by the Constitution prescribe the sanction for failing to file brief and since the constitution decrees compliance with the rules, the action of the Court sitting in Chambers to consider and dispose of the application by applying the sanction is constitutional."

{underlining supplied by me for emphasis}

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"When the Court sits in Chambers, all that it means is that the Judges of the Court are transacting the business of the court in Chambers instead of open court - See Hartmont v. Foster (1881) 8 Q.B.D. 82, 84, It

does not mean that the court is not sitting in public."

As can be seen the Statement of law (supra) is general and is equally applicable to the case in hand; it is not limited to cases falling under Order 6 rule 9 of the Supreme Court Rules, 1985 (as amended).

It is for this and the fuller reasons contained in the lead Ruling of my learned brother Ogundare JSC that I also refuse the application. I
B endorse the consequential orders made in the lead Ruling.

KUTIGI JSC

The applicants by motion on notice prayed the court for the following orders-

C *"(a) To set aside its Order of the 8th day of March 1995, made in Chambers dismissing the applicants appeal and to restore the appeal in Court's Cause List.*

D *(b) On the appeal restored, they enlarge the time prescribed by the Rules of Court for filing the appellants' brief subject to payment of the penalty for late filing."*

The grounds for the application are contained in the Schedule attached to the application. It reads:

"THE SCHEDULE

E *1. The dismissal of the appellants' appeal without any notification to them that the said order was going to be made was an infringement of their fundamental right to fair hearing and contrary to the principles for the administration of justice which rendered the dismissal null and void.*

F *2. The said dismissal of the appellants' appeal in chambers which thereby confirmed the judgment of court below in favour of the respondents offended the fundamental principle of justice, namely, awarding to a party in litigation that which he did not ask for, which rendered the same null and void and liable to be set aside by this Court which made it.*

G *3. Order 6 Rule 3(2) under which the order of dismissal was made is inconsistent with section 33 of the Constitution and is to that extent null and void.*

4. Order 6 Rule 3(2) is inconsistent with Order 6 Rule 9 as amended in 1991, and is by virtue of the said amendment impliedly repealed to the extent of the inconsistency.

H *5. The said Order 6 Rule 3(2) coming immediately after the rule dealing with application for leave to appeal or extension of time to appeal or to seek leave to appeal and before the rule dealing with preparation and filing of briefs of argument in appeals is inappropriate for failure to file brief within the prescribed period.*

6. *The rules of this Court as amended in 1991 having prescribed a penalty in Order 6 rule 7 for late filing of briefs, the said Order 6 Rule 3(2) which preceded the rule providing for the said penalty cannot override the later rule as the law maker could not have intended to provide double sanctions for the same default."*

I think the issue of the constitutionality of the Rules of the Supreme Court has since been settled vide OYEYIPO & ANOR V. OYINLOYE (1987) 1 NWLR (Part 50)356. These Rules were validly made by virtue of the powers vested in the Chief Justice of Nigeria by Section 216 of the 1979 Constitution. The Power of the Chief Justice of Nigeria to make Rules to regulate the practice and procedure, including the regulation of the exercise of the right of appeal in the Supreme Court, is clearly therefore not in doubt.

What has caused me some discomfort in this application however, is para. 1 of the Schedule above. I shall repeat it again thus -

"The dismissal of the appellant's appeal without any notification to them that the said order was going to be made was an infringement of their fundamental right to fair hearing and contrary to the principles for the administration of justice which rendered the dismissal null and void (Emphasis supplied by me).

This is certainly not the first challenge or "assault" (per Oputa J.S.C. in OYEYIPO & ANOR V. OYINLOYE (1987) 1 NWLR (Part 50) 356 on the power of the Supreme Court to dismiss an appeal for want of prosecution. The first attack was launched by the case of OGBU & ORS V URUM & ANOR (1981) 4 SC.1 It was followed by YONWUREN V. MODERN SIGNS (NIG) LTD (1985) 1 NWLR (Part 2) 244 The third challenge was made in the case of CHUKWUKA & ORS V EZULIKE (1986) 5 NWLR (Part 45) 892. The fourth and last challenge in the series before now, was made in the case of OYEYIPO & ANOR V OYINLOYE (1987) 1 NWLR (Part 50) 356.

SUPREME COURT RULES, 1977

The two cases of (1) OGBU & ORS V URUM & ANOR (supra) and (2) YONWUREN V MODERN SIGNS LTD (supra) were decided under Order 9 Rule 7 of the Rules of the Supreme Court, 1977 which reads

"If an appellant fails to file his brief within the time provided for in rule 3 above, or within the time as extended by the Court, the respondent may apply to the Court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of the Court." (underling is mine)

The sum total of the decisions in these two cases is that the supreme

court has no jurisdiction inherent or statutory to set aside its own judgment (except judgment or orders which are nullified) and to re-enter for hearing an appeal that has been dismissed for want of prosecution under the said Order 9 Rule 7 of the 1977 Rules.

B A close examination of these cases will show as provided for by the Rule (Rule7) therein that -

(1) *The applications to dismiss the appeals were at the instances of the Respondents and in open court.*

(2) *The parties and their counsel knew and were aware of the fact that the appeals were listed for hearing or disposal on the dates they were dismissed for want of prosecution.*

C (3) The dismissals were never suo motu at the instance of the Supreme Court and therefore without notice to the parties and or their counsel.

In OGBU & ORS V URUM & ANOR (supra), Obaseki J.S.C. delivering the lead Ruling said.

D *"It is common ground among the parties and their counsel that the appeal No.SC, 18/19/80 was listed for hearing before this Court on 24th day of November. 1980, that the appellants defaulted in filing their brief as required by Order 9 Rule 3 of the Supreme Court Rules, 1977 within the extended time; and that on the application of respondent's counsel, Chief Bayo Kehinde, SAN in court at the hearing, the appeal was dismissed for want of prosecution."*

Also in YONWUREN V. MODERN SIGNS LTD (supra), Obaseki J.S.C. said on page 267 -

F *"..... and after the time for the filing of briefs of argument by the parties had expired, the appeal was set down for hearing On that day, Chief F.R.A. Williams SAN appeared as counsel for the appellant and Mr. T.A. Molajo SAN, appeared as counsel for the respondent On a motion by Mr. E.A. Molajo SAN, counsel for the respondent for an order dismissing the appeal for non-prosecution under Order 9 Rule 7, Chief Williams replied that he had neither seen the appellant nor the record of appeal Thereafter, the court dismissed the appeal for want of prosecution under Order 9 Rule 7, Supreme Court Rules 1977."*

G So that as shown above even when an appeal was listed for disposal, it was the practice to serve hearing notices on counsel and or litigants. Otherwise how could any of them have been present in court as shown above? I think that is as it should have been. It is a fundamental principle of justice that a party must be aware of a claim against him

before one can pronounce against him.

SUPREME COURT RULES, 1985

The third and fourth challenges on the Rules were considered and decided under Order 6 Rule 9(1) of the Rules of the Supreme Court, 1985 which provided as follows -

"9. (1) If an appellant fails to file his Brief *within the time provided for in Rule 5 above, or within the time as extended by the Court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his Brief, he will not be heard in oral argument except by leave of the Court. A dismissal of an appeal under this Rule whether on the application of the respondent or not, where the appellant fails to file his brief shall amount to a dismissal on the merit. PROVIDED that such dismissal on the merit shall be only where the court is satisfied, prima facie, on the papers before it, that the appeal has no merit.*"

(Emphasis supplied by me.)

