

SUPREME COURT OF NIGERIA
27TH JANUARY, 2006. SC.186/2001
CORAM:- S. U. ONU, N. TOBI, G. A. OGUNTADE,
M. MOHAMMED, I. F. OGBUAGU, JJSC

AFRIBANK NIGERIA PLC APPELLANT
AND

MR. CHIMA AKWARA

[Doing business in the name and style RESPONDENT
of Chima Akwara Metal Works &
Foundry]

APPEALS - Statutes - Time to appeal - Before the Supreme Court - Is governed by the Supreme Court Act - And not the Supreme Court Rules (H1)

APPEALS - Competence - Extension of time - Leave to amend - Where appellant fails to file the amended notice - Within the extension of time granted - There will be no competent appeal (H2)

DAMAGES - Award of - Currency - Fairness - Where the circumstances justify - That the award be in foreign currency - The Court should do so (H3)

DAMAGES - Interest - Proof - Where interest is claimed - On the amount of damages - It should be proved by satisfactory evidence (H4)

JUSTICE - Fairness - Appeals - Striking out - Interest on damages - Where a party cannot contest fairness of award of interest - Because his appeal was struck out - Supreme Court will still uphold justice - By not sustaining the award (H5)

FACTS

The plaintiff/respondent filed an action against the defendant/appellant before the Aba High Court. The respondent sought inter alia, that appellant be ordered to transfer the sum of £17,647.00 to his overseas

customer as contracted between them, 20% interests on the said sum from July 1982, till judgment, N4 million damages for libel and N6 million special and general damages for negligence. He claimed a grand total N10 million from the appellant. The action arose from the appellant's failure to comply with the agreement reached in respect of the said transfer of foreign currency after respondent had lodged the naira equivalent with the appellant. Rather it gave the Central Bank that would release the pounds sterling a wrong information in stating that there was no naira available in the respondent's account with it, thereby defaming him.

The trial court dismissed the respondent's suit. His appeal to the Court of Appeal was allowed in part. That court awarded the sum of N4.5 million to the respondent for libel and negligence. It ordered the appellant to pay the sum of N21,717.48 the respondent lodged with it and 20% interest on that amount. Appellant being dissatisfied has now appealed to the Supreme Court while the respondent cross appealed seeking that the award be made in pounds sterling. Appellant that obtained leave to file an amended Notice of Appeal, failed to file the Notice within the extended time granted contending that time does not run during vacation. Respondent raised a preliminary objection as to the competence of the appellant's appeal.

ISSUE FOR DETERMINATION

“Whether the Court of Appeal was right to uphold the claim in foreign currency and then make the award in Naira; and if so whether the award in local currency for a Claim in foreign currency occasioned a miscarriage of justice.”

HELD (Unanimously striking out appellant's appeal and allowing respondent's cross appeal in part per **OGUNTADE JSC**)

Statutes - Time to appeal

1. It is made abundantly manifest in subsection (1) of section 27 above that the procedure a party wishes to appeal or bring an application for leave shall be in the manner directed by the Rules of court. Otherwise, it is the requirement of Statute in section 27 above that a person appealing shall bring his appeal within the periods prescribed. There is a specific jurisdiction in

the Supreme Court under subsection (4) to extend the periods prescribed. The Supreme Court Act above having specifically granted power to the Supreme Court to extend the periods prescribed in subsection (2) has thus taken the matter out of the power of the Chief Justice of Nigeria in the exercise of his authority to make Rules of court pursuant to section 236 of the 1999 Constitution. In other words, whereas the procedure for bringing an application for extension of time to appeal shall be in accordance with the Rules of Court, the power to extend the periods to appeal is directly vested in the Supreme Court. That power clearly derives from statute. There is therefore no power in the Chief Justice of Nigeria to extend the time to appeal even if he could make Rules governing the procedure to be followed. The Rules of Court could not therefore prescribe an extension of time to appeal. (p. 12 H)

APPEALS - Competence - Extension of time

2. It is undisputed that this Court on 25th June 2003 granted the appellant six weeks to file an amended Notice of Appeal. The effect of applying for and obtaining an order to amend an existing Notice of Appeal is to vacate the Notice of appeal and render it non-existent. In any case, the appellant having prepared the appellant's brief before us on the Amended Notice of appeal has himself eloquently conveyed that he was discarding the Notice of appeal previously filed. The six weeks given by this Court on 25/6/03 to the appellant to file its amended Notice of appeal expired on 6-8-2003. The appellant however did not file the amended Notice of appeal until 26-8-03. Neither did it seek a further extension of time. Clearly therefore, the late filing of the Amended Notice of appeal was unauthorized and a clear infraction of section 27(4) of the Supreme Court Act. In simple language appellant's Amended Notice of Appeal was filed out of time.

