

SUPREME COURT OF NIGERIA

7TH APRIL, 2000. SC. 120/1996

**CORAM:- M. E. OGUNDARE, U. MOHAMMED, A. I. IGUH,
A. O. EJIWUNMI, E. O. AYoola, JJSC.**

1. ALSTHOM S. A. 1ST APPELLANT/APPLICANT
2. SOCIETE GENERAL BANK 2ND APPELLANT
AND
CHIEF (DR.) OLUSOLA SARAki RESPONDENT

ACTIONS - Adjudication - What determines matters which are appropriate for adjudication - The enquiry the Court should embark upon.

APPEALS - Amendment - Application for leave to amend the notice of appeal - Towards ensuring that the real question is dealt with - Should be granted.

APPEALS - Extension of time to appeal - What to consider under 0.2 r. 31 (2) (d) Supreme Court Rules - Is whether the grounds prima facie show good cause.

APPEALS - Essence of an appeal - Is to show that the decision appealed from - Is wrongly made and should be set aside or varied.

APPEALS - Right to appeal - As guaranteed under s. 233 of the 1979 Constitution - Is open to a party to the proceedings

FACTS

This ruling is in respect of two applications which were consolidated and heard together. The first is by the 1st plaintiff. Alsthom S. A; seeking for leave to appeal against the whole decision of the Court of Appeal. The 2nd application made by the two plaintiffs is for leave to amend the ground of appeal already filed. The plaintiffs obtained judgment in the high court against the defendant in the sum of N45,387,264.42 being outstanding debt owing to the plaintiffs as a result of a loan granted by the

1st plaintiff to the defendant. The debt was paid to the 1st plaintiff by the 2nd plaintiff, a bank which guaranteed the debt. On appeal to the Court of Appeal, it was contended that the 1st plaintiff no longer had any right to sue for the debt and that its claim ought to have been dismissed.

The 1st plaintiff's counsel agreed that it was a case of misjoinder for which the court below struck out the 1st plaintiff's name, allowed the appeal and dismissed the plaintiffs' action. Issues related to the death of the plaintiffs' former counsel led to a delay in pursuing an appeal to the Supreme Court. The defendant contended that as the 1st plaintiff conceded to its being struck out of the case vide its counsel, it has no right of appeal. The Supreme Court found that it was premature to consider that issue at this stage. It rather considered factors that should be taken into consideration when a party prays for leave to appeal.

HELD (Unanimously granting the application per lead ruling of **AYOOLA JSC**)

Actions - Adjudication

1. What determines matters which are appropriate for adjudication are the nature of the action challenged, the kind of injury suffered or claimed to be suffered and the relationship between the parties. In deciding whether its power has been properly invoked the courts consider whether there is an actual dispute. When proceedings are initiated to protect a civil right or enforce a civil obligation known to the law and claimed to be of the person invoking the jurisdiction of the court, the court in exercise of its adjudicatory power embarks on an enquiry: (i) whether or not such right or obligation is known to the law; (ii) the rights is of the person invoking the jurisdiction of the court; or the obligation sought to be enforced is owed to that person; (iii) there is a controversy about such right or obligation. The next stage of inquiry is as regards the substantial merit of the case. This involves, among other things, a determination of fact of infringement of the claimed right or default in performance of obligation. The power of the court to find the claim lacking in merits in fact and or, in law is the essence of exercise of adjudicatory power. The court will not deny the exercise of judicial power to a person who seeks it merely because his claim, when

examined, may be wanting in merit. (p. 1403 B)

Extension of time to appeal

2. On an application for extension of time within which to appeal, what the court should concern itself with in regard to the issues the applicant seeks to raise on the appeal is, in terms of Order 2 rule 31(2)(c) of the supreme Court Rules, whether the grounds of appeal, prima facie, show good cause why the appeal should be heard. A ground of appeal which does not disclose an error by the court below, or which complains of an error where unarguably there is none cannot be said to be a ground which prima facie shows good cause why the appeal should be heard. At the stage when a party applies for extension of time within which to appeal or for leave to appeal, it is sufficient that the grounds of appeal 'show good cause.' (p. 1403 H)