Here again the sum total of the decisions in CHUKWUKA & ORS V. EZULIKE (supra) and OYEYIPO & ANOR V. OYINLOYE (supra) is that the dismissal of an appeal for want of prosecution under the above Rule 9 (1) shall be a dismissal on the merits and that the Supreme Court has no jurisdiction inherent or otherwise to re-enter an appeal dismissed for want of prosecution following OGBU & ORS V URUM & ANOR (supra) and YONWUREN V MODERN SIGNS NIG LTD (supra) were made under Order 9 Rule 7 of the 1977 Rules, the provisions of that Rule are in pari materia with those of Order 6 Rule 9 (1) of the 1985 Rules but more stringent than the former Order 9 Rule 7. The proviso to Order 6 Rule 9 (1) above clearly presupposes that before dismissing an appeal for want of prosecution the court should have read through the record before it and satisfied itself that prima facie, the appeal, lacked merit. A dismissal of an appeal under Order 6 Rule 9 (1) was therefore a dismissal on merit. For example, in CHUKWUKA & ORS V. EZULIKE (supra) the drawn up Order of the Supreme Court reads -

"UPON READING the Record of Appeal herein and there being no briefs filed and parties absent and unrepresented;

IT IS ORDERED that this appeal be dismissed for want of prosecution pursuant to Order 6 Rule 9 (1) of the Supreme Court Rules 1985 with no order as to costs."

The drawn up order above clearly presupposes that the parties and their counsel who were absent when the order was made, must have been notified that the appeal would be heard on the day it was dismissed in the open court.

And in OYEYIPO & ANOR V. OYINLOYE (supra), the appellants in

fact, received notice of motion to dismiss their appeal on the 27th October 1985 and they did nothing for 16 days before the Court sitting in Chambers, dismissed their appeal on 12th November 1986. They could have rushed into court an application for extension of time within which to file brief which could probably have stopped the court from proceeding to dismiss the appeal in Chambers for want of prosecution.

It is important to bear in mind that of the four challenges mounted against the dismissals so far, only one, CHUKWUKA & ORS V EZULIKE (supra) was conducted in the absence of counsel or litigants. And this is understandable. The appeal was fixed for hearing on the day and they failed to attend after due notification. The court therefore acted properly in dismissing the appeal. I repeat again that no appeal was dismissed behind counsel in Chambers suo motu and without any notification to counsel or litigants. I shall have more to say on this soon.

SUPREME COURT RULES, 1985 AS AMENDED UP TO 1991

The instant application is thus the fifth in the series of challenges on the power of the Supreme Court to dismiss an appeal for want of prosecution. It fails to be decided now on Order 6 Rule 3(2) of the Rules of the Supreme Court, 1985 as amended in 1991. It reads -

"3(2) Where an appellant has failed to file a Brief within the period prescribed by this Order and there is no application for extension of time within which to file the Brief, the Court may proceed to dismiss the appeal in Chambers without hearing argument."

To me the Chambers element contained herein in a marked and serious departure from the former provisions. For the first time the Supreme Court is empowered suo motu and without any safeguard whatsoever to dismiss an appeal for want of prosecution. The old Order 6 Rule 3(2) under the 1985 Supreme Court Rules, was subject to the proviso to Order 9 which ensured that no appeal was dismissed unless on the papers before the Court it lacked merit. The 1991 Amendment removed that useful proviso as shown above

As I said Order 6 Rule 3(2) originally was subject to the proviso to Rule 9 (1) of Order 6 to the effect that a dismissal on merit shall be where the court is satisfied that prima facie on the record, the appeal has no merit. The 1991 amendment substituted "struck out" for "dismissed" in Rule 9(1) and also deleted completely the last sentence in the substantive Rule 9(1) as well as the proviso. In short, when an appellant fails to file his brief, a respondent can now only apply to the court for the appeal to be struck out and not to be dismissed. In which case an appeal so struck out can be

relisted on application to the court. So that under the present state of the

Rules, there are three different sanctions against an appellant who fails to file his brief within time as follows. -

1. *Under Order 6 Rule 3(2) - The court may proceed to dismiss the appeal in Chambers without a hearing. There is no provision that the dismissal is on merit as was the case previously.*

2. *Under Order 6 Rules 9- The Respondent may apply to the court for the appeal to be struck out for want of prosecution.*

3. *Under Order 6 Rule 5(7) - Any party (including an appellant) who fails to file its Brief within time shall be liable to pay penalty of five naira per day for non-compliance.*

There is no problem with (2) or (3) above, because the appeal will still be available for disposal on merit. The problem is with (1) were the court suo motu and in Chambers without any notification to either side proceeds to dismiss an appeal for want of prosecution. The question now is - is such an exercise a valid exercise of judicial power? Should there be notice to the parties or not? If not, what are the consequences?

I have endeavored to show above that right from OGBU & ORS V URUM & ANOR(supra) up to OYEYIPO & ANOR V OYINLOYE (supra) *the Supreme Court properly acted and dismissed the appeals after satisfying itself that either -*

(1) The parties and or their counsel have notice of the appeal coming up for hearing as in OGBU & ORS V URUM & ANOR (Supra) CHUKWUKA & ORS V EZULIKE (supra), and YONWUREN V MODERN SIGNS NIG LTD (supra) or

(2) That the respondent's motion to dismiss the appeal for want of prosecution was duly served on the appellant who had ample time to react if he wished as in OYEYIPO & ORS V OYINLOYE (supra)

There is clearly in my view therefore, no precedent of this Court to cover the present situation where the Supreme Court suo motu and on its own volition, decided to list an appeal for dismissal for want of prosecution, when the respondent who is also empowered to do so (see Order 6 Rule 9) had not made an application to that effect, and when the appeal was not listed for hearing in open court. And more importantly, when the parties, particularly the appellant, had received no notice or intimation from the court that the appeal would be so dismissed. I am inclined to agree with the applicants' counsel that the dismissal of the appeal without any notification to them that the said order was going to be made, was an infringement of their fundamental right to fair hearing and completely contrary to the principles of the administration of justice which rendered the dismissal null and void.

The rules of natural justice are applicable to hearing of the court whether in

open court or in Chambers and a violation of these rules as in this case, will undoubtedly result in the nullification of the proceedings. The service of process on the appellants so as to enable them know and or defend the relief sought by the court against them and their reaction thereto must be those fundamental conditions required before the Supreme court could have competence and jurisdiction to have dismissed the appeal in Chambers. (See for example CRAIG V KANSEN (1943) 1 AER108; SKENCONSULT V UKEY (1981) 1 S.C.6 MADUKOLU V NKEMDILIM (1962) 1 All NLR 587. Sitting in Chambers must not be taken as a substitute for issuance and service of process. Sitting in Chambers to me presupposes that all papers including motions, affidavits, counter-affidavits, briefs and so an, necessary for the determination of any matter before the Justices in Chambers must have been duly filed and served by and on the parties. So that although the parties may not know the date when the matter will be taken in chambers, they will be satisfied that they have made their views known in the papers before the court. But even then, I do not think it will be a bad idea if parties are aware of, or informed of dates when their matters will be taken in chambers. Because if they know the dates, parties or counsel would then be in a position to monitor the result of such matters instead of (as is often the practice now), counsel merely waiting in the cold to receive the court's order through the post! Invariably, you find that court's orders have expired before they are received by counsel, thus necessitating another application being brought on the same matter.

In the case of the Supreme Court deciding to dismiss an appeal suo motu under order 6 rule 3(2) above, it is my view that Hearing Notices must be sent to the parties. If that is done, the appellant in particular would be able to react to such a proposal to dismiss the appeal for want of prosecution. Did I hear you say that the appellant has gone to sleep for failing to file his brief in time, and that it is not the duty of the court to wake him up from sleep? My short answer to that is that there is no harm in waking up someone who has over-slept. But if you decide not to wake up the sleeping appellant, please do not kill him in his sleep! By suo motu dismissing his appeal without any notification and then turning round to say that you cannot relist the appeal dismissed for want of prosecution, you have literally killed him as you have thereby prevented him from having his appeal decided on merit and, for ever too. That, in my view is an unjust "justice."