The consequence of the failure of the appellant to file its Amended Notice of Appeal within six weeks as ordered by this Court on 25-6-03 is that there is no competent appeal before this Court. The purported appeal is incompetent. It must be and is accordingly struck out. (p. 15 H)

Award of damages in foreign currency

3. It seems to me that the award of N21,717.48 to the Plaintiff/cross-appellant in the circumstances of this case is grossly unfair. If the case of the plaintiff/cross-appellant was that the defendant/cross-appellant negligently failed to pay £17,647.00 to the plaintiff/cross-appellant's overseas supplier and there was evidence that the debt remained unpaid, it ought to have occurred to the court below that in order to restore the plaintiff/cross-appellant to its pre-transaction position that judgment for the £17,647.00 ought to have been given in foreign currency. This was the only conclusion, which would enable the plaintiff/cross-appellant have enough money to pay to the overseas suppliers. This, the defendant/appellant ought to have done in 1982.

The cross-appeal accordingly succeeds. The judgment of the court below only in so far as it concerns the award of N21,717.48 being amount deposited with the defendant/appellant to purchase £17,647.00 is set aside. In its place, I award to the plaintiff/respondent/cross-appellant the sum of £17,647.00 (seventeen thousand, six hundred and forty seven pounds). The said amount shall attract interest at the rate of 4% per annum from the date of the judgment of the court below (i.e 25-5-2000) until the amount is completely liquidated. (pp. 18 E/ 20 A)

DAMAGES - Interest - Proof

4. The plaintiff/cross-appellant claimed 20% interest per annum on the amount claimed and the court below awarded interest at the rate claimed.

It is apparent that the plaintiff/cross-appellant did not call satisfactory evidence in support of his claim for 20% interest as awarded by the court below. There was no evidence that the plaintiff/cross-appellant's overseas suppliers had charged against him interest at 20% for his failure to pay promptly.

In Saeby Jernslober MF A/S v. Olaogun Enterprises [1999] 14 NWLR (Pt.637) 128 at 146, this Court recognized the jurisdiction of the Court of Appeal to give judgment in foreign currency if the facts so justified. (pp. 18 H/ 19 G)

JUSTICE - Fairness - Appeals - Striking out

5. The defendant/appellant whose appeal I have struck out earlier has for that reason been unable to contend that the 20% interest awarded by the court below was unjustified. In the light of my decision to award to the plaintiff/cross-appellant the claim for £17,647.00 in the currency claimed, it seems to me unjust to sustain interest on the said sum at 20%. I believe that the court below was swayed to award as high an interest as 20% because it did not consider awarding the claim in foreign currency. (p. 19 E)

NOTABLE POINTS OF INTEREST

OGUNTADE JSC

1. Need for counsel to rely on applicable judicial precedents

I must express my surprise here that appellant's counsel placed reliance on *Auto Import Export v. Adebayo* [2002] 103 LRCN 2397. It is either that counsel had not read the report before citing it before us or that he meant to mislead the court. I think it is kind to assume it's the former. It is however regrettable that counsel would cite before this court a case that is clearly against the principle being urged us on the pretext that the case supports the principle. In that case at pages 2413-2415, this Court per Iguh JSC observed:

"I think I ought to state that it cannot be overemphasized that appeals generally are creations of statute and failure to comply with the statutory requirements prescribed by the relevant laws under which such appeals may be competent and properly before the court will deprive such appellate court of jurisdictions to entertain the appeal. See Kudiabor v. Kudanu 6 W.A.C.A. 14. In particular, failure to file an appeal within the statutory period of time prescribed by law without obtaining an extension of time within which to appeal in accordance with the provisions of the Rules or to comply with the statutory requirements which are conditions precedent to the filing of a valid appeal constitutes a grave irregularity, so fundamental that there would be no appeal which the appellate court could lawfully entertain. Such irregularity can by no means be regarded as mere technicality but constitutes an incurable defect that must deprive the appellate court of jurisdiction to entertain the appeal and whether or

not the irregularity was noticed or that no objection was taken to it is not an argument which can legitimately be put forward with any effect when the matter comes before the court. (p. 13 D)

B **TOBI JSC**

2. *Time not running during vacation is only with respect to briefs*

A Practice Direction made by the Chief Justice of Nigeria under Order 10 Rule 2 which will be regarded as a rule, will also be subject to the interpretation of the Supreme Court, like any other Order or Rule of the Court.

