

SUPREME COURT OF NIGERIA

18TH JULY, 2005. SC. 195/2000

**CORAM:- I. L. KUTIGI, U. A. KALGO, D. MUSDAPHER,
I. C. PATS-ACHOLONU, S. A. AKINTAN, JJSC**

LAWRENCE CHUKWUMA O. WILLIAMS APPELLANT
AND
GREGORY MOKWE DEFENDANT
G. C. MOKWE & SONS LTD. RESPONDENT

APPEALS - Competence - Leave - Issues of mixed law and fact - Require leave of court - Where leave of court is not obtained - Such issues will be struck out for being incompetent (H1)

PRACTICE & PROCEDURE - Appeals - Joinder of parties - Where one was not a party before the trial court - It cannot appeal as of right - Against that judgment to any higher court (H2)

APPEALS - Competence - Objection - Where Court of Appeal granted leave to appeal - And notice of appeal was properly filed - And no appeal is made against the orders - The objection to competence of the appeal will fail (H3)

APPEALS - Leave to appeal - Extension of time for - Can be granted - Where conditions which must be fulfilled - To justify the grant - Have been satisfied (H4)

APPEALS - Leave - Grounds of appeal - Application for leave to appeal - Where respondent's grounds of appeal appear to be substantial - It will be unjust to shut him up - And refuse the application for leave to appeal (H5)

FACTS

Before the High Court of the then East Central State of Nigeria
2201

at Onitsha, the plaintiff/appellant filed an action against the defendants. The dispute in this case arose over a building at No. 8 Old Market Road, Onitsha which formed part of the estate of late Egerton Williams, the plaintiff's father. The claim was for a declaration that the defendant was not entitled to the building on No. 8 Old Market Road Onitsha, an injunction restraining the defendant, his servants and agents from entering the said house and N50,000 as general damages.

The original plaintiff died while the claim was pending at the High Court, Onitsha. The respondent applied to the Court to be joined as a co-defendant after witnesses were heard and the case closed for address by the appellant. The court refused the application and entered judgment for the plaintiff. Respondent later filed a motion before the Court of Appeal in which it prayed for an extension of time to apply for leave to appeal against the judgment as a person interested. The application was granted as prayed, the appeal was allowed as the trial court's decision was set aside and a retrial was ordered. The plaintiff/appellant being dissatisfied with that decision has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Was the Court of Appeal right to say that it is too late to raise the issue of competence of an appeal even in a brief of argument and with the consent of the appellant's counsel?”

“(ii) As at the date the notice and grounds of appeal was entered, was the Court of Appeal right to hold that there was an appellant ?

“(iii) Was the Court of Appeal right to hold that the trial court was obliged to hear an application for joinder not brought to its notice either by counsel for the applicant or the clerk of court.”

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

Issues of mixed law and fact

1. But ground 2 which challenges the exercise of the discretion of the Court of Appeal in granting the application without the appellant and ground 3 which challenges the finding of the Court of Appeal on failure of the trial court to hear and determine the motion for joinder will appear to me to raise issues of mixed law and fact. They both require leave of the Court

of Appeal or this court to be filed and there was no such leave from the record of appeal. They are therefore incompetent and I hereby strike them out accordingly together with issue. (p. 2209 D)

Appeals - Joinder of parties

2. It is not in dispute between the parties that the respondent, G. C. Mokwe & Sons Ltd. was not a party to the case in the trial court from the beginning to the day judgment was delivered on 28/7/84. It cannot therefore appeal as of right against that judgment to any higher court. See Section 220(1) of 1979 Constitution. But by virtue of the provisions of Section 222(a) of the 1979 Constitution, it can properly apply to the higher court, in this case the Court of Appeal, for leave to appeal as an interested party. (p. 2209 F)

APPEALS - Competence - Objection

3. By Section 31 of the Court of Appeal Act, an “appellant” is defined to mean “any person who desires to appeal or appeals from a decision of the court below or who applies for leave to appeal, and includes a legal practitioner representing such a person in that behalf”. By filing the motion for leave to appeal in the trial court on 28/7/94, the day the judgment was delivered by that court, the respondent was definitely desirous of appealing against it to the Court of Appeal. He was therefore an “appellant” within the meaning of Section 31 of the said Act. 3 It is not in dispute however, that the respondent, though not a party to the case, then filed its appeal on 28/7/94 before the actual leave to do so was granted by the Court of Appeal. At that stage, the appeal is no doubt a nullity. However, being an “appellant” at that time and having filed its notice of appeal without leave, which is no doubt void, it then filed its application for leave to appeal in the Court of Appeal and in prayer 3 asked for deeming the notice and grounds of appeal it filed earlier, as properly filed in order to regularize the filing of the notice of appeal. This, in my view, makes it unnecessary for the requirement of a separate prayer for enlargement of time to appeal, in the circumstances of this case. Therefore the Court of Appeal having granted the respondent's prayer for leave to appeal without any objection by the appellant is perfectly entitled in my view, to grant the 3rd prayer

