

SUPREME COURT OF NIGERIA
18TH. DECEMBER, 1998. SC. 27/1991
CORAM:- A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE,
S. U. ONU, A. I. IGUH, JJSC.

BOY AKUJINWA & 4 ORS. APPELLANTS
AND
JOSEPH NWAONUMA & 2 ORS. RESPONDENTS
(For themselves and as representing
Abieziem town, Oguta)

***APPEALS** - Dismissal - Suo motu by the Court of Appeal - For failure to file appellant's brief - The Court acted within its powers.*

***APPEALS** - Order - Signed by a single justice of the Court of Appeal - This does not make it the order of a single justice.*

FACTS

The appellants had appealed to the Court of Appeal (Enugu Division) against the decision of the High Court of Imo State sitting at Oguta and given on 26th May, 1983. The appeal was entered in the Court of Appeal on 14th November, 1984 when the records of appeal were received in that Court. The Appellants failed to file their briefs of argument as stipulated by the Rules of that Court. Nor did they apply for extension of time to do so.

The Court of Appeal on the 28th day of April, 1986 dismissed their appeal suo motu for want of prosecution. The record was signed by Olajide Olatawura, JCA (as he then was) who presided over the proceedings for that day. The record was however bereft of the signatures of the two other justices who participated in the proceedings. On 21st March, 1990, the appellants applied to the Supreme Court for extension of time within which to appeal against the decision of the Court of Appeal. The application was granted and, they consequently filed a Notice of Appeal against the said decision. While the appellants raised three issues as arising for determination, the respondents for their part raised

two issues. The issues raised by the respondents were preferred as being adequate to dispose if the appeal.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal had powers to make the order made on the 28/4/86.

2. Whether a party who has failed, refused and neglected to use the constitutional and procedural provisions for enforcing his right of fair hearing could turn round to say that his right of fair hearing has been denied him if the Court of Appeal dismissed his appeal for want of prosecution.

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

Appeals - Dismissal

1. The principle which governs the exercise by the court of its discretion, where required, is now so well established, it is the duty of counsel for the appellants to get on with the case since public policy demands that the business of the court should be conducted with expedition and despatch. See Obiora v. Osele (1989) 1 NWLR (part 97) 279. Besides, in the instant case, since the fault or failure to file appellants' brief³ fell on the appellants, the loss should lie where it fell. In effect, the appellants failed to comply with the mandatory provisions of Order 6 Rule 2 of the rules and at the time of determination of their appeal, did nothing to suspend the application of Order 6 Rule 10 thereof. That the court below therefore acted suo motu does not derogate from its power under the latter Rule. See Chime v. Ude (1996) 7 NWLR (part 461) 379.(p. 2634 C)

Appeals - Order

2. In the instant case, all that Olatawura, JCA (as he then was) did was to sign the order made by the Court below. His act so signing it does not, in my humble view, make it the order of a single justice. The fact that the

³ The Supreme Court in Olowu v. Abolore (1993) 6 KLR 64 examined the circumstances under which an appeal will be dismissed for failure to file Brief of Argument.

other justices wrote no dissenting opinions clearly shows that they agreed with it. Their failure to sign the order does not, in my opinion, vitiate the proceedings of the court below, nor would it be declared a nullity. See Shuaibu v. Nigeria Arab Bank Ltd. (1998)5 NWLR 582 at 608. (p. 2635D)

NOTABLE POINTS OF INTEREST

WALI JSC

1. Termination of appeal under Order 3 Rule 25

It is pertinent to say at this stage that there is nothing in the decision of the Court of Appeal showing that it was taken pursuant to the provision order 6 Rule 10 of the Court of Appeal Rules, 1981 (as amended). It was learned counsel for the appellants and for the respondents that brought Order 6 Rule 10 into the case, as both alluded to it in their respective briefs. Since the Court of Appeal did not specifically state the provision of the Court of Appeal Rules under which the decision was taken, would that render such a decision invalid? I answer this question in the negative. Apart from the inherent jurisdiction the court has to put an end to litigation where an appellant for no valid apparent reason fails to prosecute the appeal within a reasonable time, rule 25 Order 3 vests it with the power to terminate the appeal suo motu in that circumstance. But where such a decision is taken the appellant is not rendered completely helpless as the provisions of rules 25(1) and (2) of Order 3 of the Court of Appeal Rules, 1981 provide as follows-

"25. (1) If the appellant fails to appear when his appeal is called on for hearing (and has not taken action) under (Rule 24 of this Order), the appeal may be struck-out or dismissed with or without costs.

(2) When an appeal has been struck-out owing to non-appearance of the appellant, the court may, if it thinks fit, and on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for hearing."

The correct presumption would therefore be that the decision of the Court of Appeal was taken under rule (1) of order 25. The word 'dismiss' used in rule (1) supra is qualified by rule 2 coming immediately

thereafter which shows that whether the appeal is dismissed or struck out under that rule, the Court of Appeal can, on application by the appellants and showing good and substantial reasons for failure to prosecute the appeal, set aside its decision, restore the appeal to the cause list and allow the appeal to be decided on merit. The appellants could have availed themselves of the provision of rule 25(2) of Order 3 to have the appeal relisted, rather than taking the long course of appealing to this Court. (p. 2638 E)

C
2. *Drawn up orders are only signed by the presiding justice*

The complaint of the appellants that the decision of the Court of Appeal was void as it was signed by only one justice, lacks merit. For administrative convenience, drawn up orders of the court are only signed by the presiding Justice, or in his unavoidable absence the next senior Justice on the panel of that court. Where a decision or judgment is written on the bench, the presiding Justice reads the decision of the court there and then to the open court after consulting the other Justices sitting with him. Where it is unanimous, each Justice will announce his concurrence without necessarily reading all that he has written in his own concurring decision. Where however there is minority dissenting decision the Justices or Justice dissenting will read his decision to the open court. The drawn up order of the Court of Appeal was signed by Olatawura, JCA as the presiding Justice and this is the normal practice. (p. 2639 E)