Right to appeal

3. There is nothing in the Constitution which expressly deprived the 1st plaintiff of a right to appeal with the leave of the court in this case. Section 233(2) of the Constitution provides for appeal to this court from decisions of the Court of Appeal as of right while subsection 3 of section 233 provides for appeal to this court from the court below, albeit, with leave. In both cases, in terms of sub-section 5 of section 233, the liberty to appeal as of right or, as the case may be, by leave is guaranteed to a party to the proceedings, whereas a person not a party to the proceedings has no such immediate liberty but may be permitted to appeal. (p. 1404 C)

Essence of an appeal

4. The essence of an appeal is to show that the decision appealed from is wrongly made and should be set aside or varied. The question that would arise on the appeal in this case is not only whether the order was wrongly made but also whether it is open to the 1st plaintiff to contest the propriety of the order. As earlier stated, these are issues of some novelty and importance. These and the other proposed grounds of appeal are substantial. For these reasons, I think this is an appropriate case to grant the prayer

sought by the 1st plaintiff. In the result I would grant the application of the 1st plaintiff. (p. 1405 E)

Appeals - Amendment

- B 5. The application for leave to amend the notice of appeal already filed was resisted. However, I cannot find any ground why leave to amend the notice of appeal should not be granted. Any amendment that would ensure that the real question in the appeal is dealt with and disposed of is desirable. In the result I would grant the two applications. (p. 1405 G)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Mistake of counsel not to be visited on parties

- D This court has repeatedly ruled that it cannot be right to visit the parties with punishment arising out of the mistake, inadvertence or negligence of their counsel and that in such a case, the discretion of the court, although always required to be exercised judicially and judiciously, should be exercised with a leaning towards accommodating the interest of the parties without allowing mere procedural irregularities brought about by counsel, to stifle or preclude the determination of a case on the merits. See *G.B.A. Akiyede v. The Appraiser* (1971) 1 ALL N.L.R. 162 at 165. (p. 1409 G)

2. The object of an amendment

- It is a well recognised principle of law that the object of an amendment is to decide the real controversy between the parties and the rights of the parties once and for all. If the error is not fraudulent or intended to overreach, the court will correct it if it can be done without any injustice to the other side. See *Shokunbi v. Mosaku* (1969) 1 N.N.L.R. 54. (p. 1411 F)

REPRESENTATION

- H H. O. Ajumogobia (with him O. Shasore, Ibrahim Bello) for the applicants.
Chief F. R. A. Williams, S. A. N. (with him H. A. Shogbola, T. E. Williams and T. A. Adudu) for the respondent.

CASES REFERRED TO

Anyaduba v. NRTC (1992) N.W.L.R. (pt. 243) 535
Alamu v. Alao (1972) N.S.C.C. (Vol. 7) 8
Ibodo v. Enarofia (1980) 5-7 S.C. 42,
C.C.B (Nigeria) Ltd. v. Ogwuru (1993) 3 N.W.L.R. (pt. 284) 630 at 637 B
Doherty v. Doherty (1964) 1 ALL N.L.R. 299
Bawaje v. Adediwura (1976) 6 S.C. 143 at 147
Ahmadu v. Salawu (1974) 1 ALL N.L.R. (pt. 2) 318 at 324
Shokunbi v. Mosaku (1969) 1 N.N.L.R. 54
Adeleke v. Awoniyi and Another (1962) 1 ALL NLR 260 C

LEAD RULING BY AYoola JSC

This ruling concerns two applications which have been consolidated and heard together. The first is by Alsthom S. A. which was 1st D plaintiff (and is so referred to in this ruling) in an action instituted by it and Societe General Bank (the 2nd plaintiff) against Chief Dr. Olusola Saraki ("the defendant") in the High Court of Lagos State. In the first application, the 1st plaintiff sought, in the main, leave to appeal against the whole E decision of the Court of Appeal. The second application is for leave to amend the ground of appeal already filed. It was made by the two plaintiffs.

