

**SUPREME COURT OF NIGERIA**

11TH JULY, 1997. SC. 33/1991

**CORAM:- M. L. UWAIJ CJN, S. M. A. BELGORE,  
E. O. OGWUEGBU, S. U. ONU, Y. O. ADIO, JJSC.**

CHIEF VICTOR UKWU	.....	DEFENDANT/APPELLANT
AND		
CHIEF MARK BUNGE	.....	PLAINTIFF/RESPONDENT

---

**APPEALS** - *Extension of time - To apply for leave to appeal - Conditions under which time will be extended under the Rules - Inquiring into the reasons for the delay may be unnecessary - Where prima facie issue of jurisdiction is raised.*

**APPEALS** - *Extension of time to appeal - Raising of arguable issue of jurisdiction - Will make the court take lenient view of the delay in appealing.*

**JURISDICTION** - *Challenge - Where there is challenge to the court's jurisdiction - Need to settle the issue - Before hearing of the suit.*

**FACTS**

The appellant is the 3rd defendant in a chieftaincy matter pending before the Rivers State High Court. The plaintiff/respondent in the matter sought inter alia, to restrain the 3rd defendant from continuing to perform any of the functions of the chieftaincy office of Oda-Abuan. At the close of pleadings 3rd and 4th defendants filed a motion challenging the trial court's jurisdiction to entertain the plaintiff's, claim and prayed the court to dismiss the action.

The ground of the objection is that whereas the 1979 Constitution granted jurisdiction to the high court over chieftaincy matters, the 1963 Constitution did not, and the cause of action arose in 1978 when the 1979 Constitution had not come into force. This and a similar application by another counsel to the 3rd defendant were dismissed and there was no appeal filed. Appellant's reason for the delay in appealing was as a result of his counsel's failure in spite of his instructions to them to appeal. His application for extension of time to appeal was dismissed by the Court of Appeal. Being dissatisfied, appellant has now appealed to the Supreme Court raising 3 issues.

**ISSUES FOR DETERMINATION**

*"1. Where a proposed ground of appeal challenges the jurisdiction of a court to entertain a suit, and the issue of lack of jurisdiction is apparent on*

*the face of the records, is it still necessary for a party who is seeking an extension of time to appeal against the said judgment to show by affidavit evidence good and substantial reasons for failing to appeal within the prescribed time?* Etc., see p. 1517

**HELD** (Unanimously allow the appeal per lead judgment of OGWUEGBU JSC)

**Where there is challenge to the court's jurisdiction**

1. When a challenge is made to the jurisdiction of the court, as in this case, that issue should be settled one way or another before the hearing of the suit. Jurisdiction being fundamental and crucial for if jurisdiction is lacking, the proceedings thereafter would be a nullity however well conducted they might otherwise be. (p. 1522 G)

**Conditions under which time will be extended**

1. The principles governing the grant of extension of time to apply for leave to appeal and extension of time to appeal as stated earlier in this judgment have been settled in several decisions of this court some of which have been considered in this judgment. Order 3 rule 4(2) provides that there should be:

- (i) substantial reasons for the failure to appeal within time, and
- (ii) grounds of appeal which *prima facie* show good cause why the

appeal should be heard.

The two must be present. But where the proposed ground of appeal complains of lack of jurisdiction and it *prima facie* appears so, as in this case, I am of the view that it may not be necessary to inquire into the reasons for the delay. The question of jurisdiction is a constitutional issue which may be raised at any stage of a proceeding even for the first time in this court. A court is bound to put an end to proceedings if at any stage and by any means it becomes manifest that they are incompetent. (p. 1522 H)

**Raising of arguable issue of jurisdiction**

3. The proposed ground of appeal raises a constitutional and fundamental issue of jurisdiction which *prima facie* appears so, and in such a case, it might not be necessary to inquire whether there are good and substantial reasons for not appealing within the prescribed period. As a result of the issue of jurisdiction raised in the proposed ground of appeal, I will be inclined to take a lenient view of the delay in appealing within the prescribed period. If the appellant had appealed against the finding of the court below on the issue of delay, the proposed ground of appeal would have in addition, prompted me to take a more lenient view of the reason for the delay. The court should always

consider the two conditions laid down in O. 3 r. 4(2) of the Court of Appeal Rules. In the result, all the questions are answered in the negative and the appeal succeeds. (p. 1523 D)

