

SUPREME COURT OF NIGERIA

15TH MAY, 1998. SC. 261/1991

**CORAM:- A. B. WALL, M. E. OGUNDARE, E. O. OGWUEGBU,
U. MOHAMMED, A. I. IGUH, JJSC.**

OWUNARI LONG-JOHN 1ST SET OF DEFENDANT/
APPELLANT

AND

CHIEF TEDD IBOROMA & 2 ORS 2ND SET OF DEFENDANTS/
APPELLANTS

AND

CHIEF CRAWFORD N. BLAKK & 2 ORS PLAINTIFFS/
(For themselves and as representing RESPONDENTS
Dokuboye Ekin, Orubioye Akpana and Pokine
Fubara Compound of Fouche)

***APPEALS** - Dismissal - Of the application for extension of time - Where it amounts to a miscarriage of justice - The exercise of discretion by the Court will be disturbed.*

***COURTS** - Substantial justice - Extension of time - In the exercise of its discretion in such applications - The court must be guided by consideration of doing substantial justice between the parties.*

***COURTS** - Discretion - Extension of time - The exercise of judicial discretion - Must depend strictly on the facts and circumstances of a given case - As no one case can be authority for another in matters of discretion.*

***COURTS** - Discretion - Exercise of discretion based on wrong and unproven considerations - The Supreme Court is duty bound to intervene in the matter.*

***COURTS** - Negligence of the appellants - Where the Court of Appeal*

based on mere speculation found the appellants guilty of negligence - And refused their application - It is a wrong exercise of discretion.

EVIDENCE - Affidavit - Affidavit evidence which were not controverted in a counter affidavit - May be regarded as duly established.

FAIR HEARING - Denial - Where the Court of Appeal unilaterally granted the respondents' motion for the dismissal of the appeal - Without hearing both counsel on the application - It was in definite error.

LEGAL PRACTITIONERS - Negligence of counsel - Ought not to be visited on the litigant - Particularly where the litigant is not equally at default with his counsel.

PRACTICE & PROCEDURE - Extension of time - In such an application the applicant must establish good reasons to explain satisfactorily the delay in taking the steps in issue - And whatever decision a Court arrives at must entirely depend on the exercise of its discretionary jurisdiction.

PRACTICE & PROCEDURE - Extension of time - Application for an extension time - Rules of Court must prima facie be obeyed - And there must be some concrete material upon which the court is to base the exercise of its discretion.

PRACTICE & PROCEDURE - Extension of time - Where there are two motions - One for the dismissal or striking out of proceedings and the other for extension of time within which to regularize the proceedings - A court ought to take the latter before considering the former.

SUPREME COURT - Previous decisions - The Supreme Court has no power extra judicially to nullify its previous decisions - Such decisions may be annulled by legislation or by a judicial decision of the court given intra judicially.

SUPREME COURT - *Extension of time - Practice Directions of 1982 - The recognized principles upon which application for extension of time were granted prior to the issuance of the practice Directions of 1982 - Remain good law and applicable.*

FACTS

By consolidated suits numbers PHC/36/73 and PHC/37/73, the Plaintiffs/respondents claimed against the defendants/appellants, a declaration that they are entitled to the customary right of occupancy in respect of the land in dispute situate at Fouchee Bakana - DELGA, damages for trespass and an injunction. At the conclusion of the trial, the learned trial judge after a review of the evidence and the applicable law on the 14th day of July, 1986, entered judgment in favour of the plaintiffs against the defendants.

Dissatisfied with the decision of the trial court, the defendants, well within time, lodged on appeal against the same to the Court of Appeal, Enugu Division, on the 11th day of August, 1986. Thereafter, they brought an application for a stay of execution of the judgment before the trial court which application was dismissed on the 12th February, 1987. They further applied for a similar relief before the Court of Appeal on the 12th day of March, 1987 but the same was also dismissed on the 23rd day of September, 1987. Shortly after this dismissal, the respondents on the 17th November, 1987, filed an application praying for the dismissal of the appeal for want of prosecution. On the 12th January, 1988, the appellants filed an application praying the Court of Appeal for an extension of time within which to file the appellant's brief of argument. Both motions came up for hearing on the 19th January, 1988. The affidavit in support of the application for extension of time averred that the failure to file the brief of argument within the time was as a result of the carelessness of the chambers of the learned counsel for the appellant. There was no counter affidavit controverting the averments. Argument on the application was duly taken and on the 23rd February, 1988. The Court of Appeal in a reserved ruling refused the application for extension of time

but granted the application to dismiss the appeal for want of prosecution. Aggrieved by the decision of the Court of Appeal, the appellants have now appealed to the Supreme Court raising four issues which were adopted by the respondents.

B ISSUES FOR DETERMINATION

"(i) *Did the Court of Appeal exercise its discretion judicially and judiciously as laid down by this Court in dismissing the Appellants' appeal given the facts and circumstances of this case?*

C "(ii) *Was it proper for the Court of Appeal to take argument from Counsel to both sides only in respect of the Appellants' motion for extension of time and thereafter refusing same but proceeding suo motu to dismiss (rather than striking out) the appeal without taking any argument in respect of the motion to dismiss the appeal?*

D "(iii) *Were the Appellants given a fair hearing within the purview of Section 33 (1) of 1979 Constitution as amended, given the way and manner in which their appeal was dismissed by the Court below?*

(iv) *Were the Justices of the Court below right in relying on E technical rules of justice as embodied in the case of OGBU VS URUM (1981) ALL. N.L.R. (2nd ed.) page 324 and other similar cases, rather than on substantial justice as enunciated in recent cases like NNEJI Vs. CHUKWU (1988) 3 NWLR (Pt. 81 page 184, CONSORTIUM M.C. Vs NEPA (1992) 6 NWLR (Pt. 246) page 132, NALSA & TEAM ASSOCIATES Vs NNPC (1991) 8 NWLR (pt. 212) page 652 in shutting the Appellants out from the seat of Justice?"*

G HELD (Unanimously allowing the appeal per lead judgment of IGUH JSC)

Extension of time

1. There can be no doubt that for an application for an extension of time within which an appellant may file his brief of argument out of time or, H indeed, for an extension of the time prescribed by the rules of Court for taking certain procedural steps, to succeed, the applicant must establish good, substantial or exceptional reasons or circumstances to explain satisfactorily the delay in filing his brief or taking the steps in issue and thus

justify the grant of the extension of time applied for.¹ See Chief T.O.S. Benson v. Nigeria Agip Oil Co. Ltd (1982) 5 S.C. 1. Whatever decision a court arrives at in such applications must entirely depend on the exercise of its discretionary jurisdiction, having regard to the general principles of law governing the exercise of discretionary powers by the courts and guided by the consideration of doing justice to all the parties to the dispute. (p. 1242 B)

Rules of Court must prima facie be obeyed

2. It is a well settled principle of law that all judicial discretions must be exercised according to common sense and according to justice, and, if there is any miscarriage of justice in the exercise of such discretion, it is within the competence of an appellate court to have it reviewed. See Abiodun Odusote v. Olaitan Odusote (1971) 1 ALL N.L.R. 219 at 222. When, therefore, there is an application for an extension of time within which to do certain things or take certain procedural steps prescribed by the Rule of court, the court should always bear in mind that Rules of court must prima facie be obeyed and that to justify the exercise of its discretion, there must be some concrete material upon which to base such exercise of discretion. As this court explained in N. A. Williams and others v. Hope Rising Voluntary Funds Society (1982) 2 S.C. 145 at 152 per Idigbe, J.S.C. -

"Any exercise of the court's discretion where no material for such exercise has been placed before the court would certainly give a party in breach of the Rules of court uninhibited right to extension of time and the provisions as to time within which to take procedural steps set out in the Rules of Court would, indeed, in such circumstances, have no legal content." (p. 1242 E)

Substantial justice

3. In the exercise of the judicial discretion to extend time within which to

¹ See the case of NAA v. Okoro (1995) 7 KLR 1341 for what the applicant must show as exceptional circumstances

take certain procedural steps as prescribed by the Rules of Court, substantial justice to the parties has always been the cardinal determinant factor. So, in Ofem Odey v. Ovat Edim of Akam (1940) 6 W.A.C.A. 63 at 64 where in an application for extension of time within which to appeal based entirely on error on the part of the applicant's counsel, the West African Court of Appeal, as far back as over half a century ago, observed as follows:-