C Order 10 Rule 2 provides as follows:

“The Chief Justice may, at any time, by notice declare a practice of the Court as a Practice Direction and whenever so declared, such Practice Direction shall be regarded as part of these Rules.”

D It is the above rule that vests in the Chief Justice of Nigeria the power to declare a Practice Direction, which relevantly is traced or traceable to Order 6 Rule 5 of the Supreme Court Rules. The rule is not open ended. It is clearly restricted to briefs and so counsel cannot invoke the rule to cover the present situation of filing Notice of Appeal. (p. 22 B)

E 3. *Libel lies against appellant - And justification is not proved*

F It is clear from the evidence of the three witnesses quoted above that there was negligence on the part of the appellant and by the publication of the defamatory statement, the appellant committed libel. It is a most serious slur on the part of the appellant to publish to the immediate business community that the respondent was impecunious, a publication which resulted in damage to the business life of the respondent. By the publication, the whole business reputation, integrity and well being of the respondent crashed within the business community and that did damage to him and his business. The appellant cannot get out of it.

G The appellant would appear to have pleaded justification when counsel submitted that “the information given to the Central Bank, looking at the surrounding circumstances of the case, is true and therefore very justifiable.” Learned counsel tried to justify the above by referring to what H he called the “*shortfall*”. The burden is on the appellant to prove that there

was a shortfall which justified the libel. I do not think there was any such proof. (p. 25 B)

OGBUAGU JSC

4. Rules of court cannot override statutory provisions B

In other words, Rules of Court, are not as sacrosanct as Statutory provisions of law. A rule of court, cannot confer jurisdiction. It only regulates the practice of the court in the exercise of a power derived aliunde (from another source or from elsewhere) and does not confer power.

Therefore, neither Practice Directions nor Rules of Court, can override Statutory Provisions. (p. 30 E) C

5. It is time for filing pleadings & briefs that do not run during vacation

Just as the time for filing and serving pleadings, do not run during Annual Vacation - See *Nishizawa Ltd. v. Jethwani* (1994) 12 S.C. 234 @ 244 - per Obaseki, JSC, so also, by virtue of Order 6 Rule 5 of the Supreme Court Rules, 1985 and the said Practice Direction of the CJN which became effective from 24th June, 1985 pursuant to Order 10 Rule 2 of the Supreme Court Rules, Time, does not run in the computation of the period of filing Briefs. These, have nothing to do with and does not in any way, concern the statutory period of time within which to appeal or the filing of a Notice of Appeal or within such time that is extended by the court on application by an Appellant. (p. 31 C) D E F

6. Interest predating date of judgment - How awarded

As regards the Cross-Appeal of the Respondent, I wish to add that it is now settled, that except where parties have agreed on payment of interest, it is not right to award interest pre-dating the date of judgment. G

There must be express agreement that interest will be charged. (p. 32 B)

H

REPRESENTATION

C. O. Olisa Abutu Esq. for the Appellant.

Uche Nwokedi Esq. (John Eramah, Chief (Mrs.) M. I. Obegolu and Jidefor

- 8 Afribank Plc. v. Akwara (2006) 1 KLR Oguntade JSC
Edoga with him) for the plaintiff/respondent/cross-appellant.

CASES REFERRED TO

- Idiang v. State [1981] 6-7 S.C. 95 at 96
B Kiren v. Pascal and Ludwig [1978] 11 & 12 S.C. 77
Koya v. U.S.A. Ltd. [1997] 1 NWLR (Pt.481) at 289
Millianges v. George Frank (Textile) Ltd [1975] 3 All E.R. 801 (HL)
Barclays Bank International Ltd. V. Levin Brothers (Bradford) Ltd [1976] 3 All E.R 900
C Ajide v. Kelani (1988) 3 NWLR (Pt.12) 248 @ 257, 258
Ogidi v. Egba (1999) 10 NWLR (Pt.621) 42 @ 71; (1999) 6 SCNJ. 107
Ogunyemi v. Dada (1962) 1 ANLR 663
Copper v. Smith (1883) 24 Ch. J. 305
Alhaji Edun v. Odan Community, Ado Family etc. (1980) 10-11 SC. 103
D University of Lagos & anor. v. Aigoro (1984) II S.C. 152 @ 191
Airports Authority v. Chief Okoro (1995) 6 NWLR (Pt.403) 510 @ 522-523; (1995) 7 SCNJ. 1
Nneji & 3 ors v. Chief Chukwu & 7 ors (1988) 3 NWLR (Pt.81) 184 @
E 202-204. (1988) 6 SCNJ. 132
U.B.N. Ltd. v. Odusote Bookstores Ltd. (1995) 9 NWLR (Pt 421) 558,
(1995) 12 SCNJ. 175

