

SUPREME COURT OF NIGERIA
17TH DECEMBER, 2004. SC. 285/2001
CORAM:- M. L. UWAISS CJN, S. U. ONU, U. A. KALGO, A. O.
EJIWUNMI, D. O EDOZIE, JJSC

1. EGEVAFO EKPETO

2. CHIEF EDMONIDO EDORE PLAINTIFFS/APPELLANTS/

3. PHILIP OKUJENI APPLICANTS

(For themselves and on behalf of Evror

family, Ujevbe Quaters, Emevor Community)

AND

1. IKONO WANOGHO

2. OKA WANOGHO

3. GBADAMASI NYERIMENE DEFENDANTS/RESPONDENTS

4. PAYA OBRIFOR

5. MRS. DIEMIEMRE OBRIFOR

(For themselves and on behalf of Wanagho

family of Umusu Quaters Oragun)

APPEALS - Court of Appeal - Dismissal of appeal O. 6 r. 10 CA Rules -
Where appellant failed to file brief - Within 60 days, and within 30 days
extension - The condition for dismissing the appeal existed (H1)

FAIR HEARING - Absence of - Vitiates the proceedings - It demands that
court be fair and impartial (H2)

FAIR HEARING - Appeals - Denial of fair hearing - Is not what happened
in this case - It is a matter of voluntary absence from court (H3)

APPEALS - Court of Appeal - Dismissal of appeal - For failure to file
brief under O. 6 r. 10 CA Rules - Lower court cannot relist the dismissed
appeal (H4)

COURTS - Speculation - Documents that are not before the court - Can-
not be speculated upon - And the court is entitled to proceed without

FACTS

This appeal arose out of a protracted land case between the parties in the Delta State High Court. Appellants were the plaintiffs at the trial. At the end of the case the trial Judge dismissed their claim in its entirety. They appealed to the Court of Appeal Benin-City vide a notice of Appeal. After a period of over four years, a senior registrar of the Delta State High Court forwarded certified true copies of the record of proceedings to the appellants' and respondents' counsel. Sixty days passed without any brief of appeal coming from the appellants. Respondents filed a motion for the appeal to be dismissed for failure to file brief with time pursuant to O. 6 r. 10 of the Court of Appeal Rules. Appellants filed a motion for extension of time to enable them file their brief. Their motion was taken first, 30 days extension of time was granted to them while the respondents motion for dismissal of the appeal was adjourned to a period of about three months.

On the date fixed for hearing of the motion to dismiss appellant's appeal, they and their counsel were not in court. The extension of time granted to them had long expired without their filing any brief of appeal. Respondents moved their motion which was granted and the appeal was dismissed. It was later discovered that appellants' counsel was at the court registry filing another motion for extension of time with an attached brief of appeal, at the time motion for dismissal was being heard. The documents filed were not before their Lordships at the time they dismissed the appeal. In this appeal to the Supreme Court appellants have raised 3 issues.

ISSUES FOR DETERMINATION

"1. Whether or not the conditions precedent to the exercise of jurisdiction to order a dismissal of an appeal under Order 6 Rule 10 existed as at 10.45a.m on 10/2/2000 when the appeal was dismissed by the Court of Appeal.

2. Whether or not the order dismissing this appeal on 10/2/2000 made by the Court of Appeal was in breach of the rule of fair hearing

and therefore unconstitutional, null and void,

3. Whether or not documents filed in the Registry of the court constitute part of the records of the court or only those in the file being used by their Lordships”.

HELD (Unanimously dismissing the appeal per **KALGO JSC**)

Dismissal of appeal O. 6 r. 10 CA Rules

1. The affidavit in support of that motion clearly admitted the failure of the appellants’ counsel to file the appellants’ brief up to 17/8/99 about 5 months after the record of appeal was served on them. This satisfied the first condition under Order 6 Rule 10.