deeming the notice of appeal filed on 28/7/94 by the respondent as properly filed in this case. And although it has retrospective application, it was only intended to regularize the filing of the notice of appeal carried out on 28/7/94. The case of Cooperative Bank of Eastern Nigeria Ltd. v. Ogwuru (supra) cited by the appellant in support of the submission that the grant of leave by the Court of Appeal cannot be retrospective, is a Court of Appeal decision not binding on this court, and is not on all fours with the instant appeal. (p. 2214 F)

C *Leave to appeal - Extension of time for*

4. From the averments in the above paragraphs, it is abundantly clear that the respondent has a legally cognizable interest which the decision of the trial court seeks to deprive him of if not challenged; hence the filing of the notice of appeal on the day of judgment, accompanied by the application for leave to appeal. By Order 3 Rule 4 (2) of the Court of Appeal Rules, 1981 (as amended), the two conditions which must be fulfilled to justify the grant of extension of time for leave to appeal are good and substantial reasons for failure to appeal within prescribed period and grounds of appeal which prima facie show good cause why the appeal should be heard. These conditions have been satisfied fully in this case, in my view, with particular reference to the averments in the affidavit in support of the application and the notice of appeal attached thereto. (p. 2217 B)

F *Application for leave to appeal*

5. By virtue of the provisions of Section 222 (a) of the 1979 Constitution which is applicable to this case, the Court of Appeal has the discretion in granting or refusing an application before it for leave to appeal as an interested party and any such discretion exercised by it remains valid unless it is shown to have been wrongly exercised on erroneous principles or tainted with illegality. And this court does not substitute its own discretion for that of the court below in applications like this, unless the court below did not act in good faith or has been swayed by irrelevant considerations or acted arbitrarily or capriciously or under a misconception of law or misapprehension of fact. In the instant case, it is my respectful view that the Court of Appeal gave adequate considerations to all the relevant

circumstances and materials placed before it in the application for leave and came to the right conclusions by exercising the discretion to grant the application as it did. I have earlier in this judgment explained that the grant of prayer 3 of the respondent's application has obviated the need to ask for enlargement of time to appeal. And looking at the grounds of appeal of the respondent in his application for leave, they appear to me to be substantial and arguable and it would be unjust, in my view, to still shut him up and refuse the application on purely technical grounds. For this reason, I cannot find any cause to interfere with the exercise of the discretion of the Court of Appeal in this case. (p. 2217 H)

REPRESENTATION

Mr. B. E. Nwofor, SAN., (with him, B. O. B. Udeibe Esq.), for the Appellant.
Mr. P. I. N. Ikwueto, SAN., (with him, I. C. Acholonu (Miss); V. N. Aneke (Miss); F. C. Onyia, Esq., and P. E. Onukwuili Esq.), for the Respondent.

CASES REFERRED TO

Societe Generate Bank (Nig.) Ltd. v. Afekoro (1999) 7 S.C. (Pt. III) 95; (1999)11 NWLR (Pt. 628)521
University of Lagos v. Olaniyan (1986) 1 NWLR 156
Cooperative and Commerce Bank (Nig.) Ltd. v. Ogwuru (1993) 3 NWLR (Pt. 284) 630
University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143
Mbadugha v. Nwosu (1993) 9 NWLR (Pt. 315) 110
Metal Construction W. A. Ltd. v. Migliore (1990) 1 NWLR (Pt. 126) 299 at 325
Comex Ltd. v. Nigeria Arab Bank Ltd. (1997) 3 NWLR (Pt. 496) 643 at 655
Cooperative Bank of Eastern Nigeria Ltd. v. Ogwuru (1991) 1 NWLR (Pt. 168) 458 at 467
N.B.N Ltd. v. N.E.T (1989) 3 NWLR (Pt.31) 667
Tukur v. Governor of Gongola State (1989) 9 S.C.1; (1989) 1 NWLR H (Pt.68) 39
Utih & Ors. v. Ononyiwe & Ors (1991) 1 NWLR (Pt. 166) at 246
Onyema & Ors v. Uwaeze Opute & Anor. (1987) 3 NWLR (Pt. 60)

