

SUPREME COURT OF NIGERIA
30TH JANUARY, 1998. SC. 65/1989
CORAM:- A. B. WALL, I. L. KUTIGI, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC.

SHEHU BABAYAGI	APPELLANT
AND		
ALHAJI NDATSADU BIDA	RESPONDENT

***APPEALS** - Dismissal of appeal for want of prosecution - Where appellant failed to file his brief within the stipulated time - And the application for dismissal was served on him - Dismissal pursuant to O.6 r. 10 Court of Appeal Rules - Will not be disturbed.*

***APPEALS** - Dismissal of appeal - Default in filing brief of appeal - Failure to apply for extension of time - Dismissal of the appeal for want of prosecution cannot be revived under the Rules.*

FACTS

The plaintiff/appellant sued the defendant/respondent before the Benue State High Court Makurdi claiming specific performance of an agreement for sale of building. He claimed in the alternative N100,000.00 special and general damages for breach of the contractual agreement. Respondent by the agreement in question, agreed to sell part of the building in issue to the appellant who paid the sum of N7,000.00 for that purpose. The trial court ordered the respondent to refund the sum of N7,000.00 to the appellant and awarded N3,000.00 as general damages for breach of the contract.

The appellant lodged an appeal before the Court of Appeal but failed to file his brief of appeal within the specified time. Respondent's counsel filed a motion on notice by which he moved the Court below to dismiss the appeal for want of diligent prosecution pursuant to O.6 r. 10 of Court of Appeal Rules 1984. The appellant though served was not in court and no reason was given for his absence. The appeal was accord-

ingly dismissed. Appellant thereafter moved the Court below to relist the suit but his application was dismissed for being misconceived. Appellant has now appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

"(a) Whether the learned Justices of the Court of Appeal were right by dismissing the Appellant's Appeal when it was never heard on its merit instead of striking out, and whether their so doing has not occasioned a miscarriage of justice.

(b) Whether the learned Justices of the Court of Appeal are right in dismissing the Appellant's appeal in the absence of the Appellant's Counsel, without hearing the Appellant and thus visiting the sin of the appellant's Counsel on the Appellant, and whether their doing so has not occasioned a miscarriage of justice.

(c) Whether the failure of the justices of the Court of Appeal in not considering in its (sic) Ruling that the Appellant was not aware that his counsel will not be attending the court on that day so as to brief another counsel has not occasioned a miscarriage of justice."

HELD (Unanimously dismissing the appeal per lead judgment of ONU JSC)

Dismissal of appeal for want of prosecution

1. The consequence in the instant case is that it is clear that the relevant appeal was filed in the court below on the 27th November, 1986 and that the appellant's counsel was duly served on the 23rd April, 1987. Since neither the appellant nor his counsel alleged that the application leading to the dismissal of the appeal for want of prosecution was not served on him and no attempt or effort was made by him or his counsel to file his brief within the time stipulated, that is to say, within 60 days of the service of the same on him, the express provisions of Order 6 Rule 10 of the Court of Appeal Rules, 1981 (ibid), in my respectful opinion, would have full sway. (p. 194 H)

Dismissal - Default in filing brief of appeal

2. In other words, the appellant being in default and not having filed an

application for extension of time within which to file his brief, his default of the express provision of the Rules cannot in any way be remedied. The court below when moved by the respondent was therefore, in my judgment, perfectly entitled and indeed right to have dismissed appeal No. CA/J/64M/88 for want of prosecution on the 23rd June, 1988. See Chukwura v. Ezulike (supra). Be it noted that under Order 6 Rule 10 Court of Appeal Rules (ibid) the appeal dismissed cannot be revived. (p. 195 B)

NOTABLE POINT OF INTEREST

IGUHJSC

1. Sympathy cannot override the Rules of Court

Learned counsel for the appellant tried in his brief of argument to enlist the sympathy of this court by arguing that the court below was wrong in dismissing the appeal instead of striking it out as the appellant might not have been aware that his counsel would not be attending court to oppose the application. I need only restate that sympathy cannot override the clear provisions of the Rules of Court and that it would be in the best interest of the parties and their counsel to endeavour always to comply with the prescribed times set out in the Rules for the doing of any act or taking of any step. (p. 200 F)

REPRESENTATION

Appellant absent, not represented.

