

SUPREME COURT OF NIGERIA

7TH MAY, 2004. SC.38/2000

**CORAM:- M.L. UWAIS CJN, S.U. ONU, A.I. KATSINA-ALU,
U.A. KALGO, N. TOBI, JJSC**

KRAUS THOMPSON ORGANISATION APPELLANT
AND
NATIONAL INSTITUTE FOR POLICY
AND STRATEGIC STUDIES (NIPSS) RESPONDENT

APPEALS - Court of Appeal - Briefs - Failure to file brief within time - Will lead to dismissal of the appeal - On respondent's application (H1)

RULES OF COURT - Appeals - Re-listing of appeal - Court of Appeal Rules O.6 r. 10 - Appeal dismissed under this rule - Cannot be re-listed or revived by any court (H2)

RULES OF COURT - Court of Appeal Rules - Non-compliance with the Rules - Statutory interpretation - O.7 r. 3 being a general provision - Will not apply to undermine the effect of O.6 r. 10 being a specific provision (H3)

EVIDENCE - Affidavits - Effect in law - Affidavit evidence - Cannot change the law on an issue - As it is evidence and not law (H4)

STATUTES - Interpretation - Courts - Clear provision of a law - Is to be given their ordinary interpretation by court - Though it will cause hardship (H5)

FACTS

This matter has to do with transaction in foreign exchange in respect of outstanding payments for supply of books, journals, etc. Judgment was given in favour of the plaintiff/appellant. Defendant/respondent filed an application for an order, inter alia, to set aside the judgment

on the ground that the court lacked jurisdiction to entertain the claim. The application was dismissed by the trial judge. Respondent appealed to the Court of Appeal. As respondent failed to file brief of argument within time, appellant applied that the appeal be dismissed or struck out for want of diligent prosecution pursuant to O.6 r. 10 of the Court of Appeal Rules. The said appeal was then struck out.

Respondent filed an application backed up with an affidavit to re-list the appeal which was granted by the Court of Appeal. Being dissatisfied, the appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“i. Whether the Court of Appeal has jurisdiction to re-list for hearing on its merit an appeal struck out on the appellant’s, as Respondent, application for want of diligent prosecution arising from failure to file its brief within the time allowed by the Rules.

ii. Whether failure by the Appellant to file a Counter Affidavit to the Respondent’s application to re-list the appeal struck out was sufficient to accept as unchallenged the reason for failure to file the brief timeously and to ground the relisting of the appeal struck out.”

HELD (Unanimously allowing the appeal per **TOBI JSC**)

Briefs - Failure to file brief within time

1. It is clear from the above that failure on the part of an appellant to file brief within time will be visited with the sanction of dismissal of the appeal on the application of the respondent. In Ogbu v. Urum, (1981) 4 S.C. 1, the Supreme Court held that the failure to file briefs by the appellants within the extended time can be likened to an abandonment of their appeal particularly when such failure is coupled with non-appearance in court without excuse at the time of hearing. (p. 1229 E)

Re-listing of appeal - Court of Appeal Rules O.6 r. 10

2. An appeal which is dismissed under Order 6 rule 10 of the Court of Appeal Rules cannot be re-listed. This court held in Babayagi v. Bida (supra) that once an appeal is dismissed under Order 6 rule 10, the Court of Appeal has no jurisdiction to revive the appeal by re-entering or re-

listing same. See also Chukwuka v. Ezulike (1998) 2 NWLR (Pt. 538) 355.

