

**SUPREME COURT OF NIGERIA**  
9TH JULY, 1996. SC. 147/1990  
**CORAM:- M. L. UWAIJ CJN, A. B. WALI,**  
**M. E. OGUNDARE, S. U. ONU, Y. O. ADIO, JJSC**

FUNDUK ENGINEERING LTD. .... PLAINTIFF/  
APPELLANT

AND

JAMES MC ARTHUR & 4 ORS ..... DEFENDANTS/  
RESPONDENTS

In re Colonel Yohannah

Antayen Madaki (Rtd.)

..... APPLICANT/RESPONDENT

---

**APPEALS** - *Extension of time to appeal - Party who obtained leave of Court to appeal - Must do so within time - Or must make application to court - for extension of time to appeal.*

**APPEALS** - *Extension of time to appeal - Failure to add prayer for enlargement of time to appeal - Court of Appeal erred in granting that prayer.*

**APPEALS** - *Extension of time to appeal - Absence of prayer for extension of time to appeal - In application of appellants - Rendered application incompetent*

**APPEALS** - *Right of Appeal - Only a party to proceedings - Can appeal to the court of Appeal without any inhibition on his capacity.*

**APPEALS** - *Statutory period of appeal - Application for leave of court to appeal - Whether period is prescribed under statute - Within which a person interested to bring his application.*

**FACTS**

The application of the applicant/Respondent which is the substance of the present appeal was brought following the remark of the trial judge in his judgment in an action instituted by the plaintiff/Appellant against the defendants/Respondents in the High Court of Oyo State. The applicant/Respondent who was neither a party nor a witness in the case before the trial court felt offended by the said remark of the trial judge when he become away of it.

The applicant/respondent then filed an application at the Court of Appeal Ibadan, which though the application was apposed for being in

competent for lacking in the prayer for extension of time to appeal, granted it. The plaintiff/appellant has appealed to the Supreme Court in the present appeal against the decision of the Court of Appeal formulating 1 question but the apex court considered the 2 issues raised in the applicant/respondent's brief of argument.

### ***ISSUES FOR DETERMINATION***

*“(1) Whether an interested party who seeks leave to appeal has to ask for leave for extension of time to appeal before seeking extension of time for leave to Appeal.*

*(2) Whether in the particular circumstances of this case, the Court of Appeal was justified in granting leave for extension of time to appeal after granting extension (sic) and leave to appeal.”*

**HELD** (Unanimously allowing the appeal per lead judgment of **UWAIS C.J.N**)

### ***Right of appeal***

1. By the provisions of section 222 of the Constitution of the Federal Republic of Nigeria, Cap. 62 of the Laws of the Federation of Nigeria, 1990 only a party to civil proceedings can appeal to the Court of Appeal without any inhibition on his capacity to do so. Any order person who has interest in a case but is not a party to the case, cannot appeal in the proceedings, until he obtains the leave of either the High Court from which the case is being appealed or the Court of Appeal to which the appeal is to be brought. The section further provides that such a right to appeal must be exercised in accordance with any Act or rules of court applicable which regulate the powers, the practice and the procedure of the Court of Appeal. The section also provides that a party who desires to appeal as an interested party, has the option to obtain the necessary leave, prescribed for doing so, on application to either the High Court which decided the case or the Court of Appeal. The manner in which to make the application is provided by both the Court of Appeal Act, 1976 (Cap. 75) and the Court of Appeal Rules, 1981, as amended. (Cap. 62). (p. 1328 G)

### ***Statutory period for leave to appeal***

2. Neither the Constitution nor the Court of Appeal Act or the Court of appeal Rules prescribe any period within which an interested party may ring application for leave to appeal as “a person having an interest in the latter.” So that when the Applicant/Respondent brought his application in the Court below seeking - *“(1) Extension of time within which to apply for leave to appeal pursuant to Sections 221 and 222 (a) of the Constitution of the*

*Federal Republic of Nigeria, 1979, against a portion of the decision given by Ibadan High Court on 14th day of July, 1988*’ he misconceived the procedure and acted wrongly to have asked for extension of time to seek leave to appeal as an interested party. (p. 1329 C)

***Extension of time - Party who obtained leave***

3. Where a party obtains leave to appeal as an interested party he is required to appeal within the time prescribed by section 25 of the Court of Appeal Act, 1976 (Cap. 75). Failure to do so whether as a result of lateness to obtain the necessary leave under section 222 or for whatever reason will entail the making of an application to the Court of Appeal for extension of time to appeal. Also where the proposed ground of appeal raises question of fact or mixed law and fact, application for leave to appeal under section 220 would have to be brought within the time prescribed by section 25 of the Court of Appeal Act 1976 (Cap. 75). (p. 1330 C)