Respondent absent, not represented.

CASES REFERRED TO

Chukwura v. Ezulike (1986) 5 NWLR (Part 45) 892

Ogbu v. Urum (1981) 4 SC 1

Sodeinde Brothers (Nig.) Ltd. v. ACB Ltd (1982) 6 SC. 137

STATUTES & RULES REFERRED TO

Court of Appeal Rules 1984 O.6 r. 10

Court of Appeal Act. s. 16

Supreme Court Rules O. 8 r. 16, O.6 r. 9(1)
 Constitution of Nigeria 1979 s. 213(3)

LEAD JUDGMENT BY ONU JSC

B This appeal emanates from the Ruling delivered by the Court of Appeal, Jos Division on April 27, 1988 (Coram: Maidama and Mukhtar, JJCA as well as Adio, JCA, as he then was) when it dismissed the appellant's appeal acting pursuant to Order 6 Rule 10 Court of Appeal Rules, 1981 as amended in the words following:-

C *"The appellant was served with the motion papers. He is not in court this morning. No reason was given for his absence. Application is therefore granted. Appeal is hereby dismissed with one Hundred Naira costs."*

D A resume of the facts of the case may be briefly stated as follows:-

The Appellant as plaintiff had in the Benue State High Court sitting at Makurdi sued the respondent, then defendant, for, inter alia, the following reliefs:-

E *"1. Specific performance by the Defendant of the written agreement made on the 28th day of December, 1984, conveying part of building and premises at No. 16, Bank Road, Makurdi, to the plaintiff, with effect from the 1st day of January, 1985.*

F *OR IN THE ALTERNATIVE.*

G *2. Special and General Damages limited to N100,000.00 for breach as aforesaid of the contractual duty imposed on the Defendant by the said written agreement dated the 28th day of December, 1984, to convey part of the building and premises at No. 16, Bank Road, Makurdi to the Plaintiff with effect from the 1st day of January, 1985."*

H The above action was sequel to an agreement entered into on 28th December, 1984 between the appellant and the respondent wherein the respondent agreed to sell part of the building at No. 16 Bank Road, Makurdi to the appellant and to transfer same to the appellant with effect from the 1st of January, 1985 in consideration of the appellant paying to the respondent the sum of N7,000.00. Consequent upon the agreement,

the appellant paid the said sum of N7,000.00 to the respondent the receipt of which the respondent acknowledge in writing vide Exhibit 1.

The respondent refused and/or neglected to specifically perform his own side of the agreement, Exhibit 1, said to have been written by one Ndako Abdulrahman Ndabashin, who allegedly escorted the appellant to Bida from Makurdi to meet the respondent and at respondent's request that he (Ndabashin). Wrote in English and explained its content to the respondent in the Nupe language following which he signed it in Arabic. The appellant's case was given support in the testimonies of p.w.1, Ndako Abdulrahman Ndabashin aforesaid as well as P.W.2, one Sule Garba. The respondent on the other hand testified and called no witness.

The trial court in a considered judgment dated 31st October, 1986, ordered the respondent to refund to the appellant the sum of N7,000.00 while awarding against the respondent N3,000.00 as general damages for breach of the contract as well as for tying down his (appellant's) N7,000.00 since December 1984 to date.

What led to the appeal herein was sequel to the above judgment wherein the appellant although he had enough time to file his brief to get his appeal ready for hearing did not do so until by a motion on notice by the respondent's Counsel on the 28th of March, 1988 he moved the Court of Appeal (hereinafter referred to as the court below) to dismiss the appeal for want of diligent prosecution. At the hearing of the motion on 27th April, 1988 where an instant ruling was given by the court below, the following transpired:

F.M. Ebofuame. E. Neza (Mrs.) for the Respondent.