"In spite of these errors and omissions on his part, this court feels that, if it can possibly do so, it must endeavour to give him the opportunity of obtaining substantial justice in the shape of his appeal being granted a hearing on its merits provided always that no injustice is thereby caused to the other side. "The court went on -

"This is following the principle laid down by the Privy Council in the Gold Coast case of Kojo Pon v. Atta Fua (Gold Coast, Privy Council 1874 - 1928, page 95) in which Viscount Haldane said:-

'Their Lordships wish to say that in cases coming before them from the Dominions of the Crown, their first consideration always is to secure, if possible, that substantial justice is done' "

In the exercise of its discretion, therefore, in applications for extension of time, the court must be guided by consideration of doing substantial justice between the parties in the shape of his appeal being granted a hearing on its merits provided always that no injustice is thereby caused to the other side. See too Nalsa and Team Associates vs. N.N.P.C. (1991) 8 N.W.L.R. (Pt. 212) 652 and Kwaham vs. Elias (1960) S.C.N.L.R. 224. (p. 1243 B)

The exercise of judicial discretion

4. The exercise of judicial discretion depends on the facts and circumstances of each case. Accordingly the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would in effect be putting an end to the discretion. See Jenkins v. Bushby (1891) 1 Ch. 484 at 495 per Kay, L.J. The question, therefore, whether or not extension of time may be granted to regularize a particular act or default being a matter within the discretionary jurisdiction of the court

must depend strictly on the facts and circumstances of a given case. This must be so, for as I have already observed, no one case can be authority for another in matters of discretion, and the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would in effect, be putting an end to the exercise of B discretion. See too Abiodun Odusote v. Olaitan Odusote, (supra).(p.1243H)

Supreme Court - Previous decisions

5. I find it necessary to stress in very clear terms that this court has no C power, extra judicially, to overrule, reverse or nullify its previous decisions whether on question of substantive or procedural law. Such previous decisions may inter alia only be annulled by legislation or by a judicial decision of the court, given intra judicially when it is satisfied, again inter D alia, that the previous decision was given per incuriam or would perpetuate injustice.² See Bucknor - Maclean v. Inlaks Ltd. (1980) 8 - 11 S.C. 1. (p. 1248 F)

Practice Directions of 1982

6. This court has neither overruled, reversed or nullified its previous or E pre 1982 decisions on the issue of the court's exercise of discretion whether on questions of substantive or procedural law. These decisions have neither been annulled by legislation nor by a judicial decision of this court F given intra judicially. It therefore seems to me clear that the said recognized principles upon which application for extension of time were granted prior to the issuance of the Practice Directions of 1982 remain good law and applicable. Indeed, in the University of Lagos case, Obaseki, J.S.C G commented inter alia as follows -

"I do not think that the Court today will depart from the course of Justice if culpable negligence or inadvertence of Counsel is established by any litigant. That amounts to exceptional circumstances deserving of the Court's most sympathetic consideration." (p. 1248 H) H

² For circumstances under which the Supreme Court will over rule its previous decisions See Effiom v. The State (1995) 1 KLR

Negligence of counsel

7. It therefore seems to me that the interest of justice demands that parties, in appropriate cases, should be afforded a reasonable opportunity for their rights to be investigated and determined on the merits so long as the equities of the matter are not defeated and no injustice to the other party is thereby occasioned. See Abiegbe and others. v. Ugbodume and others (1983) N.S.C.C. 26. I also respectfully endorse the view, that the carelessness, negligence, or inadvertence of counsel ought not be visited on the litigant, particularly in cases where the litigant himself if unconnected with and not in pari delicto with his counsel in the matter of the default in question.³ (p. 1250 A)

Evidence - Affidavit

8. Perhaps I should observe that the plaintiffs/respondents filed no counter-affidavit to controvert any of the above depositions on oath by the defendants/appellants. It is trite law that where facts provable by affidavit evidence are duly deposed to in an affidavit by a party to a suit, his adversary has a duty to controvert those facts in a counter-affidavit if he disputes them otherwise such facts may be regarded as duly established. See Ajomale v. Yaduat (No. 2) (1991) 22 N.S.C.C. (Part 1) 570 at 575. No counter-affidavit was filed by the respondents to controvert the above depositions, including the fact that it was the carelessness or negligence of the servant and/or agent of counsel that caused the delay in filing the appellants' brief of argument within the prescribed period. I think it may safely be said that the appellants were able to establish that it was the negligence of the chambers of their counsel that caused the delay in filing their brief of argument. (p. 1250 H)

Courts - Exercise of discretion traced on wrong and unproven consideration

9. With profound respect to the Court of Appeal, I can find nothing from

³ See some recent Supreme Court authorities on the issue of negligence of counsel - Saraki v. Kofoye (1995) 5 KLR 1121; A.G. Federation v. A.I.C. Ltd (1995) 2 KLR 529

the records to justify the dereliction of duty levelled against the appellants. It is clear that there was neither any counter-affidavit before the court nor any other evidence from which the court below conceivably arrived at its findings against the appellants. In my view, there was practically no basis whatsoever for the inference and speculations made against the appellants by the Court of Appeal as there was no evidence to support them. On the contrary, it is clear from the records that both parties fiercely contested the appellants' motion for a stay of execution in the same court for over a period of seven months from March 1987 until the delivery of ruling in the application on the 23rd September, 1987. It cannot therefore be right, as speculated by the Court of Appeal, that the appellants either went into a period of alleged inactivity and/or lethargy or failed to check on their counsel for one whole year from 12th January, 1987 until 12th January, 1988 as the appellants with their counsel, for seven months during the period, were busy prosecuting their application for a stay of execution. It is plain to me that the exercise of discretion by the Court of Appeal in respect of the application in issue was based on wrong and unproven considerations.⁴ On this ground alone, this court is entitled and will be duty bound to intervene in the matter. (p. 1252 B)

Negligence of the appellants

10. I will now turn to the issue of whether there was any negligence at all on the part of the appellants apart from the carelessness of counsel's agent and/or servant in the matter. It cannot be disputed that the appellants had no control over their counsel on the question of the preparation and filing of their brief of argument. It is also correct that a vast majority of litigants, literate or illiterate, are completely ignorant of Rules of Court. Indeed, as a rule, they look to their counsel for guidance and are not in a position after briefing counsel to instruct, teach, or direct him as to how or when to take whatever steps the law and the Rules of Court prescribe in the course of the execution of his professional duties. The appellants in the affidavit in support of their application deposed to the

⁴ In *Iyalabani Ltd v. Bank of Baroda* (1995) 4 KLR 840 exercise of discretion was proper.

fact that their brief of argument would be filed within 14 days if the extension of time sought was granted. This undertaking was also given to the court below by counsel to the appellants on the date the application was argued. Additionally there was no evidence that the respondents would suffer any prejudice which could not be compensated by costs if extension of time was granted. It is, in my opinion, a wrong exercise of discretion on the part of the court below to have driven the appellants away from the temple of justice peremptorily on mere speculation, having regard to all the facts of the case. (p. 1252 G)

Appeals - Dismissal

11. In the present case, it cannot be denied that the dismissal of the application for extension of time in the circumstances of the case is a clear injustice to the appellants and amounts to a miscarriage of justice. It also seems to me that the Court of Appeal acted arbitrarily and did not exercise its discretion judicially and in the interest of justice. In these circumstances, I am of the opinion that it would be wrong for this court to hold that the Court of Appeal was justified in refusing the application in issue or that it was exercising its discretion properly and judiciously in so doing. I think this is a proper case for this court to disturb the exercise of discretion by the Court of Appeal in the present case. (p. 1254 A)

Where there are two motions

12. It is a settled principle of practice that where there are two motions, one for the dismissal or striking out of proceedings for want of prosecution and the other for extension of time within which to regularize the proceedings, a court of law and equity ought to take the motion which seeks to regularize the proceedings first before considering the application for dismissal or striking out. In practice, the motion for summary dismissal or striking out is invariably withdrawn and consequently struck out and the applicant compensated with costs if and where the motion for extension of time is granted. See Nalsa and Team Associates v. N.N.P.C. (1981) 8 N.W.L.R. (Part 212) 652. In the present case, when both motions came up for hearing, the court below, quite rightly, dealt

with the application for extension of time first but erroneously refused to grant it. If it had found itself able to grant the extension of time applied for, I entertain no doubt that the application for the dismissal of the appeal would naturally have been withdrawn and struck out as having been overtaken by events. (p. 1254 E)