The two motions mentioned earlier, i.e. for dismissal of the appeal and extension of time to file the appellants’ brief were heard together on 25/11/99. The motion for dismissal of the appeal was quite properly adjourned to 10/2/2000 for hearing and the motion for extension of time to file the appellants’ brief was granted and the appellants were given 30 days from the 25/11/99 within which to file their brief. But the 30 days expired and they still failed to file their brief. And on the 10/2/2000 when the motion for dismissal of the appeal for failure to file their brief was being heard, the appellant filed another motion for further extension of time to file the brief of the appellant. This also satisfied the second condition that the appellants failed to file their brief within the time extended for them by the court, because the 30 days from 25/11/1999 expired on or about 24/12/99. This means that the learned counsel for the appellants made no effort to file the appellant’s brief from 25/11/99 to 10/2/2000 a period of almost 3 months. This no doubt constitutes gross negligence on his part, particularly as he was fully aware that the motion for dismissal of the appeal for failure to file the brief was adjourned to 10/2/2000 for hearing. In my view, therefore, the conditions precedent for the exercise of the jurisdiction of the Court of Appeal under Order 6 Rule 10 of the Court of Appeal Rules 1981 as amended fully existed. (p. 2517 C)

FAIR HEARING - Absence of - Vitiates the proceedings

2. There is no doubt at all that the principle of fair hearing is fundamental

to all court procedures and proceedings, and like jurisdiction, the absence of it vitiates proceedings, however well conducted. Fair hearing according to our law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. It also envisages that the court or tribunal hearing the parties' case, should be fair and impartial without showing any degree of bias against any of the parties. (p. 2519 D)

Denial of fair hearing - Is not what happened in this case

3. When the motion was called, the appellants and their counsel were absent in court and no explanation was offered for their absence. It was only when the appellants' counsel appeared at the end of the ruling on the motion, that it was discovered that he was busy filing a motion in the court registry when the respondents' motion was heard. Therefore he was not refused hearing by the court as he voluntarily absented himself from the court at the material time. What is more, he himself admitted in his affidavit evidence that the motion and the brief he filed were not in the Hon. Justices' files at the time the respondents' motion was heard. How then could the Hon. Justices know that the appellants had filed a motion for extension of time to file their brief. It is very clear therefore from the facts and the circumstances of this case, that the issue of fair hearing did not and could not have arisen. (p. 2520 A)

Appeal dismissed under O. 6 r. 10 cannot be relisted

4. It is very clear that where an appellant fails to file his brief within 60 days after receiving the record of appeal or after expiry of any period extended to him to file such brief, the appeal shall be dismissed on the application of a respondent to the appeal. And there are no other provisions in the said rules giving the Court of Appeal any power to relist the appeal so dismissed. Therefore, the dismissal of the appellants' appeal on 10/2/2000 was proper and in accordance with the relevant rule and not in breach of any rule of fair hearing. It is therefore constitutional and valid. And what is also important here is that the Court of Appeal having dismissed an appeal under Order 6 Rule 10, it cannot ordinarily set aside the dismissal order

and restore the appeal in the case. (p. 2520 F)

COURTS - Speculation

5. The court, like any sensible human being, deals with only issues and matters that are before it. It does not speculate or assume things that have not appeared before it for consideration when for example, documents are filed in the registry of the court but have not been filed in the relevant court files and brought to the attention of the judge, such documents cannot, by any stretch of imagination, be deemed to be within the knowledge of the court or judge. The judge or court concerned is fully entitled to proceed without them since their existence was not known. This was clearly what happened in this case. The motion and the brief filed by the learned counsel for the appellants on 10/2/2000, when the motion to dismiss the appeal was being heard, was not brought to the notice of the court and did not in fact reach the court on that day. Therefore the Court of Appeal could not be presumed to know about the motion which was not before it and did not form part of the record before it at the material time. I also resolve this issue against the appellants. (p. 2521 A)