Appellant absent.

Respondent - We have an application before the court seeking an order of this (sic) to dismiss the appeal for want of diligent prosecution. The application is brought under Order 6 rule 10 of Court of Appeal Rules 1984. The application is supported by an affidavit sworn to by James H Kollo. I rely on all the paragraphs of the affidavit. I urge the court to dismiss the appeal.

RULING

The appellant was served with the motion papers he is not in court this morning. No reason was given for his absence. Application is therefore granted. Appeal is hereby dismissed with one Hundred Naira cost."

B Sequel to the above Ruling the appellant moved the court below under Section 16 of the Court of Appeal Act and its inherent powers thereof to re-list the suit. At the hearing of the motion on the 23rd June, 1988 the court after listening to counsel on both sides ruled inter alia as follows:-

C "RULING

This is an application to re-list appeal No. CA/J/104/87 which was dismissed by this court for want of prosecution on 27/4/88. The affidavit in support of the motion sworn to by Amadamen Oriakhi de-
D *posed to the effect that applicant's counsel could not attend court on 27/4/88 to seek an extension of time to file appellant's brief. Learned counsel however concedes (sic) that the record of proceedings was served on him on the 23rd of April, 1987. He prays this court to relist the appeal*
E *under Section 16 of the Court of Appeal rules and under our inherent powers.*

We have considered the affidavit and argument of counsel, and the short answer is that a dismissal for want of prosecution following the
F *failure of the appellant to file a brief is final and the appeal dismissed cannot be revived. By our order of dismissal this court had become functus officio. Order 6 Rule 10 of the Court of Appeal Rules 1984 clearly permits this court to dismiss an appeal where an appellant fails to*
G *file his brief. This Section is in pari materia with Order 8 Rule 16 of the Supreme Court Rules, 1985. We rely on Chukwuka v. Ezulike (1986) 12 SC. 246 at 256. See also Sodeinde Ltd. v. African Continental Bank (1982) 6 SC. 137.*

In our view, the application is misconceived and it is hereby
H *dismissed with seventy five Naira (N75.00) costs to the respondent."*

Being dissatisfied with the said decision the appellant has appealed to this court on three grounds. The three issues formulated by the appellant in accordance with the rules of this court for our resolution and

at which hearing neither of the parties appeared on 17th November, 1997, are:-

"(a) Whether the learned Justices of the Court of Appeal were right by dismissing the Appellant's Appeal when it was never heard on its merit instead of striking out, and whether their so doing has not occasioned a miscarriage of justice.

(b) Whether the learned Justices of the Court of Appeal are right in dismissing the Appellant's appeal in the absence of the Appellant's Counsel, without hearing the Appellant and thus visiting the sin of the appellant's Counsel on the Appellant, and whether their doing so has not occasioned a miscarriage of justice.

(c) Whether the failure of the justices of the Court of Appeal in not considering in its (sic) Ruling that the Appellant was not aware that his counsel will not be attending the court on that day so as to brief another counsel has not occasioned a miscarriage of justice."

It is my intention in my consideration of this appeal to deal with all three issues proffered by the appellant (the respondent having filed no brief and submitted none) by stressing that the Ruling of the court below, in my view, is well grounded, based as it were, on Order 6 rule 10 of the Court of Appeal rules (ibid) which states as follows:-

"Where an appellant fails to file his brief within the time provided for in rule 2 above, or within the time extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of court. Where an appellant fails to file a reply brief within the time specified in rule 5, he shall be deemed to have conceded all the new points or issues arising from the Respondent's brief."