***Failure to add prayer for enlargement of time***

4. The defect aforementioned in prayer No. (1) apart, even if the Applicant/Respondent was rightly granted the leave to appeal, which I hold to be unnecessary in view of the fact that the proposed ground of appeal which he was to file is said to be a ground of law, it is obvious, on the authorities and section 25 of the Court of Appeal Act, that a prayer for enlargement of time within which to appeal should have been added to his motion on notice. It is not clear to me as to why the Court of Appeal stated in its ruling that *“Time is extended until 30th April, 1990 and leave to appeal is hereby granted.”* Does the extension of time apply to prayer No. (1) for *“Extension of time to seek leave to appeal?”* It appears that it cannot apply to prayer No. (2) since the grant of leave to appeal follows it immediately. Nor could it apply to prayer No. (1) since the following words came immediately before the words in question - *“This application succeeds. It is ordered as prayed.”* I, therefore, take it that the extension of time to 30th April, 1990 was gratuitously granted to enable the Applicant/Respondent file his appeal. If I am correct in this assumption, then the Court below acted in error. (p. 1331 A)

***Absence of prayer for extension of time***

5. I, therefore, come to the conclusion that this appeal has merit and it succeeds. The absence of the prayer for extension of time within which to appeal rendered the application by the Applicant/Respondent incompetent. As a result the Court of Appeal acted in error to have granted it.

Accordingly its decision is hereby set aside and in its place the application is hereby struck out for being incompetent. (p. 1332 C)

### **NOTABLE POINTS OF INTEREST**

#### **UWAIS CJN**

- B **1. Appeals - No leave is needed in raising an issue of Law**  
As a matter of interest the proposed notice of appeal to the Court below wan in respect of only one .ground of appeal which prima facie purports to raise a question of law and not otherwise. It was wrong, therefore, to seek leave under section 221 to appeal on the ground contrary to section 220  
C which gives an uninhibited right of appeal. (p. 1330 A)

#### **ADIO JSC**

##### **2. Exercising right created by statute after time lapse**

- D Where there is a statutory provision creating a right and setting out the time within which the right can be exercised, any party that wishes to exercise the right must do so within the stipulated time except where a further provision is made for the extension of the stipulated time. Even where provision is made for the extension of the stipulated time a party must seek for and obtain an order extending the stipulated time before exercising the right.  
E This is because the extension of the stipulated time is a condition precedent to the exercise of the right. For that reason, an appeal filed after the expiration of the time stipulated by law for the filing of such appeal without seeking for extension of rime, will not be properly before the court because the condition precedent to the filing of it (i.e. extension of time) has not F  
F been complied with. Consequently, the court will not have jurisdiction to entertain it. (p. 1335 E)

### **REPRESENTATION**

Appellant absent and unrepresented

- G 1st to 5th Respondents absent and unrepresented  
Chief T. Olojo for the Applicant/Respondent

### **CASES REFERRED TO**

- Bowaje v. Adediwura (1976) 6 SC 143  
Amudipe v. Arijodi (1978) 2 NSCC 515  
H Iroegbu v. Okwordu (1990) 6 N.W.L.R. (Part 159) 643 at p. 664  
Lamai v. Orbih (1980) 12 N.S.C.C. 188 at pp. 188, 189 and 191  
Dr. Okonjo v. Dr. Odje (1985) 10 SC. 267  
Atanda v. Olarewaju (1988) 4 N.W.L.R. (Part 89) 394

Odofin v. Agu (1992) 3 NWLR (Part 229) 350

Ekpeyong v. Nyong (1975) 2S.C. 71

Ajakaiye v. Idehai (1994) 13 KLR 11; (1994) 8 N.W.L.R. (Pt. 314) 504

### **STATUTES & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria 1979, Cap. 62 L.F.N. 1990, ss, 220, 221 & 222.

Court of Appeal Act 1976, Cap. 75 L.F.N. 1990, s. 25(2)

Court of Appeal Rules, 1981 (as amended), O. 3, r. 4(2)

### **LEAD JUDGMENT BY UWAIS CJN**

By a writ of summons taken out on the 18th day of December, 1985 the plaintiff/appellant brought an action against the defendants/respondents in the High Court of Oyo State, holden at Ibadan. The case was heard by Ibidapo-Obe. J. In his judgment which was given on the 14th day of July, 1988 against the defendants/respondents, the learned trial Judge remarked as follows:-