NOTABLE POINTS OF INTEREST

KALGO JSC

1. Affidavits - Counsel in a matter need not swear on behalf of his client
I have observed from the record of appeal that both Chief A. O. Giwa and H. A. Abolaje Esq., who are appellants' counsel in this matter filed two separate motions on behalf of their clients but each of them swore the affidavit in support of their respective motions. This is a very undesirable practice since it means the counsel is giving evidence in a case in which he is appearing. Also if there is any conflict in affidavits and evidence is called to clarify or resolve such conflict, the counsel who swore the affidavit must give evidence. This is undesirable and should be avoided. (p. 2521 H)

EDOZIE JSC

2. Fair hearing lies in the correctness of the procedure followed not the

decision

No doubt, the right of fair hearing is a fundamental and constitutional right of a party to a dispute to be afforded an opportunity to present its case to the adjudicating authority. It lies in the procedure followed in the determination of a case, not in correctness of the decision of the case.

As was held in *Whyte v. C.O.P* (1966) NMLR 215 at 217, it can hardly be stated that an accused has not had a fair hearing as intended by the Constitution when the trial court had followed the procedure laid down for such hearing and has not violated the principle of natural justice. Fair hearing in relation to a case means that the trial of a case or the conduct of the proceedings therein is in accordance with the relevant law and rule of court. (p. 2523 D)

D REPRESENTATION

Chief Ayuba O. Giwa, (with him, H. A. Aboleje), for the Appellants.
Chief P. O Wanagho, (with him, E. E. Emekpu, Esq.), for the Respondents.

E

CASES REFERRED TO

- Nwafor Ejike v. Nwankwoala & Ors. (1984) 12 S.C. 301
Isiyaku Mohammed v. Kano N.A. (1968) 1 All NLR 424
United Bank for Africa Ltd & Anor. v. Mrs. Ngozi Achoru (1990) 6 NWLR (Pt. 156) 254
Whyte v. C.O.P (1966) NMLR 215 at 217
Horn v. Rickards (1963) NRNLR 67
Obadara v. President of Ibadan West District Grade B Customary Court (1965) NMLR 39
Salu v. Egeibon (1994) 6 NWLR (Pt. 348) 23 at 40
Ceekay Traders v. G. M. Co. Ltd (1992) 2 NWLR (Pt. 222) 132
Atano v. A.G Bendel State (1988) 2 NWLR (Pt.75) 201
H UBA v. Ajileye (1999) 13 NWLR (Pt. 633) 116

RULES REFERRED TO

Court of Appeal Rules 1981 (as amended O. 6 rr. 2 and 10)

LEAD JUDGMENT BY KALGO JSC

This appeal arose out of a protracted land case between the parties in the Delta State High Court. The appellants were the plaintiffs at the trial. At the end of the trial, the learned trial Judge dismissed the case of the appellants in its entirety on the 7th of June, 1994. They appealed to the Court of Appeal, Benin City, vide a notice of appeal which was filed on 4th of July, 1994. By a letter dated 18th of March, 1999, signed by A. O. Olisa, Senior Registrar of the Delta State High Court, the certified true record of proceedings and the exhibits in the case were forwarded to the Court of Appeal Benin City and both the appellants and the respondents received copies of their record of appeal through their respective counsel. This fact was not in dispute between the parties.

On the 30th of June, 1999, the respondents filed a motion in the Court of Appeal praying the court to dismiss the appellant's appeal *"for want of diligent prosecution in that the appellants have been in default of filing their appellants' brief within the time stipulated by the Rules of this Honourable Court"*. The motion was supported by an affidavit of 9 paragraphs. The appellants' though served with this motion, did not react to it but instead filed a motion of 17th August, 1999, to amend their notice of appeal by filing additional grounds of appeal and for extension of time to file appellants' brief. The two motions were fixed for hearing on the 25th November, 1999, and on that day, the respondent's motion for filing additional grounds of appeal and enlargement of time to file brief was granted as prayed. The Court of Appeal also ordered that –

"The respondents' motion dated 29/6/99 is adjourned to 10/2/2000 for hearing. The respondents are awarded N750 costs. The applicants are granted 50 days from today within which they are to file their brief."