3. *Decision reached without hearing the appellant is not unconstitutional in the circumstance*

G The fact that the decision of the Court of Appeal was taken without hearing the appellant is not a derogation from the provision of the 1979 Constitution on fair hearing as the Rules under which the said decision was taken were made by the President of the Court of Appeal pursuant to the enabling provision of section 227 of the same Constitution. The appellants failed to file brief of argument within the period specified by the Rules. (p. 2640 E)

KUTIGI JSC*4. The Court of Appeal cannot normally act suo motu under Order 6 Rule 10*

An appeal can therefore only be dismissed for want of hearing under Order 6 Rule 10 above when and only when a Respondent applies to the Court seeking for the order. The court cannot normally act suo motu under the Rule as distinct from inherent powers. I do not think the Court of Appeal acted under Order 6 Rule 10 because there was no application by the Respondents who were equally absent and not represented at the hearing (See YONWUREN VS. MODERN SIGNS LTD. (1985) 2 SC. 86 NNEJI VS. CHUKWU (1988) 3 NWLR (PT.81) 184). (p. 2642 D)

OGUNDARE JSC*5. A party who has failed to file his brief cannot complain of lack of fair hearing*

On the issue of fair hearing, having failed to file a brief of argument the Appellants have disqualified themselves from being heard and cannot now complain - see: Chime v. Ude (1996) 7 NWLR 379 Where this Court held that a party who has failed or neglected to file his brief has not complied with the conditions necessary to hearing of their appeal in Court and cannot complain of lack of fair hearing. See also: Oyeyipo v. Oyinloye (1987) 1 NWLR 356. (p. 2644 D)

6. The Court of Appeal acted under its inherent jurisdiction in dismissing the appeal

The court below obviously exercised its inherent jurisdiction when on 28/4/86 it dismissed Appellants' appeal to it "for want of diligent prosecution." But such a dismissal is not a dismissal on the merits and can, unlike a dismissal under Order 6 rule 10, be set aside on a proper application made to it by the party affected thereby, it amounts only to a striking H-out. The position is undoubtedly different from that provided for in the Rules of the Supreme Court, 1985 (as amended) - see:- Chime v. Ude (supra); Olowu & Ors. v. Abolore & Anor. (1993) 6 KLR 64; (1993) 5

NWLR 255. (p. 2646 C)

REPRESENTATION

Amechi Nwaiwu Esq. for Appellants

F. C. Dike Esq. for Respondents

B

CASES REFERRED TO

Obiora v. Osele (1989) 1 NWLR (part 97) 279.

Chime v. Ude (1996) 7 NWLR (part 461) 379

Shuaibu v. Nigeria Arab Bank Ltd. (1998) 5 NWLR 582 at 608

C

Oyeyipo v. Oyinloye (1987) 1 NWLR 356.

Olowu v. Abolore (1993) 6 KLR 64; (1993) 5 NWLR 255

University of Lagos v. Olaniyan (1985) 1 SC. 295, 317

Toteh Worby v. Samayaram 14 WACA 669 at 671

D

Akanbi v. Alao (1989) 3 NWLR (Part 108) 115 at 141

Nneji v. Chukwu (1988) 3 NWLR (part 89) 184

Nwabueze v. Nwosu (1988) 4 NWLR (part 88) 257

E

STATUTES AND RULES REFERRED TO

Court of Appeal Rules 1981, orders 1 (9), 3 (4), (20) and 25 (1) (2) and (3); 6 (2) and (10)

Court of Appeal Act, 1976 sections 9 and 10

F

Constitution of the Federal Republic of Nigeria 1979, ss. 226 and 227

LEAD JUDGMENT BY ONU JSC

G The Enugu Division of the Court of Appeal siting in Enugu (Conam: Olatawura, JCA as he then was, Katsina-Alu and Macaulay, JJ.C.A.) on the 28th day of April 1986, dismissed the appellants' appeal for want of prosecution following their failure to file a Brief of argument. The appeal itself had emanated from the decision of the High Court of Imo State holden in Oguta and dated 26th May, 1983.

H

The brief facts of the case as can be gathered from the record may be stated as follows::

By their Notice of Appeal the appellants appealed against the judgment of the High Court of Imo State, Oguta Judicial Division deliv-

ered on 26th May, 1983 to the Enugu Division of the Court of Appeal. It would appear that records were received by the Enugu Division of the Court (hereinafter in the rest of this judgment referred to as the court below) on the 14th day of November, 1984. As would also appear clear, the appellants did not file their Briefs of Argument as expressly enjoined B by Order 6 Rule 2 Court of Appeal Rules 1981 as amended (hereinafter in the rest of this judgment referred to as the Rules) whose provision are that:

"2. *The appellant shall within sixty days of the receipt of the C record of appeal from the court below file in the Court a written brief, being a succinct statement of his argument in appeal.*"

Nor did they (appellants) apply for extension of time within which to file their Brief of Argument as provided in Rule 4(i) Order 3 (ibid) which D states as follows:-

"4 (i) *The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply.*"

The Court below on the 28th day of April, 1986 (over two years the appellants' Brief in the case became due) dismissed their appeal for E want of prosecution in the following words (which for their conciseness and brevity I set out below). to Wit:

"*COURT:*

Records of Appeal were received on 14/11/84. No Brief F has been filed by the Appellants. It appears that the Appellants are not interested in the prosecution of the Appeal. In the circumstance the appeal is dismissed for want of prosecution."

(Sgd)

JUSTICE OLAJIDE OLATAWURA G

J.C.A.

28/4/86."