*“Col. Yohannah Madaki now retired must have been reading his law upside down when he wrote as contained in Exhibit 1. His influence over the Commissioner of Police Oyo State Command, Mr. Nkana as epitomised in this sordid affair to say the least is most unfortunate; it is administrative recklessness, reminiscent (sic) of what philosophers described as ‘power corrupts’ absolute power corrupts absolutely!’ .....”*

The applicant/respondent was neither a party nor a witness in the case before the High Court. Sometime in November, 1988 he came to know of the remark made by the learned judge. Feeling aggrieved, the applicant/respondent brought a motion on notice in the Court of Appeal, Ibadan on the 6th day of July, 1989 praying for:-

*“(1) Extension of time within which to apply for leave to appeal pursuant to sections 221 and 222(a) of the Constitution of the Federal Republic of Nigeria, 1979 against a portion of the decision given by the Ibadan High Court on 14th day of July, 1988.*

*(2) Leave to appeal from the portion of the said decision.*

*(3) Departure from the rules of this Honourable Court so that the appeal can be heard on the documents referred to (and marked) as Exhibit “X” in the affidavit in support of this motion on notice; and such further or other order(s) as this Honourable Court deem fit to make in the circumstance.”*

The application was filed pursuant to the provisions of Section 25(4) of the Court of Appeal Act, 1976; Order 3 rule 4 and Order 7 rule 2

of the Court of Appeal Rules, 1981; sections 221 and 222(a) of the Constitution of the Federal Republic of Nigeria, and the inherent jurisdiction of the Court of Appeal. In the affidavit in support of the motion on notice, sworn to by the applicant/respondent, paragraph 4 quoted the part of the judgment of Ibidapo-Obe, J containing the offending remark and paragraphs 5 to 8 thereof stated thus:-

B *“5. The document now shown to me and marked “Exhibit Y” is a draft of the Notice of Appeal intended to be filed if the motion on notice in support of which I swear to this affidavit is granted.*

C *6. I got to know of the adverse remarks made against my conduct by the Ibadan High Court when I came down to Ibadan sometime in November, 1988 in connection with another case, Suit No. 1/93/87 in which the plaintiff herein, sued me for libel in the course of which the said judgment was tendered as (an) Exhibit.*

D *7. My counsel in the said Suit, Mr. Tony Oyeyipo drew my attention to the said judgment and sought my views on the comment contained on page 36 and I expressed utter embarrassment, bewilderment and disbelief that such a remark could emanate from the court in respect of a matter in which I was neither a party nor a witness.*

E *8. I felt however that since the judgment had been tendered as Exhibit in the Libel Suit, it may be prejudicial to the plaintiff if I sought to appeal against the said determination, particularly when it was the same Judge who presided over the determination in this action.”*

The draft notice of appeal contained only one ground of appeal which reads:

F *“(1) The learned trial Judge erred in law in making the findings complained of regarding the conduct of the appellant when:-*

*(a) The Exhibit referred to by the trial Judge was, according to His Lordship, blotted with some of the paragraphs missing;*

*(b) The said appellant was neither a party to, nor a witness in the action;*

G *(c) The said appellant was not given a fair opportunity of being heard before the said determination was made against him, particularly, when the Exhibit referred to had a whole page of it blotted out as contained in the court’s observation on page 19 of the judgment and the determination was injurious to the appellant and constituted an unnecessary strictures which are irrelevant to the judgment in the case;*

H *(d) The said appellant gave a legal opinion or expressed a legal view in the said Exhibit 1;*

*(e) There was no direct proof that the said Exhibit emanated from the said appellant.”*

The relief sought in the proposed notice of appeal was *"To set aside the decision appealed from and direct that it shall be expunged from the judgment of the High Court."* It is pertinent to mention that the plaintiff/appellant filed a counter-affidavit, sworn to by him, against the affidavit sworn to by the applicant/respondent. The application came up before the Court of Appeal for hearing on the 17th day of January, 1990 and thereafter its ruling, which was reserved, was delivered on the 17th day of April, 1990 by Omololu-Thomas, J.C.A. with Akanbi, and Ogwuegbu, JJ.C.A. (as they were then) agreeing. The last part of the ruling states:-

*"This application succeeds. It is ordered as prayed. Time is extended until the 30th April, 1990 and leave to appeal is hereby granted."*

*The appeal shall be heard on the bundle of documents marked X. The said documents shall be indexed and numbered page by page and each line of each page shall also be numbered. I award N30.00 costs in favour of each set of the respondents."*

Dissatisfied with the ruling, the plaintiff/appellant appealed to this Court (Karibi-Whyte, Belgore, Wali, Akpata, Omo, JJ.S.C.) on the 21st day of October, 1991 for enlargement of time to seek leave to appeal, leave to appeal and enlargement of time within which to appeal. The application was granted as prayed and hence the present appeal.