In this order, the *"applicants"* are the appellants here and the *"respondents"* are the respondents in this appeal.

On the 10th of February, 2000, when the appellants' motion dated 29th June, 1999, was called for hearing, the appellants and their counsel were absent. The learned counsel for the respondents moved his motion in terms of the motion papers and it was granted as prayed. The Court of

Appeal made the following order:-

“Order as prayed. This appeal is dismissed under the provisions of Order 6 Rule 10 of the Rules of this court as the appellants refused or neglected to file the appellants’ Brief within the time stipulated by the Rules of this court N500.00 costs awarded the applicants”.

On the same day i.e. the 10th of February, 2000, at about 10.00a.m, the appellants’ counsel filed a motion in the Court of Appeal for “extension of time to file the appellant’s brief in this appeal”. The motion was supported by a 5 paragraph affidavit. This motion was not listed for hearing or even heard by the Court of Appeal. And on the 24th of February, 2000, the appellants’ counsel filed another motion supported by 27 - paragraphs affidavit praying the court for :-

“1. Leave of court to argue this motion before the expiration of T month from 10/2/2000.

2. An order setting aside the judgment/order of this Honourable Court delivered/made on 10/2/2000 in this suit.

3. An order listing the motion dated 9/2/2000 and filed on 10/2/ 2000 in this suit for hearing and determination”.

This motion was heard on the 7th March, 2000, and on the application of the appellants’ counsel himself, it was withdrawn and struck out with no order as to costs.

On the 10th March, 2000, the appellants’ counsel filed another motion supported by a 21 - paragraph affidavit praying the court for.-

“An order restoring/relisting this appeal No. CA/B/109/99 struck out/dismissed on 10/2/2000 for lack of diligent prosecution. Appeal dismissed under Order 6 Rule 10. Court is functus officio UBA v. Ajileye (1999) 13NWL (Pt. 633) 116.”

The grounds upon which this application was brought are:-

“1. The order was made in the absence of the appellants/ and their counsel.
2. As at the time the order was pronounced the appellants’ brief of argument and motion for extension of time had been filed”.

The respondents were served with this motion and on 24/10/2000 they filed a counter-affidavit of 17 paragraphs virtually stating that the

Court of Appeal lacks the jurisdiction to relist the appeal struck out on 10/2/2000. Thereafter the appellants filed a reply to the counter-affidavit sworn to by their counsel explaining what transpired in court on the 10/2/2000. The motion was heard on 23rd January, 2001, and adjourned to 12/2/2001 and subsequently to 22/2/2001 for ruling. B

In a considered ruling on the 22/2/2001, the Court of Appeal - Rowland, Ibiyeye and Akaahs, JJCA., found no merit in the application and unanimously dismissed it. Akaahs, JCA., in his leading ruling ended up by saying -

“Suffice it to say that this court lacks jurisdiction to restore or relist this appeal which was dismissed under Order 6 Rule 10, Court of Appeal Rules.” C

The appellants were dissatisfied with this decision, and appealed to this court by notice of appeal containing 4 grounds filed on 6th March, 2001. In this court, the parties filed their respective briefs of argument and exchanged them between themselves as required by the rules of court. D

The 3 issues raised by the appellants’ counsel in his brief for the determination of this court read:- E

“1. Whether or not the conditions precedent to the exercise of jurisdiction to order a dismissal of an appeal under Order 6 Rule 10 existed as at 10.45a.m on 10/2/2000 when the appeal was dismissed by the Court of Appeal.” F

2. Whether or not the order dismissing this appeal on 10/2/2000 made by the Court of Appeal was in breach of the rule of fair hearing and therefore unconstitutional, null and void,

3. Whether or not documents filed in the Registry of the court constitute part of the records of the court or only those in the file being used by their Lordship”. G

The respondents’ counsel also formulated 3 issues in his brief thus:- H

“i. Whether or not the Court of Appeal has jurisdiction to set aside an order dismissing an appeal under Order 6 Rule 10 of the Court of Appeal Rules, 1981, as amended.

ii. Whether or not a party who complains of being denied fair hearing by a court can apply to the same court which purportedly denied the party fair hearing to set aside the judgment and/or order purportedly denying such a party fair hearing or whether or not such a party can only appeal against the decision or order in which that party was purportedly denied fair hearing.

iii. Whether or not the issue of fair hearing arises from the issues decided on by the court below on appeal or same is a fresh issue being in the apex court without same having been pronounced upon by the court below. If same is being raised as a fresh issue, whether same could be properly raised without the leave of the Supreme Court:”.