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Fair Hearing - Denial

13. There can be no doubt that the Court of Appeal, having dismissed the appellants' motion for extension of time which was duly argued, ought to have called on the respondents' counsel to move his own application for the dismissal of the appeal and hear the parties or learned counsel on their behalf thereupon before making an order in that application. It cannot be overemphasized that courts of law are duty bound to consider each and every application on its merits. They are enjoined to afford reasonable opportunity for the rights of the parties to be argued, investigated and thus determined on their merits. See Rev. Moses Abiegbe and others v. Edheremn Ugboodume and others (1973) 1 SC 133., and Obomhense v. Erhahon (1993) 7 N.W.L.R. (Part 303) 22. A denial of fair hearing is a breach of the audi alteram partem doctrine and is invariable fatal to a decision of the court. I am therefore satisfied that the Court of Appeal was in definite error by unilaterally granting the respondents' motion for the dismissal of the appeal without hearing both counsel on the application. (p. 1255 C)

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NOTABLE POINTS OF INTEREST

IGUHJSC

1. Extension of time - Negligence of counsel - Effect of SC Practice Directions 1982

A careful study of the authorities since the issuance of the 1982 Practice Directions of this court by the Chief Justice of Nigeria would appear to disclose the existence of discordant voices among some of the learned Justices of this court on the question of whether or not this court would more readily exercise its discretion to extend the period prescribed for the doing of an act if it is shown that failure by a party to do that act

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within the period prescribed by the Rules was caused by the negligence, carelessness or inadvertence of his counsel. Up to the issuance of the said Practice Directions of this court by the Chief Justice of Nigeria on the 26th April, 1982 reported in 1982 4 S.C. 76 - 77, the attitude of this court in the exercise of its discretion to applications for extension of time within which to take steps in an appeal under the rules had generally been that the court would more readily exercise its discretion to extend the time if it was shown to its satisfaction that the failure by a party to do the required act within the period prescribed by the Rules of Court was caused by the carelessness, negligence, inadvertence or misconception of law on the part of his counsel. In this connection, attention may be drawn to the decisions in T.A. Doherty v. R.A. Doherty (1964) 1 ALL N. L.R. 299, Ojora v. Odunsi (1964) N.M.L.R. 12. However since the issuance of the 1982 Practice Directions, there have been various pronouncements by this court or from some learned Justices thereof from where it would appear that the said Practice Directions seem to have been construed to mean that the court's previous decisions on the principles upon which applications for extension of time were granted prior to the publication of the Practice Directions are no longer good law. This presumed new attitude of the court on the issue clearly ran counter to the pre 1982 stand of this court and seemed to indicate that negligence, carelessness, inadvertence or misconception of law on the part of counsel did not, by themselves, constitute exceptional circumstances or good and substantial reasons upon which the court would exercise its discretion in favour of an applicant for extension of time as aforesaid. (p. 1246 E)

G 2. *Courts now pursue the course of substantial justice*

Besides, it has also to be borne in mind that our courts would appear to have deliberately shifted away from the narrow technical approach which characterised some of their earlier decisions and, now, instead, pursue the course of substantial justice. See Consortium M.C. v. N.E.P.A. (1992) 6 N.W.L.R. (part 246) 132. Similarly, this court, per Nnaemeka-Agu, J.S.C. in Nalsa and Team Associates v. N.N.P.C. (supra) at Page 668 put the same issue as follows -

"..... the erring appellant has realised his mistake and has filed a motion which, if granted will correct it and bring about a valid and competent appeal. When such is the case, although, in the hey days of technicality, the practice was to take the motion which sought to strike out the appeal as incompetent first, leaving the appellant to seek to commence another appeal if he liked, I am of the view that that does not accord with the present inclination of Court to do substantial justice, for the days of technicality are gone". Along the same line also, is the dictum of Oputa, J.S.C in Nneji v. Chukwu (1988) 3 N.W.L.R (Part 81) 184 where he explained thus -

"I am not unaware of the stand of this Court that "Rules of Court are meant to be complied with". See SOLANKE Vs SOMEFUN (1974) 1 S.C. 141 at page 148. But the principal object of Courts is to decide the rights of the parties and not to punish them for mistakes they may make in the conduct of their cases by deciding otherwise than in accordance with these rights." See too Nduka v. Appio (1993) 5 N.W.L.R. (Part 292) 201. (p. 1249 C)

OGWUEGBU JSC

3. Taking into account irrelevant matters in the exercise of discretion

Apart from the carelessness of counsel's house keeper, there was no negligence on the part of the appellants. The court below was clearly in error to have dismissed the appellants' application and granted that which prayed the court to summarily dismiss the appeal. It is undesirable to give effect to rules which will merely enable one party to score, not a victory on the merits but a technical knock-out at the expense of a hearing on the merits. See University of Lagos v. Aigoro (1985) 1 N.W.L.R. (Pt. 1) 143 and Nishizawa Ltd. v. Jethwani (1984) 12 S.C. 234 at 286. I am of the view that the court below failed to exercise its discretion judicially and judiciously. An appeal court is always very reluctant to interfere with the exercise of a judge's discretion on a matter such as the one leading to this appeal. The Court of Appeal did not seem to have taken all the circumstances of the case into consideration. Rather, it took into account irrelevant matters and the exercise of that discretion has worked

injustice on the appellants and this court will interfere. (p. 1257 H)

REPRESENTATION

D. N. Ngige Esq. for the Appellants

B F. C. Ofodile Esq. for the Respondents

CASES REFERRED TO

Benson v. Nigeria Agip Oil Co. Ltd (1982) 5 S.C. 1.

Odusote v. Odusote (1971) 1 ALL N.L.R. 219 at 222.

C Odey v. Akam (1940) 6 W.A.C.A. 63 at 64

Jenkins v. Bushby (1891) 1 Ch. 484 at 495

Abiegbe v. Ugbodume (1973) 1 SC 133

Obomhense v. Erhahon (1993) 7 N.W.L.R. (Part 303) 22.

D University of Lagos v. Aigoro (1985) 5 S.C. 276 1

Nishizawa Ltd. v. Jethwani (1984) 12 S.C. 234 at 286.

Kwaham vs. Elias (1960) S.C.N.L.R. 224

Ajomale v. Yaduat (No. 2) (1991) 22 N.S.C.C. (Part 1) 570 at 575.

E Bucknor - Maclean v. Inlaks Ltd. (1980) 8 - 11 S.C. 1.

Consortium M.C. v. N.E.P.A. (1992) 6 N.W.L.R. (part 246) 132.

Doherty v. Doherty (1964) 1 ALL N. L.R. 299

Ojora v. Odunsi (1964) N.M.L.R. 12

F Bowaje v. Adediwura (1976) 6 S.C. 143

Akinyede v. The Appraiser (1971) 1 ALL N.L.R. 162

Ahamade v. Salawu (1974) 1 ALL N.L.R. 318

STATUTE AND RULES REFERRED TO

G Court of Appeal (Amendment) Rules, 1984, Order 6 Rule 10

Court of Appeal Rules, 1981, Order 3 Rules 3(1) and 4(0)

Constitution of the Federal Republic of Nigeria, 1979, s. 33.

H **LEAD JUDGMENT BY IGUH JSC**

This is an appeal against the decision of the Court of Appeal, Enugu Division, delivered on the 23rd day of February, 1998. By this decision, the defendants/appellants' application for extension of time within

which to file their brief of argument was refused but the plaintiffs/respondents' application for the dismissal of the defendants/appellants' appeal for want of prosecution was granted and the defendants/appellants' appeal was accordingly dismissed with costs.

It seems to me desirable at this stage to set out briefly the background facts to the present dispute between the parties which have culminated in this appeal. B

By consolidated suits numbers PHC/36/73 and PHC/37/73, the respondents, as plaintiffs, claimed against the appellants, as defendants, as follows:- C

"1. A Declaration that the plaintiffs are entitled to the customary right of occupancy according to Kalabari Native Law and custom to all the piece or parcel of land known as and called Fubara Polo, Akpana Polo and Dokubo-Ekine Polo land situate at Fouchee Bakana - DELGA. D

2. N400.00 damages for trespass.

3. An Injunction restraining the Defendants by themselves, their agents and or servants from committing further acts of trespass thereon."