Although for some inexplicable reasons the record of the court below for 28/4/86 is bereft of the signatures of the two of the other H justices who participated in the proceedings for that day, it is apparent from the heading thereof that HON. MR. JUSTICE ALOYSIUS IYORGYER KATSINA-ALU AND HON. MR. JUSTICE WALLACE

RONALD TISLINGTON MACAULAY, JJ.C.A., were members of the court's panel that decided the case across the bench there and then. Should I be wrong in my conclusion above, I am of the humble view that the rule of presumption of regularity expressed in the common law maxim of B Omnia praesumuntur rite esse acta, especially with regard to official acts applies Vide Ogbuanyiya v. Okudo No. I (1990)4 NWLR (Part 146) 551 at 570 and Oyenuga v. I.C.L.. Ltd. (1991)1 NWLR (Part 167)415.

On 21st March, 1990 the appellants applied to this court for extension of time within which to appeal against the earlier order of the court below dismissing their appeal, ostensibly suo motu, for want of prosecution.

The appeal to this court from the decision of the court below is premised on three grounds contained in a Notice of Appeal dated the 15th day of July, 1990. The parties filed and exchanged Briefs of argument in accordance with the rules of this court. While the appellants submitted three issues as arising for our determination, the respondents for their part, relied on two - the later which I prefer and hereinbelow set out as adequate to dispose of the matters in contest between the parties. The two issues state:

1. Whether the Court of Appeal had powers to make the order made on the 28/4/86.
2. Whether a party who has failed, refused and neglected to use the constitutional and procedural provisions for enforcing his right of fair hearing could turn round to say that his right of fair hearing has been denied him if the Court of Appeal dismissed his appeal for want of prosecution.

At the hearing of this appeal on the 5th day of October, 1998, learned counsel for both sides adopted and expatiated on their Briefs respectively.

Learned counsel for the appellants, Amechi Nwaiwu Esq. made an oral elaboration of the brief to the effect that the court below failed to distinguish between the provisions of Order 3 Rule 20(1) and order 6 Rule 10 of the Rules.. After this court had drawn his attention to the stipulation in order 3 Rules 25(1) and (2) of the Rules and enquired on

which of the two rules cited or the inherent jurisdiction he relied, learned counsel replied by referring us to the case of Akanke Olowu & ors. v. Amudatu Abolore & Anor. (1993)6 KLR 64 at 84; (1993)5 NWLR (part 293) 255.

The learned counsel thereafter proceeded to argue the two issues together as follows:-

That the court below was clearly in error when it suo motu dismissed the appellant's appeal for the reason it gave, adding that the consequences of failure to file a Brief of argument in the court below are as provided in Order 6 Rule 10 of the Court of Appeal (Amendment) Rules 1984. He further contended that the order made by the Court below never empowered it to make the said order - the order which it could have made being that of striking out the appeal. He further contended that the court below not having determined the merits of the appeal, no valid order of dismissal could have been made by it. He thereafter submitted in addition that the order made by the court below is already a breach of the fundamental principles of fair hearing as the appellants who were adversely affected were not given any opportunity of being heard before the order was made.

It would appear clear to me that the case of the respondents by implication is admitted by the appellants in that the court below has the power to dismiss an appeal for want of prosecution vide Order 6 Rule 10 (ibid). It is in fact the respondent's case as proffered by Mr. Dike of counsel?, that it does not matter whether the dismissal arose pursuant to an application by the respondents or suo motu. A reading of the provisions of Order 6 Rule 10 (ibid) will indicate that the application by the respondents is permissive and not mandatory before the appeal is dismissed by the court for want of prosecution. In other words, that the dismissal for want of prosecution was not on the merits leaving the order to be invoked to that of a striking out and not that of a dismissal. Any other interpretation would indeed leave the discretion for dismissal of an appeal in the hands of the litigants and not the court thus tying the hands of the court helplessly with a Gordian knot by the litigants. That would, in my humble view, make nonsense of the discretion to dismiss or not to

dismiss by confining such an exercise to the respondent and no more. Moreover, the facts of the instant case show sufficient grounds for the exercise of the discretion as indicated in Exhibit A (the records of appeal) which were manifestly received on 14th November, 1984. Be that as it may, by 24th April, 1986 the enthusiasm or desire to prosecute their appeal - having only made a move by their motion dated 21st March, 1990 after three years in which they applied to this court for extension of time to appeal - has left one in a situation where an appellate court such as this, ought not to disturb an exercise of discretion by a lower court simply because if it were similarly placed, it would have acted differently. See University of Lagos v. Olaniyan (1985)1 SC.295, 317 and Toteh Worby v. Samayaram 14 WACA 669 at 671. By a long line of cases, this court has held that in matters of discretion no one case is authority for the other. See Oduote v. Oduote (1971)1 All NLR 219 at 222. Where therefore, the Court of Appeal apparently fails to make a judicious exercise of its discretion (which has not been shown to be the case in the instant appeal) the Supreme Court will intervene. See Akanbi v. Alao (1989)3 NWLR (Part 108) 115 at 141; Nneji v. Chukwu (1988) 3 NWLR (part 89)184 Nwabueze v. Nwosu (1988)4 NWLR (part 88) 257. Where, however, discretion is clearly shown to have been arbitrarily exercised, this court would intervene on appeal to set it aside. See Ikomi v. The State (1986)3 NWLR (part 28) 340, 343 and 360.

The burden was on the appellants to attack the judgment of the court below which in fact they fail to do. The right to appeal be it noted, is a right which is subjectively exercised and the duty is on the appellant to justify its objectivity. Where, however, the appellants fail as in this case to justify their appeal by doing nothing, it is their funeral and not that of the respondents. Indeed, where there is no case presented, there is no merit to be decided upon. The main issue agitated in the Supreme Court in the case of Akanke Olowu & ors. v. Amudatu Abolore & Anor. (supra) was whether, after making an earlier order dismissing the appeal of the respondents for want of prosecution, the Court of Appeal had jurisdiction to hear the application to set aside the order and restore the appeal, and if there was jurisdiction, whether it was judicially exercised when the

order relisting the appeal was made.