The main question in these proceedings concerns the factors that F should be taken into consideration when a party prays that he should be granted leave to appeal.

The plaintiffs obtained judgment in the High Court in a suit instituted by them jointly against the defendant in the sum of N45,387, 264,42 G being outstanding debt owing to the plaintiffs as a result of a loan granted by the 1st plaintiff to the defendant. The plaintiffs' case at the trial was that the 1st plaintiff, a corporate body having its principal place of business in Paris, France, sometime in 1982, lent the sum of US\$500,000 to the defendant on a guarantee by the 2nd plaintiff, a corporate body carrying H on the business of Bankers, also in Paris, France. The defendant having defaulted in payment of the loan, the 2nd plaintiff settled the indebtedness of the defendant to the 1st plaintiff. Claiming that there was

an assignment of the debt to the 2nd plaintiff and that the 2nd plaintiff became subrogated to the right of the 1st plaintiff, as a guarantor which had paid the debtor's debt, the two plaintiffs jointly and severally sued the defendant and obtained judgment as earlier stated.

B The defendant appealed to the Court of Appeal where the contention was raised by the defendant in his brief of argument, among others, that the 1st plaintiff no longer had any right to sue for the debt having regard to the averment in the statement of claim that the debt had been paid to it by the 2nd plaintiff. The Court of Appeal was invited to
C hold that the 1st plaintiff's claim ought to have been dismissed. Rather, it was submitted by counsel on their behalf in the respondent's brief of argument in the court below that:

*The 1st plaintiff admits that his, is a case of a misjoinder which
D under Order 13 rule 19 of the High Court of Lagos State (Civil Procedure) Rules does not defeat the action in the suit herein. That being the case the Court of Appeal is invited to exercise its powers under section 16 of the Court of Appeal Act 1976 to strike out the 1st plaintiff from the
E suit and uphold judgment in favour of the remaining party before the court, the 2nd plaintiff."*

The same position was repeated in the course of oral argument as well as in another part of the respondents' brief where it was stated that "it
F is obvious that there is a case of a misjoinder in so far as the 1st plaintiff is concerned. The court below was urged by the plaintiffs to strike out the name of the 1st plaintiff leaving the 2nd plaintiff." In a respondents' notice filed in the court below on 27th April, 1994, the plaintiffs asked that the judgment of the High Court be varied to make it judgment in favour of the
G 2nd plaintiff only, on the ground of misjoinder of the 1st plaintiff. Relying solely on plaintiffs' counsel's concession that the 1st plaintiff had not been properly joined in the suit and acting upon the request by plaintiffs' counsel that the 1st plaintiff be struck out from the suit, the Court of Appeal
H ordered accordingly, without much ado.

Some light was shed on the reason why the majority of the Court of Appeal (Sulu-Gambari & Kalgo, JJ.C.A.) struck out the 1st plaintiff from the suit by Kalgo, J.C.A. (as he then was) when he said:

"The learned counsel for the respondent conceded quite clearly that it was wrong to join the 1st and 2nd respondents as plaintiffs at the trial in this case, and he asked that the 1st respondent be struck out from the case. It is trite that if a party to an appeal does not contend any issue on appeal, it is not open to the Court of Appeal to raise that issue on his behalf. But where a party or counsel on his behalf makes concession in course of an address, it would be untenable for the court to ignore it. See Edokpolo & co. Ltd v. Sem Edo Ltd. (1989) 4 N.W.L.R. (part 116) 473, 587."

Dissenting, Uwaifo, J.C.A. (as he then was) was of the opinion that it was unobjectionable that the 1st and 2nd plaintiff sued jointly as co-plaintiffs in the action and that it was a most proper and advisable procedure to adopt. He said:

"I am prepared to discountenance a slip made by learned counsel for the plaintiffs in the course of this appeal that there might have been a mis-joinder of parties by the inclusion of the 1st plaintiff. This was in reaction to the argument of learned counsel for the defendant. There was no misjoinder and what counsel said cannot be held binding in law."