### **NOTABLE POINT OF INTEREST**

#### **BELGORE JSC**

##### *1. Issue of jurisdiction raised must be strong*

Baldly raising issue of jurisdiction is not enough to grant the prayers for extension of time, it must in the context of the whole case be a strong and substantially arguable point. At any rate, the applicant, in consideration of the whole case must not be dilatory; the delay in bringing the application must be supported by compelling reasons before the application can be granted; otherwise the raison detre of Order 3 rule 4(2) Court of Appeal Rules would be rendered useless. Rules are made to be obeyed. Thus the requirement of substantiality of reasons for the delay and pertinence of the ground of appeal are still very relevant in the final consideration. In the instant case not only the issue of jurisdiction is pertinent to a just decision of the case, but good and substantial reasons have also been advanced in the application. (p. 1524E)

#### **REPRESENTATION**

Appellant is absent and not represented

A. Akpomude, Esq. for the Plaintiff/Respondent

#### **CASES REFERRED TO**

Oloba v. Akereja (1988) 3 N.W.L.R. (Pt. 84) 508

Ajani v. Giwa (1986) 3 N.W.L.R. (Pt. 32) 796

Ojora v. Bakare (1976) 1 S.C. 47 at 52-53

University of Lagos v. Olaniyan (No. 1) (1985) 1 N.W.L.R. (Pt. 1) 156 at 163

Timitimi v. Amabebe 14 W.A.C.A. 379

Tukur v. Government of Gongola State (1989) 4 N.W.L.R. (Pt. 117) 517 at 545

Ezomo v. Oyakhire (1985) 2 SC. 260

Nwafia v. Ububa (1966) NMLR 219 at 221

Ejiofodomi v. H.C. Okonkwo (1982) 4 SC. 1 at 16

#### **STATUTES AND RULES REFERRED TO**

Court of Appeal Act 1976 s. 25 (2) (a) & (4)

Court of Appeal Rules 1981 O.3 r. 4(1) & (2)

Constitution of Nigeria 1963 s. 161 (3)

Constitution of Nigeria 1979 s. 221

Supreme Court Act 1960 s. 22

**LEAD JUDGMENT BY OGWUEGBUJSC**

This is an interlocutory appeal by the 3rd defendant against the ruling of the Court of Appeal, Port Harcourt Division dated 10th January, 1991. The 3rd defendant who is the appellant herein filed an application in the court below praying the court for the following orders:

*"(i) An order pursuant to Order 3 Rule 4(1) of the Court of Appeal Rules, 1981, extending the time within which the 3rd defendant/appellant/applicant is allowed to seek leave to appeal against the ruling of the Ahoada High Court delivered on the 10th day of July, 1981.*

*(ii) An order pursuant to order 3 rule 4(1) of the Court of Appeal rules, 1981, extending the time within which the 3rd defendant/appellant/applicant is allowed to appeal against the ruling of the Ahoada High Court delivered on the 10th day of July, 1981.*

*(iii) An order pursuant to section 221 of the Constitution of the Federal Republic of Nigeria, 1979 granting leave to the 3rd defendant/appellant/applicant to appeal against the ruling of the Ahoada High Court delivered on the 10th day of July, 1981.*

*(iv).....*

*(v)....."*

The court below dismissed the application hence this appeal.

The plaintiff/respondent instituted an action against the 3rd defendant/appellant and three others claiming various declaratory reliefs as well as an injunction restraining the 3rd defendant/appellant and the 4th defendant/respondent from parading themselves as and performing or continuing to perform any of the functions of the chieftaincy office of Oda-Abuan and that of his Prime Minister. At the close of pleadings, the 3rd and 4th defendants filed a motion on 27th October, 1980 challenging the jurisdiction of the High Court of Rivers State to entertain the plaintiff's claims and prayed the court to dismiss the action. The ground for the objection was that the cause of action arose in 1978 when the 1979 Constitution had not come into force.