Only one ground of appeal has been filed. It reads:-

*"The learned Justice (sic) of the Court of Appeal erred in law and misdirected themselves when they granted the applicant's prayer and stated as follows:*

*"The application succeeds, it is ordered as prayed. Time is extended until the 30th April, 1990 and leave to appeal is hereby granted."*

*Particulars*

(i) *Whereas the learned Justices of the Court of Appeal failed to consider and come to a specific decision on the submission of counsel to the plaintiff/respondent/appellant to the effect that the application was defective as the applicant had not asked for extension of time within which to appeal.*

(ii) *Whereas the applicant's right to seek leave to appeal pursuant to sections 221 and 222(a) of the Constitution could not exist since the three month (sic) period within which an appeal should normally be filed had expired and there was no order of Court or any prayer in the application extending or seeking an extension of time."*

Similarly the plaintiff/appellant formulated, in his brief of argument, only one issue for our determination. It is as follows:-

*"Whether or not the Court of Appeal was right in granting the 6th respondents application for leave to appeal when there was no prayer for extension of time within which to appeal."*

B The 3rd, 4th and 5th defendants/respondent filed a joint brief of argument. It also contains only one issue for determination. The issue reads thus:

*"Whether the learned Justice of Appeal (sic) were right in granting the 6th respondent leave to appeal when the 6th respondent did not include extension of time within which to appeal."*

C The applicant/respondent, who has been referred to above as simply the 6th respondent, filed a brief of argument. He raised therein two issues for determination, namely:-

*"(1) Whether an interested party who seeks leave to appeal has to ask for leave for extension of time to appeal before seeking extension of time for leave to appeal."*

D *(2) Whether in the particular circumstances of this case, the Court of Appeal was justified in granting leave for extension of time to appeal after granting extension (sic) and leave to appeal."*

E The 1st and 2nd defendants/respondents did not file briefs of argument nor were they represented at the hearing of the appeal. The applicant/respondent was represented by learned counsel- Chief Olojo. The remaining defendants/respondents were also neither present nor represented by counsel. The common thread that runs through the issues postulated by the parties concerns the granting by the Court below of the application made by the applicant/respondent in the absence of a prayer for enlargement of time within which to appeal.

G Arguing the issue in the plaintiff/appellant's brief of argument, learned counsel, Mr. Fagbohungebe, contends that there should have been a third prayer in the motion brought seeking extension of time to appeal. He refers to section 25 subsection (2)(a) of the Court of Appeal Act. Cap. 75 which stipulates the period for bringing appeal to the Court of Appeal from the final decision of the High Court. Since the limit is three months he contends that any person wishing to take advantage of the provisions of Section 222 subsection (2) of the Constitution of the Federal Republic of Nigeria. 1979 (Cap. 6) to appeal as an interested party is bound to do so within the prescribed period. He cites in support of this submission the cases of Tunji Bowaje v. Moses Adediwura (1976) 6 SC 143 and Amudipe v. Arijodi (1978) 9-10 SC 27; 1978) 2 NSCC 515. He canvasses further that where the interested party is late in filing appeal against the final decision of the High Court. He is bound to ask for an extension of time within



which to appeal for leave to appeal and in addition pray for an enlargement of time within which to appeal. He supports the arguments with the decision of this Court in the case of Iroegbu v. Okwordu (1990) 6 NWLR (Pt.159) 643 at p. 664. where Obaseki, J.S.C. stated as follows:-

*"If the statutory period within which to exercise a right of appeal has expired the Court cannot entertain an application for leave (to appeal) unless a prayer for extension of time to seek leave (to appeal) and prayer for extension of time to appeal are included."*

(Parenthesis mine).

He submits, in conclusion that the application to the Court below by the applicant/respondent did not contain a prayer for extension of time to appeal and therefore the application was incompetent since the omission was fatal to the application as a whole. He says that the Court of Appeal acted in error when it granted the application and urges upon us to set aside its ruling.

Mr. Sule learned Principal Legal Officer for the 3rd, 4th and 5th defendants/respondents contends in the joint brief of argument filed by the parties that from the facts of the case the applicant/respondent is an interested party *"whose right of appeal can only be exercised when the relevant provisions of the Constitution have been satisfied."* He refers to section 25 of the Court of Appeal Act and submits that the Court below was right in granting the applicant/respondent extension of time within which to apply for leave to appeal and cites the case of Lamai v. Orbih (1980) 5-7 SC 28; (1980) 12 NSCC 188 at pp. 188, 189 and 191. He submits further that the absence, in the application of the prayer for leave to appeal was not fatal and contends that technicality should not be allowed to defeat justice. He relies on the case of Dr, Okonjo v. Dr. Mudiaga Odje (1985) 10 SC 267.