As can be seen, the above rule which is in pari materia with the old Order 6 rule 9(1) of the Supreme Court Rules, 1985 then in force, provided inter alia that:

"If an appellant fails to file his Brief within the time provided for in rule 5 above, or within the time as extended by the court the respondent may apply to the court for the appeal to be dismissed for want

of prosecution. If the respondent fails to file his Brief, he will not be heard in oral argument except by leave of the court. A dismissal of an appeal under this Rule whether on the application of the respondent or not, where the appellant fails to file his brief shall amount to a dismissal on the merit"

In the Supreme Court, there has been no dearth of authorities in relation to the interpretation of this and other related Rules. For instance, it has been decided by this court in John Chukwura and Ors. v. Ndugueze Gregory Ezulike (1986) 5 NWLR (Part 45) 892 - a case in which the Appellant had appealed to the Supreme Court against the judgment of the Court of Appeal and failed to file their brief within the prescribed period, this court on the 12th November, 1985 proceeded to dismiss the appeal for want of prosecution pursuant to Order 6 Rule 9(1) of the old Rules.

On 25th August, 1986 the Appellant brought an application for, inter alia, extension of time within which to apply for leave to appeal to this Court, and an order for leave to appeal on questions other than questions of law alone.

The grounds upon which the application was based were that through oversight the appellants' counsel did not take necessary steps in respect of the appeal in that although the grounds of appeal raised questions other than questions of law alone, no leave had been sought for or obtained when the Notice of Appeal was filed, and that the appellants were anxious to prosecute their appeal.

The Respondents' Counsel raised a preliminary objection that the Supreme Court having dismissed the appeal of the Appellants on 12th November, 1985, the Court was not competent to hear the appeal a second time again.

The main argument of Counsel to the Appellants in support of the application was that since the original grounds of appeal filed by the Appellants which contained grounds on questions other than questions of law alone were filed without the leave of the Court of Appeal or the Supreme Court as required by Section 213(3) of the 1979 Constitution, they were invalid.

In arguing the Appellants' appeal, Counsel contended that the

Supreme Court lacked jurisdiction since there was no valid appeal before it. Where a determination is made by a court without jurisdiction, he further argued, it is not necessary to have to do anything about it since it was an act done without jurisdiction. He therefore maintained that he was entitled to bring the motion for extension of time as he did not ignore B the determination by the Supreme Court on 12th November, 1985 and also that the proper order which ought to have been made was one striking out the appeal.

This Court unanimously held inter alia (per Aniagolu, JSC) that C the jurisdiction of any appellate court is statutory and that -

"Under the Rules the appeal could be dismissed for failure to file brief; or for non-compliance with the conditions of appeal; or for want of prosecution. (See Order 6 Rule 9(1); Order 8 Rule 8(1); and Order 8 Rule 8(3) respectively. BIRKETT v. JAMES (1978) AC 297 has D given detailed analysis of principles for a dismissal of an action for want of prosecution. It is clear from the foregoing that upon the transgressions of the Applicant, this court was rightly entitled to dismiss the appeal.

There is one other point. Obviously mindful of the old doctrine: E interest reipublicae ut sit finis litium, the Supreme Court Rules have provided in Order 8 Rule 16 that:

"16. The Court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising F from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the Court decided nor shall the operative and substantive part of it be varied and a different G form substituted."

The above Order 8 Rule 16 has identical wordings with Order 7 Rule 30 of the 1977 Rules of the Supreme Court under which CHIEF IRO OGBU and ors. v. CHIEF OGBURU URUM and Anor. (1981) 4 SC.1 was decided. In IRO OGBU (supra) this Court (per Obaseki, JSC) at page 9 H stated as follows:-

"I am aware that since the order of dismissal was delivered by the court, the judgment has been drawn up, signed and sealed.