I have carefully examined the issues for determination raised by the parties to this appeal and it appears to me that the appellants’ issues are more in line with the grounds of appeal already filed and are properly distilled from them. I shall consider them in determining this appeal.

The first issue deals with whether at the time the appellants’ appeal was dismissed at 10.47am on 10/2/2000, the conditions precedent to the exercise of jurisdiction to order the dismissal of the appeal existed under Order 6 Rule 10. What then are the conditions precedent to the application of the said Order 6 Rule 10 of the Court of Appeal Rules 1981 as amended. Order 6 Rule 10 provides:-

“Where an appellant fails to file his brief within the time provided for in Rule 2 of this Order, or within the time as extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of the court. Where an appellant fails to file a reply brief within the time specified in Rule 5, he shall be deemed to have conceded all the new points or issues arising from the respondents’ brief.” (Underlining mine)

This order fully and clearly deals with the filing of briefs by the parties to an appeal and sets out the time limit within which the brief shall be filed failing which a sanction is imposed therefor. It is clear, unambiguous and comprehensive. In the instant case, we are dealing with an appellant who should file a brief. He comes directly under the first sen-

tence of the Order 6 Rule 10. Under it the first condition is that the brief must be filed “within the time provided for in rule 2 of the Order”. Rule 2 of Order 6 says:

“The appellant shall within 60 days of the receipt of the Record of Appeal from the court below file in the court a written brief being a succinct statement of his argument in the appeal”. (Underlining mine) B

From the affidavit supporting the motion filed by the respondent on 30/6/99 to dismiss the appeal on pages 109-110 of the record, it is evident that the appellants’ counsel was served with the record of appeal on or about the 18th of March, 1999. He did not file any brief thereafter and on receipt of the respondents’ motion to dismiss the appeal, he filed a motion on 17/8/99 seeking to amend his grounds of appeal and for extension of time to file the appellant’s brief. **The affidavit in support of that motion clearly admitted the failure of the appellants’ counsel to file the appellant’s brief up to 17/8/99 about 5 months after the record of appeal was served on them. This satisfied the first condition under Order 6 Rule 10.** C
D

The two motions mentioned earlier, i.e. for dismissal of the appeal and extension of time to file the appellants’ brief were heard together on 25/11/99. The motion for dismissal of the appeal was quite properly adjourned to 10/2/2000 for hearing and the motion for extension of time to file the appellants’ brief was granted and the appellants were given 30 days from the 25/11/99 within which to file their brief. But the 30 days expired and they still failed to file their brief. And on the 10/2/2000 when the motion for dismissal of the appeal for failure to file their brief was being heard, the appellant filed another motion for further extension of time to file the brief of the appellant. This also satisfied the second condition that the appellants failed to file their brief within the time extended for them by the court, because the 30 days from 25/11/1999 expired on or about 24/12/99. This means that the learned counsel for the appellants made no effort to file the appellant’s brief from 25/11/99 to 10/2/2000 a period of almost 3 months. This no doubt constitutes gross negligence on his part, particularly as he was fully aware that E
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the motion for dismissal of the appeal for failure to file the brief was adjourned to 10/2/2000 for hearing. In my view, therefore, the conditions precedent for the exercise of the jurisdiction of the Court of Appeal under Order 6 Rule 10 of the Court of Appeal Rules 1981 as amended fully existed.