In the brief of argument filed on behalf of the applicant/respondent, it is stated that section 25 of the Court of Appeal Act prescribes 3 months as the period within which a party seeking leave to appeal as an interested party must bring application for leave to appeal.' Where the period expires, it then becomes necessary to bring application *"for an extension of time within which to seek the leave to appeal"* Therefore *"until a person secures the leave, he is not yet in law a party with any right of appeal. It is the day the leave is granted that he ipso facto (sic) becomes a party and from whence time will begin to run."* On this premise, it is contended that *"it is wrong for the plaintiff/appellant to contend that the applicant/respondent needs a prayer for further extension of time within which to appeal after he has obtained leave to appeal and has not delayed any further."* A party interested should not be treated as the original party in the

suit, it is argued, therefore, the argument continues, the cases of Bowaje (supra) and Amudipe (supra) cited by the plaintiff/appellant are not relevant as they do not deal with the point in question in the present case. Similarly the case of Iroegbu v. Okwordu (supra) is not apposite.

B It is also argued in the alternative in the brief, that assuming, but without conceding, that the applicant/respondent's application needed a prayer for extension of time within which to appeal. It is within the powers or the Court of Appeal to grant the prayer since the facts to be relied upon in obtaining extension of time to seek leave to appeal are the same as the facts that would be relied on for such prayer. Furthermore, the general  
C prayer in the motion on notice, to wit "*and such further or other order(s) as this Honourable Court may deem fit to make in the circumstances*" suffices for the extension of time within which to appeal to be granted by the court below, since the prayer is merely secondary to the grant of the leave to appeal as an interested party. In any event, it is argued, the failure to  
D obtain such leave is not fatal to the leave granted the applicant/respondent to appeal as an interested party since he can apply at any time for the extension of time to appeal. However, the court should not encourage such multiplicity or applications in order to avoid congestion of cases and waste of time since there is no law imposing such action.

E In the plaintiff/appellant's reply brief of argument it is submitted that the positions of the original party to a case and a party interested in the case are the same once the latter obtained the leave to appeal. Therefore, the same conditions of appeal would apply to them and the decisions in the cases of Amudipe, Bowaje and Iroegbu (supra) would apply. Other-  
F wise the position would be thus: while an original party who can appeal as of right would have to comply with a time limit of 3 months, an interested party who would appeal with the leave of court would have an indefinite time within which to appeal. This interpretation of the provisions of sections 220, 221 subsection (1) and 222 subsection (a) of the 1979 Constitution (Cap.62) and section 25 subsection (2)(a) of the Court of Appeal Act,  
G it is submitted would lead to unreasonableness and absurdity.

Now, I think there is some confusion with regard to the prayer in the application in question here for extension of time within which to seek leave to appeal. By the provisions of section 222 of the Constitution of the Federal Republic of Nigeria, Cap. 62 of the Laws of the Federation of  
H Nigeria, 1990, only a party to civil proceedings can appeal to the Court of Appeal without any inhibition on his capacity to do so. Any other person who has interest in a case but is not a party to the case, cannot appeal in the proceedings, until he obtains the leave of either the High Court from which the case is being appealed or the Court of Appeal to which the

Appeal is to be brought. The section further provides that such a right to appeal must be exercised in accordance with any Act or rules of court applicable which regulate the powers, the practice and the procedure of the Court of Appeal. The section also provides that a party who desires to appeal as an interested party, has the option to obtain the necessary leave prescribed for doing so, on application to either the High Court which decided the case or the Court of Appeal. The manner in which to make the application is provided by both the Court of Appeal Act, 1976 (Cap. 75) and the Court of Appeal Rules, 1981 as amended (Cap.62).

Neither the Constitution nor the Court of Appeal Act or the Court of Appeal Rules prescribe any period within which an interested party may bring application for leave to appeal as a person having an interest in the matter." So that when the applicant/respondent brought his application in the Court below seeking:-

*"(1) Extension of time within which to apply for leave to appeal pursuant to Sections 221 and 222(a) of the Constitution of the Federal Republic of Nigeria 1979, against a portion of the decision given by Ibadan High Court on 14th day of July 1988."*

he misconceived the procedure and acted wrongly to have asked for extension of time to seek leave to appeal as an interested party.