It was held by the Supreme Court (per Karibi-Whyte, JSC) unanimously allowing the appeal inter alia, that:

"The Court of Appeal Rules provide for dismissing an appeal in the following circumstances. First, where there is non-compliance with conditions of appeal,. See Order 3 rule 20 subrule 1. Secondly, if the appellant fails to appear when his appeal is called on for hearing - see Order 3 rule 25, sub-rule (1). Thirdly, where an appellant fails to file his brief of argument within the time as extended by the court -Order 6 rule 10. In the first two situations the rules have made provisions enabling relisting the appeal so dismissed. I hereunder reproduce the relevant provisions of Order 3 rule 20(1), (3), (4), Order 3 rule 25 sub-rule (1), (2) and Order 6 rules 2 and 10."

Order 3 rule 20(1) provides as follows:

"If the appellant has complied with none of the requirements of Rules 10 and 11 of this Order, the Registrar of the Court below shall certify such fact to the court, which shall thereupon order that the appeal be dismissed either with or without costs, and shall cause the appellant and respondent to be notified of the terms of its order."

Order 3 rule 10(3) -

"If the respondent alleges that the appellant has failed to comply with a part of the requirements of Rules 2, 10 or 11 of this Order, the court, if satisfied that the appellant has so failed, may dismiss the appeal for want of due prosecution or make such order as the justice of the case may require."

(4) An appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored. Any such application may be made to the court and the court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit."

After setting out the above rules amongst others, Karibi Whyte, JSC H went on to elaborate at page 272 of the Nigerian Weekly Law Reports as follows:

"It follows therefore that an appeal may be dismissed by both

the court acting suo motu under rule 20(1) or the respondent, for want of due prosecution under rule 20(3). In each of such cases appellant can apply to restore the appeal on to the list under rule 20(4).

An appellant's appeal may also be dismissed for nonappearance B of the appellant under rule 25(1) which provides as follows:

"If the appellant fails to appear when the appeal is called on for hearing and has not taken action under Rule 24 of this Order, the appeal may be struck out or dismissed with or without costs."

C Thus, an appeal struck out by virtue of the non-appearance in rule 25, sub-rule (1) may be relisted and entered for hearing on the application of the appellant, if the court thinks fit, and on such terms as to costs or otherwise as it may deem just.

D The implication of providing in the rules for restoring an appeal dismissed or struck out is that the matter is regarded as having not been finally determined and can be reopened for final adjudication.

Consequently, and as earlier out on this judgment, reference or E Order 6 rules 2 and 10 of the Court of Appeal Rules 1981 as amended (ibid) dismissal for want of prosecution relates to dismissal for failure to file appellant's brief or argument. Continuing, the Court while further elaborating on the purports of Order 6 rules 2 and 10 of the Rules (ibid), held at the same page 272 of the Report thus:

F *"Now, the three situations enabling application for the dismissal of an appeal are different. Non-compliance with conditions of appeal is different from non-appearance of the appellant. The two are different from failure to file appellant's brief of a argument.*

G *Whereas there are provisions for an appeal dismissed under the first two, to be relisted, there are provisions for an appeal dismissed under the first two, to be relisted, there is no provision in Order 6 enabling relisting an appeal dismissed for failure to file appellant's brief of argument under sub-rule 10."*

H Further commenting on a situation analogous to what I consider is more or less on all fours with what transpired in the case in hand at page 227 of paragraphs B-D and F-G of the Report, the learned Justice said graphically as follows:-

"As I have already pointed out in this judgment, there is statutory power for an appeal dismissed for non-compliance with the conditions of appeal by virtue of Order 3 rule 20(3) to be restored under Order 3 rule 20(4). Similarly, where an appellant's appeal has been dismissed for non-appearance under Order 3 rule 25(1), it may be relisted under Rule 25(2). There is no inherent power in any of the situations. In any case the application before the court below was to relist an appeal dismissed for failure to file appellant's brief of argument. It is entirely different and governed by different rule.

It is well settled that the exercise of appellate jurisdiction is statutory. A court cannot exercise jurisdiction to hear appeal unless such jurisdiction is conferred by the Constitution or some enabling statute. Hence in the instant case the jurisdiction to relist an appeal dismissed under Order 6 rule 10 should be found in the rules of the Court. I have not been lucky to discover any in the Rules.

This court has decided several principles as exemplified in Chukuka v. Ezulike (1986)5 NWLR (part 45) 892, in which it was held that it has no jurisdiction under 1979 Constitution or inherent powers to entertain an application for re-entering an appeal dismissed under Order 8 rule 16 of the Supreme Court Rules for want of prosecution: Ogbu v. Urum (1981)4 SC.1; Yonwuren v. Modern Signs (Nig.) Ltd. (1985)2 SC.86; (1985) 1 NWLR (part 2) 244

It was also held that it has no inherent jurisdiction to set aside an order of dismissal properly made on the valid exercise of its jurisdiction and to re-enter the appeal. An appeal dismissed on the ground of the failure to file appellant's brief of argument is final. The appeal so dismissed cannot be revived." (Underlining is mine for emphasis)

In consequence of the above, it is little wonder that Belgore, JSC at pages 278-279, paragraphs H-A of the Report hit the nail on the head when he asserted with an air of finality and unambiguousness at pages 278-279 of the Report thus:

"Once the Court of Appeal has dismissed the appeal for want of prosecution due to appellant's failure to file Brief of Argument, that court is functus officio on that matter. (See Orobator v. Mrs. Mercy Amata

(1981)5 SC.276; Nwaora v. Nwakonobi (1985)2 SC.86; Yonwuren v. Modern Signs Ltd. (1985)1 NWLR (part 2) 244, 245). If before the judgment of dismissal was entered and the appellant prayed for extension of time to file his brief, that will be a different matter governed by Order 3 rule 41(1) Court of Appeal Rules. However, this issue has nothing to do with application of enlargement of time but with a matter dismissed for want of prosecution for which there is no remedy again in the Court of Appeal." (Underlining is also mine for emphasis).