In the event, whereas the majority of the Court of Appeal (Sulu-Gambari, J.C.A. and Kalgo, J.C.A. (as he then was) allowed the appeal and dismissed the action of the plaintiff, Uwaifo, J.C.A. (as he then was) dismissed the defendant's appeal.

The plaintiffs appealed from the majority decision by their joint notice of appeal, dated 10th November, 1994, filed by Mr. Kehinde Onafowokan, S.A.N. who was then counsel for the plaintiffs. Their appeal was from the whole decision of the court below and the grounds of appeal were substantially to the merits of the judgment. There was, then, no challenge to the order striking out the 1st plaintiff from the suit. The complaint in ground 6 of the grounds of appeal is that the court below having struck out the 1st plaintiff from the suit ought not to have dismissed the suit against the 1st plaintiff. They went further to complain in ground 7 that the court below "erred in law in not giving judgment in the alternative in favour of the 1st plaintiff, in view of the admission made by the

defendant."

I now turn to the main question in these proceedings. Learned counsel for the 1st plaintiff argued that the two conditions which an application of this nature must meet, namely that there are good and substantial reasons for failure to appeal within the prescribed time and that there are grounds of appeal which *prima facie* show good cause why the appeal should be heard, have been satisfied. It was submitted that the counsel who filed the notice of appeal on behalf of the 1st plaintiff was in error to have appealed on the merits of the decision without first of all disposing of the order striking out the 1st plaintiff from the suit and that the proposed grounds of appeal raise substantial issues of law.

For his part, learned counsel for the defendant submitted that the 1st plaintiff was not competent to invoke the jurisdiction of the court in this matter because the 1st plaintiff did not have the necessary locus standi, in the absence of issue touching the civil rights and obligation of the 1st plaintiff. Reference was made to Senator Adesanya v. President of Nigeria (1981) 2 N.C.L.R. 358, 385. It was argued that the 1st plaintiff's application was unnecessary because the court acting pursuant to O.8 r 5(1) of the Supreme Court Rules could direct the notice of appeal to be served on the 1st plaintiff. Finally, it was submitted that the grounds of appeal are inadequate.

In reply, it was submitted that, granted, that the 1st plaintiff's application to be struck out from the suit was made in the exercise of his civil right as contended by the defendant's counsel, the decision to strike out was that of the Court of Appeal which, if found to be wrong in law, is subject to review by this court on an exercise by the 1st plaintiff of its right of appeal. Relying on Anyadube v. NRTC (1992) N.W.L.R. (pt. 243) 535, it was submitted by counsel for the 1st plaintiff that the 1st plaintiff's application to strike out being predicated on a wrong legal premise ought not to have been countenanced by the court. It was urged that it was the duty of the court below to consider all issues placed before it. Finally, it was urged that the request of the 1st plaintiff that it be struck out was no more than a submission which the Court of Appeal could accept or reject.

Resort to section 6(6)(b) of the Constitution to resolve the issue

in these proceedings is using a sledge hammer to crack a nut. Section 6(6)(b) provides that the judicial powers vested in the court to which the section relates include actions between persons and proceedings relating thereto for determination of any question as to the civil rights and obligations of those persons. This is, largely, a re-statement of what has already been acknowledged in our jurisdiction, as in most common law jurisdictions, to be the true adjudicatory role of the courts. It relates to the nature of questions which the courts will regard as their business to decide. **What determines matters which are appropriate for adjudication are the nature of the action challenged, the kind of injury suffered or claimed to be suffered and the relationship between the parties. In deciding whether its power has been properly invoked the courts consider whether there is an actual dispute. When proceedings are initiated to protect a civil right or enforce a civil obligation known to the law and claimed to be of the person invoking the jurisdiction of the court, the court in exercise of its adjudicatory power embarks on an enquiry: (i) whether or not such right or obligation is known to the law; (ii) the right is of the person invoking the jurisdiction of the court; or the obligation sought to be enforced is owed to that person; (iii) there is a controversy about such right or obligation. The next stage of inquiry is as regards the substantial merit of the case. This involves, among other things, a determination of fact of infringement of the claimed right or default in performance of obligation. The power of the court to find the claim lacking in merits in fact and or, in law is the essence of exercise of adjudicatory power. The court will not deny the exercise of judicial power to a person who seeks it merely because his claim, when examined, may be wanting in merit.**