Section 221 provides:-

*"221. Subject to the provision of section 220 of this Constitution, an appeal shall lie from decisions of a High Court to the Court of Appeal with the leave of that High Court or the Court of Appeal"*

Section 220 specifies which appeals can be brought to the Court of Appeal as of right. Therefore, to put together under a single prayer application for leave under section 221 and another for leave under section 222 is to cause confusion. The requirement of the two sections are incompatible. A party interested to appeal, because he has interest in the proceedings, must first of all obtain leave under Section 222 to become a party to the case. Having obtained the leave, he would decide the grounds of appeal on which he wished to appeal. These may be grounds of law in which case he would not be required to seek leave to appeal under section 221 since by section 220 any appeal on point of law is brought directly as of right. On the other hand, the grounds of appeal may raise question of fact or mixed law and fact or fresh points not taken in the High Court, that is to be taken for the first time in the Court of Appeal. In that event, both section 221 and the Court of Appeal Rules and indeed the general principles of procedure require that leave to appeal on such grounds must first

be applied for and obtained before the notice of appeal could properly be filed. The filing of the notice of appeal to the contrary would render the appeal incompetent.

As a matter of interest the proposed notice of appeal to the court below was in respect of only one ground of appeal which prima facie purports to raise a question of law and not otherwise. It was wrong, therefore, to seek leave under section 221 to appeal on the ground contrary to section 220 which gives an uninhibited right of appeal. Be that as it may, section 25 subsection (2)(a) of the Court of Appeal Act, 1976 (Cap. 75) prescribes time limit as follows:-

C “(2) *The periods for the giving of notice of appeal or notice of application for leave to appeal are:-*

(a) *In an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision.”*

D Where a party obtains leave to appeal as an interested party he is required to appeal within the time prescribed by section 25 of the Court of Appeal Act 1976 (Cap. 75). Failure to do so whether as a result of lateness to obtain the necessary leave under section 222 or for whatever reason will entail the making of an application to the Court of Appeal for extension of time to appeal. Also, where the proposed ground of appeal raises question of fact or mixed law and fact, application for leave to appeal under section 221 would have to be brought within the time prescribed by section 25 of the Court of Appeal Act, 1976 (Cap. 75). See: Amudipe’s case (supra); Lamai v. Orbih (supra) (1980) 5-7 SC. 28; Atanda v. Olawajuwaju (1988) 4 NWLR (Pt.89) 394 and Owonihoyos Technical Services Ltd. v. John Holt F Ltd., (1991) 6 NWLR (Pt.199) 550 at Pp. 557-9. If the prescribed time expired before such application was made, then it becomes necessary to apply:-

1. For enlargement of time to seek leave to appeal.
2. Leave to appeal, and
- G 3. Extension of time within which to appeal.

See: Iroegbu v. Okwordu (1990) 6 NWLR (Pt.159) 643 and Odojin v. Agu (1992) 3 NWLR (Pt.229) 350; (1992) 3 SCNJ 161.

H Now in the present case judgment of the High Court was delivered on the 14th day of July, 1988. As the applicant/respondent was not a party to the case in the High Court, he would have to seek leave under Section 222(a) of the Constitution, as a first step, to appeal to the Court of Appeal as an interested party. Secondly, he would have to meet the requirement of section 25 of the Court of Appeal Act by filing a notice of appeal within 3 months of the decision of the High Court. That is within 3 months from the

14th July, 1988 when the decision of the High Court was delivered: in other words by the 14th of October, 1988. However, this did not happen. It was on 6th July, 1989 that the applicant/respondent filed the application for leave to appeal. That is nearly 9 months after the expiration of the time within which to appeal. The defect aforementioned in prayer No. (1) apart, even if the applicant/respondent was rightly granted the leave to appeal B which I hold to be unnecessary in view of the fact that the proposed ground of appeal which he was to file is said to be a ground of law, it is obvious, on the authorities and section 25 of the Court of Appeal Act that a prayer for enlargement of time within which to appeal should have been added to his motion on notice. It is not clear to me as to why the Court of Appeal stated in its ruling that *"Time is extended until 30th April, 1990 and leave to C appeal is hereby granted."* Does the extension of time apply to prayer No. (1) for "Extension of time to seek leave to appeal?" It appears that it cannot apply to prayer No. (2) since the grant of leave to appeal follows it immediately. Nor could it apply to prayer No. (1) since the following words came immediately before the words in question - "This application suc- D ceeds. It is ordered as prayed." I, therefore take it that the extension of time to 30th April, 1990 was gratuitously granted to enable the applicant/respondent file his appeal. If I am correct in this assumption, then the Court below acted in error. A similar situation arose in Odofin's case (supra). There too, no application was made for extension of time within which to E appeal. In granting the prayers for extension of time to seek leave to appeal and for leave to appeal, which were applied for, the Court of Appeal enlarged the time within which to appeal even though there was no prayer for it. It was argued in that case that the enlargement was necessary as a consequential order (as indeed has been argued in this case by applicant/ F respondent). Rejecting the argument, this court held as follows, per Nnaemeka-Agu, J.S.C. at page 372 thereof:-