In UGBU & ORS V URUMANOR (supra) Bello J.S.C. said -

"It seems to me that on the authority of OBIMONURE V ERINOSHO (1966) 1 All NLR 250, the inherent jurisdiction of a court to set aside its judgment or order is limited to judgments or orders which are

nullities."

Nnamani J.S.C. who also took part said -

"If there is a fundamental defect which goes to the issue of jurisdiction and competence of this court on the day it made its order, it would set aside its judgment. (See the decision of this court SC.50/1980, SKENCONSULT (NIG) LTD V. GODWINSEKONDY UKEY delivered on B 16.1.81)"

And in OYEYIPO & ANOR V OYINLOYE (supra) Karibi-Whyte J S C also said -

"There is no doubt as Chief Afe Babalola conceded, decision of OGBU V URUM (supra) applied only where the court validly exercised C jurisdiction. Accordingly where the contention that this court had violated the rules of natural justice in coming to its decision, the decision will be a nullity if the contention succeeded, and this court can *ex debito justitia* set it aside."

I agree with the views expressed above in their entirety. However, the statement of Oputa J.S.C. in CHUKWUKA & ORS V EZULIKE (supra) that - D

"Arguments that the order of 12th November, 1985 (Ex.D) was a nullity will be valid before a court exercising appellate jurisdiction to review that order. I wonder which court in Nigerian hierarchy of courts has appellate jurisdiction to review judgments of the Supreme Court? The answer is E none."

is only partially correct. Certainly, there is no court in Nigeria which can review the judgments of the Supreme court. But where there is a fundamental defect, as in this case, which goes to the issue of jurisdiction and competence, a court of law will on application *ex debito justitia* set aside its proceedings. As was stated in MACFOY V U.A.C. (1962) A.C.152 at 160 per Denning L.J. - F

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes G convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

The issue of nullity did not arise in any of the four "challenge cases" before the Supreme court which I have referred to above. But I say H the issue of nullity is involved in the present suit which was ably raised by the learned counsel for the appellants/applicants and with whom I agree. It has given me serious concern. If the Supreme Court must continue to dismiss appeals for want of prosecution under order 6 Rule 3(2) of the

rules, it must comply with the basic elementary requirements for the administration of justice before it could have competence and jurisdiction. The Supreme Court cannot properly in my view pretend to dismiss appeals for want of prosecution on merit when we all know that it was not on any merit. All previous dismissals were on merit as the judgments or orders show. The rules which permit the court to sit in chambers to transact certain matters, I believe, do not envisage that due issuance and service of process would be thrown to the wind and that the court will be "secretly" (Courtesy) of Chief G.O.K. Ajayi SAN in the on-going Abiola Treason Trial), dismissing appeals in Chambers suo motu and without notification to any of the parties. That is clearly unsupportable.

The attitude of this Court, I believe, has always been that whenever it is possible to determine a case on its merit, the Court should not cling to technicalities to refuse a complainant the opportunity of being heard. It is also I believe, the judicial stand of this Court, not to dismiss an appeal for want of prosecution unless the court is satisfied that the appeal has no merit anyway (see OYEYIPO & ANOR V OYINLOYE (supra), STATE V GWONTO (1983) 1 S.C. NLR 142). Furthermore, the appellants/applicants have exhibited to this motion their Brief of Argument for the appeal. In addition, learned counsel for the applicant, Mr. Ebue has also fully accepted responsibility for the delay in filing the applicants, brief. That is as it should be, It has always been the attitude of this Court not to punish applicants for the mistake or negligence of counsel. The court will normally overlook such lapses and accommodate such applicants in the overall interest of justice. (see DOHERTY V DOHERTY (1964) 1 All NLR 299. BOWAJE V ADEDIWURA (1976) 6 S.C. 143). So I say let it be in this case.

SUMMARY

1. This Court in OGBU & ORS V. URUM & ANOR (supra) YONWUREN V. MODERN SIGNS (NIG) LTD (supra) CHUKWUKA & ORS V. EZULIKE (supra), and OYEYIPO & ANOR V OYINLOYE (supra) decided that the Supreme Court has no statutory jurisdiction under the 1979 Constitution, or the Supreme Court Act, 1960 or the Supreme court rules, or under the inherent jurisdiction of the court to restore or relist an appeal dismissed for want of prosecution. These decisions remain valid and binding having regard to the facts and the circumstances under which each and everyone of them was made

2. The decision to dismiss the appeal for want of prosecution in each and everyone of the case referred to above was taken after the in

tended victim i e the Appellant in each case was either heard or given the

opportunity to be heard as Hearing Notices of the appeal and or Motion to Dismiss same were served on the parties, or counsel as appropriate.

3. The decisions in all the decided cases above do not extend to cases of nullities. In other words, in a case of a fundamental breach which goes to jurisdiction and competence; the Supreme Court would have inherent jurisdiction to set aside its order or judgment.

4. In all the decided cases referred to above the Supreme Court did not on its own volition, single handedly, sum motu and without intimation or notification to any of the parties, proceed to dismiss any appeal for want of prosecution as was done in the instant case.

5. The case before us now therefore has no precedent because none of the decided cases is authority for the proposition that the Supreme Court can suo motu quietly and privately arrange to dismiss an appeal for want of prosecution in Chambers without any prior notification or intimation to the parties to that effect.

6. Sitting in Chambers is no substitute for regular issuance and service of process on litigants and or counsel.

CONCLUSION

It is for the above reasons that I grant applicants' application. I accordingly order as follows -

(a) The order of this Court made suo motu on 8th day of March, 1995 dismissing applicants' appeal in Chambers is hereby declared null and void and it is set aside.

(b) The appeal No.SC242/93 is restored to the Cause List forthwith.

(c) The time for filing Appellant's Brief is extended by 15 days subject to payment of penalty for late filing.

(d) No order as to costs.

OGWUEGBU JSC

I had a preview of the ruling just delivered by my learned brother Ogundare, J.S.C. I agree with his reasoning and conclusion. I too would dismiss the application.

On 8th March, 1995, this court pursuant to Order 6 rule 3(2) of the Supreme Court Rules, 1985 as amended, dismissed the appellants/applicants' appeal in chambers for failure to file the appellants' Brief within the period prescribed by the rules and there being no application from them for extension of time within which to file their Brief.

On 6:11:95, they brought a motion on notice for the following or-

ders:-

"(a) to set aside its Order of the 8th day of March, 1995, made in chambers dismissing the applicants' appeal and to restore the appeal in the Court's Cause List.

(b) On the appeal restored to enlarge the time prescribed by rules of Court for filing the appellants (sic) brief subject to payment of the penalty for late filing."

The six grounds upon which the application is based are set out in the schedule to the motion paper. The application is supported by an affidavit of eighteen paragraphs deposed to by Mr. H.C.F. Ebue, learned counsel for the applicants and a brief of argument.

In the affidavit in support of the application, the deponent Mr. Ebue admitted that he did not file the appellants' brief of argument within ten weeks from the receipt of the record of proceedings and before 8th March, 1995 when this court dismissed the appeal. His reasons for his failure to do so were domestic and not relevant in an application of this nature.

The schedule to the motion paper raised certain fundamental and Constitutional issues which I think it is desirable for me to make a few comments, if only for emphasis.

The applicants in their brief of argument submitted the following two issues for consideration in the application:

"(a) Is this court competent to set aside its decision shown to be invalid, or null and void or in breach of the provisions of the Constitution or in error?

(b) Was the dismissal of the applicants' appeal in their absence and suo motu by the court constitutional and in consonance with the rules of this court as amended in 1991.

The learned applicants' counsel has argued that every court of record has the inherent power to set aside its judgment or order affected by a fundamental defect or which is a nullity. He relied on the cases of *Skenconsult Nigeria Ltd. v Ukey* (1981) 1 S.C.6, *Craig v Kanseen* (1943) K.B.256 at 262-263 and *Agunbiade v Okunuga & Company* (1961) All N.L.R 110.