When an appeal is dismissed under Order 6 rule 10 of the Court of Appeal Rules, its life terminates and it is therefore removed from the cause list. No court has jurisdiction to revive or resuscitate it. (p. 1230 F)

Court of Appeal Rules - Non-compliance with the Rules

3. Learned counsel for the respondent invoked Order 7 rule 3 which generally provides for effect of non-compliance with the Rules. It is clear to me that Order 7 rule 3 is a general provision dealing with non-compliance with the Rules generally, as opposed to the specific provision of Order 6 rule 10, on failure of an appellant to file brief. It is a well established canon of statutory interpretation that where an issue in a statute is governed by a general provision and a specific provision, the latter will be invoked in the interpretation of the issue before the court. This is because the specific provision will be deemed to have anticipated the issue as against the general provision. In the circumstances, the applicable rule is Order 6 rule 10 and not Order 7 rule 3, and I so hold. (p. 1230 H)

EVIDENCE - Affidavits - Effect in law

4. In the light of the above, I do not intend to take Issue No. 2 because it is otiose. I may however add that as a matter of strict law, affidavit evidence cannot change the legal position as the process of affidavit is evidence and not law. (p. 1231 C)

STATUTES - Courts - Clear provision of a law

5. Where provision of a statute or rule of court is clear, the duty of the court is to interpret the clear provision by giving the plain wordings their ordinary interpretation without more. It is not the function of a court of law to sympathise with a party in the interpretation of a statute merely because the language of the statute is harsh or will cause hardship. That is not the function of the court. That is rather the function of the Legis-

lature. Much as I realise that so much hardship is caused to the respondent, I am bound to interpret the clear wording of Order 6 rule 10 and this is what I have done. (p. 1232 C)

B NOTABLE POINT OF INTEREST

TOBI JSC

1. Recommendation that O. 6 r. 10 be amended to avoid injustice

I must pause here to say that Order 6 rule 10, as it stands, causes grave injustice to an appellant who has a good and arguable appeal on the merit. When brief writing was introduced in 1977 in the Supreme Court, the rule was as in Order 6 rule 9 of the Supreme Court Rules, 1985 as amended and extant, now reads:

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

In the circumstances, I recommend the above to the President of the Court of Appeal in the interest of justice for consideration in amending the Rule. (p. 1231 D)

F REPRESENTATION

J. Odubela, (with him, A. Aina and O. Jolawu), for the Appellant.
Jide Olasile, (with him, Kayode Ogundare), for the Respondent.

CASES REFERRED TO

- G** Ogbu v. Urum, (1981) 4 S.C. 1
Olowu v. Abolare (1993) 5 NWLR (Pt. 293) 255
Akinjinwa v. Nwaonuma (1998) 2 NWLR (Pt. 583) 632
Nwugha v. Nwala (1992) 2 NWLR (Pt. 225) 610
H Olowu v. Abolore (1993) 5 NWLR (Pt. 293) 255
Onumajuru v. Akanihu (1994) 3 NWLR (Pt. 334) 620
The State v. Nnolim (1994) 5 NWLR (Pt. 345) 394
Olumesan v. Ogundepo (1996) 2 NWLR (Pt. 433) 628

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

RULES REFERRED TO

Court of Appeal Rules 1984 O. 6 r. 10, O. 7 r. 3

Supreme Court Rules 1985, O. 6 r. 9

B

LEAD JUDGMENT BY TOBI JSC

The matter in the High Court had to do with transaction in foreign currency in respect of outstanding payments for the supply of books, journals and/or periodicals. On 13th May, 1996, judgment was given in favour of the appellant by the trial Judge. The respondent filed an application for an order inter alia, to set aside the judgment of 13th May, 1996, on the ground that the court lacked jurisdiction to entertain the claim. The application was dismissed.

D

Dissatisfied with the ruling of the trial Judge, the respondent went to the Court of Appeal. As the respondent failed to file its brief of argument within time, the appellant filed an application to dismiss or strike out the appeal for want of diligent prosecution. The application was struck out. The respondent filed an application to re-list the appeal struck out on the ground that at the time the appeal was struck out, its counsel was in the Court of appeal Registry filing its brief and an application for extension of time to file the same. The Court of Appeal duly re-listed the appeal. That is the cause of this appeal.

F

Briefs were filed and duly exchanged. Appellant formulated two issues for determination:

“i. Whether the Court of Appeal has jurisdiction to relist for hearing on its merit an appeal struck out on the appellant’s, as Respondent, application for want of diligent prosecution arising from failure to file its brief within the time allowed by the Rules.