It was contended on behalf of the applicants during the hearing of the motion to dismiss the suit before Okara, J. that the jurisdiction of the High Court of Rivers State to entertain the suit which is a chieftaincy matter was ousted by section 161(3) of the Constitution of the Federal Republic of Nigeria, 1963. The application was dismissed and there was no appeal against the dismissal. There was yet another application which was filed in the High Court on behalf of the appellant by another counsel challenging the jurisdiction of the High court. This second application was also dismissed and there was no appeal against that ruling. The reasons for his failure to appeal can be gathered from paragraphs 9 - 17 and 21 to 23 of his affidavit in support of the

application for leave to appeal. He deposed as follows:

"9. *On the 10th day of July, 1981, the High Court dismissed my motion and ruled that it has jurisdiction to hear the case.*

10. *Following the facts deposed in paragraph 9 above, I instructed my counsel aforementioned to appeal against the ruling. He advised me to wait until final judgment after which I can attack the ruling of the High Court refusing my application for dismissal, as he was of the view that the substantive case will be disposed off (sic) in a short time.*

11. *The matter could not be heard on time as my counsel advised due to the fact that the Presiding Judge P. G. Okara (late) was transferred out of Ahoada Judicial Division. The hearing of the matter was not started before P. G. Okara (late).*

12. *I later briefed Chike Ofodile Esq. S.A.N. to be my leading counsel in this case.*

13. *In the course of my instructions to Collins Ikebudu Esq. one of the junior counsel in the Chambers of Chike Ofodile S.A.N. my leading counsel in this case I did bring to his knowledge the ruling referred to in paragraph 9 above and insisted that it should be appealed against.*

14. *I was informed by Collins Ikebudu that instead of appealing against the ruling referred to above that it will be necessary to file a fresh motion challenging the jurisdiction of the court.*

14(a) *I was further advised by Collins Ikebudu and I verily believed him that if the court refuses my fresh application challenging its jurisdiction it will then be necessary to appeal against the respective rulings of the lower court together.*

15. *On 17th October 1986, Chambers of Chike Ofodile filed a motion-on-notice challenging the jurisdiction of the court.*

16. *On the 21st January 1987, the court dismissed the application on the ground of Res-Judicata since a similar application on lack of jurisdiction has been heard and dismissed by the same court. My counsel instead of appealing against the rulings as promised preferred to go into trial on the matter contrary to the advise referred to in paragraph 14(a) above.*

17. *My failure to appeal against the ruling referred to in paragraph 9 above was due to no fault of mine. It was as a result of my counsel's failure to follow my instructions to them.*

21. *By reason of the facts deposed to in paragraph 20 above, I renewed my plead to my leading counsel Chike Ofodile Esq. S.A.N. to appeal against the ruling of the court referred to in paragraph 9 above which he now accepted to do after personally going through the ruling.*

22. *I am informed by my leading counsel - Chike Ofodile S.A.N. and*

*I verily believe him that the time within which I am allowed to appeal to this court against the ruling afore mentioned has since expired and that it will be necessary to file the instant application in order to exercise my right to appeal against the said ruling.*

23. *My counsel aforesaid also informed me and I verily believe him that the only ground of appeal he intend (sic) to canvass before this court bothers on the jurisdiction of the High Court to entertain the plaintiff's claim."*

He averred in paragraphs 19 and 20 of the affidavit that the plaintiff closed his case on 9th November, 1989 and that the defendants are yet to open their defence.

The material averments in the counter-affidavit of the plaintiff/respondent are paragraphs 7, 8 and 9 and they read thus:

*"7. In the statement of claim of the plaintiff/respondent the reliefs sought against the defendants jointly and severally were for series of declarations most of which do not challenge the appointment and or recognition of defendant/applicant and consequently not affected by the applications (sic) motion relating to jurisdiction of the trial court.*

*8. There are no reliefs in the further amended statement of claim of the plaintiff/respondent challenging the appointment and/or recognition of the defendant/applicant which said further amended statement of claim is contained in Exhibit "A" attached to the Defendant/Applicants (sic) affidavit in support of this motion.*

*9. This case would have been finished long ago by the trial judge but for the Dependent/Applicant who always seeks for adjournment as a delay tactics to keep this case indefinitely in Court."*

As stated earlier, the court below dismissed the application of the 3rd defendant/appellant for extension of time within which to seek leave to appeal. The appellant was dissatisfied with the ruling and has appealed to this court. I have set down at length the background to the application and the materials before the Court of Appeal when it dismissed the application.