On the second issue, counsel submitted that this court expressly acted under Order 6 rule 3(2) of its Rules in dismissing the appeal. He submitted that the rule did not specifically say that the court was to act *suo motu* and that it must be interpreted to conform with the principle of justice that a court is without power to grant a litigant that which he did not ask for.

He submitted further that rule 3(2) of Order 6 came before the

point where the rules made provision for filing of briefs. It is therefore not to be presumed that the maker of the rule was anticipating the provisions he would make for filing of brief.

It was also contended that the provision for filing of briefs was made in a later Rule - (Order 6, Rule 5), that penalty for default in filing briefs within the stipulated period was contained in the former Order 6, Rule 9 (1) and under that rule, application for dismissal for failure to file brief was at the option of the respondent.

We were also referred to the cases of Chief Iro Ogbu & Ors v Chief Ogburu Urum & Or. (1981) 4 S C I, Yonwuren & Ors, v Modern Signs (Nigeria.) Ltd. & Ors. (1985) 16 N.S.C.C. (pt. 1) 243.

The court had not the benefit of the assistance of the respondents' counsel who did not file any brief of argument and was not present at the hearing of the application even though he was aware of the hearing date.

There is a distinction between order 6, rule 3(2) and order 6, rule 9 of the Rules of this court. They provide:-

Order 6, Rule 3(2)

"Where the appellant has failed to file a Brief within the period prescribed by this Order and there is no application for extension of time within which to file the Brief, the Court may, subject to the proviso to Rule 9 of this Order, proceed to dismiss the appeal in chambers without hearing argument."

Order 6, Rule 9:

"If an appellant fails to file and serve his brief within the time provided for in rule 5 of these Rules, or within the time as extended by the Court, the respondent may apply to the Court for the appeal to be struck out for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by the leave of the Court."

Rule 9 envisages a situation where the respondent is vigilant and can even bring his application within twenty four hours after the appellant's default to file his Brief. Rule 3(2) or Order 6 is to guard against a situation where both parties are indolent or asleep as it were. In a situation such as this, the court as the impartial umpire has to take steps to apply the rules of the game and get rid of stale appeals swelling the number of pending appeals. The rule is also intended to bring an end to litigation.

Of course the court does not apply Rule 3(2) in a reckless manner. Whereas the respondent can apply for the appeal to be struck out within one day of the default in filing the appellant's brief, the court does not do so. It usually acts after giving the appellant a reasonable time to wake from

his slumber. In this case the last date within which the appellants ought to

have filed their Brief was 16:2:94. This court dismissed the appeal on 8:3:95 more than one year after the default and without any application by them for extension of time to file their brief.

In the light of the foregoing, the applicants cannot be heard to argue that the dismissal of their appeal without any notice to them was an infringement of their fundamental right to fair hearing or a breach of section 33 of the constitution. I hold that such a long delay was a demonstration of an intention to abandon the appeal.

It will be necessary to ascertain the precise content of the right to fair hearing under section 33 of the Constitution having regard to the facts and circumstances of this application. Here are the appellants who by the rules of the court defaulted in taking steps to file their Brief within the time prescribed. They also failed to apply to the court for enlargement of time to file the same on the expiration of the time. They did not submit their case for consideration as required by the rules of the court. There was no inconsistency between the power exercised by the Court in the case and the provisions of section 33(1) of the Constitution. They expected the court to notify them of what it was going to do when they had not legal right to be heard as a result of their inaction. See *Oyeyipo & Or. v Oyinloye* (1987) 1 N.S.C.C. 183. Although the right to be heard is of wide application and great importance, it must be confined within proper limits and not allowed to run wild. See *London Borough of Hounslow v Twickenham Garden Dev. Ltd.* (1970) 3 All E.R. 326 at 347.

In the peculiar circumstances of this application, the failure to notify let alone hear the applicants before their appeal was dismissed did not infringe section 33(1) of the 1979 Constitution.

The Chief Justice of Nigeria had made the rules in exercise of the powers conferred on him by section 216 of the 1979 Constitution read along with section 274 of the same Constitution relating to existing laws. There is nothing in those Rules authorising the relisting of or hearing of an appeal which had been dismissed under Order 6 rule 3(2) of the Rules. By the dismissal of such a case, the appeal had been brought to an end and the judgment cannot be reviewed except in certain cases which are not applicable here. See *Yonwuren & Ors. v Modern Signs (Nigeria) Ltd & Ors* (1985) 1 N.S.C.C. 243. There is no longer a *lis pendens* in respect of which a restoring order can be made.

Finally, I have also drawn support from the case of *Oyeyipo & Or. v Oyinloye* supra decided by a panel of seven Justices of this court. That decision is sound and there is no reason now to depart from it. Even

though the dismissal of the appeal in that case was at the instance of the

respondent acting under Order 6 Rule 9(1) of the Supreme Court Rules, 1985, it was a dismissal on the merit as under rule 3(2) of Order 6 of the present Rules. The hearing in chambers did not make the proceedings less fair as was argued by the learned applicants counsel.

This court does not have the power under its rules, the law or under its inherent jurisdiction to restore the appeal in its cause list. See John Chukwuka & Ors v Ezulike (1986) 5 N.W.L.R 892, Yonwuren v Modern Signs (Nigeria) Ltd. supra, Chief Iro Ogbu & Ors v Chief Ogbaru Urum & Or. supra, Sodeinde Bros. Ltd v A C B Ltd. (1982) 6 S C 137 and Asiyanbi v Adeniji (1967) 1 All N L R 82

In the final result, for the reasons given above and for the fuller reasons in the lead ruling of my learned brother Ogundare, J S C, I, too, will dismiss the application. I adopt all the consequential Orders in the said ruling.

ONU JSC

Having been privileged before now to read in draft the Ruling of my learned brother Ogundare, J.S.C. just delivered I entirely agree with his reasoning and conclusion that this appeal is devoid of any merit and it is accordingly refused by me.

I only wish to add by way of emphasis the following contribution of mine.

Rules of court, it must be stressed, must *Prima facie* be obeyed. As Lord Guest in the Privy Council had occasion to observe in Ratman v. Curmarasary (1965) 1 WLR 88:

"The rules of court must Prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be material upon which the court can exercise its discretion."

The above dictum was cited with approval by this court in Bank of Baroda & Anor v. Mercantile Bank Limited (1987) 3 NWLR (part 60) 233 at 239. See also Williams v. Hope Rising Voluntary Fund Society (1982) A.N.L.R.1.. The clear principle established by these authorities therefore is that not only must the rules be *prima facie* obeyed but that if there is non-compliance with them, it must be explained and if not, unless it is of a minimal kind, no indulgence of the court can be granted. See In Re Appolos Udo (1987) 4 NWLR (part 63) 120 at 125-127; Ebueku v. Sunmola Amola (1988) 2 NWLR (part 75) 128 and NIPOL Ltd., v Bioku Investment

Co.Ltd (1992) 3 NWLR 272 at 753 . In the light of principle laid

down above, obedience to the Supreme Court Rules cannot be treated with any lesser sanctity and enforcement since they too must be obeyed.

With the foregoing as background, the appellants/applicants, in the instant appeal being dissatisfied with the judgment of the Court of Appeal, Enugu Division and delivered on 18th January, 1993, appealed to this Court against that decision. Pursuant thereto, the record of appeal having been transmitted to this court on 8th December, 1993 in conformity with Order 7 rule 4 of the Supreme Court Rules (hereinafter referred as the Rules), the applicants who were presumed to have received their own copy of the record on the latter date ought, unless otherwise shown, to have filed their Brief of Argument on or before 16/2/94 i.e. ten weeks thereafter vide Order 6 Rule 5 (1) (a) of the Rules. The applicants having defaulted to do so within the stipulated time, this court sitting in Chambers *suo motu* and mandatorily dismissed their appeal for want of prosecution pursuant to Order 6 rule 3(2) of the Rules on 8/3/95. *The invocation of the sanction against an errant appellant who fails to file his Brief within the stipulated time under order 6 rule 3(2) (ibid) is but one of three different sanctions, the other two being -*

1. Under Order 6 rule 9 of the rules wherein the respondent may apply for the appeal to be struck out for want of prosecution.

