

SUPREME COURT OF NIGERIA
11TH JULY, 1997. SC. 50/1996
CORAM:- S.M.A.BELGORE, A.B.WALI, E.O.OGWUEGBU,
S. U. ONU, Y. O.ADIO, JJSC.

BOLEX ENTERPRISES NIGERIA LTD. PLAINTIFF/APPELLANT
AND
INCAR NIGERIA PLC & ANOR. DEFENDANTS/RESPONDENTS

APPEALS - *Extension of time - For the giving of notice of appeal -Even where most of the prayers are not being opposed - Court has the duty to ensure compliance with the Rules.*

APPEALS - *Grounds of appeal - Need to attach proposed grounds of appeal - In an application for leave to appeal on questions other than those of law alone.*

APPEALS - *Extension of time to appeal - Three essential prayers that go to the issue of jurisdiction - Must include prayer for enlargement of time within which to file notice of appeal.*

RULES OF COURT - *Departure from the Rules - That provide for exhibition of copies of judgments - Should not be encouraged - Though the departure is reluctantly granted in this case.*

FACTS

Before the Supreme Court, the applicant through their counsel applied for some Orders including departure from the provision of 0.6 r. 2(1) (c) of the Supreme Court Rules that provide for exhibition of certified copies of the lower Courts' judgments. Applicant also sought for enlargement of time within which to appeal to the Supreme Court on questions other than those of law alone among other prayers.

Applicant failed to seek an enlargement of time for filing the notice of appeal which was filed out of time. Whilst the apex Court reluctantly granted the applicant certain departure from the Rules of Court, it refused to grant those parts of the prayers that are fundamentally defective as a result of failure to pray for enlargement of time within which to file the notice of appeal.

HELD (Unanimously allowing the application in part per lead ruling of **OGWUEGBUJSC**)

Court has duty to ensure compliance with the Rules

1. Section 27 (4) of the Supreme Court Act gives the court power to extend the periods prescribed in section 27(2) thereof for the giving of notice of appeal or notice of application for leave to appeal while Order 2 Rule 31 and Order 6 Rule 2 (1) provide for the procedure and the contents of the application. Even though most of the prayers are not being opposed, the court will ensure that the conditions laid down by the rules are fulfilled. (p. 1567 E)

Departure from the Rules

2. The applicants failed to exhibit the certified copies of the judgments with which the application is concerned, that is, both of the Court of Appeal and the High Court. The certified copies of the notices of appeal were not exhibited or attached to the affidavit in support of the motion. The first prayer in the motion paper is for an order departing from the provisions of Order 6 rule 2(1) (c) of the rules of this court in so far as the defendants/applicants are required to exhibit with the affidavit in support of the motion, the judgments with which the application is concerned. Instead, we are referred to the various pages of the record of appeal where the judgments are contained. This is non-compliance with the rules and should not be encouraged. However, since the record of appeal is before us, a departure from the rules is hereby reluctantly granted as prayed in the interest of justice. (p. 1568 C)

Need to attach proposed grounds of appeal

3. The court will consider the grounds of appeal along with the judgment complained against and be satisfied that they prima facie show good cause why the appeal should be heard. There is no prayer for departure from Order 2 rule 31(2) (c) i.e. dispensing with the attachment of the grounds of appeal to the affidavit as was done in prayer (1) in respect of the judgments of the court below and the High Court. The proposed grounds of appeal is a very important document which must be before the court like the judgment appealed against. (p. 1568 F)

Extension of time - Three essential prayers

4. The applicants required three substantive prayers namely:
- for (i) enlargement of time within which to seek leave to appeal;
 - (ii) leave to appeal; and
 - (iii) extension of time within which to appeal.