Ijebu Ode L.G. v. Adediji Balogun & Co. (1991) 1 NWLR (Pt. 166) 136 at 154

Oloba v. Akereja (1988) 7 S.C. (Pt. I) 1; (1988) 2 NWLR (Pt. 84.) 508

STATUTE & RULE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979 ss. 220(1) & 222(a)
Court of Appeal Rules 1981 (as amended) O. 3 r. 4(2)

LEAD JUDGMENT BY KALGO JSC

By a Writ of Summons issued out on the 22/12/75 in the High Court of the then East Central State of Nigeria at Onitsha, the appellant as plaintiff claimed against the defendants as per Amended Statement of Claim, the following reliefs:-

“(a) A declaration that the defendant is not entitled to build on No. 8, Old Market Road, Onitsha, which forms part of the estate of late E. Egerton Williams, the plaintiff’s father.

Plaintiff as against the defendant is entitled to the possession of the property known as No. 8. Old Market Road, Onitsha, as one of the beneficiaries/successors-in-title to his father, E. Egerton Williams.

(b) An injunction to restrain the defendant, his servants and/or agents from entering into No. 8, Old Market Road and/or in anyway interfering with the plaintiff’s right to the said property.

(c) General damages in the sum of N50,000.00 (Fifty Thousand Naira) only.”

It is at this stage pertinent to observe that the original plaintiff in this case. Dr. S. S. Olukotun-Williams, died on 11th May, 1987, and was by order of the trial court, substituted by the appellant. Also the original defendant, Mr. George C. Mokwe, died on 18/4/88 and was by order of the trial court also substituted by one person named E. Mokwe.

Parties filed their pleadings in the trial court, and before the commencement of trial, they made frantic efforts to settle the dispute between them out of court but this did not materialize. The trial therefore commenced on 27/1/93 and concluded with the appellant’s address on 13/7/ 94. The suit was undefended by E. Mokwe. On the 28/7/94, the

learned trial Judge. Nwazota, J., (as he then was), delivered a considered judgment in favour of the appellant and granted him all the reliefs claimed in his Writ of Summons.

It is important to state here that the respondent was not a party to this case from its inception to the judgment at the trial. It is clear from the record of proceedings in this matter that by a motion on notice filed in the trial court on 8/7/94, the respondent prayed the trial court to be joined as a co-defendant to the suit. This was after witnesses were heard and the case was closed for address by the appellant. It is however, not clear from the record of proceedings what happened to the motion for joinder after it was filed. It was not shown whether it was moved or drawn to the attention of the trial court but it was filed 2 days from the day judgment was given. The motion was however, not entertained by the trial court but the appeal against the alleged refusal to hear it was abandoned and struck out by the Court of Appeal. Be that as it may, it is abundantly clear that up to the time of the delivery of the judgment by the trial court on the 28/7/94, only Gregory Mokwe was the defendant in the case; G. C. Mokwe & Sons Ltd., the present respondent was not a party to the case. However, the respondent as a party interested filed its notice of appeal against the judgment on 28/7/94 and then applied on the 24th of June, 1995, to the Court of Appeal under Section 222(a) of the 1979 Constitution of Nigeria which is applicable to this case, for an order for leave to appeal against the said judgment as a person interested. That application was granted as prayed on the 5th of February, 1996, more than 6 months after filing the notice of appeal.

The appeal was then heard by the Court of Appeal, Enugu Division; it was allowed and the decision of the trial court was set aside and a retrial was ordered. The notice of appeal filed on 14/7/94, by the party interested/ respondent was struck out.

The appellant was dissatisfied with this decision and appealed to this court. The respondent/party interested (hereinafter referred to simply as respondent) also cross-appealed against the decision striking out its appeal filed on 14/7/94, but this was later withdrawn and struck out on the 24/10/2001.

Written briefs were filed in court and exchanged between the parties as required by the rules of court. The appellant formulated 3 issues for the determination of this court which read:-

B “(i) Was the Court of Appeal right to say that it is too late to raise the issue of competence of an appeal even in a brief of argument and with the consent of the appellant’s counsel?

(ii) As at the date the notice and grounds of appeal was entered, was the Court of Appeal right to hold that there was an appellant

C (iii) Was the Court of Appeal right to hold that the trial court was obliged to hear an application for joinder not brought to its notice either by counsel for the applicant or the clerk of court.”

The respondent having abandoned his cross-appeal raised only one issue in its brief which is:-

D “Whether the court below was justified to have granted leave to the appellant to appeal as a person interested against the judgment of the learned trial court in the circumstances of this case.”

E Having regard to the original and additional grounds of appeal filed by the appellant in this case, I find that the appellant’s issues for determination are more germane to the grounds than the sole issue of the respondent. I shall therefore consider them in the determination of this appeal.