2. Under Order 6 Rule 5(7) wherein any party (including the appellant) *who fails to file his Brief within time shall be liable to pay penalty of five naira per day for non-compliance.*

There is of course, a situation where both parties have filed their Briefs but the appellant voluntarily withdraws or disengages from litigation Vide Order 6 rule 3(3).

In bringing the application giving rise to this appeal on 6th November, 1995, the applicants supplicated this court for the following reliefs:

(a) to set aside its order of the 8th day of March, 1995, made in Chambers dismissing the applicants' appeal and to restore the appeal in Court's Cause List.

(b) On the appeal restored to enlarge the time prescribed by rules of Court for filing the appellants' brief subject to payment of the penalty for late filing.
upon the following grounds:

1. *The dismissal of the appellants' appeal without any notification to them that the said order was going to be made is an infringement of their fundamental right to fair hearing and contrary to the principles for the administration of justice which rendered the dismissal null and void.*

2. *The said dismissal of the appellants' appeal in chambers which*

thereby confirmed the judgement of the court below in favour of the respondents offended the fundamental principle of justice, namely, awarding to a party in litigation that which he did not ask for, which rendered the same null and void and liable to be set aside by this court which made it.

3. Order 6 Rule 3(2) under which the order of dismissal was made is inconsistent with S.33 of the Constitution and is to that extent null and void. B

4. Order 6 Rule 3(2) is inconsistent with order 6 Rule 9 as amended in 1991 and is by virtue of the said amendment impliedly repealed to the extent of the inconsistency.

5. The said Order 6 Rule 3(2) coming immediately after the rule dealing with application for leave to appeal or extension of time to appeal or to ask for leave to appeal and before the rule dealing with preparation and filing of briefs of argument in appeals is inappropriate for failure to file brief within the prescribed period. C

6. The rules of this Court as amended in 1991 having prescribed a penalty in Order 6 Rule 7 for late filing of briefs the said Order 6 Rule 3(2) which preceded the rule providing for the said penalty cannot override the latter rule as the law maker could not have intended to provide double sanctions for the default. D

Facts deposed to in the applicants' affidavit in support of their application, the salient paragraphs of which are well set out in the lead judgment do not, in my view, call for repetition here, I shall, as and when necessary, make comments thereon as the occasion permits in this Ruling. It will suffice for now to observe, that in paragraph 17 of their affidavit they averred that they had prepared the appellants' Brief dated 6/12/95 no doubt, in anticipation of their appeal being eventually restored on the Cause List. F Be that as it may, in their Brief in support of this application they have submitted two issues for our determination thus:

"(a) Is this Court competent to set aside its decision shown to be invalid, or null and void or in breach of the provisions of the Constitution or in error? G

(b) Was the dismissal of the applicants' appeal in their absence and *suo motu* by the Court constitutional and in consonance with the rules of natural justice and the rules of this Court as amended in 1991" H

As my answer to issue (a) which is devoid of any controversy is clearly in the affirmative, I will set about answering issue (b) in the light on the six "challenges" set out in the Schedule set out above under the nomenclature of grounds or challenges.

CHALLENGE NO. 1

I am of the firm view that the dismissal of the applicants' appeal without any notification to them that the said order was going to be made neither infringed their fundamental right to fair hearing contrary to the principles for the administration of justice nor rendered the dismissal null and void. This is because of the express provisions of order 6 rule 3(2) (ibid)

B which clearly states that -

"(2) Where the appellant has failed to file a Brief within the period prescribed by this Order and there is no application for extension of time within which to file the Brief, the Court may subject to the proviso to Rule 9 of this Order, proceed to dismiss the appeal in chambers without hearing argument."

C Rule 9 referred to above provides that -

"(9) If an appellant fails to file and serve his Brief within the time provided in rule 5 of these Rules, or within the time as extended by the Court, the respondents may apply to the Court for the appeal to be struck out for want of prosecution. If the respondent fails to file his Brief, he will not be heard in oral argument except by leave of the Court."

D If "within ten weeks of the receipt of the record of Appeal" vide Order 6 rule 5 (1)(a), the applicants for no just cause following their default initiate "no application for extension of time within which to file the Brief," the court operating from its chambers for the easy despatch of cases, has E no business waking them from their slumber or lethargy but is empowered to suo motu dismiss the appeal.

F It ought to be remembered that it is the same Constitution of the Federal Republic of Nigeria, 1979 which in Section 216 empowers the Chief Justice of Nigeria to make rules for regulating the practice and procedure of the Supreme Court that is being alleged to have been breached in its fair hearing and administration of justice provision. See Baba v NCATC (1991) 5 NWLR (part 192) 388. It is preposterous to suggest that the dismissal of the appeal with the Court acting suo motu, could be regarded as null and void. This is because -

G (a) *The Supreme Court sitting in chambers to transact its business is doing no lesser even-handed administration of justice and keeping within its purview the audi alteram partem rules than when it sits in open court all for its convenience and facility in the expeditious disposal of cases.*

H (b) *even where it sits in the open, it is within its powers to exclude the public in pursuance of the inherent judicial powers vested in it, by Section 6(6)(a) of the Constitution (ibid).*

(c) *The Supreme Court may, while sitting in chambers send back*

matters into open court for arguments to be proffered in circumstances where the affidavits and or documents filed are contentious in any form.

Thus, when the learned Counsel for the applicants Mr. Ebue, by his own admission in the affidavit he swore to on 6th November, 1995, in paragraph 3 deposed to the effect -

"That I did not file the appellants' brief within ten weeks from the receipt of the copy of the record of proceedings transmitted to this Court and had not filed it by the 8th of March, 1995, when this Court dismissed my clients' appeal in chambers, for want of prosecution"

he was thereby asking for the Court's indulgence and at the same time challenging it for doing what the rules empowered it to do. The learned counsel having in paragraph 11 of his affidavit deposed to the fact that he was lulled to a false sense of security by the provision of the rules of this court for the payment of N5.00 penalty for every day he was out of time, failed to disclose what he was doing between 14th October, 1994 when, in his own words, "Nemesis caught up" with his wife who died, until 8th March, 1995 when this court dismissed his clients' appeal in chambers. The exercise of this power suo motu conferred on this court by rule 3(2) of Order 6 has been given judicial expression in several cases, the culmination of which is the recent and similar case to the one in hand of *Oyeyipo & Anor v. Oyinloye* (1987) 1 NWLR (Part 50) 356; (1987) 1 NSCC 183, wherein Karibi-Whyte, J S C in his lead Judgment stated the law *inter alia* thus:-

"I think the regulation of the exercise of the right of appeal and of the practice and procedure thereto, enables the Chief Justice to determine when there will be hearing and the form the hearing and the form the hearing will take. Hence it has been provided that a party who has not filed his brief of argument is only entitled to oral hearing of this Court. See Order 6 rule 5(5). Oral argument is only allowed at the hearing where brief of argument has been filed to emphasis and clarify the written argument. Accordingly, as in this case, where no written brief had been filed and there was no leave of the court to dispense with the requirement, appellant has not brought himself within the scope of being heard by the Court. Concisely stated, applicant has not satisfied the conditions necessary for the hearing of his appeal in Court. He was in fact not entitled to a hearing, oral or written. The provisions of Section 33(13) relied upon by the applicant is applicable to proceedings in Court for the determination of right. Applicant has not submitted his case for consideration as he was required by the rules of this Court to do. There is clearly no inconsistency between the

power here exercised and the provision of section 33(1).