Pleadings were ordered in the suit and were duly settled, filed E and exchanged. At the conclusion of the subsequent trial, the learned trial Judge, Opene, J., as he then was, after a review of the evidence and the applicable law on the 14th day of July, 1986, entered judgment in favour of the plaintiffs against the defendants for title to the land in dispute, N200.00 damages for trespass and perpetual injunction. F

Dissatisfied with this decision of the trial court, the defendants, well within time, lodged an appeal against the same to the Court of Appeal, Enugu Division, on the 11th day of August, 1986. Thereafter, they brought an application for a stay of execution of the judgment before the trial court which application was dismissed on the 12th February, 1987. G They further applied for a similar relief before the Court of Appeal on the 12th day of March, 1987 but the same was also dismissed on the 23rd of September, 1987. I shall hereinafter refer to the defendants and the plaintiffs in this judgment as the appellants and the respondents respectively. H

Shortly after this dismissal, the respondents, on the 17th November, 1987, filed an application pursuant to the provisions of Order 6,

Rule 10 of the Court of Appeal (Amendment) Rules, 1984 praying for the dismissal of the appeal for want of prosecution. On the 12th January, 1988, C. O. Akpamgbo, Esq. S.A.N., learned counsel for the appellants, filed an application on their behalf, praying the Court of Appeal for an extension of time within which to file the appellants' brief of argument pursuant to the provisions of Order 3 Rules 3(1) and 4(1) of the Court of Appeal rules, 1981.

Both motions came up for hearing before the Court of Appeal on the 19th January, 1988. In accordance with the usual practice of the courts, the appellants' application for extension of time was taken first as its success or failure would determine the fate of the application to have the appeal dismissed.

The application for extension of time was accompanied by an affidavit sworn to by one Blessing Eyitenne, a legal practitioner in the chambers of C. O. Akpamgbo, Esq. S.A.N. In it, Miss Eyitenne deposed that she was authorised by the appellants to swear to the affidavit. She deposed that the appellants brought the record of appeal to their chambers on the 12th January, 1987; judgment having been delivered therein on the 14th July, 1986 in favour of the plaintiffs/respondents. Paragraphs 7, 8, 9, 10, 11, 12, 13 and 14 of the affidavit in support of the application appear to me relevant and deposed as follow -

"7. That on 12/1/87, the clients sent into this Chambers the Record of proceedings. Further that the said C. O. Akpamgbo, Esq. S.A.N. tells me and I verily believe him that he started working on the Appellants' brief of argument, but later shelved this for some pressing family problem.

8. That a week after, the said head of Chambers tells me and I verily believe him that when he sat to conclude the Appellants' brief of argument, he noticed that the lady housekeeper, Miss Eugenia Mba, had unwittingly made away with the records and the draft Appellants' Brief among the disposed off files.

9. That the intensive search for this Record and the documents enclosed therein continued until the month of November, 1987 when the Plaintiffs/Respondents served me with a motion to dismiss the appeal.

10. *That weary of the search, the said Solicitor tells me and I verily believe him that by the first of January, 1988 he succeeded in getting a copy of the Record from Chief R. R. Briggs of Port Harcourt, the solicitor who did the case in the trial Court.*

11. *That the time limited to me to file the Appellants' brief of argument in this Court expired on 13/3/87.*

12. *That the Appellant/Applicants are still ready, able and willing to prosecute this appeal.*

13. *That C. O. Akpamgbo, Esq. S.A.N. of No. 39, Bedewright Street, Uwani, Enugu, tells me and I verily believe him that he has recommenced writing up the Appellants' Brief.*

14. *That the said Solicitor tells me and I verily believe him that the Appellants brief will be ready within 14 days of the grant of my application."*

I should, perhaps, add that there was no counter-affidavit controverting any of the above averments.

Arguments on the application were duly taken on the 19th January, 1988 and on the 23rd February, 1988, the Court of Appeal in a reserved ruling, refused the application for extension of time within which to file the appellants' brief of argument but granted the application to dismiss the appeal for want of prosecution. The appeal was accordingly dismissed pursuant to Order 6 Rule 10 of the Court of Appeal (Amendment) Rules, 1984.

Aggrieved by this decision of the Court of Appeal, the appellants have now appealed to this court.

Altogether, five grounds of appeal were filed by the appellants. These grounds of appeal, without their particulars, are as follows -

"(1) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law in failing to exercise their discretion judiciously in granting the Appellants' application for extension of time within which to file their Appellants' brief of argument so as to ensure that they get fair hearing of their appeal as required under section 33 of the 1979 Constitution as amended.

(2) ERROR IN LAW

The learned justices of the Court of Appeal erred in law in refusing to grant the Appellants a period of 14 days within which their Counsel would file their brief of argument, a refusal which denied the Appellants a fair hearing as guaranteed under the 1979 Constitution as amended.

(3) MISDIRECTION IN LAW

The learned justices of Court of Appeal misdirected themselves, when Kolawole, J.C.A. in his lead ruling said inter alia.
 "The only ground upon which the appellant's application is based is the carelessness of Miss Eugenia Mba as deposed in paragraph 15 of the affidavit of Eyitenne. But that is not all; there is, as I have stated, the negligence of the appellants themselves who did nothing for one year after depositing the record of appeal in the chambers of Mr. C. O. Akpamgbo".

(4) ERROR IN LAW

The learned justices of the Court of Appeal erred in law when they suo motu proceeded to dismiss the Appellants' appeal for want of prosecution after refusing their motion for extension of time, without calling on the Respondents' Counsel to formally move his motion for dismissal of the appeal and the Appellants' Counsel replying thereto - a flaw which rendered the judgment null and void.

(5) ERROR IN LAW

The learned justices of the Court of Appeal erred in law in relying heavily on the case of *IRO OGBU & ORS VS URUM* (1981) ALL N.L.R. (2nd Ed.) page 324 as an authority for refusing the Appellants' application for extension of time."

Both the appellants and the respondents filed and exchanged their written briefs of argument pursuant to the Rules of this Court.

The four issues distilled from the appellants' grounds of appeal set out on their behalf for the determination of this court are as follows -

"(i) Did the Court of Appeal exercise its discretion judicially and judiciously as laid down by this Court in dismissing the Appellants' appeal given the facts and circumstances of this case?

(ii) Was it proper for the Court of Appeal to take argument from

Counsel to both sides only in respect of the Appellants' motion for extension of time and thereafter refusing same but proceeding suo motu to dismiss (rather than striking out) the appeal without taking any argument in respect of the motion to dismiss the appeal?

(iii) *Were the Appellants given a fair hearing within the purview of Section 33 (1) of 1979 Constitution as amended, given the way and manner in which their appeal was dismissed by the Court below?*

(iv) *Were the Justices of the Court below right in relying on technical rules of justice as embodied in the case of OGBU VS URUM (1981) ALL. N.L.R. (2nd ed.) page 324 and other similar cases, rather than on substantial justice as enunciated in recent cases like NNEJI Vs. CHUKWU (1988) 3 NWLR (Pt. 81 page 184, CONSORTIUM M.C. Vs NEPA (1992) 6 NWLR (Pt. 246) page 132, NALSA & TEAM ASSOCIATES Vs NNPC (1991) 8 NWLR (pt. 212) page 652 in shutting the Appellants out from the seat of Justice?"*

The respondents, on the other hand, adopted the same four issues set out by the appellants as sufficient for the determination of this appeal.

At the oral hearing of the appeal, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification thereof. It is clear to me that issues 1 and 4 which deal with the exercise of the courts discretion in the application and whether this discretion was exercised in conformity with the justice of the case revolve around the same orbit and may therefore be considered together. Similarly, issues 2 and 3 concern the question whether or not the appellants were given a fair hearing in the manner their appeal was dismissed. These two issues may also be considered together in this judgment.