F The learned counsel for the respondent submitted in his brief that the grounds of appeal 1, 2, 3 and 4 and the additional ground filed by the appellant in his notice of appeal in this case are at most all of mixed law and fact for which no leave was granted or obtained to file them and should therefore be struck out as incompetent. He cited in support the cases of Obatoyinbo v. Oshotoba (1996) 5 NWLR (Ft. 450) 531 at 547; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718 at 743; Metal Construction W. A. Ltd. v. Migliore (1990) 1 NWLR (Pt. 126) 299.

The learned counsel for the appellant however submitted in the brief that all the 4 grounds of appeal and the additional ground are grounds of law and are validly filed in this case. He cited a plethora of decided cases in support.

H In this court, the appellant filed a notice of appeal and in ground

of appeal 1, on page 319 of the record, he challenged the order of the Court of Appeal which he said was illegal and occasioned a miscarriage of justice. The main ground read with the particulars are challenging the competence of the appeal by the respondent in the Court of Appeal. This is no doubt an issue of law which can properly be taken up in this court B having failed in the Court of Appeal. The same is true of ground 4 which challenges the jurisdiction of the Court of Appeal to entertain the application for leave to appeal. **But ground 2 which challenges the exercise of the discretion of the Court of Appeal in granting the application without the appellant and ground 3 which challenges the finding of the Court of Appeal on failure of the trial court to hear and determine the motion for joinder will appear to me to raise issues of mixed law and fact. They both require leave of the Court of Appeal or this court to be filed and there was no such leave from the record of appeal. They D are therefore incompetent and I hereby strike them out accordingly together with issue.** This leaves grounds of appeal 1, 4 and the additional ground for which leave to file has been granted by this court. From this, we now only have issues 1 and 2 to be canvassed and considered in the E appeal.

I will take issues 1 and 2 together. **It is not in dispute between the parties that the respondent, G. C. Mokwe & Sons Ltd. was not a party to the case in the trial court from the beginning to the day F judgment was delivered on 28/7/84. It cannot therefore appeal as of right against that judgment to any higher court. See Section 220(1) of 1979 Constitution. But by virtue of the provisions of Section 222(a) of the 1979 Constitution, it can properly apply to the higher court, in this case the Court of Appeal, for leave to appeal as an interested G party.**

It is also not in dispute that the respondent, even though not a party to the case as of 28/7/94, when the judgment of the trial court was delivered, filed a notice of appeal against the said judgment on 28/7/94. H The following day, on the 29th of July 1994, he filed another motion for leave to appeal as an interested party. This motion was purported to be transferred to the Court of Appeal, Enugu by the trial Judge. Thereafter, on

the 24th of June, 1995, it filed a motion on notice supported by affidavit praying the Court of Appeal for leave to appeal against the said judgment as a party interested and in prayer 3 asked specifically for:

“An order deeming the Notice of Appeal dated 28/7/94 and filed on 28/7/94 as properly filed.”

The motion was heard by the Court of Appeal. The appellant’s counsel did not oppose the application and the prayers in the application were granted as prayed. The court therefore further ruled thus:-

“It follows that the applicant G. C. Mokwe & Sons Ltd. is hereby granted the leave of this court to appeal against the judgment of the lower court in Suit No. O/183/75 as an interested party. Leave is also granted in that capacity against the said judgment. The applicant having filed and served his notice and grounds of appeal against the said judgment of the lower court, the notice and grounds of appeal are deemed to have been properly so filed.”

The appellant did not appeal against this ruling of the Court of Appeal directly but he sought and obtained leave to file an additional ground of appeal which was filed.

The main contention of the learned counsel for the appellant in his arguments in his brief on issues 1 and 2 is that since the respondent filed its notice and grounds of appeal in this case without leave on 28/7/94, and only obtained leave to do so when the Court of Appeal granted its application on 5/2/96, the notice of appeal filed is incompetent and the appeal is a nullity. He cited in support the cases of Aqua Ltd. v. Ondo State Sports Council (1988) 10-11 S.C. 31; (1988) 4 NWLR (Pt. 91) 622 at 648; Ezenwosu v. Ngonadi (1988) All NLR 254 at 263; In re-Madaki (1996) 7 NWLR (Pt. 459) 153 at 164. Learned counsel further argued that as the notice of appeal tiled by the appellant was invalid having been filed without the necessary leave on 28/7/94, the Court of Appeal would have no jurisdiction and is incompetent to entertain the appeal as it did. He also submitted that the leave granted or obtained by the appellant on 5/2/96 to appeal as a person interested cannot be granted retrospectively. He cited in support the case of Cooperative Bank of Eastern Nigeria Ltd. v. Ogwuru (1991) 1 NWLR (Pt. 168) 458 at 467. N.B.N Ltd. v. N.E.T (1989) 3 NWLR (Pt.31) 667; Tukur v. Governor of Gongola State (1989) 9 S.C. 1; (1989)