Learned counsel for the defendant has invited us "to strike out the application of the 1st plaintiff because his complaint falls outside the scope of judicial powers vested in this court by law and the Constitution of Nigeria."

On an application for extension of time within which to appeal, what the court should concern itself with in regard to the issues the applicant seeks to raise on the appeal is, in terms of

Order 2 rule 31(2)(c) of the supreme Court Rules, whether the grounds of appeal, prima facie, show good cause why the appeal should be heard. A ground of appeal which does not disclose an error by the court below, or which complains of an error where unarguably there is none cannot be said to be a ground which prima facie shows good cause why the appeal should be heard. At the stage when a party applies for extension of time within which to appeal or for leave to appeal, it is sufficient that the grounds of appeal 'show good cause.'

There is nothing in the Constitution which expressly deprived the 1st plaintiff of a right to appeal with the leave of the court in this case. Section 233(2) of the Constitution provides for appeal to this court from decisions of the Court of Appeal as of right while subsection 3 of section 233 provides for appeal to this court from the court below, albeit, with leave. In both cases, in terms of sub-section 5 of section 233, the liberty to appeal as of right or, as the case may be, by leave is guaranteed to a party to the proceedings, whereas a person not a party to the proceedings has no such immediate liberty but may be permitted to appeal.

It is in this wise that the two conditions which the 1st plaintiff must satisfy are those stated by learned counsel for the 1st plaintiff and earlier set out. Of these, the first needs not delay me. In regard to the second condition, if the 1st plaintiff is granted leave to appeal, one of the questions that would arise for determination is whether the order striking out the 1st plaintiff as party to the suit can be impugned by the 1st plaintiff, notwithstanding that that order was made at the request of that party. There may be the additional question whether, if the request had been made by the 1st plaintiff alone, the 2nd plaintiff could not complain of the order made. All these are questions which need not be pronounced upon at this stage.

No authority directly to the point has at this stage been cited to us, either way, by counsel to the parties. It may well be that at the appropriate time the case of Alamu v. Alao & Anor (1972) N.S.C.C. (Vol. 7) 8 will be considered. There, the appellants complaining that the judgment

of the High Court has been delivered even though their representative had died during the pending of an appeal to the High Court, unknown to that court, and before the judgment of the High Court, applied to the High Court for an order setting aside the judgment or, in the alternative, an order enabling them to substitute someone else for the alleged deceased representative. The learned judge granted them the alternative order but refused to set aside the judgment. The Western State Court of Appeal dismissed their subsequent appeal to that court. On a further appeal to this court, it was contended that the appeal should not have been heard by the High Court as their representative had then died. This court (per Coker, J.S.C) rejecting the contention (at page 9) said:

"..... in view of the alternative order on their motion as granted by the Judge, we do not think it is still open to the appellant to contest, as they now do before us, the propriety of proceeding to judgment by the High Court."

No doubt, should there be no direct authority on the point, the court would have to resort to analogical reasoning in which case more materials than are placed before us may be useful.

The essence of an appeal is to show that the decision appealed from is wrongly made and should be set aside or varied. The question that would arise on the appeal in this case is not only whether the order was wrongly made but also whether it is open to the 1st plaintiff to contest the propriety of the order. As earlier stated, these are issues of some novelty and importance. These and the other proposed grounds of appeal are substantial.