On the 10/2/2000, the appellants' counsel filed a motion praying the Court of Appeal to restore or relist the appeal struck-out on 10/2/2000. In the affidavit in support which he swore himself paragraph 19 reads:-

"That I filed the motion and the brief before the court sat and before the case was called and before the order was written and/or read out and pronounced, but the brief and motion were not in their Lordships files".

Learned counsel was referring to what transpired on 10/2/2000 when the motion for dismissal of the appeal was taken. It is evidently clear that he himself admitted that on that day the appellants' brief and the motion for extension of time to file the same were not in the court's file before the learned Justices. And what is more, the record of the court on that day, which was unchallenged, reads:-

"1st and 2nd applicants, present

P. O. Wanogho for the applicants. Respondents absent and not represented.

Mr. Wanogho - My motion is dated 29/6/99. I move in terms of the motion papers". (Underlining mine)

Learned appellants' counsel also deposed in paragraph 15 of his affidavit in support that:-

"At the stage I got into the court. I met that the court was already writing the ruling dismissing the appeal for failing to file the brief."

This clearly showed that at the time the application of the respondents to dismiss she appellants' appeal was moved, neither the appellants nor their counsel were present in court and paragraph 16(a) of the respondents counter-affidavit which also was unchallenged, says:-

"That in further reply lo paragraph 16 of the affidavit in support of the motion which is vehemently denied. I hereby state that as at 10.47am

on 10/2/2000 when neither the deponent nor his client were present in court; this Honourable Court allowed me to move the motion filed on 30/6/99”.

This averment coupled with the appellants’ counsel’s own deposition that at the time he entered the court the ruling on the motion to dismiss the appeal was being written, confirms that the appellants’ counsel was not in court when the motion was moved. And according to his own averment in the affidavit, he was in the Court of Appeal registry filing the motion for extension of time to file the brief at the time the court was sitting. This also indicates another careless attitude on the part of the learned counsel for the appellants particularly when the respondents’ motion was adjourned for hearing by the court on 10/2/2000 in his presence. In the circumstances I am satisfied that conditions precedent existed fully for the Court of Appeal to exercise its jurisdiction under Order 6, Rule 10 of the Court of Appeal Rules 1981 as amended. I shall answer issue 1 in the affirmative.

Issue 2 borders on fair hearing. **There is no doubt at all that the principle of fair hearing is fundamental to all court procedures and proceedings, and like jurisdiction, the absence of it vitiates proceedings, however well conducted.** See Salu v. Egeibon (1994) 6 NWLR (Pt. 348) 23 at 40; Ceekay Traders v. G. M. Co. Ltd (1992) 2 NWLR (Pt. 222) 132; Atano v. A.G Bendel State (1988) 2 NWLR (Pt.75) 201. **Fair hearing according to our law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. It also envisages that the court or tribunal hearing the parties’ case, should be fair and impartial without showing any degree of bias against any of the parties,** See Nwafor Ejike v. Nwankwoala & Ors. (1984) 12 S.C. 301; Isiyaku Mohammed v. Kano N.A. (1968) 1 All NLR 424.

In the instant appeal, the appellants’ counsel was not in court at the time the motion dismissing his appeal was moved. He was fully aware that the motion was fixed for hearing on the 10/2/2000, and when he came on that day to court, he proceeded to file his motion for extension of time to file the appellants’ brief in the registry of the court and by the time

he came back to court the motion was moved by the respondents' counsel and the ruling written by the court. **When the motion was called, the appellants and their counsel were absent in court and no explanation was offered for their absence. It was only when the appellants' counsel**
 B **appeared at the end of the ruling on the motion, that it was discovered that he was busy filing a motion in the court registry when the respondents' motion was heard. Therefore he was not refused hearing by the court as he voluntarily absented himself from the court at the material time. What is more, he himself admitted in his affidavit**
 C **evidence that the motion and the brief he filed were not in the Hon. Justices' files at time the respondents' motion was heard. How then could the Hon. Justices know that the appellants had filed a motion for extension of time to file their brief. It is very clear therefore**
 D **from the facts and the circumstances of this case, that the issue of fair hearing did not and could not arisen.** The learned counsel for the appellant was not in court to be heard and his motion was not before the court at the material time. Learned counsel had in his brief cited and examined many decided cases on fair hearing. I have also examined them and
 E found that none of them is useful for the determination of this issues and I so hold.