Later in his contribution at page 279 of the Report, Olatawura, JSC made a similar unequivocal pronouncement as his learned brothers before him. I cannot agree more. **The principle which governs the exercise by the court of its discretion, where required, is now so well established, it is the duty of counsel for the appellants to get on with the case since public policy demands that the business of the court should be conducted with expedition and despatch. See Obiora v. Osele (1989) 1 NWLR (part 97) 279. Besides, in the instant case, since the fault or failure to file appellants' brief fell on the appellants, the loss should lie where it fell. In effect, the appellants failed to comply with the mandatory provisions of Order 6 Rule 2 of the rules and at the time of determination of their appeal, did nothing to suspend the application of Order 6 Rule 10 thereof. That the court below therefore acted suo motu does not derogate from its power under the latter Rule. See Chime v. Ude (1996)7 NWLR (part 461) 379**

On the issuance or otherwise of hearing notices before the appeal was heard, the respondents have contended that assuming without conceding that no hearing notices were issued to the parties, the court below was justified in dismissing the appellants' appeal having regard to the combined effect of the provisions of Order 1 Rule 9 and Order 3 Rule 25. Order 1 Rule 9 states:

"9 - (1) *The sittings of the court and the matters to be disposed of at such sittings shall be advertised and notified in such manner as the president may direct:*

Provided that the court may in its discretion hear any appeal and deal with any other matter whether or not the same has been adver-

(2) *This Rule shall not apply to the hearing of any matter by a single justice.*" Order 3 Rule 25 on the other hand provides:

"25 (1) *If the appellant fails to appear when his appeal is called on for hearing and has not taken action under Rule 24 of this Order, the appeal may be struck out or dismissed with or without costs.*" B

With respect to the submission of the appellants that the order of the court below dismissing the appellants' appeal was made by a single judge therefore, to wit: Olataura, JCA (as he then was), I am of the firm view that on the face of the record vide Exhibit 'A', three justices of the Court below did indeed sit on the appeal albeit that only Olataura, JCA (as he then was) is shown to have signed the record on the 20th day of April, 1986. In the face of no averments or challenge to the contrary the record is presumed to be regular. See B.A. Shitta-Bey v. Attorney-General of the Federation & Anor. (1998) 7 SCNJ 264. C D

In the instant case, all that Olatawura, JCA (as he then was) did was to sign the order made by the Court below. His act so signing it does not, in my humble view, make it the order of a single justice. The fact that the other justices wrote no dissenting opinions clearly shows that they agreed with it. Their failure to sign the order does not, in my opinion, vitiate the proceedings of the court below, nor would it be declared a nullity. See Shuaibu v. Nigeria Arab Bank Ltd. (1998) 5 NWLR 582 at 608. E F

The issues considered and argued together having been resolved against the appellants, their appeal lacks merit and it is accordingly dismissed with costs of N10,000.00 to the respondents.

G

WALI JSC

I have read in advance the lead judgment of my learned brother Onu, JSC and I agree with the conclusion reached therein. H

This is an appeal against the decision of the Court of Appeal, Enugu in which the appeal of the appellants then pending in the Court of Appeal was dismissed sue motu for want of prosecution for failure by

the appellants to file brief of argument as stipulated by the Court of Appeal Rules 1981.

The facts of this case are not in dispute and are stated hereunder as follows:

B There was a litigation by the parties involved in this appeal before the High Court of Justice of Imo State sitting in Oguta, at the end of which judgment was given against the present appellants on 26th May, 1983. They appealed against the judgment, to the Court of Appeal, Enugu Division. The appeal was entered in that court. When the matter came up C before the Court of Appeal, Enugu for hearing on 28th April, 1993, coram:

D *"Hon. Mr. Justice Olajide Olatawura,
Hon. Mr. Justice Aloysius Iyorgyer Katsina-Alu,
Hon. Mr. Justice Wallace Ronald
Tislington Macaulay."*

there was no appearance by either of the parties or their respective counsel. The Court of Appeal then ruled.

E "Records of Appeal were received on 14th November, 1984.

No brief has been filed by the appellants.
It appears that the Appellants are not interested
F in the prosecution of the Appeal. In the circumstances
the appeal is dismissed for want of prosecution.'

According to the appellants and as contained in paragraphs 3 and 4 of their affidavit in support of their application to this court for extension of time and leave to appeal to this court against the Court of G Appeal decision of 28th April, 1986, they did not receive a copy of the drawn up order of the Court of Appeal until about 8th day of January, 1990. This court granted the application for extension of time and leave to appeal as a result of which the Notice of Appeal dated 15th July, 1990 H was filed on 17th July, 1990.

Parties filed and exchanged briefs of argument. In the brief of the appellants the following three issues were raised for determination:-

"(i) *Whether it is proper in Law for the Court of Appeal to*

dismiss the Appellants' appeal when no such Order was applied for nor the parties given an opportunity of being heard?

(ii) Whether in the circumstances of this case the Order of dismissal was proper or valid in Law?

(iii) Whether the Court of Appeal has jurisdiction in the circumstances of this case to dismiss an appeal when the merits of the appeal has not been determined?"

The respondents also formulated two issues in their brief as follows:-

"(i) Whether the Court of Appeal had powers to make the Order it made on the 28th day of April, 1986.

(ii) Whether a party who has failed, refused and neglected to use the constitutional and procedural provisions for enforcing his right of fair hearing could turn round to say that his right of fair hearing has been denied him if the Court of Appeal dismissed his appeal for want of prosecution."