I agree that the rules of natural justice are applicable *to hearings of the Court whether sitting in Chambers or in Open Court, where the rules of natural justice are properly applicable, a violation of the rules will result in the nullification of the proceedings. However, the rules are applicable to a party whose case is properly before the Court and not where a party has not satisfied the conditions of being heard. In my opinion, where the party, as in this case the applicant, has not satisfied the conditions required for hearing his case, the Court will not be competent to hear him - See Madukolu & ors V. Nkemdilim & ors (1962) 1 All NLR 582. The right to be heard having not been earned cannot be exercised. In my opinion, there is no question of the breach of a non-existent right. This court has pointed out in Yonwuren v. Modern Signs (Nig.) Ltd (supra), that a party who has failed or neglected to submit his case for consideration cannot complain of a denial of hearing. The failure or neglect per se tantamounts to an abandonment of the appeal.*

The other point strongly canvassed by Chief Williams for the appellant was that the hearing of the application to dismiss the appeal in Chambers was not a public hearing and was a violation of Section 33(13) of the Constitution of 1979. The enabling rule of Court i.e. Order 6 rule 3(1) which has already been reproduced provides that where appellant has failed to file a brief in respect of his appeal and having failed had also not sought an extension within which to do so an application to dismiss the appeal on grounds of failure to file brief of argument may be heard in Chambers without hearing argument - Order 6 rule (2).. The Court is also empowered to dismiss an appeal, in hearing an appeal in chambers without hearing argument.

The purpose of hearing in chambers is to enable the hearing of the application before the Court on the material before it. Where it is required to hear arguments from the parties the application could be adjourned into the open court. In the instant case, the application to dismiss the appeal was sufficient notice to the applicant who was aware of the fact that he had not filed his brief of argument, and had not even sought an extension of time to do so.

.....Service on him of the date of hearing of the application was not necessary, since no argument need be heard in consideration of the application. Applicant cannot exercise his right of appeal under Section 213, since he had not complied with the procedure prescribed for the exercise.

The Court sitting in chambers was considering whether the applicant's appeal ought to be dismissed for want of prosecution. All the materials for so deciding was (sic) before the Court."

See also Iro Ogbu v Urum (1981) 4 S.C.I. and Yonwuren v. Modern Signs (Nig) Ltd (1985) 1 NWLR (Part 2) 244.

CHALLENGE NO 2

The second challenge, the consideration of which overlaps my treatment of CHALLENGE NO 1 is to the effect that the said dismissal of the applicants' appeal in chambers which thereby confirmed the judgment of the court below in favour of the respondent offended the fundamental principle of Justice, namely, awarding to a party in litigation that which he did not ask for and which rendered the same null and void and liable to be set aside by this court which made it. It is enough to point out that the fundamental principle of law set out in the proposition argued herein is primarily applicable where a civil suit or proceedings is being fought by the parties thereto in open court; not as here, where a procedural rule governed by the rules of court and obedience to which is enjoined to oil the machinery of justice, is being flouted. In the application of Order 6 rule 3(2) of the Rules the court is empowered to suo motu invoke its powers, which after all are products of its inherent powers as well as by virtue of the invocation of powers conferred on the Chief Justice of Nigeria to make rules regulating the practice and procedure pursuant to Section 216 of the Constitution (ibid). Consequently, I am of the View that this court was neither confirming the judgment of the court below by acting suo motu to dismiss the applicants' case for want of prosecution nor awarding to the respondents that which they did not ask for but rather for abandoning their appeal.

See Awijo v. Olunlade (1975)1 NMLR82; Tanko Tometi v. Ajagunna & ors (1975)1 NMLR 122; Obioma v. Olomu (1978)3 S.C.I.; Awoyegbe v. Ogbeide(1988)1 NWLR(Part 73) 695.

CHALLENGE NO. 3:

The argument under this challenge is that Order 6 Rule 3(2) of the Rule under which the order of dismissal was made is inconsistent with Section 33 of the Constitution, and is to that extent null and void.

In view of my earlier conclusion that like all laws and subsidiary enactments which found their existence and sustenance from the Constitution, rules of court being themselves also products of the Constitution, cannot stricto sensu be said to be inconsistent with a section of the Constitution e.g. Section 33 thereof. The Constitution from which they both emanate being one and the same document, the situation here is not to be likened to provisions of two statutes which are at variance one with the

other. While section 33 of the Constitution provides for fair hearing - a

genus of which is the audi alteram partem rule or the rule of natural Justice, Order 6 Rule 3(2) (ibid) is a creation of the Constitution emanating from its section 216. It is a cardinal rule of construction that in seeking to interpret a particular section of a statute or a subsidiary legislation, one does not take the section in isolation, but one should approach the question of the interpretation on the footing that the section is part of a greater whole.

See James Orubu v. National Electoral Commission (1988) 5 NWLR (Part 94) 323.

While rules of Court are lubricants of the machinery of Justice and they contain minute details of the Various steps which a litigant is expected to take in the process of getting the court to hear and adjudicate on the different types of cases which come before it vide Akanbi v. Alao (1989) 3 NWLR (Part 108) 118 at 136, a fair hearing under section 33 of the Constitution which is distinguishable from what the rules provide, presupposes that the court or tribunal shall give equal treatment, opportunity and consideration to all concerned in a case.

See Sheldon v. Bromfiel Justices (1964) 2 QB 573. Indeed, as Nnaemeka - Agu, JSC lucidly put it in Kotoye v. C.B.N. (1989) 1 NWLR (Part 98) 419 at 448:

"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."

The above principles are what they should be for cases ready for hearing but not with regard to what steps one should adopt for getting cases ready for hearing and to which the rules of court are specifically and specially directed. Where a matter on the papers filed in court is contentious, it will usually be remitted to the open court for hearing and not summarily dealt with; not so with Rule 3(2) of order 6 which is aimed at eliminating delay which denies justice and ensuring the expeditious disposal of cases in chambers.

CHALLENGE NO. 4

As to whether Order 6 Rule 3(2) is inconsistent with Order 6 Rule 9 as amended in 1991 and if by virtue of the said amendment it is impliedly repealed, it is important to stress that while powers in order 6 rule 3(2) are those conferred on the court to suo motu dismiss an appeal in chambers for failure on the part of an appellant to file a Brief for want of prosecution,

Rule 9 empowers the Respondent to move the Court to strike out the appeal for want of prosecution. The only superfluous words used in the proviso in Rule 9 which in my view do no violence to the purport of Rule 9 are those which stipulate in the underlined portion hereunder thus :

.....*"If the respondent fails to file his Brief, he will not be heard in oral argument except by leave of the Court."*

Since, however, Rule 9 does not evince that the Court is acting on its own motion but acts on the Respondent's motion, the provision cannot be rightly said to be inconsistent with Rule 3(2) (ibid) in which the Court is the prime mover and as master of its own house as well as guardian of its rules.

The difference between these two rules, in my opinion, lies in the fact that while under rule 3(2) no briefs are filed since the appellant is not granted a hearing in chambers written or oral, under Rule 9 the Respondent who has waited in vain for the Appellant to file his brief, applies by way of a motion and in writing, for appellant's appeal to be struck out for want of prosecution. At that stage his asking for leave to be heard in oral argument would be premature.

CHALLENGE NO. 5 AND 6.

For the answers to the above challenges which I wish to consider together, it is my desire to stress that the decided authority of Oyeyipo v Oyinloye (supra); a host of earlier ones and my earlier comments on Challenges 1 to 4 above, are enough to dispose of these issues. Suffice it to add, firstly, that the contention that Order 6 rule 3(2) coming immediately after the rule dealing with extension of time to appeal and before the rule dealing with preparation and filing of briefs of argument in appeals, is inappropriate for failure to file brief within the prescribed period, becomes non sequitur. This is because each rule is made to provide certain steps to be taken for the disposal or facilitation of the hearing and disposal of cases or interlocutory applications leading to the effectual disposal of such cases. The fact that a rule is positioned to another in the rules where each deals with matters which are not cognate one to the other is, in my respectful view, immaterial. They are made consciously to lubricate the machinery of justice and once they serve that role, so good. In this wise, since both counsel and their clients are all equally involved in facilitating the administration of justice, the going into slumber of one without waking up seals the fate of the appeal from being heard. The rules in essence, provide the checks and balances in the litigation process and penalties provided ought strictly to be avoided in order to ensure strict obedience and compliance therewith.