For these reasons, I think this is an appropriate case to grant the prayer sought by the 1st plaintiff. In the result I would grant the application of the 1st plaintiff.

The application for leave to amend the notice of appeal already filed was resisted. However, I cannot find any ground why leave to amend the notice of appeal should not be granted. Any amendment that would ensure that the real question in the appeal is dealt with and disposed of is desirable.

In the result I would grant the two applications. I order as

follows:

(1) That time within which 1st plaintiff to apply for leave to appeal against the majority judgment of the Court of Appeal dated 11th August, 1994 is extended till today.

B (2) Leave is granted to the 1st plaintiff to appeal against the said judgment.

(3) Time within which the 1st plaintiff may appeal against the said judgment is extended till the 21st April, 2000.

C (4) The 1st plaintiff shall file its notice of appeal in this court within the same period.

(5) Leave is granted to the 2nd plaintiff to amend within 14 days hereof, the notice of appeal filed and dated the 10th November, 1994 to the extent and manner shown on the "Proposed Amended Notice of Appeal
D annexed to the motion paper and marked Exhibit IBB2."

The parties should bear their costs of the application.

E **OGUNDARE JSC**

I have been privileged to have a preview of the ruling of my learned brother Ayoola, J.S.C just delivered. I agree with him that the two applications of the plaintiffs now pending before us be granted.

F The application of the 1st plaintiff prays the court for -

"1. An order extending the time within which the 1st appellant may apply for leave to appeal against the majority judgment of the Court of Appeal dated 11th of August, 1994.

G *2. An order granting the 1st appellant leave to appeal against the said judgment*

3. An order extending time within which the appellant may appeal against the said judgment.

H *4. An order deeming as properly filed and served the annexed Notice of appeal dated the 2nd August, 1999.*

The 5th prayer for stay of execution was withdrawn and was consequently struck out. To succeed, the applicant must show (a) good and substantial reasons for the failure to appeal or to apply for leave to appeal

within the prescribed period, and (b) grounds of appeal which prima facie show good cause why the appeal should be heard. See order 2 rule 31(2), Supreme Court Rules.

As regards (a) I am satisfied, from the affidavits filed in support of the application, that this is made out. It is as regards (b) that there is much divergence of views between the application and the respondent. Ordinarily, it cannot be seriously disputed that the grounds of appeal show good cause why the appeal should be heard. But there is a twist here. Because of what happened in the court below, it is submitted for the respondent, that the application should not be granted. At the court below, learned counsel for the applicant (1st respondent therein) readily submitted that the applicant was wrongly joined in the action and it should be struck out. In the course of his lead judgment Sulu-Gambari, J.C.A. (with whom Kalgo, J.C.A., as he then was, agreed) struck out the name of the 1st respondent. The learned Justice of Appeal said:

"It is settled principle of law that non-joinder or misjoinder of parties is not fatal to be the proceedings but the court may order a retrial in appropriate cases. In this case, it will be appropriate, and by virtue of the power conferred on this court by section 16 of the Court of Appeal Act, I hereby make the order to only strike out the name of the 1st plaintiff from the suit and accordingly also from the appeal - See Anyaduba v. N.R.T.C. Ltd (1992) 5 N.W.L.R. (pt. 243) 535."

At the end of his judgment, however, and after considering other issues raised in the appeal, the learned Justice adjudged thus:

"On the whole, the learned trial judge ought to have dismissed the claim of the plaintiffs before him. I therefore allow the appeal and dismiss the claim of the 1st and 2nd plaintiffs who are now the 1st and 2nd respondents before us."

Kalgo, J.C.A., who agreed with Sulu-Gambari, J.C.A. also adjudged as follows:

"In the circumstances, I agree with Sulu-Gambari, J.C.A. that this appeal succeeds. I also dismiss the action of the respondents at the trial."

Uwaifo, J.C.A. as he then was, dissented from the conclusion reached

by Sulu-Gambari and Kalgo, JJ.C.A.