In considering this appeal I shall adopt the issues formulated in the appellants' brief as they have adequately covered the two issues raised by the respondents. I shall consider the three issues together.

It was the submission of learned counsel for the appellants that the Court of Appeal was wrong when it suo motu dismissed their appeal for want of prosecution under order 6 rule 10 of the Court of Appeal Rules, 1981, when there was no application by respondents to that effect. He submitted that the order was made in breach of their constitutional right to be heard and as such there was no fair hearing.

On the validity of the order made, learned counsel contended that as it was made by a single justice of that court to Wit: Olatawura JCA, it was invalid as no single justice of the Court of Appeal is vested with the power of final determination of any cause or matter, and cited section 10 of the Court of Appeal Act, 1976 in support. He urged the court to allow the appeal.

In reply to the submissions of learned counsel for the Appellants, Mr. F.C. Dike learned counsel for the respondents, submitted that it is permissive and not mandatory and therefore it is within the discretion

of the Court of Appeal to dismiss the appeal or refuse to do so, whether or not there is an application by a respondent. He argued that the facts in this case justified the dismissal by the Court of Appeal of the appellants' appeal suo motu. He urged the court not to disturb this lawful exercise of discretion by the Court of Appeal. He said that the appellants' complaint lacks merit as they failed to comply with the mandatory provisions of order 6 rule 2 of the Court of Appeal Rules, 1981, to file brief of argument.

As regards Issue II, it was the submission of learned counsel for the respondents that whether or not hearing notice was sent to the appellants before their appeal was dismissed, the decision of the Court of Appeal could still be sustained and justified under the provisions of Order 1 rule 9 and Order 3 rule 25 of the Court of Appeal Rules, 1981.

On issue III, he submitted that on the face of the Court of Appeal records, three judges sat and took the decision being complained against, although the drawn up order was signed by a single judge and this would not convert the decision of the court to that of a single justice. He submitted that the Court of Appeal Act, 1976. He further submitted in the alternative that even if the decision was taken by virtue of section 10 of the Court of Appeal Act 1976, the appellants did not avail themselves of the provision to that section to move the Court of Appeal to set aside the ex-parte decision. He urged the court to dismiss the appeal.

It is pertinent to say at this stage that there is nothing in the decision of the Court of Appeal showing that it was taken pursuant to the provision order 6 Rule 10 of the Court of Appeal Rules, 1981 (as amended). It was learned counsel for the appellants and for the respondents that brought Order 6 Rule 10 into the case, as both alluded to it in their respective briefs.

Since the Court of Appeal did not specifically state the provision of the Court of Appeal Rules under which the decision was taken, would that render such a decision invalid? I answer this question in the negative. Apart from the inherent jurisdiction the court has to put an end to litigation where an appellant for no valid apparent reason fails to prosecute the appeal within a reasonable time, rule 25 Order 3 vests it with the power

to terminate the appeal suo motu in that circumstance. But where such a decision is taken the appellant is not rendered completely helpless as the provisions of rules 25(1) and (2) of Order 3 of the Court of Appeal Rules, 1981 provide as follows-

"25. (1) *If the appellant fails to appear when his appeal is called on for hearing (and has not taken action) under (Rule 24 of this Order), the appeal may be struck-out or dismissed with or without costs.*

(2) *When an appeal has been struck-out owing to non-appearance of the appellant, the court may, if it thinks fit, and on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for hearing."*

The correct presumption would therefore be that the decision of the Court of Appeal was taken under rule(1) of order 25. The word 'dismiss' used in rule (1) supra is qualified by rule 2 coming immediately thereafter which shows that whether the appeal is dismissed or struck out under that rule, the Court of Appeal can, on application by the appellants and showing good and substantial reasons for failure to prosecute the appeal, set aside its decision, restore the appeal to the cause list and allow the appeal to be decided on merit. The appellants could have availed themselves of the provision of rule 25(2) of Order 3 to have the appeal relisted, rather than taking the long course of appealing to this Court.

The complaint of the appellants that the decision of the Court of Appeal was void as it was signed by only one justice, lacks merit. Learned counsel for the appellants, Mr. C. O. Nwosu complied the records of proceedings in this appeal after this court had granted him leave to do so. Part of the drawn up order of this court reads :-

"1. *that this application for a departure from the Rules of this court be granted;*

2. *that Exhibit "A" shall be taken as the Record of proceedings for the purposes of the appeal".*

The drawn up order of this court was signed by only one Justice - Saidu Kawu presiding. For administrative convenience, drawn up orders of the court are only signed by the presiding Justice, or in his unavoidable absence the next senior Justice on the panel of that court. Where

a decision or judgment is written on the bench, the presiding Justice reads the decision of the court there and then to the open court after consulting the other Justices sitting with him. Where it is unanimous, each Justice will announce his concurrence without necessarily reading all that he has written in his own concurring decision. Where however
B there is minority dissenting decision the Justices or Justice dissenting will read his decision to the open court.

The record of proceedings complied by the learned counsel for the appellants shows that on the 28th day of April, 1986 the panel of the
C Court of Appeal, Enugu was made up of the following Justices of that court:

Hon. Mr. Justice Olajide Olatawura, Hon. Mr. Aloysius Iyorgyer Katsina-Alu and Hon. Mr. Justice Wallace Ronald Tislington Macaulay.
D The presumption is that everything had been done regularly. Learned counsel for the appellants cannot be allowed to take advantage of his fault and negligence in not compiling the concurring decisions of the two other justices. The drawn up order of the Court of Appeal was signed by
E Olatawura, JCA as the presiding Justice and this is the normal practice.

There is no need to say much on the application of section 10 of the Court of Appeal Act, 1976 as this has been impliedly repeated by section 226 of the 1979 Constitution.