In his brief of argument the following issues are identified as arising for determination in the appeal:

*"1. Where a proposed ground of appeal challenges the jurisdiction of a court to entertain a suit, and the issue of lack of jurisdiction is apparent on the face of the records, is it still necessary for a party who is seeking an extension of time to appeal against the said judgment to show by affidavit evidence good and substantial reasons for failing to appeal within the prescribed time?*

*2. Were the learned Justices of the Court of appeal right in dismiss-*

*ing the defendant/appellant's application on the ground that he can still appeal against the interlocutory ruling after final judgment?*

3. *Did the learned Justices of the Court of Appeal exercise their discretion judiciously and judicially when they held that the interest of justice will be better served if this case is allowed to proceed to finality?"*

B The plaintiff/respondent also filed a brief of argument. He formulated two issues for determination which are amply covered by those identified by the appellant. It is therefore not necessary to reproduce them. When the appeal came up for hearing on 5th May, 1997, the appellant and his counsel were absent and having filed his brief of argument, the appeal was treated as argued. See Order 6 rule 8(6) of the Supreme Court Rules, 1985.

The court was referred to section 25 (2) (a) and (4) of the Court of Appeal Act and 0.3 r. 4(1) and (2) of the Court of Appeal Rules, 1981 in respect of issue (1). It was conceded in the appellant's brief that ordinarily, a party seeking an extension of time within which to appeal is expected to satisfy the D two conditions laid down in 0. 3 r. 4(2) and that in recent times, this court advocated that where the proposed grounds of appeal are arguable, the court should be lenient when considering the reasons for the delay and as much as possible, where the grounds are good, the applicant should not be shut out. It was however contended that where in an application for extension of time E within which to apply for leave to appeal, a proposed ground complains of jurisdiction and it, prima facie, appears so, it would not be necessary to inquire whether there were good and substantial reasons for failure to appeal within the prescribed time. The cases of In re Adewunmi & Ors. v. Osibanjo & Or. (1988) 3 N.W.L.R. (Part 83) 483 at 497 and 506, Lauwers Import Export v. Jozebson F Industries Ltd. (1988) 3 N.W.L.R. (Pt. 83) 429 at 450, Oloba v. Akereja (1988) 3 N.W.L.R. (Pt. 84) 508 and Westminster Bank Ltd. & Or. v. Edward & Or. (1942) A.C. 529 at 536 were cited. It was further submitted that if the case is allowed to go to completion and it is found out later that the High Court lacks jurisdiction, the parties would have wasted considerable time and expense. It was G further contended that the cases relied upon by the court below in dismissing the application did not deal with the issue of jurisdiction which is raised in the proposed ground of appeal.

The case of Ajani v. Giwa (1986) 3 N.W.L.R. (Pt. 32) 796 was referred to the court and it was contended in the brief that if the appellant waits till final H judgment before exercising his right of appeal, he will still have to bring an application for extension of time within which to seek leave to appeal and leave to appeal notwithstanding the provisions of 0. 3 r. 22 of the Court of Appeal rules.

It was also argued in the appellant's brief that the plaintiff's claims as

couched in the amended statement of claim is a subtle and ingenious attempt to side-track the provisions of Edict No. 5 of 1988 and section 161(3) of the 1963 Constitution. We were urged to allow the appeal.

It was submitted in the plaintiff/respondent's brief that the court below was right in dismissing the appellant's motion for failure to satisfy one of the mandatory conditions for the grant of such application, namely, good B and substantial reasons for failing to appeal within the prescribed time. The cases of Ibodo v. Enarofia & Ors. (1980) 5-7 S.C. 42 and Ojora v. Bakare (1976) 1 S.C. 47 at 52-53 were cited. It was argued that this court did not decide in Re Adewunmi & Ors. v. Osibanjo that once the grounds of appeal are substantial, there will be no need to inquire into the reason for the delay. C

It was further contended in the respondents' brief that the appellant delayed for nine years and six days before bringing his application and no acceptable reason was given for the delay as was found by the court below and that where there is inordinate delay as in this case, it would be a dangerous precedent for the courts to grant as a matter of course any application for D extension of time just because the grounds are arguable and raise an issue of jurisdiction. He cited and relied on the case of Ojora v. Bakare (1976) 1 SC. 47 at 52-53.

It was further submitted that the plaintiff had closed his case at the High Court and the defence ought to have started long before the appellant E filed the application leading to this appeal and that no useful purpose will be served if the appeal against the first ruling is granted when there is yet subsisting a second ruling by Okor, J. dated 21st January, 1987.