G

ii. Whether failure by the Appellant to file a Counter Affidavit to the Respondent’s application to relist the appeal struck out was sufficient to accept as unchallenged the reason for failure to file the brief timely and to ground the relisting of the appeal struck out.”

H

The two issues formulated by the respondent are virtually the same

as those formulated by the appellant. I expected the respondent to therefore adopt those formulated by the appellant. A little change in language towards the end of issue No. 2 by the respondent cannot make any reasonable difference. I will therefore take it that the parties in this appeal

B are in agreement in respect of the two issues.

Taking Issue No. 1 learned counsel for the appellant, Mr. J. Odubela, called in aid the case of Attorney-General of Lagos State v. Dosunmu (1989) 6 S.C. (Pt. II) 1; (1989) 3 NWLR (Pt. 111) 552, 557-558 and Government of Kwara State v. Gafar (1997) 7 NWLR (Pt. 511) 51 at 53
C to 54 and submitted that the Court of Appeal lacked jurisdiction to relist the appeal. Relying on Order 6 rule 10 of the Court of Appeal Rules, learned counsel submitted that the only remedy available as consequence for failure to file brief within time under the rule, is one of dismissal of
D the appeal. On the effect of dismissal of an appeal, learned counsel cited Eronini v. Iheuko (1989) 3 S.C. (Pt. 1) 30; (1989) 2 NWLR (Pt. 101) 46 at 50; Fadare v. Oduyale (1995) 5 NWLR (Pt. 395) 375; Babayagi v. Bida (1998) 1-2 S.C. 108; (1998) 2 NWLR (Pt. 538) 367 at 369 and
E Akujinwa v. Nwaonuma (1998) 11-12 S.C. 112; (1998) 13 NWLR (Pt. 583) 632.

On Issue No. 2 learned counsel submitted that failure on the part of the appellant to file a counter-affidavit to the respondent's application to relist the appeal struck out is not sufficient to accept as unchallenged
F the reason for failure to file the brief timeously and to ground the re-listing of the appeal struck out. He cited Ajomale v. Yadau (No. 2) (1991) 5 NWLR (Pt. 191) 266 at 266 and 270; Badejo v. Federal Ministry of Education (1996) 8 NWLR (Pt. 464) 15 at 20 and Folorunso v. Shaloub
G (1994) 3 NWLR (Pt. 333) 413 at 417. He urged the court to allow the appeal.

Learned counsel for the respondent, Mr. Jide-Olasite, submitted that Order 7 rule 3 of the Court of Appeal Rules confers wide powers/
H jurisdiction on the court to ameliorate non-compliance with any of its rules, such as Order 6 rule 2 or Order 6 rule 10. He cited Ojonye v. Ibrahim (2002) 1 NWLR (Pt. 747) 166 at 178; Nneji v. Chief Chukwu (1988) 3 NWLR (Pt. 43) 587; Ayinla v. Adigun (1986) 3 NWLR (Pt. 30)

511 and Surakatu v. Nigeria Housing Development Society Ltd. (1981) NSCC 92 at 96. He also cited Halsbury's Laws of England, Third Edition, Vol. 9, page 249 on the consequence of striking out a suit.

On Issue No. 2, learned counsel submitted that by the arguments at page 9, paragraphs 5.02 and 5.03, the appellant has conceded the issue of filing a counter-affidavit. Taking the merits of the argument, learned counsel submitted that since there was no misdirection by the Court of Appeal in making the finding that counsel for the respondent was in the Registry at the material time, this court should hold that the Court of Appeal was right when it came to the conclusion that the appellant did not file a counter-affidavit to challenge the evidence of the whereabouts of counsel at the material time. He urged the court to dismiss the appeal.

Order 6 rule 10 of the Court of Appeal Rules reads in part:

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

It is clear from the above that failure on the part of an appellant to file brief within time will be visited with the sanction of dismissal of the appeal on the application of the respondent. In Ogbu v. Urum, (1981) 4 S.C. 1, the Supreme Court held that the failure to file briefs by the appellants within the extended time can be likened to an abandonment of their appeal particularly when such failure is coupled with non-appearance in court without excuse at the time of hearing.