The appellants' main submissions on the first and fourth issues were that in the exercise of its discretion to hear applications, the court is essentially guided by consideration to do justice between the parties and to ensure ultimately that the dispute between them is decided on its merits. In this regard, they cited the decisions in Khawam v. Elias (1960) S.C.N.L.R. 244 and Nalsa and Team Associates v. N.N.P.C. (1991) 8

N.W.L.R. (Part 212) 652) in support of their contention. It was their submission, relying on the decision in Nzeribe v. Dave Engineering Co. (1994) 8 N.W.L.R. (Part 361) 124, that the Court of Appeal exercised its discretion in the application upon wrong and irrelevant principles and that this court, by virtue of the decision in Anya v. A.N.N. Ltd. (1992) 6 N.W.L.R. (Part 247) 319, is duty bound to reverse the same. They stressed that the main reason upon which the Court of Appeal dismissed the appeal was the alleged failure by the appellants to check on their counsel from the 12th January, 1987 to the 12th January, 1988 to remind him of the need to file their brief of argument. It was argued that there was no basis for this line of reasoning by the court below as there was no evidence in support of the same. It was further contended that most litigants are ignorant of Rules of Court governing appeals that they look to their counsel for guidance and, at any rate, that they have no control over their counsel on the issue of the preparation or filing of briefs of argument. The appellants were therefore not responsible for the failure of their counsel to file their brief of argument within time. Relying on the decision in Doherty v. Doherty (1964) ALL N.L.R. 299, the appellants contended that the sin of their counsel must not be visited on the litigant.

The respondents, in their reply, contended that for justice to be done in the case, the competing interest of both parties must be taken into consideration. They argued that where the appellants, as in the present case, did not or refused to proceed with their appeal, the court below was left with no alternative than to apply the provisions of Order 6 Rule 10 of the Court of Appeal Rules to dismiss the appeal. It was further submitted on their behalf that carelessness, negligence or inadvertence of counsel by themselves did not constitute exceptional circumstances upon which the court would grant indulgence to an applicant. The decisions in Benson v. Nigerian Agip Oil (1982) 5 S.C.1 and Orobator v. Amata (1981) 5 S.C. 276 were cited in support of this contention. It was their submission that the decision of this court in the University of Lagos v. Aigoro (1985) 1 S.C. 266 announced the demise of the period of leniency for careless or negligent counsel who failed to comply with the mandatory provisions of the rules. This court was urged to hold that the Court of

Appeal exercised its discretion in the applications judicially and judiciously, bearing in mind that the appellants went into slumber after filing their appeal and were unable to show any special circumstance why they should not be granted the extension of time they applied for.

On issues 2 and 3, the appellants argued that the respondents' application for the dismissal of the appeal was granted without hearing arguments from the parties after their motion for extension of time within which to file their brief of argument was dismissed by the court below. It was submitted that the procedure adopted by the court below could not be justified as the court was bound to consider every application on its merits. Citing the decision in Obomhense v. Erhahon (1993) 7 N.W.L.R. (Part 303) 22, the appellants submitted that the Court of Appeal was in error by unilaterally granting the motion for dismissal of the appeal without inviting the respondents' counsel to move the application and the appellants' counsel to reply. This, it was contended, amounted to a denial of the right to fair hearing under section 33(1) of the Constitution of Nigeria 1979. Learned counsel urged the court to allow this appeal and to grant an extension of time to the appellants within which to file their brief of argument.

The respondents, in their reply, argued that the two motions came before the Court of Appeal for hearing on the 19th day of January, 1988. They explained that after arguments were taken from both counsel, ruling was adjourned to the 23rd February, 1988, on which date the application for extension of time was dismissed and the motion for dismissal of the appeal was granted. They claimed that learned appellants' counsel was given full opportunity to move his application for extension of time and to answer to the respondents' application for the dismissal of the appeal. He referred to the decision in Chief Victor Ukwu v. Chief Mark Bunge (1991) 3 N.W.L.R. (Part 182) 677 at 691 and submitted that it was not for the Court of Appeal to advance arguments for counsel, that counsel is the master of his brief and that where counsel prefers not to make any or adequate submission on his application before the court, the court cannot be held accountable. Learned counsel urged the court to dismiss this appeal.

Turning now to issues 1 and 4, it is perhaps, desirable firstly to examine briefly the relevant principles of law which govern the exercise of discretion by courts of law, particularly in respect of matters involving extension of time within which to take certain procedural steps as prescribed by the Rules of court.

There can be no doubt that for an application for an extension of time within which an appellant may file his brief of argument out of time or, indeed, for an extension of the time prescribed by the rules of Court for taking certain procedural steps, to succeed, the applicant must establish good, substantial or exceptional reasons or circumstances to explain satisfactorily the delay in filing his brief or taking the steps in issue and thus justify the grant of the extension of time applied for. See Chief T.O.S. Benson v. Nigeria Agip Oil Co. Ltd (1982) 5 S.C. 1. Whatever decision a court arrives at in such applications must entirely depend on the exercise of its discretionary jurisdiction, having regard to the general principles of law governing the exercise of discretionary powers by the courts and guided by the consideration of doing justice to all the parties to the dispute.

In this regard, it is a well settled principle of law that all judicial discretions must be exercised according to common sense and according to justice, and, if there is any miscarriage of justice in the exercise of such discretion, it is within the competence of an appellate court to have it reviewed. See Abiodun Odusote v. Olaitan Odusote (1971) 1 ALL N.L.R. 219 at 222. When, therefore, there is an application for an extension of time within which to do certain things or take certain procedural steps prescribed by the Rule of court, the court should always bear in mind that Rules of court must prima facie be obeyed and that to justify the exercise of its discretion, there must be some concrete material upon which to base such exercise of discretion. As this court explained in N. A. Williams and others v. Hope Rising Voluntary Funds Society (1982) 2 S.C. 145 at 152 per Idigbe, J.S.C. -

"Any exercise of the court's discretion where no material for

such exercise has been placed before the court would certainly give a party in breach of the Rules of court uninhibited right to extension of time and the provisions as to time within which to take procedural steps set out in the Rules of Court would, indeed, in such circumstances, have no legal content."

B

It has also to be emphasized that in the exercise of the judicial discretion to extend time within which to take certain procedural steps as prescribed by the Rules of Court, substantial justice to the parties has always been the cardinal determinant factor. So, in Ofem Odey v. Ovat Edim of Akam (1940) 6 W.A.C.A. 63 at 64 where in an application for extension of time within which to appeal based entirely on error on the part of the applicant's counsel, the West African Court of Appeal, as far back as over half a century ago, observed as follows:-

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D

"In spite of these errors and omissions on his part, this court feels that, if it can possibly do so, it must endeavour to give him the opportunity of obtaining substantial justice in the shape of his appeal being granted a hearing on its merits provided always that no injustice is thereby caused to the other side."

E

The court went on -

"This is following the principle laid down by the Privy Council in the Gold Coast case of Kojo Pon v. Atta Fua (Gold Coast, Privy Council 1874 - 1928, page 95) in which Viscount Haldane said:-

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"Their Lordships wish to say that in cases coming before them from the Dominions of the Crown, their first consideration always is to secure, if possible, that substantial justice is done"

G

In the exercise of its discretion, therefore, in applications for extension of time, the court must be guided by consideration of doing substantial justice between the parties in the shape of his appeal being granted a hearing on its merits provided always that no injustice is thereby caused to the other side. See too Nalsa and Team Associates vs. N.N.P.C. (1991) 8 N.W.L.R. (Pt. 212) 652 and Kwaham vs. Elias (1960) S.C.N.L.R. 224.

H

It must also be borne in mind that the exercise of judicial dis-

cretion depends on the facts and circumstances of each case. Accordingly the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would in effect be putting an end to the discretion. See Jenkins v. Bushby (1891) 1 Ch. 484 at 495 per Kay, L.J. The question, therefore, whether or not extension of time may be granted to regularise a particular act or default being a matter within the discretionary jurisdiction of the court must depend strictly on the facts and circumstances of a given case. This must be so, for as I have already observed, no one case can be authority for another in matters of discretion, and the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would in effect, be putting an end to the exercise of discretion. See too Abiodun Odusote v. Olaitan Odusote, (supra). I will now examine the facts of the present application with a view to determining whether or not the appellants were able to establish that the court below was in error when it failed to exercise its discretion in the matter of the appellants' application for extension of time within which to file their brief of argument in their favour.