*"Now a consequential order is one giving effect to a judgment or order to which it is consequential. See Obayagbona v. Obazee (1972) 5 SC 247. It is directly traceable to or flowing from that other judgment or order G duly prayed for and made. In this case, each of the three prayers which I have discussed above is a substantive prayer none can be consequential to the other. I, therefore do not agree with learned counsel for the respondents that the order for the extension of time to appeal was a consequential order to either a prayer for extension of time within which to seek leave or leave H to appeal. Each of the three prayers must have to be prayed for and duly asked for before it can be granted."*

*It has been said times without number that a court ought not to*

*play the role of father Christmas which (sic) can go around granting to parties reliefs which they have not asked for. See: Nwanya v. Nwanya (1987) 3 NWLR (Pt.62) 697. The case of Ndukwe Erisi & Ors. v. Uzor Idika & Ors. (supra) (1987) 4 NWLR (Pt.66) 503 which the respondents relied upon is*  
 B *inapplicable. In our adversary system, a court makes orders on the list or issues raised by the parties. Where a court grants to a party a relief which it did not seek, it has made the order on a list not raised by the parties. This will be an order made without jurisdiction and therefore a nullity. See: Umenweluaku v. Ezeana (1972) 5 SC 343; Western Steel Works Ltd. v.*  
 C *Iron & Steel Workers Union (1986) 3 NWLR (Pt.30) 617 at p. 618."*

I, therefore, come to the conclusion that this appeal has merit and it succeeds. The absence of the prayer for extension of time within which to appeal rendered the application by the applicant/respondent incompetent. As a result the Court of Appeal acted in error to have granted it. Accord-  
 D ingly, its decision is hereby set aside and in its place the application is hereby struck out for being incompetent.

The plaintiff/appellant is hereby awarded N1,000.00 costs against the applicant/respondent. I make no order as to costs against the 3rd, 4th and 5th respondents.

E

### **WALI JSC**

I have had a preview of the lead judgment of my learned brother Uwais, C.J.N. and I entirely agree with the reasons set out therein for allowing the appeal. I adopt these reasons as mine.

F For these same reasons, I hereby allow the appeal, set aside the decision of the Court of Appeal and strike out the application which was incompetent as it contained no prayer for extension of time within which to appeal.

I endorse the consequential orders as to costs made in the lead judg-  
 G ment.

### **OGUNDARE JSC**

H I have been privileged to read in draft the judgment of my learned brother Uwais, C.J.N. just read. I agree with his conclusion and the reasoning leading thereto.

I need to add only a brief comment. When the application of the applicant/respondent came before the court below for hearing, Mr.

Fagbohunge, learned counsel for the plaintiff raised the issue of the incompetence of the application for the reason that there was no prayer for extension of time to appeal. Mr. Olojo learned counsel for the applicant/respondent submitted, in response, that the point raised was misconceived. Strangely enough, however, the Court of Appeal in its ruling, gave no consideration to this all-important point which went to the root of the application before it. Omololu-Thomas, J.C.A. in his lead judgment considered whether a case was made out for the grant of an application, for extension of time to appeal. He said:-

*"By the said order 3 rule 4(2)-*

*'(2) Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard' .....*

*the applicant must show:-*

*(i) good and substantial reasons for failure to appeal within the period prescribed.*

*(ii) grounds of appeal which prima-facie show good cause for the appeal to be heard."*

But there was no such prayer before the court. Had the court adverted its mind to the objection taken to the competence of the application before it, their Lordships of that Court would undoubtedly have struck out the application in limine without the need to consider all the issues of law pronounced upon.

I too, allow this appeal and set aside the order made by the court below on 17th day of April, 1990 and in its place I order that the application of the applicant/respondent before it be struck out as being incompetent.

I abide by the order for costs made in the lead judgment.

---

### ONU JSC

I have been privileged to read the judgment of my learned brother Uwais, C.J.N. just delivered and with it I agree that this appeal succeeds and ought to be allowed.

The lone issue for our determination in this appeal which falls within a very narrow precinct and has hitherto been the subject of interpretation in numerous cases by this court, is whether or not the application of the 6th respondent containing inter alia two prayers for:

*"(1) Extension of time within which to apply for leave to appeal*

*pursuant to sections 221 and 222(a) of the Constitution of the Federal Republic of Nigeria, 1979 against a portion of the decision of the Ibadan High Court on the 14th day of July, 1988.*

*(2) Leave to appeal from the portion of the said decision."*

should have included a compulsory "third prayer" seeking extension of time within which to appeal, and the implication of failure to include such a prayer therein.