Order 6 Rule 10 was in the Court of Appeal (Amendment) Rules, 1984 made by the President of the Court of Appeal in exercise of the
 F powers conferred on him by Section 227 of the 1979 Constitution. It is still in operation. I have earlier set out the provisions of Order 6 Rule 10 in this judgment. I do not intend to repeat it here, but **it is very clear that where an appellant fails to file his brief within 60 days after receiving**
 G **the record of appeal or after expiry of any period extended to him to file such brief, the appeal shall be dismissed on the application of a respondent to the appeal. And there are no other provisions in the said rules giving the Court of Appeal any power to relist the appeal**
 H **so dismissed. Therefore, the dismissal of the appellants' appeal on 10/2/2000 was proper and in accordance with the relevant rule and not in breach of any rule of fair hearing. It is therefore constitutional and valid. And what is also important here is that the Court**

of Appeal having dismissed an appeal under Order 6 Rule 10, it cannot ordinarily set aside the dismissal order and restore the appeal in the case. I resolve issue 2 against the appellants.

The third issue, in my respectful view, borders on common sense. **The court, like any sensible human being, deals with only issues and matters that are before it. It does not speculate or assume things that have not appeared before it for consideration when for example, documents are filed in the registry of the court but have not been filed in the relevant court files and brought to the attention of the judge, such documents cannot, by any stretch of imagination, be deemed to be within the knowledge of the court or judge. The judge or court concerned is fully entitled to proceed without them since their existence was not known. This was clearly what happened in this case. The motion and the brief filed by the learned counsel for the appellants on 10/2/2000, when the motion to dismiss the appeal was being heard, was not brought to the notice of the court and did not in fact reach the court on that day. Therefore the Court of Appeal could not be presumed to know about the motion which was not before it and did not form part of the record before it at the material time. I also resolve this issue against the appellants.**

In the final analysis, I find that there is no issue of fair hearing arising in this appeal and that the motion and brief filed by the appellants counsel on 10/2/2000 which did not come within the notice of the Court of Appeal when it was hearing the motion to dismiss the appeal, even though filed in the registry, did not constitute the record of the court at the material time.' I also fully agree with the Court of Appeal that the court lacked jurisdiction to restore or relist the appellants appeal which it dismissed under Order 6 Rule 10 of the Court of Appeal Rules 1981, as amended. See *Nigeria Airways Ltd. v. Lapite* (1990) 7 NWLR (Pt. 163) 392 at 410; *Ajayi v. Omorogbe* (1993) 6 NWLR (Pt. 301) 512.

I have observed from the record of appeal that both Chief A. O. Giwa and H. A. Abolaje Esq., who are appellants' counsel in this matter filed two separate motions on behalf of their clients but each of them swore the

affidavit in support of their respective motions. This is a very undesirable practice since it means the counsel is giving evidence in a case in which he is appearing. Also if there is any conflict in affidavits and evidence is called to clarify or resolve such conflict, the counsel who swore the affidavit must
B give evidence. This is undesirable and should be avoided. See Horn v. Rickards (1963) NRNLR 67; Obadara v. President of Ibadan West District Grade B Customary Court (1965) NMLR 39.

For the above reasons, I find no merit in this appeal. I hereby dismiss
C it with N10,000 costs against the appellants in favour of the respondents.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by
D my learned brother, Kalgo, JSC. I entirely agree with him that this appeal has no merit.

Accordingly, I too hereby dismiss it with N10,000 costs to the respondents against the appellants.
E

ONU JSC

I entirely agree.
F

EJIWUNMI JSC

Being privilege to have read in advance the judgment just delivered by my learned brother, Kalgo, JSC., I agree for the reason given in the said
G judgment that this appeal lacks merit. It is also dismissed by me . I award costs in the sum of N10,000 in favour of the respondent.