These requirements go to the issue of the jurisdiction of the court, and leave

to appeal in our courts is a requirement of the Constitution and the periods within which a litigant can appeal are provided for in the statutes. In this application, one of the three prayers is missing and, as a result, the application is fundamentally defective. It is necessary for the applicants to seek for an enlargement of time for filing the notice of appeal. A notice of appeal filed out of time will require a prayer for enlargement of time within which to file such notice of appeal. It is only after that prayer is granted that the court may deem the notice of appeal already filed as duly and properly filed. (p. 1569 B)

REPRESENTATION

Chief F.R.A. Williams, S.A.N., with T.E. Williams, Esq for the Applicant
O. Ayanlaja, Esq., S.A.N., with E. A. Ebenezer (Miss), for the Respondents

CASES REFERRED TO

Atanda v. Olanrewaju (1988) 4 N.W.L.R. (Pt. 89) 394
Lamai v. Orbih (1980) 5-7 S.C. 28
Odofin v. Agu (1992) 3 N.W.L.R. (Pt. 229) 350
Akeredolu v. Akinremi (1986) 1 N.S.C.C. (Pt. 581 at 592
N.B.N. v. N.E.T. (1986) 3 NWLR (Part 31) 667
R. Lauwers Import-Export v. Jozebson Industries Ltd. (1988) 3 NWLR (Part 83) 429 at 447

STATUTE & RULES REFERRED TO

Supreme Court Rules 0.6 r. 2(1)(c), 0.2 r.31(2)
Constitution of Nigeria 1979 s. 213(3)

LEAD RULING BY OGWUEGBUJSC

By an application dated 24th February, 1997 and filed on the same date, the applicant Bolex Enterprises Nigeria Ltd. through their counsel applied to this court for the following orders:-

"(i) directing a departure from the provision of order 6 rule 2(c) of the Supreme Court Rules in so far as the defendants/applicants herein are required to exhibit with the affidavit in support of this motion on notice the judgments with which the application is concerned that is, both of the court below and the court of first instance.

(ii) for enlargement of time within which to seek leave to appeal to the Supreme Court on questions other than those of law alone from the judgment of the Court of Appeal delivered herein on the 30th day of January, 1996 and

(iii) for leave to appeal to the Supreme Court on questions other

than those of law alone and

(iv) to deem the Notice of Appeal already filed by each defendant to have been duly and properly filed,

(v) for extension of time within which to file the Appellant's Brief in support of the Appeal and to deem the Brief already filed to have been duly B and properly filed.

The application is supported by an affidavit of fourteen paragraphs deposited to by Tokunbo Eniola Williams, Esq., Legal practitioner in the Chamber of Chief F.R.A. Williams, S.A.N. which is representing the applicants. It was averred that the Court of Appeal delivered its final judgment in the case C on 30th January, 1996 and by motions dated 13:3:96 and 28:2:96 respectively each of the defendants moved the court below for leave to appeal to this court on questions other than questions of law alone and in its ruling dated 6th June, 1996, leave was granted.

It is appropriate to reproduce paragraphs 7, 8, 9, 11, 12, 13 and 14 of D the supporting affidavit. They read thus:

"7. At the material time when leave was granted as mentioned in paragraph 6 hereof, Chief Rotimi Williams S.A.N. did advise both defendants that the order of the Court below purporting to grant such leave was void but that leave was in any event unnecessary since the appeal appeared to E him to involve questions of law alone.

8. I actively participated with Chief Williams when he was preparing the Appellants' Briefs herein. Consequently I know that in the course of preparing that Brief Chief Williams became aware that some areas of the argument necessary to be presented to the court on behalf of the defendants F may to some extent be said to involve questions other than questions of law alone.

9. As soon as the preparation of the Brief was completed, Chief Williams decided to apply to this Honourable Court for leave to appeal to the Supreme Court on questions other than those of law alone and the necessary order enlarging the time within which to seek such leave. G

11. To the best of my knowledge, information and belief, the time for the Appellants to file their Brief expired on the 30th day of December 1996.

12. To my knowledge C. I. I. Joseph Esq. who had earlier been separately briefed for the 2nd defendant herein and who filed the Notice of H Appeal on its behalf and settled a draft brief in support of that defendant's case around the middle of November 1996, (sic). It was after this that the defendants agreed that Chief Williams should lead in the final appeal and submit a single Brief. A copy of the Brief prepared Mr. Joseph was given to Chief Williams.