It is submitted for the applicant that the concession made in the court below by learned counsel for the applicant is an error in law which does not preclude the appellant appealing against it to this court.

B I do not think it is prudent to resolve this issue at the stage we are. Having concluded that the applicant has established the two requirements of Order 2 rule 31(2), I think the application should be granted and leave the parties to put forward at the hearing of the appeal their arguments on the issue whether or not the applicant could resile from the concession
C made by its counsel in the court below.

In the application of the 2nd plaintiff, it is, in effect, sought to add an additional ground of appeal to the 8 grounds contained in the original notice of appeal. I have considered the argument of learned counsel for the
D parties. With respect to Chief Williams, S.A.N., I find no reason for refusing the application.

It is for the reasons above and the more detailed reasons given in the ruling of my learned brother Ayoola, J.S.C. that I too grant the two
E applications of the two plaintiffs.

I too make no order as to costs.

MOHAMMED JSC

F I have had the advantage of reading the ruling just read by my learned brother Ayoola, J.S.C., in this case and I agree with him that the prayers of the 1st plaintiff are meritorious. I therefore grant them parties to bear own costs.
G

IGUH JSC

I have had the advantage of reading in draft the ruling just delivered by my learned brother, Ayoola, J.S.C. and I am in full agreement that both applications are meritorious and should be granted.

In applications for an enlargement of time within which to apply for leave to appeal, leave to appeal and an enlargement of time to appeal

pursuant to the provisions of Order 6 rule 2 of the Supreme Court rules 1985, as amended, the court must be generally satisfied on two main issues. These are whether:

- (i) There are good and substantial reasons for the failure to appeal within the prescribed time; and
- (ii) The proposed grounds of appeal Prima facie show good cause why the appeal should be prosecuted, that is to say, whether they disclose arguable and substantial grounds of appeal.

See Ukpe Ibodo and Others v. Igulasi Enarofia and others (1980) 5-7 S.C. 42, C.C.B. (Nigeria) Ltd. v. Ogwuru (1993) 3 N.W.L.R. (pt. 284) 630 at 637.

With regard to the first issue, the affidavit in support of this application discloses that a Notice of appeal in the case was filed by the late Chief Kehinde Onafowokan on behalf of the appellants/applicants and that briefs of argument by learned counsel on both sides had been filed and exchanged. It would appear that following the death of Chief Kehinde Onafowokan, the appellants on the 30th October, 1998 instructed their present counsel, the firm of Ajumogobia and Okeke, to continue with the prosecution of their appeal. Upon a review of the processes already filed by the appellants, their present counsel found it imperative and in the interest of justice that they be amended to save the appeal of the 1st appellant/applicant which had been struck out before the appellant's new counsel were retained. It is the case of the 1st applicant that failure to apply for a stay of the order striking out of the suit and to appeal within the prescribed time was entirely caused by the inadvertence and death of its former counsel.

This court has repeatedly ruled that it cannot be right to visit the parties with punishment arising out of the mistake, inadvertence or negligence of their counsel and that in such a case, the discretion of the court, although always required to be exercised judicially and judiciously, should be exercised with a leaning towards accommodating the interest of the parties without allowing mere procedural irregularities brought about by counsel, to stifle or preclude the determination of a case on the merits. See G.B.A. Akiyede v. The Appraiser (1971) 1 ALL N.L.R. 162 at 165,

Doherty v. Doherty (1964) 1 ALL N.L.R. 299, Tunji Bawaje v. Moses Adediwura (1976) 6 S.C. 143 at 147, Ahmadu v. Salawu (1974) 1 ALL N.L.R. (pt. 2) 318 at 324. In the circumstances of this application, I am inclined to accept that good and substantial reasons for the failure to appeal within the prescribed period have been satisfied by the explanation as to the cause of the delay. Learned counsel for the applicants did frankly concede that failure to appeal within the prescribed time was due to the inadvertence and death of the appellants former counsel. It is my view that the applicants in the circumstances of this case need not be unduly penalized by not having the dispute between them and the respondent determined upon the merits. It does not also seem to me that this is a proper case in which mistake or inadvertence of their erstwhile counsel should be visited on them. I think it is the duty of this court in the exercise of its powers, both legal and equitable, to encourage the fair determination of the entire questions between the parties in the overall interest of justice.