In Babayagi v. Alhaji Bida (1998) 1-2 SC. 108; (1998) 2 NWLR (Pt. 538) 367, the appellant did not file brief after one year of filing Notice of Appeal. Consequently the respondent moved the Court of Appeal to dismiss the appeal for want of diligent prosecution. The Court of Appeal acting under Order 6 Rule 10 of the Court of Appeal Rules, acceded to the application and dismissed the appeal. Thereafter the appellant applied to the Court of Appeal under Section 16 of the Court of Appeal Act to re-list the appeal. The court dismissed the appeal on the ground that it had no power under the Rules to re-list the appeal.

On appeal to the Supreme Court, it was held that under Order 6 rule 10 of the Court of Appeal (Amendment) Rules, 1984, an appeal could be dismissed for failure of the appellant to file his brief within the time provided for in rule 2 thereof or within the time as extended by the court; or for non-compliance with the conditions of appeal; or for want of prosecution. Dealing with whether the court should have sympathy for the appellant, Iguh, JSC., in his concurring judgment said at page 379:

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

See also Nwugha v. Nwala (1992) 2 NWLR (Pt. 225) 610; Olowu v. Abolore (1993) 5 NWLR (Pt. 293) 255; Onumajuru v. Akanihu (1994) 3 NWLR (Pt. 334) 620; The State v. Nnolim (1994) 5 NWLR (Pt. 345) 394; Olumesan v. Ogundepo (1996) 2 NWLR (Pt. 433) 628; Chime v. Ude (1996) 7 NWLR (Pt. 461) 379.

An appeal which is dismissed under Order 6 rule 10 of the Court of Appeal Rules cannot be re-listed. This court held in Babayagi v. Bida (supra) that once an appeal is dismissed under Order 6 rule 10, the Court of Appeal has no jurisdiction to revive the appeal by re-entering or re-listing same. See also Chukwuka v. Ezulike (1998) 2 NWLR (Pt. 538) 355.

When an appeal is dismissed under Order 6 rule 10 of the Court of Appeal Rules, its life terminates and it is therefore removed from the cause list. No court has jurisdiction to revive or resuscitate it.

Learned counsel for the respondent invoked Order 7 rule 3 which generally provides for effect of non-compliance with the Rules.

It is clear to me that Order 7 rule 3 is a general provision dealing with non-compliance with the Rules generally, as opposed to the specific provision of Order 6 rule 10, on failure of an appellant to file brief. It is a well established canon of statutory interpretation that where an issue in a statute is governed by a general provision B and a specific provision, the latter will be invoked in the interpretation of the issue before the court. This is because the specific provision will be deemed to have anticipated the issue as against the general provision. In the circumstances, the applicable rule is Order 6 rule 10 and not Order 7 rule 3, and I so hold. C

In the light of the above, I do not intend to take Issue No. 2 because it is otiose. I may however add that as a matter of strict law, affidavit evidence cannot change the legal position as the process of affidavit is evidence and not law. D

I must pause here to say that Order 6 rule 10, as it stands, causes grave injustice to an appellant who has a good and arguable appeal on the merit. When brief writing was introduced in 1977 in the Supreme Court, the rule was as in Order 6 rule 9 of the Supreme Court Rules, 1985 as E amended and extant, now reads:

“9. If an appellant fails to file and serve his Brief within the time provided for in rule 5 of these rules, or within the time as extended by the court, the respondent may apply to the court for the appeal to be struck out for want of prosecution. If the respondent fails to file his Brief, he will not be heard in oral argument except by leave of the court.” F

In the circumstances, I recommend the above to the President of the Court of Appeal in the interest of justice for consideration in amending the Rule. G

In Nneji v. Chukwu (1988) 3 NWLR (Pt. 81) 184, Oputa, JSC., said at page 206 on Order 6 rule 10 of the Court of Appeal Rules:

“It is thus clear that the prior responsibility of the Court of Appeal (as well as all other courts) is to hear the parties out, not to shut out any party, to hear the merits of the case or appeal and decide according to those merits. That being so, Order 6 Rule 10 (of the Court of Appeal Rules) which allows a Respondent to apply for the appeal to be dismissed H

for want of prosecution consequent on the failure of the Appellant to file his Brief will have to be cautiously considered and the surrounding circumstances anxiously reviewed before a decision to dismiss can be taken. In this case, it was a mistake to counsel who (thought quite naturally, but as it turned out mistakenly) that since time did not run both in the High Court Enugu and the Supreme Court during those courts' annual vacations, time will not run in the Court of Appeal."

I should add here that the situation in this appeal is not that of mistake on the part of counsel. It was clearly a matter of the respondent failing to file brief within time and there is no evidence of mistake on the part of counsel.

Where provision of a statute or rule of court is clear, the duty of the court is to interpret the clear provision by giving the plain wordings their ordinary interpretation without more. It is not the function of a court of law to sympathize with a party in the interpretation of a statute merely because the language of the statute is harsh or will cause hardship. That is not the function of the court. That is rather the function of the Legislature. Much as I realise that so much hardship is caused to the respondent, I am bound to interpret the clear wording of Order 6 rule 10 and this is what I have done.

In sum, the appeal is allowed and I award N10,000.00 costs in favour of the appellant.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother, Tobi, JSC. I entirely agree with him that there is merit in the appeal and it should be allowed.

There is no doubt that Order 6 rule 10 of the Court of appeal Rules 1981 (as inserted in 1984) which reads thus, is very harsh in its provision for the appeal to be dismissed.

"10. Where an appellant fails to file his brief within the time provided for in rule 2 above, or within the time as extended by the court,

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

This court had similar rule in its 1977 and 1985 Rules, which was amended in 1990 and deleted and substituted in 1991 in effort to water down its harshness. Order 6 rule 9 of the Supreme Court Rules, 1985 as amended and extant, now reads- C

9. If an appellant fails to file and serve his brief within the time provided for in rule 5 of these Rules, or within the time as extended by the court, the respondent may apply to the court for the appeal to be struck out for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of the court." D

I recommend this rule to the Honourable President of the Court of Appeal as Order 6 rule 10 of the Court of Appeal Rules, 1981 as amended.

Be that as it may, the prescription by Order 6 rule 10 of the Court of Appeal Rules 1981, as amended, is that the appellant's appeal in the court below should be dismissed and that is what the Court of Appeal had done, and in the circumstance rightly too – see Chief Iro Ogbu & Ors. v. Chief Ogburu Urum. (1981) 4 S.C. 1 at p. 9 where Obaseki, JSC., held- F

"..... the provision of Order 7 rule 30 (of the Supreme Court Rules, 1977) deprives this court of any jurisdiction to review the judgment of dismissal for want of prosecution. The inherent jurisdiction of this court under Section 6(6)(a) of the Constitution cannot be invoked to save the situation. This court is therefore unable and incompetent to entertain this application to direct that the appeal be re-entered. Sympathy cannot override the clear provisions of our Rules and it would be in the interest of all if parties and their counsel endeavour to keep to the times set out in the Rules for the doing of any act or taking of any step." G H

Accordingly, I too hereby allow the appeal with N10,000.00 costs to the appellant against the respondent.

ONU JSC

Having been privileged to read in draft the judgment of my learned brother, Tobi, JSC., just delivered, I am in complete agreement with him that the appeal be and is hereby allowed. I endorse the order for costs therein made coupled with admonition to the Honourable President of the Court of Appeal to endeavour to amend the Rules of his court with a view to the removal of the pinpointed areas of their harshness.

KATSINA-ALU JSC

Editor's Note – The judgment of Katsina-Alu JSC, was not available as at the time of going to press.

KALGO JSC

I have had the opportunity of reading in advance the judgment just delivered by my learned brother, Tobi, JSC., in this appeal. I entirely agree with him that there is merit in the appeal and it ought to be allowed.