My short answer to it which is in the positive, is to the effect that this court has times without number held in cases such as *Tunji Bowaje v. Moses Adediwura* (1976) 6 SC 143; *Amudipe v. Arijodi* (1978) 9-10 SC 27; (1978) 2 NSCC 515; *Iroegbu v. Okwordu* (1990) 6 NWLR (Pt.159) 643 at 664 and *Odojin v. Agu* (1992) 3 NWLR (Pt.229) 350 to mention but a few, that since the time fixed for appeal by virtue of section 25(2) Court of Appeal Act, 1976 Cap. 75 is three (3) months and there was no prayer for extension of time within which to appeal, the entire application must revolve or rotate upon a three-legged launching-pad, all of which must co-exist for the grant of such reliefs. As *Nnaemeka-Agu, J.S.C.*, succinctly put it in *Odojin v. Agu* (supra) at page 371.

*"I wish to pause here to emphasize that a person who wishes to seek leave on any grounds to appeal after the expiration of the statutory periods to appeal under section 25 of the Court of Appeal Act (No. 43) of 1976 (or section 31 of the Supreme Court Act (No. 12) of 1960 requires three substantive prayers, namely:*

*for (i) extension of time to seek leave to appeal*

*(ii) leave to appeal; and*

*(iii) extension of time within which to appeal.*

*That any such application must contain these prayers is not a matter of mere cosmetic importance which could be waived off with levity or waived. Rather, it is a matter which goes to the serious issue of jurisdiction of court. The periods within which a party can appeal in our courts are prescriptions of statutes; and leave to appeal, where necessary is a requirement of our Constitution. Where necessary, it must be applied for and obtained within the statutory period of appeal unless time to do so has been extended: See: *Owoniboy's Technical Services Ltd. v. John Holt Ltd.* (1991) NWLR (Pt. 199) 550 at Pp. 557-558."*

The Court below was therefore wrong to have granted the 6th respondent's prayers standing as they did on only two legs of what should be resting on a tripod. The point was in fact made before the court below that the course it was steering was wrong but unfortunately, it would appear that it paid no heed to that warning. In veering off the right track it grievously erred.



For these reasons and those elaborately set out in the judgment of my learned brother Uwais, C.J.N. I too will set aside the application and strike it out as being incompetent. I make the same consequential orders including those as to costs.

B

### **ADIO JSC**

I have had the advantage of reading in draft, the judgment just read by my learned brother, Uwais, the Hon. C.J.N. and I entirely agree with him that the appeal has merit and that it succeeds. Accordingly, I too allow the appeal and abide by the orders for costs.

In view of the importance of the issues raised, I make some comments. The circumstances leading to this matter have been comprehensively set out in the read judgment of my learned brother, the Hon. C.J.N. The two relevant issues are whether the application of the respondent in question was incompetent because it did not include a prayer for extension of the time within which to appeal and whether, in the circumstances of this case, it was competent on the part of the court below to grant an extension of the time within which to appeal which was not included in the application of the respondent.

Where there is a statutory provision creating a right and setting out the time within which the right can be exercised, any party that wishes to exercise the right must do so within the stipulated time except where a further provision is made for the extension of the stipulated time. Even where provision is made for extension of the stipulated time a party must seek for and obtain an order extending the stipulated time before exercising the right. This is because the extension of the stipulated time is a condition precedent to the exercise of the right. For that reason, an appeal filed after the expiration of the time stipulated by law for the filing of such appeal without seeking for extension of time, will not be properly before the court because the condition precedent to the filing of it (i.e extension of time) has not been complied with. Consequently, the court will not have jurisdiction to entertain it. See: *Madukolu v. Nkemdilim* (1962) 2 SCNLR 34 and (1962) 1 All NLR 587 at p. 595. Applying the foregoing principles to the application of the respondent, the proper order which the court below should have made was to strike out the application.

Instead of striking out the application, the court below presumably thought that the situation could be saved by granting to the respondent an extension of the time within which to appeal. It, therefore erroneously granted

H

the order. That, in my view, further complicated the matter as the application of the respondent did not include a prayer for the order. A court should not grant to a party a relief or remedy he has not asked for. See: Ekpenyong v. Nyong (1975) 2SC 71; and Ajakaiye v. Idehai (1994) 8 NWLR (Pt. 364) 504.

**B**           It is for the foregoing reasons and the fuller reasons given in the lead judgment of my learned brother, Uwais, C.J.N. that I entirely agree that the appeal succeeds. I too allow it and abide by the orders for costs.

**C**

**D**

**E**

**F**

**G**

**H**