There is one last point I desire to make with regard to the first issue under consideration. This is to recall the observation of Thesigar, L.J. in the case of Collins v. Vestry of Paddington (1880) 5 Q.B.D. 380 at 381 in connection with the principles upon which the court act in circumstances such as have arisen in this application. Said the noble Lord Justice:-

"I agree that until a judgment has been arrived at upon the merits, an extension of time may be allowed for rectifying a mistake or oversight. Up to that time, both parties may be considered as standing upon an equal footing: the questions between them are still open, and it is doubtful which of their opposing contentions is correct: each party has a right to have the dispute determined upon the merits and courts should do everything to favour the fair trial of the questions between them. Blunders must take place from time to time, and it is unjust to hold that because a blunder during interlocutory proceedings has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits. All such cases of blunder may be remedied by payment of costs or the imposition

of terms and conditions."

See too *Ojikutu v. Francis Odeh* (1954) 14 W.A.C.A. 640 at 641.

I am in respectful agreement with the above observations of Thesiger, L.J. which were adopted by the West African Court of Appeal in the *Ojikutu* case (*supra*) and fully endorse the same. It remains for me to state that following those principles, I am of the view that this is a proper case in which this court ought to exercise its discretion in favour of the applicants in all the circumstances of the case. B

With regard to the second issue, I have closely studied the proposed grounds of appeal raised in the Notice of Appeal of the 1st appellant. These seem to me prima facie to disclose arguable and substantial issues of law to be canvassed at the hearing of the appeal. The foregoing two issues having been resolved in favour of the applicants, I can see no reason why the application for extension of time within which the 1st appellant may apply for leave to appeal etc. should not be granted. C D

Turning now to the application for amendment, the case of the applicants is that the Notice of Appeal sought to be amended was settled and filed by their late counsel, Chief Kehinde Onafowokan, S.A.N. on the 10th November, 1994. After the applicants' present counsel were briefed to take over the prosecution of the appeal, they reviewed the processes already filed in the appeal and found it imperative in the interest of justice to amend the said Notice of Appeal in order to bring the issues arising for determination by this court into a sharper perspective. It is also stated that the amendment sought is material to a just determination of the applicant's rights in the appeal. E F

It is a well recognised principle of law that the object of an amendment is to decide the real controversy between the parties and the rights of the parties once and for all. If the error is not fraudulent or intended to overreach, the court will correct it if it can be done without any injustice to the other side. See Shokunbi v. Mosaku (1969) 1 N.N.L.R. 54, Adeleke v. Awoniyi and Another (1962) 1 ALL NLR 260. etc. G H

The general principles of law governing amendments were succinctly stated by Bowen, L.J. in *Cropper v. Smith* (1884) 26. Ch.D. 700 at 701. He said:

"Now I think it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other Division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or of grace."

See too Collins v. Vestry of Paddington (supra).

Upon the application of the above principles to the facts and circumstances of the present case, I am unable to identify any reason why leave to amend the Notice of Appeal should not be granted. It is clear to me that the main purpose of the amendment sought is to enable this court to decide the real controversy and the rights of the parties once and for all. There is no suggestion that this amendment sought is fraudulent or that it is intended to overreach. It was also not suggested that the amendment cannot be done without injustice to the respondent. I think this is a proper application in which the amendment sought ought to be granted.

It is for the above and the more detailed reasons contained in the ruling of my learned brother, Ayoola, J.S.C. that I, too, grant these applications and abide by the same orders as are therein made.

EJIWUNMI JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother Ayoola, J.S.C. I find myself in entire agreement with his reasons for granting the two applications brought before this court they are also granted by me. I also abide with the consequential orders made therein.