I NWLR (Pt.68) 39. Counsel also submitted that parties to a case cannot by acquiescence, consent or default, confer jurisdiction to a court where the court’s jurisdiction is only conferred by statute and he relied on the cases of Utih & Ors. v. Ononyiwe & Ors (1991) 1 NWLR (Pt. 166) at 246; Onyema & Ors v. Uwaeze Opute & Anor. (1987) 3 NWLR (Pt. 60) 293. He therefore further submitted that since the issue of jurisdiction of a court is fundamental, it can be raised at any stage of the proceedings at the trial or on appeal and by the court itself suo motu. He relied on the cases of Ijebu Ode L.G. v. Adedeji Balogun & Co. (1991) 1 NWLR (Pt. 166) 136 at 154; Oloba v. Akereja (1988) 7 S.C. (Pt. I) 1; (1988) 2 NWLR (Pt. 84.) 508. Learned counsel finally submitted that since the notice of appeal in this case was filed without the leave of court sought and obtained before filing the notice on 28/7/94, there is no appeal and ipso facto, there is no appellant.

For the respondent, it was submitted in the brief that the notice of the application for leave to appeal from the decision of the trial court was duly and promptly given the very day the trial court delivered its judgment. The respondent also submitted that considering the peculiar circumstances of this case, the Court of Appeal was perfectly justified in exercising its discretion to grant the application. The respondent further submitted that the order deeming the notice of appeal as properly filed was legitimately made having regard to the circumstances of the case and that the case of Cooperative Bank of Eastern Nigeria Ltd. v. Ogwuru (supra) cited by the appellant to invalidate the deeming order cannot apply to the instant case.

The central issue in this appeal therefore is essentially a complaint against the grant of the leave to appeal by the Court of Appeal to the respondent against decision of the trial court as an interested party. It is however, submitted that the grant of such leave involves an exercise of judicious and judicial discretion on the part of the Court of Appeal taking into consideration all the circumstances of the application before the court. See Metal Construction W. A. Ltd. v. Migliore (1990) 1 NWLR (Pt. 126) 299 at 325; Comex Ltd. v. Nigeria Arab Bank Ltd. (1997) 3 NWLR (Pt. 496) 643 at 655.

The main contention of the appellant in his brief, is that by filing the notice of appeal against the judgment of the trial court on 27/8/94 be-

fore obtaining leave to appeal from the trial court or the Court of Appeal, the appeal filed was incompetent and a nullity. It was further contended that the leave granted by or obtained from the Court of Appeal on 5/2/96, could not sustain or validate the appeal as it was made retrospectively.

B The learned counsel for the respondent explained in his brief that since the respondent was not a party to the case at the time the trial court delivered the judgment in the case on 28/7/94, the respondent could only be made a party as a person interested in the matter with the leave of the trial court or the Court of Appeal pursuant to the provisions of Section C 222 (a) of the 1979 Constitution which is applicable to this case. Learned counsel further explained that an application by motion on notice was filed by the respondent for leave to appeal as an interested party against the judgment of the trial court delivered on 28/7/94. All this was conceded by the appellant in his brief. But what the appellant was saying was that D the leave granted for extension of time to file the notice of appeal could not be retrospective.

Let me now examine closely the application for leave to appeal and the order of the Court of Appeal granting the leave. The application E which was filed on 29/6/95 was for:-

“1. An order extending the time within which the applicant may apply for leave to appeal against the final judgment of the High Court, Onitsha dated 28/7/94 as a party interested.

F 2. An order granting the applicant G. C. Mokwe and Sons Limited leave to appeal against the judgment of the High Court, Onitsha dated 28/7/94 as a party interested.

3. An order deeming the Notice of Appeal dated 28/7/94 and filed on 28/7/94 as properly filed.

G 4. An order directing a stay of execution of the judgment of the High Court, Onitsha delivered in this suit on 28/ 7/94 pending the determination of the appeal to this Honourable Court.