The provisions of Order 6 rule 10 of the Court of Appeal Rules 1981, as amended, are very clear and need no further interpretation. It says very clearly that if the appellant fails to file his brief within the time provided by the rules or the time extended by the court for doing so, the respondent may apply to the court for the appeal to be dismissed for want of prosecution. This did not seem to give the court any discretion. Once the respondent applies under the said rule, the appeal must be dismissed and such dismissal is final. See Olowu v. Abolare (1993) 5 NWLR (Pt. 293) 255; Akinjinwa v. Nwaonuma (1998) 2 NWLR (Pt. 583) 632. In the instant case, the appellant as respondent in the appeal before the Court of Appeal, applied for an order dismissing or striking out the appeal for want of prosecution. Therefore the order striking out the appeal on the 2nd June, 1989, is in full compliance with the provisions of Order 6 rule 10 of the Court of Appeal rules and the “*striking out*” amounts to a

“dismissal” of the appeal. There is no provision for the re-listing of such an appeal.

The learned counsel for the respondent submitted that the Court of Appeal has power to re-list the appeal under Order 7 rule 3 of the Court of Appeal Rules, 1981. Order 7 rule 3 provides:-

“3. (1) *the court may, in an exceptional circumstance, and where it considers in the interest of justice so to do, waive compliance by the parties with these Rules or any part thereof.*

(2) *Where there is such waiver of compliance with the Rules, the court may, in such manner as it thinks right, direct the appellant or respondent as the case may be, to remedy such non-compliance or may, notwithstanding, order the appeal to proceed or give such directions as it considers necessary in the circumstance.*

(3) *The Registrar shall forthwith notify the appellant or the respondent as the case may be of such order or directions given by the court under this Rule where the appellant or the respondent was not present at the time when such order was made or direction were given”.*

(Underlining mine)

Learned counsel submitted that by this provision, the Court of Appeal can, subject to the conditions stated therein, waive compliance with any rule in the Court of Appeal Rules or any part thereof, including the filing of brief by the parties. In this case, the respondent only applied for “an order relisting this appeal struck out for want of diligent prosecution due to non-filing of the appellant’s brief.” His application clearly comes within the provisions of Order 6 rule 10 of the Court of Appeal Rules which inter alia says:-

“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.” (Underlining mine)

Rule 2 Order 6 provides that the appellant shall within 60 days of receipt of the Record of Appeal from the court below file a written brief of argument in the appeal.

As can be seen from above, Order 6 rule 10 deals specifically with

failure of an appellant to file his brief within time stipulated by the rule 2 or any extended time therefore whilst Order 7 rule 3 deals with non-compliance generally. The former gives sanction for non-compliance with the rule whereas the latter talks about waiver of a general non-compliance. And although there may be time factor to be considered in both provisions, the former deals specifically with filing of brief by an appellant, whereas the latter deals with general matters. In law, any specific provision excludes the general one; so that the application of Order 6 rule 10 does not fall under or within that of Order 7 rule 3. The maxim generalia specialibus non derogant¹ applies here and it means that general things do not derogate from special things. Thus a specific enactment is not affected by a subsequent general enactment unless the earlier enactment is inconsistent with the later enactment. I hold the view for the reasons stated earlier, that Order 6 rule 10 is not inconsistent with Order 7 rule 3 and therefore the Court of Appeal was wrong to apply the provisions of Order 7 Rule 3 to this case and relist the appeal as it did. I appreciate the fact that Order 6 rule 10 is rather harsh in its effect. However, in order to be fair and just to the parties to an appeal and also hear their cases on the merits, I also recommend to the President, Court of Appeal, the amendment of Order 6 rule 10 in line with Order 6 rule 9 of the Supreme Court Rules 1985, (as amended).

In the circumstances and for the fuller reasons given in the leading judgment of my learned brother, Tobi, JSC., I allow this appeal and abide by the order of costs made therein.

G

1. General words do not derogate from special

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