F **STATUTE & RULES REFERRED TO**

- Supreme Court Act s. 27(1)-(4)
Supreme Court Rules, 1985 O.10 r. 2, O. 6 r. 5

LEAD JUDGMENT BY OGUNTADE JSC

- G The respondent, as the plaintiff, issued his writ of summons against the appellant (as the defendant) on 11-4-90 at the Aba High Court of Imo State claiming the following:
“(a) An order of this Honourable Court directing the Defendant to transfer to the Plaintiffs oversea’s Customer as contained in BILL NUMBER BC. 1406/81 namely NEWBY IRON FOUNDERS LIMITED
H OF WEST MIDLANDS the sum of £17,647.00 (seventeen thousand six

hundred and forty seven pounds sterling) as contracted between them.

(b) 20% (twenty per centum) interest on the said sum of £17 ,647.00 from July 1982 till judgment is delivered.

(c) 4% (four per centum) interest on the said sum from the date of judgment until completely liquidated.

(d) N4m. (four million Naira) damages for libel

(e) N6m. (six million Naira) special and general damages for negligence.

PARTICULARS OF SPECIAL DAMAGES

(i) 252,000 pieces of water pipe fittings at N17.00 (Seventeen Naira) loss per pipe fitting: = N4,284,000.00

(ii) 1,400 tonnes of mild steel sections from John Willisma Steel Services Ltd. at N940.00 loss per to tonne = N1,316,000.00

(iii) Airtickets/Transportation = 30,000.00

(iv) Hotel Bills/Accommodation = 144,000.00

(v) Telex Messages/Telephone calls = 5,000.00

(iv) Telex Messages/Telephone calls =

N5,000.00 General Damages

= 221,000.00 TOTAL

= 6,000,000.00 G R A N D

TOTAL = N10,000,000.00

The parties filed and exchanged pleadings. The relevant pleadings are the Statement of claim filed on 5-9-90 and the Amended Statement of defence filed on 13-6-91. The suit was tried by Chianakwalam J. In his judgment on 5-7-91, the trial judge dismissed the plaintiffs suit. Dissatisfied, the plaintiff brought an appeal against the said judgment before the Court of Appeal, Port Harcourt Division (hereinafter referred to as the court below). The court below in its judgment on 25-5-2000 allowed the appeal. In concluding the judgment, the court below at page 191 of the record said:

“For libel and negligence, I award N4.5 million. It must not be forgotten that the parties entered in the transaction since 1982 when 1 dollar was less than 1 Naira. At that time £17,000.00 was \$421,000..... Now £17,000.00 is worth more than (£42 million).

The respondent will pay the sum of \$421,717.48 lodged with it at the instant (sic) rate of 20% until today the judgment day and interest of 4% on the judgment debt till it is completely liquidated. The proof of special damage is scanty. But there is a proof of travels. On Air ticket for overseas travels I find as proved a sum totalling only N5,940.00.”

B The defendant before the High Court and respondent before the court below was dissatisfied with the judgment of the court below. It has brought this appeal before this court. The plaintiff also filed a cross-appeal. In the appellant’s brief filed, the issues for determination were identified
C as the following:

“ 1. Who had the burden of proving the state and/or status of the respondent’s account with the appellant and was that burden discharged as required by law?

D 2. In the peculiar circumstances of this case, was the Information ‘NO NAIRA AVAILABLE’ given to the Central Bank by the appellant concerning the Respondent’s account wrong, and can the appellant be held liable for changing that position in order to assist the respondent?

E 3. Did the Exchange Risk Indemnity provide a mandatory obligation on the appellant to make up the shortfall and debit the respondent’s account whether or not there was money in the said account?

4. From the evidence before the court of first instance did the appellant inform the respondent of the shortfall?

F 5. In the circumstances of the case, were the words ‘NO NAIRA AVAILABLE’ defamatory of the character of the Respondent?

6. Was there any evidence and was it proper in law for the learned Justices of the Court of Appeal to arrive as they did at the sum of N4.5million as fair damage for libel and negligence?

G 7. Was it right for the lower court to deliver judgment Against a non-existent company?”

The respondent formulated four alternative issues for determination in the appeal. The issues read:

H “(i) Was the Court of Appeal right to have found libel and negligence against the appellant proved and was the award of damages for libel and negligence against the law?