Secondly, on the argument that the rules of this court as amended in 1991 having prescribed a penalty in Order 6 Rule 7 for late filing of briefs

the said Order 6 Rule 3(2) that preceded the former cannot override the latter rule as the lawmaker could not have intended to provide double sanctions for the default. I need only stress that while Order 6 Rule 7 comes in for consideration where the applicant has to a large extent acted in obedience to the Court's rules, in Order 6 Rule 3(2) the act of the B applicants founded, as it were, on disobedience through abandonment of the appeal, the sanctions imposed by the lawmaker existing in separate independent, though interlaced provisions at they do, in my respectful view, provide no double sanction.

In conclusion, by paragraph 17 of the affidavit sworn to in support C of the application wherein it is averred on applicants' behalf -

"That I have also prepared the appellants' brief in the substantive appeal which I shall file, paying any penalty required, the same day the instant application is granted and the appeal restored"

they (applicants) who were earlier depicted as belligerent or confrontational, D are now shown to be appealing to the Court for the exercise of its discretion. They cannot be blowing hot and cold at the same time. See Ezomo v. A G of Bendel State (1986) 4 NWLR (Part 36) 448 at 462 following Watson v. Cave (1881) 17 CH.D. 23.

It is for these reasons and the fuller ones contained in the lead E Ruling of my learned brother Ogundare, J.S.C. that I, too, refuse the application. I abide by the consequential orders inclusive of those as to costs contained therein.

IGUH JSC

F I have had the privilege of reading in draft, the leading ruling just delivered by my learned brother, Ogundare, J S C and I agree entirely with his reasoning and conclusion therein.

In view, however, of the recurring nature, before this court, of the legal principle involved in the application, I find it desirable to say a few G words of my own in connection with the main issues that arise for consideration,

The facts that led to the filing of this application have been exhaustively set out in the leading ruling and no useful purpose will be served in my recounting them all over again. It suffices to state that the first arm H of the application before the court touches on the inherent jurisdiction of this court. It is for an order to set aside the order of this court made in chambers on the 8th day of March, 1995 dismissing the applicants' appeal

for want of prosecution and to restore the appeal on the court's cause list.

The second arm of the application is for an order to enlarge the time prescribed by the Rules for filing the appellants' brief of argument subject to payment of the prescribed penalty. The respondents, although served with this application, neither appeared nor were they represented before this court. In the circumstance, Mr. Ebue, of learned counsel for the applicants, was obliged to move his application. B

It should be observed that by the leave of the Court of Appeal; granted on the 16th March, 1993, the applicants on the 21st April, 1993 filed an appeal to this court against the decision of the Court of Appeal delivered on the 18th February, 1993 in the substantive suit. It is on record that a copy of the record of proceedings transmitted to this court was served on the applicants on the 29th December, 1993. C

By Order 6 Rule 5(1) (a) of the Rules of the Supreme Court 1985, an appellant shall within ten weeks of the receipt of the Record of Appeal file in the court and serve on the respondent his written brief of argument in the appeal. The appellants, who are now applicants, should therefore have filed their brief of argument on or before the 14th March, 1994. This, the applicants failed to do. They also failed to apply for extension of time within which to file their said brief of argument. The position remained unchanged until the 8th March, 1995 when this court suo motu dismissed their appeal in chambers for want of prosecution under the provisions of order 6 Rule 3(2) of the Rules of this court. D E

The applicants' main complaint in this application is that there exists special circumstance for the failure to file their brief of argument within time as prescribed by the Rules of this court. This, according to the affidavit in support of their application, was due to a personal misfortune which befell their learned counsel whose wife on the 28th September, 1993 deserted their matrimonial home and eloped with an unknown man. They contended that the dismissal of their appeal suo motu was in breach of section 33(1) of 1979 Constitution and their fundamental right to fair hearing as the applicants were not put on notice that the order against them was going to be made and were therefore not heard contrary to the audi alteram partem rule. They further argued that the provisions of Order 6 Rule 3(2) of the Rules of this court under which the dismissal order was made are inconsistent with section 33 of the Constitution of Nigeria, 1979 and are to that extent null and void. They argued that order 6 Rule 3(2) is inconsistent with the latter provisions of order 6 rule 9 of the said rules and must therefore be deemed impliedly repealed to the extent of the inconsistency. In conclusion, they submitted that the rules of this court having prescribed a penalty under order 6 rule 5(7) for the late filing of briefs, order 6 rule 3(2) which preceded order 6, rule 5(7) cannot override the latter F G H

provisions of order 6 rule 5(7) as the law makers could not have intended to provide double sanctions for the same default.

It seems to me necessary at this stage to set out the provisions of the relevant rules of this court under consideration. There is firstly, Order 6 Rule 3(2) which provides thus: -

B *"Where the appellant has failed to file a brief within the period prescribed by this order and there is no application for extension of time within which to file the brief, the court may, subject to the proviso to rule 9 of this order, proceed to dismiss the appeal in chambers without hearing argument."*

C There is next Order 6 Rule 9 which stipulates as follows:-

"If an appellant fails to file and serve his brief within the time provided for in rule 5 of these rules, or within the time as extended by the court, the respondent may apply to the court for the appeal to be struck out for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of the court."

D *There is finally order 6 rule 5(7) which provides:-*

"Notwithstanding the provisions of rule 9 hereof, any party who failed to file his brief within the time prescribed herein before shall be liable to pay penalty for non-compliance as proved in the Second Schedule to these Rules."

E under this Rule, failure to file a brief within the prescribed period attracts a penalty of N5.00 for each additional day thereof pursuant to the second schedule to the Rules.

I think that the first point that needs be emphasized is that by virtue of the provisions of Order 6 rule 5 of the rules of the Supreme Court, F an appellant who intends to prosecute or argue his appeal shall within ten weeks of his receiving the record of appeal, as aforementioned, file and serve on the respondent his written brief of argument. In the same vein, a respondent who desires to exercise his constitutional right of fair hearing shall also file in the court and serve on the appellant his reply brief of G argument within eight weeks of his receiving the appellant's brief of argument. A respondent who fails to file his brief will not be heard in oral argument except by leave of the court.

H It is also clear that there are ample provisions in the rules of this court for the extension or enlargement of time for the execution of any act or acts prescribed thereunder. The appellants, in the present appeal, after the service of the record of proceedings on them on the 29th December,

1993 did nothing for one whole year and three months to prosecute their

appeal. They neither filed their brief of argument within the time prescribed by the rules of court nor did they bother to apply to this court for an extension of time within which to file their brief of argument. In my view, the appellants having failed or neglected to file their brief of argument as required by the rules or at all and not have bothered to file an application for an extension of time within which to file their said brief for the said period of one year and three months clearly put themselves in a position in which they could not be heard in court in respect of the appeal as at the 8th March, 1995 when their appeal was dismissed *suo motu* by this court. They had, without doubt, lost their right to be heard as at the 8th March, 1995 in respect of the appeal and cannot, therefore, legitimately complain, as they now pretend to do, of any infringement of their alleged right under section 33(1) of the 1979 Constitution. In my opinion, they neither possessed the alleged right they claim nor did they as much as attempt to put themselves in a position to invoke that right as at the 8th March, 1995 when their appeal was dismissed.