In the case on hand, it is clear from the affidavit of Miss Eyitenne, counsel in the chambers of C. O. Akpamgbo, ESq. S.A.N. that the failure to the appellants to file their brief of argument within the period prescribed by the Rules of Court was, at the worst, caused by the negligence, carelessness or inadvertence of the chambers of counsel. There can be no doubt that the court below fully appreciated this position of the appellants but was unable to exonerate the applicants themselves for their "gross negligence" by failing to attend the chambers of their counsel to remind them of the need to file their brief of argument. Said the Court of Appeal per the leading judgment of Kolawole, J.C.A., with which Olatawura and Onu, JJ.C.A., as they then were, agreed -

"The only ground upon which the appellants' application is based is on the carelessness of Mrs. Eugenia Mba as deposed in paragraph 15 of the affidavit of Eyitenne. But that is not all; there is, as I have stated, the negligence of the appellants themselves who did nothing for one year after depositing the record of appeal in the chambers of Mr. C. O.

Akpamgbo. *The appellants who failed to check on their counsel to ascertain if necessary steps have been taken to comply with Order 6 Rule 2 of the Rules of court are as guilty as the lady housekeeper of the appellants' leading counsel, Mr. C. O. Akpamgbo.*"

Earlier in its judgment, the Court of Appeal had stated -

"In the present application, it appears from para. 7 of the affidavit of Eyitenne that once the appellants had deposited the record of appeal in the chambers of Mr. Akpamgbo on 12 January 1987, the appellants took no further interest in the steps which their learned counsel should take. There is nothing in the affidavit that they ever called back from 12th January 1987 to 12 January 1988 to find out what steps their counsel had taken. Perhaps if they had checked up on learned Senior Advocate, he would have been saved of the weariness of the search for the documents tucked away among the disposed off files and would have retrieved the record from Chief R. R. Briggs of Port Harcourt, the solicitor who appeared for the appellants at the High Court earlier than January, 1988."

It went on -

"The appellants' application appears, in my judgment, not to be deserving of any sympathetic consideration for a number of reasons.

(1) First, it is the application of the respondents to have the appeal dismissed for want of prosecution that awakened the appellants. If the respondents did not file the application of 17 November 1987, it is doubtful if the appellants would have taken any steps;

(2) Secondly, there is no affidavit from the house-keeper who negligently tucked away the record of appeal and the draft of the Appellants' Brief and who was promoted a clerical officer after the negligence;

(3) Thirdly, as I have said earlier, there is no affidavit from the appellants themselves explaining why they went to sleep after depositing the record of appeal in the Chambers of Mr. C. O. Akpamgbo."

The Court of Appeal also commented -

"In this case learned Senior Counsel for the appellants acceptance of responsibility for the carelessness of his house-keeper Miss. Eugenia

Mba cannot and did not explain the appellants' apparent lethargy in failing to check on their counsel whether the steps required to be taken under the Rules were taken within the prescribed time. As it has been emphasised several times the Rules of Court must, prima facie, be obeyed and, in order to justify a court in extending the time during which some step or procedure requires to be taken, there must be some material on which the court can exercise its discretion."

It would seem from the affidavit of Miss Eyitenne that the house-keeper of Mr. C. O. Akpamgbo, S.A.N., Miss Eugenia Mba, was at all material times an agent or servant of the chambers of Mr. Akpamgbo. A finding of negligence against her is clearly a finding of negligence against the chambers of the appellants' solicitors. It is clear, in my view, that the court below was unable to exercise its discretion in favour of the appellants firstly, because of the negligence, carelessness or inadvertence of the chambers of the appellants' solicitors and, secondly, but more importantly, because of the gross negligence of the appellants themselves by their failure to attend the chambers of their counsel to remind him of the need to file their brief of argument. I will firstly deal with the issue of the alleged negligence of the chambers of the appellants' learned counsel.

A careful study of the authorities since the issuance of the 1982 Practice Directions of this court by the Chief Justice of Nigeria would appear to disclose the existence of discordant voices among some of the learned Justices of this court on the question of whether or not this court would more readily exercise its discretion to extend the period prescribed for the doing of an act if it is shown that failure by a party to do that act within the period prescribed by the Rules was caused by the negligence, carelessness or inadvertence of his counsel. Up to the issuance of the said Practice Directions of this court by the Chief Justice of Nigeria on the 26th April, 1982 reported in 1982 4 S.C. 76 - 77, the attitude of this court in the exercise of its discretion to applications for extension of time within which to take steps in an appeal under the rules had generally been that the court would more readily exercise its discretion to extend the time if it was shown to its satisfaction that the failure by a party to do the required act within the period prescribed by the Rules of Court was caused

by the carelessness, negligence, inadvertence or misconception of law on the part of his counsel. In this connection, attention may be drawn to the decisions in T.A. Doherty v. R.A. Doherty (1964) 1 ALL N. L.R. 299, Ojora v. Odunsi (1964) N.M.L.R. 12, Tunji Bowaje v. Moses Adediwura (1976) 6 S.C. 143, Akinyede v. The Appraiser (1971) 1 ALL N.L.R. 162, Ahamade v. Salawu (1974) 1 ALL N.L.R. 318, Alagbe v. The Oluwo of Iwo (1978) N.S.C.C. 84 etc. In Doherty's case, (supra), for instance, it was held by this court that failure to comply with the conditions of appeal was entirely due in that case to the fault of the appellants' solicitors and that to shut them out from the hearing of the appeal on the merits was to hold them personally responsible for the negligence of their solicitors. In other words, it was the view of this court that the sin of counsel ought not be visited on the litigant and this remained the attitude of this court on the subject.

However since the issuance of the 1982 Practice Directions, there have been various pronouncements by this court or from some learned Justices thereof from where it would appear that the said Practice Directions seem to have been construed to mean that the court's previous decisions on the principles upon which applications for extension of time were granted prior to the publication of the Practice Directions are no longer good law. This presumed new attitude of the court on the issue clearly ran counter to the pre 1982 stand of this court and seemed to indicate that negligence, carelessness, inadvertence or misconception of law on the part of counsel did not, by themselves, constitute exceptional circumstances or good and substantial reasons upon which the court would exercise its discretion in favour of an applicant for extension of time as aforesaid. But in University of Lagos and Another v. M.I. Aigoro (1984) 11 S.C. 152 at 165 - 166, Bello, J.S.C., as he then was, had cause to explain as follows -

"I think, there is substance in the submission of Chief Williams and I am inclined to agree with him, that since the publication of the Practice Directions the court has, or at least, some of its Justices have appeared to have construed the Practice Directions to mean that its previous decisions on the principles upon which applications for extension

of time were granted prior to the Practice Directions are no longer applicable. Some recent decisions of this court appear to depart from the decisions mentioned in the foregoing paragraph. The court has held in numerous cases since the publication of the Practice Directions that
 B counsel's carelessness, negligence, inadvertence or misconception of law are not exceptional circumstances or reasons to grant extension of time."

There is also the contribution of Karibi-Whyte, J.S.C. in the same case where he opined at Page 214 of the report as follows -

"But since after the 26th April, 1982, the following cases clearly
 C demonstrate a shift in the position of the court. The court's new attitude is that the carelessness, negligence, inadvertence or misconception of law of counsel by themselves do not constitute exceptional circumstance or reasons to grant extension of time - See Chief Benson v. Agip Oil
 D (1982) 5 S.C. 1 Echezue v. Awka Community Council S.C. 18/1983, 6/3/84; Akwivu Motors v. Dr. Sangonuga S.C. 97/1983 delivered 2/7/84. It is undoubted that from the reasons given by justices in dismissing these appeals, the Practice Directions in issue was the determining factor in
 E the exercise of their discretion."

The court's presumed new attitude alluded to in the University of Lagos case was further manifested in the case of Chief T. O. S. Benson v. Agip Oil (1982) 5 S.C. 1. But as explained by Bello, J.S.C., as he then
 F was, it is clear that the pronouncements in the decisions were influenced by the Practice Directions of 1982.

**I find it necessary to stress in very clear terms that this court has no power, extra judicially, to overrule, reverse or nullify its previous decisions whether on question of substantive or procedural law. Such previous decisions may inter alia only be annulled by legislation or by a judicial decision of the court, given intra judicially when it is satisfied, again inter alia, that the previous decision was given per incuriam or would perpetuate injustice. See
 G Bucknor - Maclean v. Inlaks Ltd. (1980) 8 - 11 S.C. 1.**

This court has neither overruled, reversed or nullified its previous or pre 1982 decisions on the issue of the court's exercise of discretion whether on questions of substantive or procedural law.