13. *The failure of Chief Williams to complete the preparation of the brief of the Appellants herein was due mainly to heavy pressure of other work particularly in the months of November 1996 to January 1997 and he regrets extremely the delay caused in filing and serving the Brief herein.*

14. *I depose to this Affidavit in support of the motion on notice filed herein this day.*"

B

The applicants filed a brief in support of the application which is one of the requirements of Order 6 rule 2(1) of the supreme Court Rules. This court is being called upon to exercise its jurisdiction under section 213(3) of the Constitution of the Federal Republic of Nigeria, 1979 to grant the applicants leave to appeal on grounds of fact or of mixed law and fact. A brief in opposition to the application was also filed on behalf of the respondent company. One issue was formulated in the applicants' brief as arising for determination in the motion. It reads:

"Whether the defendants ought to be granted leave to appeal to this court on questions other than those of law alone as well as the extension of time necessary to seek such leave."

In the introduction to the respondent's brief Mr. Ayanlaja, S.A.N. stated as follows:

"the plaintiff does not oppose prayers (i), (ii), (iv), (v) and (vi) thereof but shall oppose prayer (iii) which seeks:-

E

'Leave to appeal to the Supreme Court on questions other than those of law.' "

Section 27 (4) of the Supreme Court Act gives the court power to extend the periods prescribed in section 27(2) thereof for the giving of notice of appeal or notice of application for leave to appeal while Order 2 Rule 31 and Order 6 Rule 2 (1) provide for the procedure and the contents of the application. Even though most of the prayers are not being opposed, the court will ensure that the conditions laid down by the rules are fulfilled. Order 2 Rule 31(2) provides that :

"31(2) Every application for an enlargement of time in which to appeal or in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period. There shall be exhibited or annexed to such affidavit -

(a) a copy of the judgment from which it is intended to appeal; H

(b) a copy of other proceedings necessary to support the complaints against the judgment; and

(c) grounds of appeal which prima facie show good cause why the appeal should be heard."

Order 6 Rule 2(1) provides:

"1(1) An application for leave to appeal or for enlargement of time within which to appeal or to seek leave to appeal, shall be supported by a Brief and shall include the following -

- (a) the motion paper for the application;
- B (b) the relevant affidavit in support thereof;
- (c) the relevant documents referred to in, and exhibited with, the said affidavit which must include true copies of the judgments with which the application is concerned that is, both the court below and the court of first instance verified by affidavit;
- C (d) the proposed grounds of appeal from the said judgment,

The applications failed to exhibit the certified copies of the judgments with which the application is concerned, that is, both of the Court of Appeal and the High Court. The certified copies of the notices of appeal were not exhibited or attached to the affidavit in support of the motion. The first
D **prayer in the motion paper is for an order departing from the provisions of Order 6 rule 2(1) (c) of the rules of this court in so far as the defendants/applicants are required to exhibit with the affidavit in support of the motion, the judgments with which the application is concerned. Instead, we are referred to the various pages of the record of appeal where the judgments are**
E **contained.**

This is non-compliance with the rules and should not be encouraged. However, since the record of appeal is before us, a departure from the rules is hereby reluctantly granted as prayed in the interest of justice. See Order 2 rule 31(1). The proposed grounds of appeal were not exhibited as
F **required by Order 6 rule 2(1) (c) of the Supreme Court Rules, 1985. By Order 2 rule 31(2) (c), there shall be exhibited or annexed to such affidavit grounds of appeal which prima facie show good cause why the appeal should be heard. The court will consider the grounds of appeal along with the judgment complained against and be satisfied that they prima facie show good cause why**
G **the appeal should be heard. There is no prayer for departure from Order 2 rule 31(2) (c) i.e. dispensing with the attachment of the grounds of appeal to the affidavit as was done in prayer (1) in respect of the judgments of the court below and the High Court. The proposed grounds of appeal is a very important document which must be before the court like the judgment appealed**
H **against.**

The failure to exhibit the proposed grounds of appeal to the affidavit in support of the motion is not a serious defect as the failure of the applicants to ask for extension of time within which to appeal. The application is for leave to appeal on questions other than those of law alone (See section 213 (3)

of the Constitution). An application for leave was made to the Court of Appeal. The court below purported to grant the application when the period it had jurisdiction to do so had elapsed. The leave granted being void, the applicants applied to this court. The applicants failed to include in their prayers, extension of time within which to appeal on grounds other than those of law alone. **The applicants required three substantive prayers namely:** B

- for (i) enlargement of time within which to seek leave to appeal;
- (ii) leave to appeal; and
- (iii) extension of time within which to appeal.