A party who has failed or neglected to prosecute his case or matter in the sense that he has thereby created a situation which renders such cause or matter unripe for hearing over an unreasonable period of time cannot complain of a denial of fair hearing if the cause is removed from the cause list since such failure necessarily tantamounts to an abandonment of the matter. See *Oyeyipo and another v Oyinloye* (1987) 1 N.W.L.R. 356. This is the position the applicants have now found themselves in the present case. They filed an appeal and abandoned it for one year and three months until this court in the exercise of its powers under the Rules listed it suo motu for disposal and duly dismissed it. The real question is whether this exercise of its powers under the provisions of Order 6 rule 3(2) is unconstitutional as submitted by learned counsel for the applicants. The disposal of the appeal in chamber was also attacked and described as null and void and in breach of the applicants' fundamental right to fair hearing under section 33 of the 1979 Constitution.

In the first place, the power of this court to sit and determine applications in chambers is derived from the Supreme Court Rules themselves. The provisions of Order 6 Rule 3(2) of the Supreme Court Rules, 1985 in particular, pursuant to which the appeal in issue was dismissed for want of prosecution specifically empower this court to dismiss appeals of the category therein spelt out "In chambers without hearing argument." The said provisions of Order 6 rule 3(2) are rules made pursuant to section 216 of the 1979 Constitution. I am therefore unable to accept that these

rules are either unconstitutional or inconsistent with section 33(13) of the

1979 Constitution. Viewed from this particular angle, it is clear to me that the dismissal of the applicants' appeal was absolutely constitutional and valid. See Oyeyipo and another v. Oyinloye, supra and shitta-Bey v Federal public Service Commission (1981) 1S.C. 40.

- It was also argued on behalf of the applicants that the provision of Order 6 Rule 3(2) is inconsistent with that of Order 6 Rule 9 of the Rules of the Supreme Court, 1985 and must be deemed impliedly repealed to the extent of the inconsistency and that, at all events, with the penalty clause provided for by Order 6 Rule 5(7), the law makers could not have intended to provide double sanctions for the same default. With profound respect, I am unable to find any substance in these submissions. In this connection, the point must be stressed that if words of an Act or provision are clear, one must without doubt follow them even though they lead to some manifest absurdity. The court cannot be concerned with the question whether the law makers had committed some absurdity or not.
- D See The Queen v The Judge of the city of London Court (1892) 1Q. B. 273 at 290. Accordingly where by the use of clear and unequivocal language capable of only one meaning, anything, is enacted by the law makers, it must be enforced, even though it be absurd or mischievous. See Mersey Docks and Bord v Turner (1893) A.C. 468. I will now turn to the relevant provisions above set out.

- E Under Order 6 Rule 3(2), It cannot be disputed that this court possesses the power or jurisdiction suo motu to proceed to dismiss an appeal in chambers without hearing argument where the appellant has failed to file his brief within the period prescribed by order 6 Rule 5 (1) (a) and there is no application for extension of time within which to file the brief pending in the cause. It is also beyond doubt in terms of the practice and procedure of the Supreme Court that the court only acts suo motu as aforesaid where the appellant's inactivity or indolence in the prosecution his appeal amounts to such an inordinate delay that it almost borders on total abandonment of his appeal. The principle ut sit finis litum is the rationale behind the dismissal of an appeal by the Supreme Court suo motu for want of prosecution. In that situation the court can rightly act suo motu to list the appeal for disposal and to dismiss it in chambers for want of prosecution. Under such circumstance, the dismissal is final and the appeal may not be relisted unless of course, the court acted in error by dismissing
- H the appeal, such as where there was an application for extension of time within which to file the brief already filed and pending for determination at the time the appeal was listed in error for dismissal for want of prosecution.

This has been the decision of this court in several applications with which I

am in full agreement. Accordingly it must now be regarded as settled that this court has no jurisdiction under its Rules of practice, the Supreme Court Act or under its inherent jurisdiction to re-enter an appeal dismissed under the provisions of Order 6 Rule 3(2) of its 1985 Rules for want prosecution. See John Chukwuka and others v Ezulike (1986) 5 N.W.L.R 892, Yonwuren v Modern Signs Ltd. (1985) 1 N.W.L.R. (part 2) 244., Iro Ogbum and others v. Chief Ogburu Urum and Another (1981) 4 S.C. 1, Sodeinde Bros Ltd, V. ACB Ltd. (1982) 6 S.C. 137. Alhaji Raimi Edun and others v. Odan Community (1980) 8-11 S.C. 103 and Asiyanbi v Adeniji (1967) 1 All NLR 112. The above ratio decidendi together with the validity of the provisions of the said Order 6 Rule 3(2) of the Rules of this Court were fully considered and upheld by the decision of a full panel of this court in Oyeyipo and Another v Oyinloye, supra and the matter ought now to rest there. Where, however, the court acted in error, as I have already observed, by dismissing the appeal under Order 6 Rule 3(2), *ibid*, such as where there was a pending application for or for an extension of time within which to file the brief at the time the appeal was dismissed. It would seem that there is jurisdiction in such circumstance to set aside such order of dismissal and to re-enter the appeal in the cause list.

As against the provisions of Order 6 Rule 3(2), are those of Order 6 Rule 9 which, again, in very clear terms, concern situations where an appellant fails to file and serve his brief within the time stipulated for in the rules, or within the time as extended by the court and the respondent has applied to the court for the appeal to be struck out for want of prosecution. Order 6 rule 9, therefore, envisages situations where following the default of the appellant filing his brief of argument within the time provided for in the Rules, or within such extended time as the court had allowed , the respondent had filed an application for the dismissal of the appeal. In such a case, however, the appeal is merely struck out and not dismissed and the appellant may in appropriate cases and on sufficient cause shown apply to have the appeal relisted. The one point that ought to be noted is that under Order 6 rule 9, the respondent may apply for an appeal to be struck out for want of diligent prosecution even after a day's lateness on the part of the appellant to file his brief as prescribed by the Rules. This position is unlike the dismissal of appeals suo motu by the court under Order 5 rule 3(2) of the supreme Court rules where the appellant's indolence in the prosecution of his appeal invariably amounts to such an inordinate delay that borders on an abandonment of his appeal.

There is finally the provisions of Order 6 rule 5(7), *ibid*, which prescribes a penalty of N5.00 for each additional day of default in the filing

of briefs. In my view, this provision only comes into play where neither the provisions of order 6 rule 3(2) nor those of order 6 rule 9 have been successfully invoked. I am therefore unable to accept that the above mentioned provision of our Rules are either inconsistent with each other or that one must be deemed impliedly repealed by the other or, indeed, that double sanctions have by their enactments been prescribed by the law makers for the same default.

It was finally contended by learned counsel for the applicants that there are special circumstances as deposed in the affidavit in support of this application for the failure to file the appellants' brief within the time prescribed by the Rules. These special circumstances, as I have already indicated, comprise of the personal misfortune which befell counsel whose wife on the 28th September, 1993 deserted him and eloped with an unknown man. He considered these circumstances as special reasons for failure by the appellants to file their brief within time.

There can be no doubt that the special circumstances referred to in the applicants' affidavit in support of their application may appear prima facie unfortunate. They are, however, totally irrelevant to the issue that has arisen for consideration in this application, inherent or otherwise, to re-enter an appeal dismissed for want of prosecution under the provisions of order 6 rule 3(2) of the Supreme court Rules, 1985 unless the court acted in error by dismissing the appeal as aforementioned. The issue or whether or not there is good cause for the applicants' failure to file their brief in respect of an appeal which is properly dismissed under Order 6 Rule 3(2) of the Supreme Court Rules, therefore, hardly arises.

The final point I desire to stress is that what calls for decision in this application is not an interpretation of what the Rules of this court ought to be but an interpretation of what the Rules in fact state. What those Rules ought to be must, in my opinion, wait until they are appropriately amended or revised.

It is on this note that I must conclude, having regard to the above and the more detailed reasons contained in the leading ruling of my learned brother, Ogundare, J S C that this application fails. Accordingly, the same is hereby dismissed, I abide by the order for costs as contained in the leading ruling.

H