F The fact that the decision of the Court of Appeal was taken without hearing the appellant is not a derogation from the provision of the 1979 Constitution on fair hearing as the Rules under which the said decision was taken were made by the President of the Court of Appeal pursuant to the enabling provision of section 227 of the same Constitution. The
G appellants failed to file brief of argument within the period specified by the Rules.

It is for these and the similar reasons contained in the lead judgment of my learned brother Onu, JSC that I also hereby dismiss the
H appeal with the same consequential order as to costs contained in the said judgment.

KUTIGI JSC

On the 28th day of April 1986, this is what happened in the Court of Appeal holden at Enugu -

"Court. Records of Appeal were received on 14/11/84. No brief has been filed by the Appellants. It appears that the Appellants are not interested in the prosecution of the Appeal. In the circumstances the appeal is dismissed for want of prosecution."

The Appellants contend that the Court of Appeal was wrong when it purported to dismiss their appeal suo motu when no such order was sought and when the parties were not given an opportunity of being heard. They also contend that the court had no jurisdiction to have dismissed the appeal when same had not been determined on merits.

I think apart from inherent jurisdiction, there are also provisions in the Court of Appeal Rules for doing what it did on 28/4/86 above. It is clear from the ruling that two things operated on the mind of the Court -

1. The Appellants were absent and not represented by Counsel when the appeal was called;
2. The Appellants had not filed their brief of argument since 14/11/84 when the records were received.

An appeal may be dismissed for any of the two reasons above. For reason No. 1, Order 3 Rule 25(1) & (2) of the Court of Appeal Rules provide thus -

"25. (1) If the appellant fails to appear when his appeal is called on for hearing (and has not taken action under Rule 24 of this Order), the appeal may be struck-out or dismissed with or without costs."

(2) When an appeal has been struck-out owing to non-appearance of the appellant, the court may, if it thinks fit, and on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for hearing".

The court suo motu acting under this Rule 25 above can therefore dismiss or strike out an appeal as it deems proper.

It is also clear that under the Rule, an appeal which was struck-out or which was not dismissed on merit (as in this case) could easily

have been relisted if the appellants had taken pains to apply to the Court of Appeal for the appeal to be relisted. It is probably never late! (See for example

OLOWU & ORS VS. ABOLORE & ANOR (1993) 5 NWLR (PT. 293)

B 255.

As for reason No. 2, the relevant Order and Rule is Order 6 Rule 10 of the Court of Appeal Rules. It reads:

C *"10. 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. If the Respondent fails to file his brief, he will not be heard in oral argument except by leave of the court"*

D An appeal can therefore only be dismissed for want of hearing under Order 6 Rule 10 above when and only when a Respondent applies to the Court seeking for the order. The court cannot normally act suo motu under the Rule as distinct from inherent powers. I do not think the E Court of Appeal acted under Order 6 Rule 10 because there was no application by the Respondents who were equally absent and not represented at the hearing (See YONWUREN VS. MODERN SIGNS LTD. (1985) 2 SC.86 NNEJI VS. CHUKWU (1988) 3 NWLR (PT.81) 184).

F The appeal therefore fails.

It is for the above reasons that I agree with the conclusion in the judgment of my learned brother Onu, JSC. to dismiss the appeal with N10,000 costs for the Respondents.

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OGUNDARE JSC

Has the Court of Appeal, or any other Court of record for that matter, any jurisdiction to dismiss proceedings before it for want of prosecution? This is the question that calls for determination in this appeal.

The Appellants herein had appealed to the Court of Appeal (Enugu Division) against the decision of the High Court of Imo State sitting at Oguta and given on 26th May 1983. The appeal was entered in the Court

of Appeal on 14th November 1984 when the records of appeal were received in that Court. By Order 6 rule 2 of the Court of Appeal Rules, 1981 (as amended), the Appellants had sixty days within which to file their written Brief of argument. They failed to do so. Nor did they apply for extension of time to do so, as they could have done under Order 3 B rule 4(1). Neither did the Respondents also move the Court to dismiss the appeal pursuant to Order 6 rule 10. Both parties simply went to sleep. Faced with this situation, the Court below on 28th April 1986 listed the appeal for dismissal and ordered accordingly. The Court record for that C day reads:

"COURT:

Records of Appeal were received on 14/11/84. No Brief has been filed by the Appellants. It appears that the Appellants are not interested in the prosecution of the Appeal. In the circumstance the appeal is D dismissed for want of prosecution."

The record was signed by Olajide Olatawura, JCA (as he then was) who presided over the proceedings for the day. According to the record of appeal before us, Katsina-Alu and Macaulay JJCA sat with him on that E day. But their records for the day are not included in the record of appeal before us.

On 21st March, 1990 the Appellants applied to this Court for extension of time to appeal against the decision of the Court below given F on 28/4/86. This application was granted and, on 15th July 1990 they filed a Notice of Appeal against the said decision. Briefs of argument were filed and exchanged and at the oral hearing before us, learned counsel for the parties proffered oral arguments to emphasize and clarify their G written briefs.

The Appellants have raised three main complaints, that is,

(1) that the order of the Court below was made without jurisdiction in that there was no application by the Respondents before it for a dismissal of the appeal, pursuant to Order 6 rule 10 of the Court of H Appeal Rules;

(2) that the Appellants did not have fair hearing as they were not heard before the order was made; and

(3) that the order was incompetent as it was made by only one Judge of the Court below.

I do not think there is substance in complaints (2) and (3). I say this because there is no dispute that 3 Justices of the Court of Appeal sat on 28/4/86 when the Appellants' appeal to that Court was dismissed. What appears to have happened is that it is only Olatawura JCA's record for the day that was included in the record of appeal. The records of the other two Justices that sat with him were not reproduced in the record of appeal. Appellants have the burden to satisfy this Court that the other Justices did not join in the decision to dismiss their appeal. This is so because the record of appeal shows, prima facie, that the Court was properly constituted that day as provided in Section 226 of the Constitution. That burden they have failed to discharge.