Even if it were not drawn up, signed and sealed, the provision of Order 7 rule 30 deprives this court of any jurisdiction to review the judgment of dismissal for want of prosecution. The inherent jurisdiction of this court under Section 6(6)(a) of the Constitution cannot be invoked to save the situation. This court is therefore unable and incompetent to entertain this application to direct that the appeal be re-entered. Sympathy cannot override the clear provisions of our Rules and it would be in the interest of all if parties and their counsel endeavour to keep to the times set out in the Rules for the doing of any act or taking of any step."

IRO OGBU (supra) was approved and followed in *SODEINDE BROTHERS (NIG.) LTD v. ACB LTD* (1982) 6 SC. 137. But *IRO OGBU* (supra) was still being pursued angrily by some Counsel with drawn dagger of an assassin. This Court in a final bid to settle the issue in *T.A. YONWUREN v. MODERN SIGNS (NIG) LTD; JOHN ENEMOH & Anor v. CHIEF DANIEL ONOKPITE and Ors., AND UDEALO NWAOPA v. NWANNOLI NWAKONOB* (1985) 2 SC. 86 (Consolidated) empanelled a full Court which returned the same verdict that this court has no jurisdiction, inherent or pursuant to the 1977 Supreme Court Rules, to re-enter an appeal dismissed under Order 9 Rule 7 of the 1977 rules - a fortiori, to re-enter an appeal dismissed under Order 8 Rule 16 of the 1985 rules.

Chief Williams' ingenious argument in the present matter was another way - subtle and penetrating - of resurrecting the old tirade against *IRO OGBU* (supra) and *YONWUREN* (supra). But I should think that the time has come when the tired bones of *IRO OGBU* (supra) which under went ceremonial interment on 3rd April, 1981, should be allowed to rest in perfect peace, within their congenial surroundings.

I would therefore hold and hereby hold, that this Court was *functus officio* after its order of 12th November, 1985 dismissing the appeal. The preliminary objection raised by Mr. Ezekwe, of Counsel, was well founded, and consequently the motion of the Applicants dated 25th August, 1986 is hereby dismissed with N25.00 costs to the Respondent."

The consequence in the instant case is that it is clear that the relevant appeal was filed in the court below on the 27th Novem-

ber, 1986 and that the appellant's counsel was duly served on the 23rd April, 1987. Since neither the appellant nor his counsel alleged that the application leading to the dismissal of the appeal for want of prosecution was not served on him and no attempt or effort was made by him or his counsel to file his brief within the time stipulated, that is to say, within 60 days of the service of the same on him, the express provisions of Order 6 Rule 10 of the Court of Appeal Rules, 1981 (ibid), in my respectful opinion, would have full sway. In other words, the appellant being in default and not having filed an application for extension of time within which to file his brief, his default of the express provision of the Rules cannot in any way be remedied. The court below when moved by the respondent was therefore, in my judgment, perfectly entitled and indeed right to have dismissed appeal No. CA/J/64M/88 for want of prosecution on the 23rd June, 1988. See Chukwura v. Ezulike (supra). But contrast this with the provisions of Order 6 Rule 9 of the Supreme Court Rules, 1985 as amended, which in this Court now provides:

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

Be it noted that under Order 6 Rule 10 Court of Appeal Rules (ibid) the appeal dismissed cannot be revived.

In the result, this appeal lacks merit and I accordingly dismiss it with no order as to costs to the respondent who did not appear at the hearing on 17th November, 1997.

WALI JSC

I have read in advance the lead judgment of my learned brother Onu, JSC and I entirely agree with it.

For the same reasons stated in the lead judgment I also hereby

dismiss the appeal with N10,000.00 costs to the respondent.

KUTIGIJSC

This is an appeal by the appellant whose pending appeal at the Court of Appeal Kaduna was dismissed for want of prosecution pursuant to the provisions of Order 6, Rule 10 of the Court of Appeal (Amendment) Rules, 1984 which reads:-

"10. Where an appellant fails to file his brief within the time prescribed for in Rule 2 above, or within the time as extended by the Court, the respondent may apply to the Court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of the Court. Where an appellant fails to file a reply brief within the time specified in Rule 5, he shall be deemed to have conceded all the new points or issues arising from the respondent's brief."