These decisions have neither been annulled by legislation nor by a judicial decision of this court given intra judicially. It therefore seems to me clear that the said recognised principles upon which application for extension of time were granted prior to the issuance of the Practice Directions of 1982 remain good law and applicable. B Indeed, in the University of Lagos case, Obaseki, J.S.C commented inter alia as follows -

"I do not think that the Court today will depart from the course of Justice if culpable negligence or inadvertence of Counsel is established by any litigant. That amounts to exceptional circumstances deserving of the Court's most sympathetic consideration." C

Besides, it has also to be borne in mind that our courts would appear to have deliberately shifted away from the narrow technical approach which characterised some of their earlier decisions and, now, instead, pursue D the course of substantial justice. See Consortium M.C. v. N.E.P.A. (1992) 6 N.W.L.R. (part 246) 132. Similarly, this court, per Nnaemeka-Agu, J.S.C. in Nalsa and Team Associates v. N.N.P.C. (supra) at Page 668 put the same issue as follows -

"..... the erring appellant has realised his mistake and has filed a motion which, if granted will correct it and bring about a valid and competent appeal. When such is the case, although, in the hey days of technicality, the practice was to take the motion which sought to strike F out the appeal as incompetent first, leaving the appellant to seek to commence another appeal if he liked, I am of the view that that does not accord with the present inclination of Court to do substantial justice, for the days of technicality are gone". (Underlinings mine for emphasis) G Along the same line also, is the dictum of Oputa, J.S.C in Nneji v. Chukwu (1988) 3 N.W.L.R (Part 81) 184 where he explained thus -

"I am not unaware of the stand of this Court that "Rules of Court are meant to be complied with". See SOLANKE Vs SOMEFUN (1974) 1 S.C. 141 at page 148. But the principal object of Courts is to decide the rights of the parties and not to punish them for mistakes they may make in the conduct of their cases by deciding otherwise than in accordance with these rights." (Underlining mine for emphasis). H

See too Nduka v. Appio (1993) 5 N.W.L.R. (Part 292) 201.

It therefore seems to me that the interest of justice demands that parties, in appropriate cases, should be afforded a reasonable opportunity for their rights to be investigated and determined on the merits so long as the equities of the matter are not defeated and no injustice to the other party is thereby occasioned. See Abiegbe and others. v. Ugbodume and others (1983) N.S.C.C. 26. I also respectfully endorse the view, that the carelessness, negligence, or inadvertence of counsel ought not be visited on the litigant, particularly in cases where the litigant himself if unconnected with and not in pari delicto with his counsel in the matter of the default in question. I will now advert to the facts of the present application.

It is clear from the depositions in the affidavit in support of the application that the sole reason for the appellants' lateness in filing their brief of argument within the period prescribed by the Rules of Court was the misplacement of their file in the chambers of their counsel. This was by one Miss Eugenia Mba, an employee, servant and/or agent of the said counsel. The facts relied on by the appellants were that on receipt of the record of proceedings in the case, they immediately delivered the same to their counsel, C. O. Akpamgbo Esq., S.A.N. on the 12th January, 1987. A week after, their counsel commenced working on their brief of argument but shelved this at some stage for some pressing family problem. When the following week he returned to conclude the said brief of argument, he noticed that the Records with the draft brief could not be found. Intensive search for these documents continued without success until in November 1987 when the plaintiffs/respondents served them with a motion for the dismissal of their appeal. It transpired that the appellants' Records with the draft brief were accidentally, if not carelessly, tucked away with the disposed off files. Counsel, however, succeeded in getting another copy of the Records from Chief R. R. Briggs, the solicitor who defended the appellants in the trial court and subsequently filed his present application.

Perhaps I should observe that the plaintiffs/respondents filed

no counter-affidavit to controvert any of the above depositions on oath by the defendants/appellants. It is trite law that where facts provable by affidavit evidence are duly deposed to in an affidavit by a party to a suit, his adversary has a duty to controvert those facts in a counter-affidavit if he disputes them otherwise such facts may be regarded as duly established. See Ajomale v. Yaduat (No. 2) (1991) 22 N.S.C.C. (Part 1) 570 at 575. No counter-affidavit was filed by the respondents to controvert the above depositions, including the fact that it was the carelessness or negligence of the servant and/or agent of counsel that caused the delay in filing the appellants' brief of argument within the prescribed period. I think it may safely be said that the appellants were able to establish that it was the negligence of the chambers of their counsel that caused the delay in filing their brief of argument.

I have already observed that the sin of counsel ought not be visited on the litigant, particularly in a case such as the instant application where the appellants were not shown to have been guilty of any negligence. I will however return to this issue later in this judgment. I have also held that the discretion of this court in applications such as the one under consideration is more readily exercised in favour of an applicant whose main reason for failure to comply with the rules of Court, as in the present case, is the carelessness, negligence or inadvertence of counsel. I think that on the particular facts of the present case, the court below was in error by dismissing the appellants' application before it.

It should be stressed that the main plank upon which the court below rested its judgment in dismissing the application of the appellants was its finding to the effect that the appellants were guilty of gross negligence by their failure to remind their counsel of the need to file their brief of argument. Said the Court of Appeal per the leading judgment of Kolawole, J.C.A. with which Olatawura and Onu, JJ.C.A., as they then were, agreed -

"I cannot imagine a more serious case of negligence on the part of the appellants than the present case. For a whole year they did nothing and they now ask for the court's discretion. I do not think that they

are entitled to it."

Earlier on the court had stated -

"There is no doubt that the failure of the appellants to check on their counsel from January 12, 1987 until January 12, 1988 to ascertain if necessary steps have been taken to comply with the rules of court is an act of gross negligence."

With profound respect to the Court of Appeal, I can find nothing from the records to justify the dereliction of duty levelled against the appellants. It is clear that there was neither any counter-affidavit before the court nor any other evidence from which the court below conceivably arrived at its findings against the appellants. In my view, there was practically no basis whatsoever for the inference and speculations made against the appellants by the Court of Appeal as there was no evidence to support them. On the contrary, it is clear from the records that both parties fiercely contested the appellants' motion for a stay of execution in the same court for over a period of seven months from March 1987 until the delivery of ruling in the application on the 23rd September, 1987. It cannot therefore be right, as speculated by the Court of Appeal, that the appellants either went into a period of alleged inactivity and/or lethargy or failed to check on their counsel for one whole year from 12th January, 1987 until 12th January, 1988 as the appellants with their counsel, for seven months during the period, were busy prosecuting their application for a stay of execution. It is plain to me that the exercise of discretion by the Court of Appeal in respect of the application in issue was based on wrong and unproven considerations. On this ground alone, this court is entitled and will be duty bound to intervene in the matter. I will now turn to the issue of whether there was any negligence at all on the part of the appellants apart from the carelessness of counsel's agent and/or servant in the matter.