5. An order for accelerated hearing of this appeal.” (Underlining mine)

H The application was supported by a 43 - paragraph affidavit sworn to by one Emeka Umejiaku, a legal practitioner. There was no

counter-affidavit filed by the appellant. On the 5/2/96 when the Court of Appeal heard counsel for the parties on the application, the learned counsel for the appellant (respondent in the application) Mr. Chilota, concluded his submission by saying:-

“I now say that I am not opposing the motion.” Thereafter, the B Court of Appeal ruled thus:-

“With the learned counsel for the respondent not opposing having heard counsel for the applicant. Ikwueto. Esq., the prayers of the applicant are hereby granted. It follows that the applicant, G. C. Mokwe & Sons Ltd. is hereby granted the leave of this court to appeal against the judgment of the lower court in Suit No. 0/183/75 as an interested party. Leave is also granted to appeal in that capacity against the said judgment. The applicant having filed and served his notices and grounds of appeal against the said judgment of the lower court, the notices and grounds of appeal are deemed to have been properly so filed. Also, it is ordered that the execution of the judgment of the lower court in suit No. 0/183/75 delivered on 28/7/94 be stayed pending the determination of this appeal”.

(Underlining mine) E

This ruling of the Court of Appeal is comprehensive and clear. It granted all the prayers of the respondent and was with the agreement of counsel for the appellant who raised no objection to the grant. I have carefully examined all the submissions of the learned counsel for F the appellant in his brief including the decided cases cited in support thereof and although I found them to be relevant in accordance with the principle of law enunciated in those cases, I am of the view that the order deeming the notice of appeal filed by the respondent as properly filed with effect from the day the order was made cannot be seriously faulted. My G reasons are these:-

“1. The respondent in his application for leave to appeal as a party interested has given good and substantial reasons in the affidavit why it failed to appeal within time. H

2. It exhibited the notice of appeal containing grounds of appeal which shows good cause why the appeal should be heard.

3. It filed the application for leave to appeal under Section 222 (a) of 1979 Constitution as a party interested on 28/7/94, the day the

judgment of the trial court was delivered.

4. During the trial of the case and before the said judgment was delivered, precisely on 11/7/94, the respondent filed an application to be joined as a necessary party to the proceedings.

B 5. When the learned trial Judge failed to hear the application mentioned in (5) above, the respondent felt aggrieved and filed a notice of appeal to the Court of Appeal against that on 14/7/94.

C 6. By virtue of the provisions of Section 31 of the Court of Appeal Act (Cap. 75 of 1990 Laws of the Federation) as from 28/7/94, the respondent is deemed to be an “appellant” as defined therein.

7. The case was undefended in the trial court because the then defendant had no interest in the land in dispute.”

D All these have been meticulously stated in the affidavit in support of the application for leave to appeal by the respondent in the Court of Appeal.

By Section 31 of the Court of Appeal Act, an “appellant” is defined to mean “any person who desires to appeal or appeals from a decision of the court below or who applies for leave to appeal, and includes a legal practitioner representing such a person in that behalf”. By filing the motion for leave to appeal in the trial court on 28/7/94, the day the judgment was delivered by that court, the respondent was definitely desirous of appealing against it to the Court of Appeal. He was therefore an “appellant” within the meaning of Section 31 of the said Act. 3 It is not in dispute however, that the respondent, though not a party to the case, then filed its appeal on 28/7/94 before the actual leave to do so was granted by the Court of Appeal. At that stage, the appeal is no doubt a nullity. However, being an “appellant” at that time and having filed its notice of appeal without leave, which is no doubt void, it then filed its application for leave to appeal in the Court of Appeal and in prayer 3 asked for deeming the notice and grounds of appeal it filed earlier, as properly filed in order to regularize the filing of the notice of appeal. This, in my view, makes it unnecessary for the requirement of a separate prayer for enlargement of time to appeal, in the circumstances of this case. Therefore the Court of Appeal having granted the respondent’s prayer for leave to appeal

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without any objection by the appellant is perfectly entitled in my view, to grant the 3rd prayer deeming the notice of appeal filed on 28/7/94 by the respondent as properly filed in this case. And although it has retrospective application, it was only intended to regularize the filing of the notice of appeal carried out on 28/7/94. The case of Cooperative Bank of Eastern Nigeria Ltd. v. Ogwuru (supra) cited by the appellant in support of the submission that the grant of leave by the Court of Appeal cannot be retrospective, is a Court of Appeal decision not binding on this court, and is not on all fours with the instant appeal.