The motion to dismiss the appeal was supported by an affidavit of 9 paragraphs sworn to by one James koko. It reads

"1. That I am the Litigation Clerk in the Law Firm of Osuman and Company of No. 29 osuman Street, Wurukwu, makurdi.

2. That by virtue of my position I am conversant with all cases that are being handled by this Law Firm.

3. That the above named matter is one of the cases presently being handled by this Law Office.

4. That I have the authority of the applicant to depose to this affidavit on his behalf.

5. That I am informed by F.M. Ebofuame-Nezan Esq., whom I verily believe that the above appeal was filed on the 27th day of November, 1986.

6. That I am informed by F.M. Ebonfuame-Nezan Esq., who I verily believe that the record of Appeal was subsequently prepared by the Makurdi High Court Registry.

7. That I am informed by F.M. Ebofuame-Nezan Esq., whom I verily believe that the Record of Appeal was served on appellant's counsel on the 23rd day of April, 1987.

8. *That I am further informed by F.M. Ebofuame-Nezan Esq., whom I verily believe that despite the fact deposed to in paragraph 7 above the appellant is yet to file his brief of appeal.*

9. *That I make this oath solemnly and conscientiously believing same to be true and correct according to the best of my information, knowledge and belief."*

There was no counter affidavit in opposition even though appellant's counsel was served with the motion papers as we shall soon see.

The relevant proceedings of the Court of Appeal on the fateful day, the 27th April, 1988, is short and clear thus:-

"F.M. Ebofuame E. Neza (Mrs.) for the respondent Appellant absent - served.

Respondent - we have an application before the court seeking an order of this Court to dismiss the appeal for want of diligent prosecution. The application is brought under order 6, rule 10 of the Court of Appeal Rules 1984. The application is supported by an affidavit sworn to by James Koko. I rely on all the paragraphs of the affidavit. I urge the Court to dismiss the appeal.

RULING

The appellant was served with the motion papers, he is not in court this morning. No reason was given for his absence. Application is therefore granted. Appeal is hereby dismissed with one hundred Naira costs.

(SGD.)

UMARU MAIDAMA
RESIDING JUSTICE.

I agree.

(SGD).

A. M. MUKHTAR.

JUSTICE, COURT OF APPEAL
(SGD).

I agree.

Y. O. ADIO,
JUSTICE, COURT OF APPEAL."

From the uncontroverted affidavit evidence above, the follow-

ing points stood clear:-

1. The appeal was filed on 27th November, 1986

2. The record of appeal was served on the appellant's counsel on the 23rd April, 1987.

B 3. The motion papers were filed on 29th March, 1988 and the appellant's counsel was served.

C 4. The appellant who had sixty days within which to file his brief from 23/4/87 when he received the record of appeal from the court below, (see Order 6 Rule 2 Court of Appeal Rules), had not done anything up to 29/3/88 when the motion was filed and almost one year from the receipt of the record on 23/4/87.

D 5. When the Court of Appeal dismissed the appeal for want of prosecution on 27/4/88, there was no application before it for extension of time to file appellant's brief. In addition there was no prior notification to the Court that the appellant and or his counsel would be absent in court on the day the motion was heard and granted.

E I have earlier on set out the provisions of Order 6 Rule 10 of the Court of Appeal Rules as well as the Ruling of the Court itself. It is very clear to me that under the circumstances narrated above, the Court of Appeal had no alternative but to accede to the prayer to dismiss the appeal for want of prosecution. I think it was the right decision it took.

F I now answer the three issues posed for determination briefly as follows:-

G (a) The learned Justices of the Court of Appeal were right in dismissing the appellant's appeal as provided for under Order 6 Rule 10 above. It would have been contrary to the Rule to have struck out the appeal.