H EDOZIE JSC

This appeal is sequel to two related rulings delivered by the Court of Appeal, Benin Division, in respect of an appeal by the appellant against the judgment of the Delta State High Court delivered on the 7th of June, 1994.

The first of the two rulings was delivered on the 10th Feb, 2000, whereby the Court of Appeal dismissed the appellants' appeal for want of prosecution upon the respondents' motion to that effect.

The second ruling was given on 22nd Feb, 2001, in respect of the appellants' application to relist or restore on the cause list the appeal dismissed, which application the Court of Appeal refused to grant on the ground that it lacked the jurisdiction to do so.

These two rulings appeared to be the main focus of this appeal and the main plank upon which the appellants' counsel seeks to impugn them is that the first ruling dismissing the appellants' appeal was made in violation of the appellants' right to fair hearing, in that the order of dismissal was made in the absence of the appellants and their counsel and at a time when the appellants' brief of argument and motion to regularise same had been filed.

No doubt, the right of fair hearing is a fundamental and constitutional right of a party to a dispute to be afforded an opportunity to present its case to the adjudicating authority. It lies in the procedure followed in the determination of a case, not in correctness of the decision of the case: See *United Bank for Africa Ltd & Anor. v. Mrs. Ngozi Achoru* (1990) 6 NWLR (Pt. 156) 254.

As was held in *Whyte v. C.O.P* (1966) NMLR 215 at 217, it can hardly be stated that an accused has not had a fair hearing as intended by the Constitution when the trial court had followed the procedure laid down for such hearing and has not violated the principle of natural justice. Fair hearing in relation to a case means that the trial of a case or the conduct of the proceedings therein is in accordance with the relevant law and rule of court. See *Mohammed v. Kano N.A.* (1968) 1 All NLR 427, *Salu v. Egubom* (1994) 6 NWLR (Pt. 348) 23, *Mohammed v. Olawunmi & Ors* (1990) 2 NWLR (Pt. 133) 458.

In the case in hand, the applicable rule of court governing the filing of briefs and the consequences of failure to do so timeously in the Court of Appeal, is Order 6 of the Court of Appeal Rules, Cap. 62, Laws of the Federation 1990. Rules 2 and 10 thereof are pertinent and they ordain in part, as follows:-

“6(2) The appellant shall within sixty days of the receipt of the record

of appeal from the court below file in the court a written brief being a succinct statement of his argument in the appeal.

(10) Where an appellant fails to file his brief within the time provided in Rule 2 above or within the time as extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution.....”

The above rules postulate clearly and unambiguously that if an appellant fails to file his brief within 60 days from the date of the receipt of the record of appeal or within the time as extended by the court, the respondent was at liberty to apply for the dismissal of the appeal for want of prosecution. The antecedent facts leading to the dismissal of the appellants’ appeal as disclosed in the affidavit in support of, and the counter-affidavit in opposition to the motion for the relistment of the appeal have been admirably articulated in the leading judgment of my learned brother, Kalgo, JSC. Those facts clearly establish that the appellants defaulted in filing their written briefs within an extended period granted to them by the court below to do so; the respondent filed a motion for the dismissal of the appeal on that ground; the motion for the dismissal was duly served on the appellants and they were aware of the date slated for hearing but despite this, they and their counsel chose to be absent from the court; the respondents’ motion was moved and on being granted, the court below dismissed the appellants’ appeal for want of diligent prosecution. I am of the view that upon the foregoing scenario, in which the appeal was dismissed in accordance with Order 6 rules 2 and 10 of the Court of Appeal Rules with adequate opportunity given to the appellants to be heard, their complaint about not having a fair hearing is not sustainable. The Court of Appeal was eminently justified in dismissing their appeal and in declining to restore same in the cause list as it lacked the jurisdiction to do so.

It is for the foregoing reasons and the fuller reasons highlighted in the leading judgment that I also dismissed this appeal with costs as ordered in the said judgment.