Another contention of the plaintiff/respondent is that the plaintiff's declaratory reliefs are varied and it will be more convenient to take all the F objections at the end of the case in the interest of justice and that the appellant has not lost his right of appeal. The cases of Utih & Ors. v. Onoyivwe (1991) 1 N.W.L.R. (Pt. 116) 166 and Ige v. Obiwale (1967) 1 All N.L.R. 276 were cited and relied upon.

The application in issue was brought pursuant to section 25 (2) (a) G and (4) of the Court of appeal Act, 1976 and section 221 of the 1979 Constitution. Section 25 (2) (a) and (4) reads:

*"25 (2) The periods for the giving of notice of appeal or notice of application for leave to appeal are -*

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

*(4) The Court of Appeal may extend the periods prescribed in subsection (2) and (3) of this section".*

The governing rule of procedure is Order 3 rule 4(1) and (2). Order 3 rule 4(1) also gives the court the power to extend the time for doing anything under the rules. Order 3 rule 4(2) lays down the conditions to be fulfilled by a party asking for an extension of time within which to seek leave to appeal. Order 3 rule 4(2) Court of Appeal Rules, 1981, provides:

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

One of the appellant's complaints is that the court below did not exercise its discretion judiciously and judicially. It is trite that an appellate court will not interfere with an exercise of discretion by a lower court simply because faced with a similar application, it would have exercised the discretion differently. See University of Lagos v. Olaniyan (No. 1) (1985) 1 N.W.L.R. (Pt. 1) 156 at 163 and Worbi & Ors. v. Asamanyeram & Ors. 14 W.A.C.A. 669 at 671. But it may do so in special circumstances such as where the discretion was exercised on wrong or insufficient material or where no weight or insufficient weight was given to relevant considerations or where the tribunal acted under E misconception of law or under misapprehension of fact and in all other cases where it is in the interest of justice to interfere. See Enekebe v. Enekebe & Or. (1964) All N.L.R. 95, Demuren v. Asuni & Or. (1967) All N.L.R. 101 and Mobil Oil v. Federal Board of Internal Revenue (1977) 3 S.C. 97 at 141.

This court has laid down the principles governing the grant of extension of time to apply for leave to appeal in many of its decisions such as University of Lagos v. Olaniyan No. 1 (supra), Ibodo v. Enarofia (1980) 5-7 S.C. 42, Lamai v. Orbin (1980) 5-7 S.C. 28, Ojora v. Bakre (1976) 1 S.C. 47 and Bowaje v. Adediwura (1976) 6 S.C. 143. The appellant conceded that ordinarily a party seeking an extension of time within which to apply for leave to appeal is G expected to satisfy the two conditions laid in order 3 rule 4(2) of the Court of Appeal rules but contended that where the proposed ground of appeal challenges the jurisdiction of the court to entertain the suit, and the issue of lack of jurisdiction is apparent on the face of the records, the court should be lenient when considering the reasons for the delay and that it is even unnecc-  
H essary to inquire whether there are good and substantial reasons for the delay.

Is the appellant's contention that where the proposed ground of appeal challenges the jurisdiction of the court to entertain the suit, the court should be lenient in its consideration of the reasons for the delay and should

not even inquire into the correctness of the reasons in law. I will at this stage refer to the case of Adewunmi & Ors. v. Osibanjo & Ors. (supra) where Nnamani, J.S.C. expressed the following views:

*"I now come to the issue of grounds of appeal. Let me reiterate that consideration of the proposed grounds of appeal is a necessary exercise within the proper meaning of Order 3 rules 4(2) of the Court of Appeal B Rules. I also reiterate that the substantiality of those grounds may even weigh on the mind of the court in considering its ultimate attitude to the reasons for the delay, and must weigh on its mind in determining whether it is just that the application for extension of time ought to be granted. The case of Moukarim v. Agbaje (1982) 11 S.C. 122 to which my attention has C been drawn is no authority for the proposition that once the reasons for the delay are found to be unsatisfactory the court need not proceed to look at the grounds of appeal. There was no pronouncement on the issue by the Supreme Court."*

Agbaje, J.S.C. in his contribution to the led judgment of Nnamani, D J.S.C., said:

*"I have had the advantage of reading in draft the lead judgment of my learned brother, Nnamani, J.S.C. I agree with him that on the materials before us in this case this appeal deserves to succeed in that the appellants have shown not only good and substantial reasons for their failure to ap- E peal within the time prescribed by law they have also supported their application with grounds of appeal which prima facie show good cause why the appeal should be heard. I regret I cannot agree with my learned brother, Nnamani, J.S.C. on the construction he placed on Order 3 rule 4 (2) of the Court of Appeal Rules, 1981. The rule states thus:-*

*"....."*

*Adverting to this ruling (sic) and the submission of learned counsel for the respondents on it, my learned brother Nnamani, J.S.C. said:-*

*"....."*

*I will for my part hold that the submission of the learned counsel for the G respondents is well founded on a true and proper construction of Order 3 rule 4(2) of the Court of Appeal Rules, 1981. The rule says:*

*"....."*

*So, in my view, the two props of an application for an extension of time within which to appeal should be regarded by the reason of their being H joined together by the conjunctive word "and" as having established simultaneously before an application for an extension of time can succeed. In other words the failure to establish either of them in an application for an extension of time will spell doom on the application."*

Continuing at page 506 Agbaje, J.S.C. observed:

"I am prepared to hold that where an application for an extension of time within which to appeal a proposed ground of appeal complains about lack of jurisdiction and it prima facie appears so, it may not be necessary to inquire whether there were good and substantial grounds for failure to appeal within the prescribed time. In such a situation what this court said in Hakido Kpema v. The State, (1986) 1 N.W.L.R. (Pt. 17) 396 at 407 and 408 per Obaseki, J.S.C. may apply."

There is no real conflict in the views of Nnamani and Agbaje, J.S.C. on the interpretation of Order 3 rule 4(2) of the Court of Appeal Rules, 1981. The views of Agbaje, J.S.C. are that where one of the conditions is not met, the application should be refused and there is no need to consider the second condition except where the proposed ground of appeal complains lack of jurisdiction whereas Nnamani, J.S.C. observed that there is no pronouncement by this court in Moukarim v. Agbaje (supra) for the proposition that once the reasons for they delay are found to be unsatisfactory the Court need not look at the grounds of appeal. He said that if the grounds of appeal are substantial, the court may be inclined to look with more favour on the reason for the delay and that as much as possible an appellant with an arguable appeal ought not to be shut out from an appeal.

There is no doubt that the delay in this case was in-ordinate (9 years and 6 days). But the appellant was not sleeping during those years. He was relying on the advice of the various counsel who were conducting the case for him. I will say no more on this since the appellant did not complaint of the finding of the court below on the reasons for delay in his grounds of appeal.

The only ground of appeal proposed in the notice of appeal which was annexed to the affidavit in support of the motion questions the jurisdiction of the court to entertain the suit in view of section 161(3) of the Constitution of the Federal Republic of Nigeria, 1963 and section 14 of the Constitution (Basic Provisions) Decree No. 32 of 1975.

**When a challenge is made to the jurisdiction of the court, as in this case, that issue should be settled one way or another before the hearing of the suit. Jurisdiction being fundamental and crucial for if jurisdiction is lacking, the proceedings thereafter would be a nullity however well conducted they might otherwise be.** See Onyema & Ors. v. Oputa & Ors. (1987) 3 N.W.L.R. (Pt.60) 259, Attorney-General of the Federation & Ors. v. Sode & Ors. (1990) 1 N.W.L.R. (Pt. 128) 500, Madukolu & Ors. v. Nkemdilim (1962) 2 All N.L.R. 581 and Ishola v. Ajiboye (1994) 6 N.W.L.R. (Pt. 352) 506.

**The principles governing the grant of extension of time to apply for leave to appeal and extension of time to appeal as stated earlier in this judg-**

ment have been settled in several decisions of this court some of which have been considered in this judgment. Order 3 rule 4(2) provides that there should be:

- (i) substantial reasons for the failure to appeal within time, and
- (ii) grounds of appeal which *prima facie* show good cause why the

appeal should be heard.