H (b) The learned Justices of the Court of Appeal were also right in dismissing appellant's appeal in the absence of appellant's counsel who though served with the motion papers refused and or failed to attend the court without prior notification to the court.

(c) The learned Justices of the Court of Appeal did not fail to consider in its Ruling that "the appellant was not aware that his counsel will not be attending the court on that day so as to brief another counsel",

because since neither the appellant nor his counsel was in court, the court was not in a position to know that the appellant did not know that his counsel would not be attending court. The issue was thus never before the learned Justices of the Court of Appeal for consideration.

I hasten to add that there is nothing in the Ruling of the Court of Appeal above that has occasioned any miscarriage of justice. All the three issues are thus resolved against the appellant. The appeal therefore fails. B

It is for the above reasons that I agree to dismiss the appeal. I make no order as to costs the respondent having played no part in the appeal. C

MOHAMMED JSC

I too agree that the Court of Appeal is right to dismiss this appeal for want of prosecution. It is evidently clear that the appellant's counsel had been served with the record of appeal on 23rd April, 1987 and, one year after service of the record the appellant had failed to file his brief. Under Order 6, Rule 10 of the Court of Appeal (Amendment) Rules, 1984, the Court of Appeal, on the application of the respondent, can dismiss the appeal for want of prosecution. This is what the court had done and it is right in doing so. D E

This appeal has no merit and for the fuller reasons given in the lead judgment by my learned brother, Onu, J.S.C., the appeal is dismissed. I also make no order as to costs. F

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Onu, J.S.C. and I agree that there is no substance in this appeal. G H

It is clear from the records that the relevant appeal was filed in the court below on the 27th November, 1986. The record of proceedings was duly served on the appellant's counsel on the 23rd April, 1987.

It is also not seriously disputed that the application before the Court of Appeal dated the 28th March, 1988 for the dismissal of the appeal for want of prosecution was duly served on the respondent's counsel as required by the Rules of Court. Indeed the Court of Appeal in its ruling under attack expressly noted that the appellant was duly served with the relevant motion papers.

It is not controverted that up till the 27th April, 1988 when the application was duly heard and determined by the court below, the appellant was in default of filing his brief of argument in that court and there was no application for extension of time within which to file the same.

Order 6 rule 10 of the Court of Appeal Rules, 1981 provides inter alia as follows -

"Where an appellant fails to file his brief within the time provided for in rule 2 above, or within the time as extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution"

The above provisions are in pari materia with those of the old order 6 Rule 9(1) of the Supreme Court rules. It seems to me crystal clear from these provisions that upon failing to file an appellant's brief within the time stipulated by the Rules of that court or such extended time the court may allow, the court below would rightly be entitled to dismiss such an appeal upon an application for the same to be dismissed for want of prosecution. See John Chukwura and others v. Ndugueze Ezulike (1986) 5 N.W.L.R. (Part 45) 892.

Learned counsel for the appellant tried in his brief of argument to enlist the sympathy of this court by arguing that the court below was wrong in dismissing the appeal instead of striking it out as the appellant might not have been aware that his counsel would not be attending court to oppose the application. I need only restate that sympathy cannot override the clear provisions of the Rules of Court and that it would be in the best interest of the parties and their counsel to endeavour always to comply with the prescribed times set out in the Rules for the doing of any act or taking of any step.

In the case on hand, Order 6 Rule 10, *ibid*, makes provision for

the dismissal of an appeal where an appellant fails to file his brief within the stipulated time. The appellant at all material times was in default of filing his brief of argument and there was no application before the court below for an extension of time within which to file his said brief. I entertain no doubt that the appeal was properly dismissed by the court below pursuant to the express provisions of Order 6 Rule 10 of the court of Appeal Rules, 1981. B

It is for the above and the more detailed reason contained in the leading judgment of my learned brother that I, too, dismiss this appeal as lacking in substance. I abide by the order for costs contained in the leading judgment. C

D

E

F

G

H

B

C

D

E

F

G

H