In the Cooperative Bank case, there was as an application for extension of time to appeal, but in this case there was none, as the respondent, on filing the application on 28/7/94, became an appellant by law and had earlier filed its notice of appeal, though not regular, as no leave to appeal was then granted to it. When the Court of Appeal granted the leave to appeal and deemed the notice of appeal properly filed, the appeal was regularized, which has, of course, retrospective effect. The appeal was heard by the Court of Appeal and in its judgment, Niki Tobi, JCA., (as he then was) who read the leading judgment said:-

“It is clear from the Record Book that the motion in question (for leave to appeal) was moved by learned counsel for the appellant on 5/2/96. A. U. Chilota, counsel for the respondent, did not oppose the motion. This court accordingly granted it as prayed. Leave was therefore granted the applicant. The order was given way back on 5/2/96. The respondent had all the opportunity to appeal if he was not satisfied. But there was no appeal. He now raises the issue in his brief filed on 28/10/96. I do not think the law allows him to do so. The objection on the competence of the appeal therefore fails”.

G

The facts elicited in the above quotation were perfectly correct according to the proceedings in this case, and I entirely agree with the Court of Appeal that without an appeal against the orders, the objection to the competence of the appeal on that ground cannot be taken. That should be the end of the matter.

In the affidavit in support of the application for leave to appeal as an interested person under Section 222 (a) of the 1979 Constitution, the following paragraphs are pertinent:-

“37. That the original defendant in this suit was Chief George C. Mokwe, late.

38. That following the death of the said original defendant, the plaintiff in this suit prayed the High Court, Onitsha to substitute the deceased defendant with Gregory Mokwe.

39. That by an order of court dated 20/3/89, the High Court, Onitsha substituted Gregory Mokwe as a defendant

40. That the said Gregory Mokwe has no interest whatsoever in the property commonly known as No. 8 old Market Road Onitsha.

41. That I am informed by the applicant and I verily believe that the said Gregory Mokwe did not make any attempt to defend this suit nor did he bring the pendency of same to the notice of applicant.

42. That late Chief George C. Mokwe was in his lifetime the alter-ego/Chairman/Chief Executive of G. C. Mokwe and Sons limited.

43. That by a Deed of Conveyance dated 26/4/74 and registered as 81/81/712 in the lands Registry, Enugu (now kept at Awka) Chief George C. Mokwe conveyed the property known as No. 8 Old Market Road Onitsha to the applicant.

44. That hereto annexed and marked as Exhibit G is a copy of the deed of conveyance dated 26/4/74 and registered as 81/81/712 Enugu (now Awka)

45. That I am informed by the applicant and I verily believe that the applicant's application to be joined as a defendant in this suit is to enable the applicant defend its title and interest in the property known as No. 8 Old Market Road Onitsha.

46. That I am informed by the applicant and I verily believe that the applicant built a 3 storeyed building at No. 8 Old Market Road Onitsha which was awarded to the plaintiff/respondent by the High Court, Onitsha without hearing and or determining the applicant's applications to be joined as a necessary party in this suit”.

From the averments in the above paragraphs, it is abundantly clear that the respondent has a legally cognizable interest which the decision of the trial court seeks to deprive him of if not challenged; hence the filing of the notice of appeal on the day of judgment, accompanied by the application for leave to appeal. See Societe Generate

Bank (Nig.) Ltd. v. Afekoro (1999) 7 S.C. (Pt. III) 95; (1999)11 NWLR (Pt. 628)521. **By Order 3 Rule 4 (2) of the Court of Appeal Rules, 1981 (as amended), the two conditions which must be fulfilled to justify the grant of extension of time for leave to appeal are good and substantial reasons for failure to appeal within prescribed period and grounds of appeal which prima facie show good cause why the appeal should be heard.** See In Re Adewunmi & Ors. (1988) 7 S.C. (Pt. III) 1; (1988) 3 NWLR (Pt. 83) 483; University of Lagos v. Olaniyan (1986) 1 NWLR 156; Cooperative and Commerce Bank (Nig.) Ltd. v. Ogwuru (1993) 3 NWLR (Pt. 284) 630. **These conditions have been satisfied fully in this case, in my view, with particular reference to the averments in the affidavit in support of the application and the notice of appeal attached thereto.**

It is also of great importance to emphasize and bear in mind that the failure of the trial Judge to hear and determine the respondent's application to be joined as co-defendant to the action and for leave to appeal to Court of Appeal has serious effect on the proceedings in this case generally and must be considered in the interest of justice.