The two must be present. But where the proposed ground of appeal complains of lack of jurisdiction and it *prima facie* appears so, as in this case, I am of the view that it may not be necessary to inquire into the reasons for the delay. The question of jurisdiction is a constitutional issue which may be raised at any stage of a proceeding even for the first time in this court. A court is bound to put an end to proceedings if at any stage and by any means it becomes manifest that they are incompetent. See Timitimi v. Amabebe 14 W.A.C.A. 379., Westminster Bank Ltd. v. Edwards & Or. (1942) A.C. 529, Tukur v. Government of Gongola State (1989) 4 N.W.L.R. (Pt. 117) 517 at 545 and Mustapha v. Governor of Lagos State (1987) 2 N.W.L.R. (Pt. 58) 539.

The fact that under Order 3 Rule 22 of the Court of Appeal Rules, the appellant can appeal against the interlocutory ruling after final judgment is not sufficient reason to dismiss the application. **The proposed ground of appeal raises a constitutional and fundamental issue of jurisdiction which *prima facie* appears so, and in such a case, it might not be necessary to inquire whether there are good and substantial reasons for not appealing within the prescribed period. As a result of the issue of jurisdiction raised in the proposed ground of appeal, I will be inclined to take a lenient view of the delay in appealing within the prescribed period. If the appellant had appealed against the finding of the court below on the issue of delay, the proposed ground of appeal would have in addition, prompted me to take a more lenient view of the reason for the delay. The court should always consider the two conditions laid down in O. 3 r. 4(2) of the Court of Appeal Rules.**

**In the result, all the questions are answered in the negative and the appeal succeeds.** It is allowed by me. I hereby set aside the ruling of the Court of Appeal dated 11th January, 1991. Pursuant to the powers of this court under section 22 of the Supreme court Act, 1960, I make the following orders:

1. The prayers for enlargement of time within which to seek leave to appeal and for leave to appeal are hereby granted.

2. The applicant is granted an extension of 30 days from the date of this judgment to file his notice of appeal in the court below against the ruling of Okara, J. dated 10th July, 1981. The appellant is entitled to the costs both in the court below and in this court which I assess at N500.00 and N1,000.00 respectively against the plaintiff.

**UWAIS CJN**

I have had the opportunity of reading in draft the judgment read by my learned brother Ogwuegbu, JSC. I agree that the appeal has merit and that it should be allowed for the reasons stated therein.

I too hereby allow the appeal and set aside the decision of the court below. The application brought in the Court of Appeal is hereby allowed. Extension of Time to apply for leave to appeal and leave to appeal are hereby granted as prayed. Similarly the application for extension of time within which to appeal is granted as prayed. The proposed notice of appeal challenging the jurisdiction of the High Court to hear the action brought shall be filed in the Court of Appeal, PortHarcourt, within 30 days from today.

I award N1,000.00 costs to the Appellant against the Respondent.

**BELGORE JSC**

Where a party prays for extension of time to appeal and the ground is based on issue of jurisdiction and it is prima facie a strong issue in consideration of the whole proceedings, the Court will readily accede to the prayer as jurisdiction is always a good and substantial reason why an appeal should be heard. (Lauwers Import-Export v. Jozebson Industries Ltd. (1988) 3 N.W.L.R. (Pt. 83) 429, 450; Oloba v. Akereja (1988) 3 NWLR (Pt 84) 508; In Re Adewumi & Ors. v. Osibanjo & Ors. (1988) 3 NWLR (Pt 83) 483, 497, 506). Baldly raising issue of jurisdiction is not enough to grant the prayers for extension of time, it must in the context of the whole case be a strong and substantially arguable point. At any rate, the applicant, in consideration of the whole case must not be dilatory; the delay in bringing the application must be supported by compelling reasons before the application can be granted; otherwise the raison d'être of Order 3 rule 4(2) Court of Appeal Rules would be rendered useless. Rules are made to be obeyed. Thus the requirement of substantiality of reasons for the delay and pertinence of the ground of appeal are still very relevant in the final consideration.

In the instant case not only the issue of jurisdiction is pertinent to a just decision of the case, but good and substantial reasons have also been advanced in the application. I also allow the appeal for the fuller reasons contained in the judgment of my learned brother, ogwuegbu, J.S.C. I make the same consequential orders as to costs.

H

**ONU JSC**

Having had before now the privilege to read the judgment of my learned brother Ogwuegbu, JSC just delivered, I am in entire agreement with him that this appeal is meritorious and must therefore succeed.