On the issue of fair hearing, having failed to file a brief of argument the Appellants have disqualified themselves from being heard and cannot now complain - see: Chime v. Ude (1996) 7 NWLR 379 Where this Court held that a party who has failed or neglected to file his brief has not complied with the conditions necessary to hearing of their appeal in Court and cannot complain of lack of fair hearing. See also: Oyeyipo v. Oyinloye (1987) 1 NWLR 356.

I now turn to the first complaint. Order 6 rule 10 of the Court of Appeal Rules provides;

" 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" (underlining is mine)

No doubt, the order made by the Court below on 28/4/86 was not made pursuant to this rule as there was no application by the Respondents for a dismissal of the appeal for want of prosecution. But this is not to say that the Court below could not make the order it made.

The rules of court apart, every court of record has an inherent jurisdiction to control its proceedings. The Court has inherent jurisdiction to strike out a case that is vexatious or frivolous - Enwezor v. Onyejekwe (1964) 1 ALL NLR 14, 19; to grant leave to amend the grounds

of appeal - Okoronkwo v. Inspector General of Police, 2 FSC 9; to prevent abuse of its process - Onalaja v. Oshinubi, 12 WACA 503; to strike out proceedings for want of diligent prosecution - Chime v. Ude (supra) where at pages 421-422 H-D, Uwais, CJN observed:

"With regard to whether the court has the power to deal with the appellants' default suo motu under Order 6 Rule 3(2), I think, there cannot be doubt about that whatsoever. The court has a duty to do away with the congestion of cases filed before it, particularly where those cases are frivolous and are intended to merely overreach or deny the respondent the enjoyment of the fruit of the judgment given in his favour by the lower courts or court below. The golden rule is that justice delayed is justice denied. I, therefore, see nothing wrong or unconstitutional in this court invoking its inherent jurisdiction to deal with such infractions. If authority is required for the exercise of the jurisdiction, recourse should be had to the provisions of section 6 subsection (6) (a) of the 1979 constitution which state thus:

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

(a) shall extent, notwithstanding anything to the contrary in this constitution to all inherent powers and sanctions of a Court of law."

I too, opined in that case at pages 417 F-H- 418A:

"The rules of court apart, this court, like all courts of record, has an inherent power to strike out any proceedings for want of prosecution:- See: Krakauer v. Katz (1954) 1 WLR 279; Remington v. Scoles (1897) 2Ch 1. This power is based on the principle sit finis litium. The appellants in the present proceedings showed such a complete apathy to the prosecution of their appeal as to amount to an abandonment of it. They received the records of appeal and did nothing for fifteen months to prosecute it by filing their briefs within time or, in default, applying for extension of time to do so . They went to sleep. The respondents who might have woken them from their slumber by applying to have the appeal struck out for non-prosecution, did nothing either. In a situation such as this, the Court would have no choice but to fall back on its power if it is to decongest its list of 'dead' cases. This inherent power of the

court is given constitutional force by Section 6(6) (a) of the 1979 Constitution which provides:-

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

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

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

C As pointed out by this court in Chime v. Ude our constitution recognizes this jurisdiction in section 6(6) (a) thereof.

The court below obviously exercised its inherent jurisdiction when on 28/4/86 it dismissed Appellants' appeal to it "for want of diligent prosecution." But such a dismissal is not a dismissal on the merits and can, unlike a dismissal under Order 6 rule 10, be set aside on a proper application made to it by the party affected thereby, it amounts only to a striking-out. The position is undoubtedly different from that provided for in the Rules of the Supreme Court, 1985 (as amended) - see:- Chime v. Ude (supra); Olowu & Ors. v. Abolore & Anor. (1993) 6 KLR 64; (1993) 5 NWLR 255.

Learned counsel for the Appellants, in his oral address, has asked us, in a turn-around, to set aside the order of dismissal of the appeal and replace it with an order striking out the appeal. As made clear above, the order of dismissal made by the Court below in its inherent jurisdiction is not a dismissal on the merits. It follows that if the Appellants had applied to it to set it aside that Court might have been disposed to do so, if it thought fit so to do. Such an application was not made to that Court. Rather, the Appellants appealed to this court. I find no substance in their appeal. It is not for us to explain the consequences of the order of the Court below to the Appellants. Like my learned brother Onu, JSC I, too, dismiss the appeal with N10,000.00 costs to the Respondents.

IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Onu, JSC and I agree entirely that this appeal is without substance and should be dismissed.

By their Notice of Appeal, the appellants filed an appeal against the decision of the High Court of Imo State, holden at Oguta, delivered on the 26th day of May, 1983 to the Enugu Division of the Court of Appeal. The records of appeal were received by the Court of Appeal on the 14th day of November, 1984. The appellants neither filed their brief of argument nor did they apply for extension of time within which to file the same out of time. They apparently went into deep slumber whereupon the Court of Appeal on the 28th day of April, 1986 dismissed the appeal suo motu for want of diligent prosecution. It was not until the 21st day of March, 1990 that the appellants woke up from their deep slumber to apply to this court for extension of time within which to appeal against the order of the Court of Appeal dismissing their appeal.

It ought to be clear by now that the Court of Appeal, apart from its Rules of Court, has inherent jurisdiction to dismiss any matter before it that is not being diligently prosecuted by the appellant. Such a dismissal, however, cannot be said to be on the merit. It amounts to no more than an order of striking out under the inherent jurisdiction of courts of record. I think the Court of Appeal was right in dismissing the appeal suo motu under its inherent jurisdiction for want of diligent prosecution.

It is for the above and the more detailed reasons contained in the leading judgment that I, too, dismiss this appeal as lacking in merit. I abide by the order for costs therein made.

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