By virtue of the provisions of Section 222 (a) of the 1979 Constitution which is applicable to this case, the Court of Appeal has the discretion in granting or refusing an application before it for leave to appeal as an interested party and any such discretion exercised by it remains valid unless it is shown to have been wrongly exercised on erroneous principles or tainted with illegality. See Ndulue v. Ibezum (2002) (Pt.247) 331. **And this court does not substitute its own discretion for that of the court below in applications like this, unless the court below did not act in good faith or has been swayed by irrelevant considerations or acted arbitrarily or capriciously or under a misconception of law or misapprehension of fact.** See University of Lagos v. Olaniyan; (supra) In Re Alase (2002) 10 NWLR (Pt. 776) 553; University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143; Mbadugha H v. Nwosu (1993) 9 NWLR (Pt. 315) 110. **In the instant case, it is my respectful view that the Court of Appeal gave adequate considerations to all the relevant circumstances and materials placed before it in the**

application for leave and came to the right conclusions by exercising the discretion to grant the application as it did. I have earlier in this judgment explained that the grant of prayer 3 of the respondent's application has obviated the need to ask for enlargement of time to appeal. And looking at the grounds of appeal of the respondent in his application for leave, they appear to me to be substantial and arguable and it would be unjust, in my view, to still shut him up and refuse the application on purely technical grounds. For this reason, I cannot find any cause to interfere with the exercise of the discretion of the Court of Appeal in this case. I therefore resolve issues 1 and 2 in favour of the respondent.

From all what I have said above, I find no merit in this appeal having regard to the circumstances. I dismiss it and affirm the decision of the Court of Appeal delivered on 11th August, 1997. I award to the respondent N10,000.00 costs against the appellant.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Kalgo, JSC. I agree with his conclusion that the appeal is unmeritorious. It is accordingly dismissed with N10,000.00 costs in favour of the respondent against the appellant. It must be noted that the Cross-Appeal had earlier been struck out on 24/10/2001.

MUSDAPHER JSC

I have had the honour to read in advance the judgment of my Lord, Kalgo, JSC., just delivered, with which I entirely agree. For the same reasons so lucidly and comprehensively set out in the aforesaid judgment, which I respectfully adopt as mine, I too find no merit in this appeal. I dismiss it and I also abide by the order for costs contained in the aforesaid judgment.

PATS-ACHOLONU JSC

I agree

AKINTAN JSC

The dispute in this case arose over a building at No. 8 Old Market Road. Onitsha, which formed part of the estate of late Egerton Williams, the plaintiff's father. The claim was for a declaration that the defendant was not entitled to the building on No. 8 Old Market Road, Onitsha and that it belongs to the plaintiff; injunction restraining the defendant, his servants and/or agents from entering the said house and/or in any way interfering with the plaintiff's right to the said property; and N50,000 as general damages.

The original plaintiff died while the claim was pending at the High Court. Onitsha, where the action was filed and he was substituted by one E. Mokwe who is said not to be keenly interested in prosecuting the claim. The present respondent company, owned mainly by the deceased original defendant, applied to the trial court to be joined as a defendant. But its application to that court was not taken and the trial court eventually entered judgment for the plaintiff in the case.

Shortly after the trial High Court delivered its judgment, the respondent filed a notice of appeal against the judgment. He later filed a motion in which it prayed, inter alia, for extension of time to apply for leave to appeal against the judgment as a party interested; leave to appeal as a party interested: an order deeming the notice of appeal already filed as properly filed: and stay of execution of the judgment of the trial High Court. The motion was supported with an affidavit and at the hearing it was not opposed. All the prayers in the motion were therefore granted as prayed.

The appellant was dissatisfied with the decision and an appeal filed against it at the Court of Appeal was dismissed. The present appeal is against the decision of the Court of Appeal. Three issues were formulated as arising for determination in the appeal in the appellant's brief filed in this court. These are well set out in the leading judgment written by my learned brother, Kalgo, JCA. I therefore need not repeat them. All the issues raised in the appeal are also fully discussed and I entirely agree with the reasoning and conclusions reached in the said leading judgment.

The only aspect I will like to comment on is the contention that since the respondent did not obtain its leave to be joined as a party interested, it was wrong to grant the prayer deeming the notice filed before the

application was made. I believe that that submission is totally misplaced in that since the respondent was not a party in the case at the trial, it could only be a party when the court granted its prayer to appeal as a party interested. The time when the notice and grounds of appeal was in this case, B deemed to be filed is on the date the court granted the prayer for deeming the notice as properly filed. It was open to the court, as it was within the prayer before it, to order that the notice already filed be re-filed or give any other order as to how and when the notice could be filed or to deem C the one already filed as properly filed as the court ordered in the case. Any of the forms of filing mentioned above would be proper and within the prayer before the court. The contention that the order as made is unlawful is therefore totally wrong.

For the reason I have given above, and the fuller reasons given in the leading judgment just delivered by my learned brother, Kalgo JSC, D which I have read before now and which I adopt, I also agree that there is no merit in the appeal and I dismiss it with N10,000 costs in favour of the respondent.

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