As the law applicable to the matter herein which was raised and decided against the appellant by the trial High Court was upheld by the Court of Appeal, to wit: that the High Court's jurisdiction to entertain the chieftaincy matter under challenge whose cause of action arose in 1978 when the 1979 Constitution of the Federal Republic of Nigeria was yet to come into force and so ousted by virtue of section 161(3) of the Constitution of the Federation, B 1963, the overruling of the appellant's application for leave to appeal on grounds of ouster of jurisdiction ought not to have been so overruled. This is because despite the fact that time within which to appeal had elapsed, the presence of a strong ground of appeal founded on jurisdiction which by virtue of Order 3 Rule 4(2) Court of Appeal Rules, 1981 (as amended) stipulates C that -

*"Every application for 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 ....."* D ought to have militated against this application pivoted on the above twin requirements which were apparently satisfied to merit being thrown out by the wave of the hand by both courts below.

Besides, the appellant having shown some strong reasons why the Court of Appeal should have enlarged his time to appeal pursuant to Section E 25(2) and (4) of the court of Appeal Act, 1976 which provides that -

*"25(2) The periods for the giving of notice of appeal or notice of application for leave to appeal are -*

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

*(b) in an appeal in a criminal cause on matter, ninety days from the date of the decision appeal against.*

*(4) The Court of Appeal may extend the periods prescribed in sub-sections (2) and (3) of this section."* G

that court ought reasonably to have granted his application.

Also, the lone ground of jurisdiction notwithstanding, it being established that when a challenge is made to the jurisdiction of the court as in the case in hand, that issue should be settled one way or another before the hearing of the suit. Furthermore, as it is settled law that jurisdiction being H fundamental and crucial, the very fact that its absence automatically results in a nullity of proceedings no matter how well conducted, it must be specifically dealt with and resolved if and when raised. See Kasikwu Farms Ltd. v. A. G. Bendel State (1986) 1 NWLR (Part 19) 695. This is moreso that jurisdiction

goes to the competence of the court to try a case at all - see Madukolu v. Nkemdilim (1962) 1 ALLNLR 587 at 595. Besides, this court has unequivocally held that any defect in competence is fatal for the proceedings are therefore a nullity however well conducted or decided; the defect being extrinsic to the adjudication. In Obikoya v. Registrar of Companies & Anor. (1975) 4 SC. 31 at B 34/35 this court held:

*"..... the existence or absence of jurisdiction in the court of trial goes to the root of the matter so as to sustain on nullity the trial Judge's decision or order in respect of the relevant subject-matter."*

See also Ezomo v. Oyakhire (1985) 2 SC. 260 and Nwafia v. Ububa (1966) C NMLR 219 at 221.

Finally, as a question of jurisdiction can be raised at any time or stage in the proceedings or on appeal as a sub-stantive point of law, for which see Bronik Motors Ltd. v. Wema Bank Ltd. (1983) 6 SC. 158 at 273; Ejiofodomi v. H.C. Okonkwo (1982) 4 SC. 1 at 16; Salati v. Shehu (1986) 1 NWLR (Part 15) 198 D at 205 and Onyema v. Oputa (1989) 3 NWLR (Part 60) 259, the court below ought to have granted the appellant's application which was apparent on his proposed ground of appeal. The court below did not advert its attention to the fundamental fact as disclosed in the case in hand that the jurisdiction of a court is determined by the existing law at the time the cause of action in E dispute arose (here in 1978 when the 1963 Constitution was in force) and not when, by the existing law at the time the trial court's and the Court of Appeal's jurisdiction on a proposed Notice of Appeal, ought to have put them on notice or on guard to allow the matter to be thrashed out first and not to side-track or overstep a fundamental legal requirement.

F For these and the more elaborate reasons given by my learned brother Ogwuegbu, JSC I too allow the appeal and I make similar consequential orders as contained in the lead judgment.

---

#### ADIO JSC

G I have had a preview of the judgment just read by my learned brother, ogwuegbu, J.S.C., and I too think that there is merit in the application. I allow it and I abide by the consequential orders, including the order for costs.

There were substantial reasons for the failure to appeal within the prescribed time. The appellant was vigilant and persistent in his demand that H his solicitors should lodge an appeal. The ground of appeal which raised issue of jurisdiction of the court to entertain the action could not be said to be frivolous and it, prima facie, showed good cause why the appeal should be heard.