It cannot be disputed that the appellants had no control over their counsel on the question of the preparation and filing of their brief of argument. It is also correct that a vast majority of

litigants, literate or illiterate, are completely ignorant of Rules of Court. Indeed, as a rule, they look to their counsel for guidance and are not in a position after briefing counsel to instruct, teach, or direct him as to how or when to take whatever steps the law and the Rules of Court prescribe in the course of the execution of his professional duties. The appellants in the affidavit in support of their application deposed to the fact that their brief of argument would be filed within 14 days if the extension of time sought was granted. This undertaking was also given to the court below by counsel to the appellants on the date the application was argued. Additionally there was no evidence that the respondents would suffer any prejudice which could not be compensated by costs if extension of time was granted. It is, in my opinion, a wrong exercise of discretion on the part of the court below to have driven the appellants away from the temple of justice peremptorily on mere speculation, having regard to all the facts of the case. B C D

I will conclude this judgment on the main issue of the exercise of discretion by courts of law and equity by reference to the decision of this court in Abiodun Odusote v. Olaitan Odusote (supra) in which it quoted, with approval, a passage in the judgment of Lord Wright, L.J. in Evans v. Bartlem (1937) A.C. 473 in the following terms - E

"A Judge's order fixing the date of trial or refusal to grant an adjournment is a typical exercise of purely discretionary powers and would be interfered with by the Court of Appeal only in exceptional case, yet it may be reviewed by the Court of Appeal. Thus in Maxwell v. Keun (1928) 1 K.B. 645, the Court of Appeal reversed the trial Judge's order refusing to the plaintiff an adjournment. That was a pure matter of discretion on the facts. Atkin, C.J. said (at p. 653)." F G

'I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or the order of the parties, then H

the court has power to review such an order, and it is, to my mind, its duty to do so.' "

In the present case, it cannot be denied that the dismissal of the application for extension of time in the circumstances of the case is a clear injustice to the appellants and amounts to a miscarriage of justice. It also seems to me that the Court of Appeal acted arbitrarily and did not exercise its discretion judicially and in the interest of justice. In these circumstances, I am of the opinion that it would be wrong for this court to hold that the Court of Appeal was justified in refusing the application in issue or that it was exercising its discretion properly and judiciously in so doing. I think this is a proper case for this court to disturb the exercise of discretion by the Court of Appeal in the present case. Issues 1 and 4 are therefore resolved in favour of the appellants.

Dealing now with issues 2 and 3, it is clear from the records that the two motions for dismissal of the appeal for want of prosecution and extension of time within which to file the appellants' brief of argument came up for hearing before the court below on the 19th January, 1988. It is a settled principle of practice that where there are two motions, one for the dismissal or striking out of proceedings for want of prosecution and the other for extension of time within which to regularise the proceedings, a court of law and equity ought to take the motion which seeks to regularise the proceedings first before considering the application for dismissal or striking out. In practice, the motion for summary dismissal or striking out is invariably withdrawn and consequently struck out and the applicant compensated with costs if and where the motion for extension of time is granted. See Nalsa and Team Associates v. N.N.P.C. (1981) 8 N.W.L.R. (Part 212) 652.

In the present case, when both motions came up for hearing, the court below, quite rightly, dealt with the application for extension of time first but erroneously refused to grant it. If it had found itself able to grant the extension of time applied for, I entertain no doubt that the application for the dismissal of the appeal

would naturally have been withdrawn and struck out as having been overtaken by events. But as already stated, the application for extension of time was refused by the Court of Appeal which, in its ruling, proceeded at the same time to grant the respondents' own application for the dismissal of the appeal for want of prosecution. This, the court B below did, without taking any arguments whatever from learned counsel for both parties on that second motion. It is the appellants' contention that the procedure adopted by the Court of Appeal was completely erroneous as it denied the appellants their right to fair hearing as guaranteed C under Section 33(1) of the Constitution of Nigeria, 1979.

There can be no doubt that the Court of Appeal, having dismissed the appellants' motion for extension of time which was duly argued, ought to have called on the respondents' counsel to move his own application for the dismissal of the appeal and hear D the parties or learned counsel on their behalf thereupon before making an order in that application. It cannot be overemphasized that courts of law are duty bound to consider each and every application on its merits. They are enjoined to afford reasonable opportunity E for the rights of the parties to be argued, investigated and thus determined on their merits. See Rev. Moses Abiegbe and others v. Edheremn Ugbodume and others (1973) 1 SC 133., and Obomhense v. Erhahon (1993) 7 N.W.L.R. (Part 303) 22. A denial F of fair hearing is a breach of the audi alteram partem doctrine and is invariable fatal to a decision of the court. I am therefore satisfied that the Court of Appeal was in definite error by unilaterally granting the respondents' motion for the dismissal of the appeal G without hearing both counsel on the application. Issues 2 and 3 must therefore be resolved in favour of the appellants.

The decision I finally reach is that having regard to all I have said above, this appeal succeeds and it is hereby allowed. The decision and orders of the Court of Appeal made on the 23rd day of February, 1988 H dismissing the appellants' application for extension of time within which to file their brief of argument out of time as well as granting the respondents' application and dismissing the appellants' appeal for want of pros-

ecution are hereby set aside, together with orders for costs therein made.
In substitution thereof, I make the following orders -

1. That the application by the defendants/appellants dated the
12th day of January, 1988 for extension of time within which to file their
B brief of argument be and is hereby granted.

2. That the defendants/appellants are hereby granted 14 days
from today within which to file and serve their brief of argument on the
plaintiffs/respondents.

3. That the application by the plaintiffs/respondents for the dis-
C missal of the defendants/appellants' appeal dated the 17th day of Novem-
ber, 1987 be and is hereby struck out, having been overtaken by events.

4. That the plaintiffs/respondents be awarded N500.00 against
the defendants/appellants as costs in the court below in respect of the
D application for extension of time hereby granted.

5. That the defendants/appellants be and are hereby awarded the
costs of this appeal which I assess and fix at N10,000.00

E

WALI JSC

I have read before now, the lead judgment of my learned brother
Iguh JSC and for the same reasons well stated therein and which I also
F endorse as mine allow the appeal and adopt the consequential orders
made by my learned brother.

OGUNDARE JSC

G I agree entirely with the judgment just delivered by my learned
brother Iguh, JSC. He has said all that need be said in this appeal. For
the reasons given by him I too allow this appeal and abide by the conse-
quential orders (including the orders for costs) made by him.

H

OGWUEGBU JSC

I have had the advantage of reading before now, the lead judgment just delivered by my learned brother Iguh, J.S.C. I agree with the views expressed in the said judgment allowing the appeal. There were two applications before the Court of Appeal. The respondents herein B filed an application pursuant to Order 6 Rule 10 of the Court of Appeal (Amendment) Rules, 1984 praying for the dismissal of the appeal for want of prosecution. The appellants filed a motion for the enlargement of the time within which to file their brief of argument pursuant to the provisions of Order 3 Rules 3(1) and 4(1) of the Court of Appeal Rules C aforesaid.

Both applications came before the court below for hearing on 19-11-88. That court rightly did what a court of justice and equity should do by first taking the motion seeking to regularise the proceedings and D preserve it from being struck out or summarily dismissed before considering the application for the dismissal of the appeal for want of prosecution.

Invariably, in practice, the motion to summarily dismiss or strike E out an appeal is withdrawn and struck out and the applicant is compensated with costs. See Nalsa & Team Associates v. N.N.P.C. (1991) 8 N.W.L.R. (Pt. 212) 652 and Khawam v. Fouad Michael Elias (1960) 5 FSC 224.

In this case, the application seeking to regularise the proceedings F was dismissed for what the court below perceived as an act of gross negligence on the part of the appellants by failing to check on their counsel from 12-1-87 until 12-1-88 to ascertain if necessary steps had been taken to comply with the rules of court. From the affidavit in G support of the application sworn to by counsel in the Chambers of the appellants' counsel, it was deposed that the failure to file the brief within time was as a result of the negligence of a lady house keeper in the office of the appellants' counsel who unwittingly made away with the records H and the draft of the appellants' brief among the disposed of files.

Apart from the carelessness of counsel's house keeper, there was no negligence on the part of the appellants. The court below was

clearly in error to have dismissed the appellants' application and granted that which prayed the court to summarily dismiss the appeal. It is undesirable to give effect to rules which will merely enable one party to score, not a victory on the merits but a technical knock-out at the expense of a hearing on the merits. See University of Lagos v. Aigoro (1985) 1 N.W.L.R. (Pt. 1) 143 and Nishizawa Ltd. v. Jethwani (1984) 12 S.C. 234 at 286.

I am of the view that the court below failed to exercise its discretion judicially and judiciously. An appeal court is always very reluctant to interfere with the exercise of a judge's discretion on a matter such as the one leading to this appeal. The Court of Appeal did not seem to have taken all the circumstances of the case into consideration. Rather, it took into account irrelevant matters and the exercise of that discretion has worked injustice on the appellants and this court will interfere.

For the above reasons and the reasons set out in the lead judgment of Iguh, J.S.C., I too would and hereby allow the appeal. I endorse all the consequential orders made in the said lead judgment including the order as to costs.

MOHAMMED JSC

I agree with the opinion of my learned brother, Iguh, JSC., that this appeal ought to be allowed. My learned brother has considered all the issues canvassed in this appeal and I have nothing more to add. I abide by all the consequential orders made in the lead judgment.

G

H