These requirements go to the issue of the jurisdiction of the court, and leave to appeal in our courts is a requirement of the Constitution and the periods within which a litigant can appeal are provided for in the statutes. In this application, one of the three prayers is missing and, as a result, the application is fundamentally defective. See Atanda v. Olanrewaju (1988) 4 N.W.L.R. (part 89) 394 and Lamai v. Orbih (1980) 5-7 S.C.28. It is necessary for the applicants to seek for an enlargement of time for filing the notice of appeal. D
A notice of appeal filed out of time will require a prayer for enlargement of time within which to file such notice of appeal. It is only after that prayer is granted that the court may deem the notice of appeal already filed as duly and properly filed. See Odofin & Or. v. Agu & Or. (1992) 3 N.W.L.R. (pt. 229) 350 and Akeredolu & Ors. v. Akinremi (1986) 1 N.S.C.C. (pt. 1) 581 at 592. E

This is the position even if the appellants' notices of appeal already filed were filed within time and contained some grounds of law. They need the prayer for extension of time since they are now seeking leave to appeal on grounds other than those of law alone. As a result of the above conclusion, it is not necessary to consider the merits of the prayer for leave to appeal on F grounds other than those of law alone.

Prayer (v) which is for enlargement of time within which to file the appellants' brief of argument and to deem the brief filed on 17:2:97 as duly and properly filed is hereby granted. It is not affected by the irregularity. Prayer (i) is also granted. Prayers (ii), (iii) and (iv) are accordingly refused. The respondent is entitled to the costs of this application which I assess at N1000.00. G

BELGORE JSC

I agree that the prayers to give full effect to the application are incomplete and this motion therefore fails. I make the same consequential orders as in the Ruling of Ogwuegbu, J.S.C. H

WALI JSC

I have the privilege of having a pre-view of the lead Ruling of my

learned brother Ogwuegbu, JSC and I agree with it.

For the same reasons in the lead Ruling, I also hereby grant the order as prayed in prayers (i) and (v). Prayers (ii), (iii) and (iv) for leave to appeal on grounds other than grounds of law are refused as there is no prayer for enlargement of time to file the Notice of Appeal containing such other grounds B than those of law alone.

I abide by the order of costs made in the lead Ruling.

ONU JSC

I have been privileged to read before now the Ruling just read by my C learned brother Ogwuegbu, JSC and with it I am in complete agreement that prayer (v) which is for enlargement of time within which to file the appellant's brief of argument and to deem the brief filed on 17th February, 1997 as duly and properly filed is hereby granted and that prayer (i) is also granted as prayed.

D However, in relation to prayers (ii), (iii) and (iv), inasmuch as it is the procedural law that a person who wishes to seek leave of court on any grounds of appeal after the expiration of the statutory periods prescribe under Section 25 of the Court of Appeal Act, 1976 and section 31 of the Supreme Court Act, 1960 as the case may be, requires THREE substantive prayers, namely:

- E (a) extension of time to seek leave to appeal
(b) leave to appeal
(c) extension of time within which to appeal,

Prayer (a) hereof is missing and the application is fundamentally defective. See Lamai v. Orbih (1980) 5-7 SC28; Odofin & Anor. v. Agu & Anor. (1992)3 F NWLR (part 229) 350 at 371 - 372; Premier Breweries Ltd v. Anere Construction Co. Ltd. (1987)3 NWLR (part 62) 688; N.B.N. V. N.E.T. (1986) 3 NWLR (part 31) 667 and R. Lauwers Import-Export v. Jozebson Industries Ltd (1988)3 NWLR (part 83) 429 at 447. It is immaterial that the applicants had already filed the appellants' notices of appeal which contained some grounds of law. It will be G struck out as incompetent since Chief Williams cannot be said to be on a firm ground here.

For these and the fuller reasons contained in the lead Ruling of my learned brother Ogwuegbu, JSC I too subscribe to the order made inclusive of the costs awarded.

H _____

ADIO JSC

Also agreed with the lead ruling