“(ii) Was the Court of Appeal right to have allowed the appeal

against a non-existent legal entity.

(iii) *Did the Court of Appeal properly evaluate Exchange Risk Indemnity?*

(iv) *Was the Court of Appeal right to hold that the appellant prevaricated when it held ‘no Naira’ and later ‘there was Naira’ to the Central Bank of Nigeria. In other words, on whom does the burden of ‘No Naira’ or ‘there is Naira’ rest?’* B

From the cross-appeal, respondent’s counsel formulated one issue for determination thus:

“Whether the Court of Appeal was right to uphold the claim in foreign currency and then make the award in Naira; and if so whether the award in local currency for a Claim in foreign currency occasioned a miscarriage of justice.” C

The appellant did not file an alternative issue in the cross-appeal. D

The respondent in his brief raised a preliminary objection as to the competence of the Amended Notice of Appeal upon which the brief was based. The objection reads:

“(1) The respondent will by way of an objection in limine contend that the appellant’s amended grounds of appeal, dated 21st August, 2002 but filed in court on 26/8/02 is consistent with Form 12, Order 8 Rule 2 of the Supreme Court Rules. If it is so, the said application is incompetent as the time allowed to appeal consistent with Section 27(2) Supreme Court, Act Cap.424 Laws of the Federation 1990 had expired. The Court is urged to strike out the said Amended Notice of Appeal.” E F

The appellant in its Reply brief reacted to the respondent’s preliminary objection in these words:

“On the 25th June, 2003, the Supreme Court ordered that the appellant should file an Amended Notice of Appeal (containing 6 original and 11 additional Grounds of Appeal) within 6 weeks from that day. It is trite that time does not run during vacation, and so the six weeks granted the appellant by the Supreme Court starting from 25th of June, 2003 should have expired about the 20th of September, 2003 taking into consideration the fact that time will not run in August which was the vacation period. The Amended Notice of Appeal filed on the 26/8/2003 is therefore competent and within time. See the 1985 Practice Direction of the CJN dated 24/6/85 G H

12 Afribank Plc. v. Akwara (2006) 1 KLR Oguntade JSC
and Order 6 Rule 5(7) of the Supreme Court Rules. See also the case of
Auto Import v. Adebayo [2002] 103 LRCN 2397.”

B Could the appellant’s counsel be correct in his submission reproduced above? I think not. The time within which to appeal to the Supreme
Court from a judgment or order of the Court of Appeal is governed entirely
by Section 27 of the Supreme Court Act which provides:

C “27(1) *Where a person desires to appeal to the Supreme Court, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by Rules of court within the period prescribed by subsection (2) of this section that is applicable to the case.*

(2) *The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are -*

D (a) *in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision;*

(b) *in an appeal in a criminal case, thirty days from the date of the decision appealed against.*

E (3) *Where an application for leave to appeal is made in the first instance to the court below, a person making such application shall in addition to the period prescribed by subsection (2) of this section be allowed a further period of fifteen days, from the date of the hearing of the application by the court below, to make an application to the Supreme Court.*

F (4) *The Supreme Court may extend the periods prescribed in subsection (2) of this section.”*

G It is made abundantly manifest in subsection (1) of section 27 above that the procedure a party wishes to appeal or bring an application for leave shall be in the manner directed by the Rules of court. Otherwise, it is the requirement of Statute in section 27 above that a person appealing shall bring his appeal within the periods prescribed. There is a specific jurisdiction in the Supreme Court under subsection (4) to extend the periods prescribed. The Supreme Court Act above having specifically granted power to the Supreme Court
H to extend the periods prescribed in subsection (2) has thus taken the

matter out of the power of the Chief Justice of Nigeria in the exercise of his authority to make Rules of court pursuant to section 236 of the 1999 Constitution. In other words, whereas the procedure for bringing an application for extension of time to appeal shall be in accordance with the Rules of Court, the power to extend the periods to appeal is directly vested in the Supreme Court. That power clearly derives from statute. There is therefore no power in the Chief Justice of Nigeria to extend the time to appeal even if he could make Rules governing the procedure to be followed. The Rules of Court could not therefore prescribe an extension of time to appeal.

I must express my surprise here that appellant's counsel placed reliance on *Auto Import Export v. Adebayo* [2002] 103 LRCN 2397. It is either that counsel had not read the report before citing it before us or that he meant to mislead the court. I think it is kind to assume it's the former. It is however regrettable that counsel would cite before this court a case that is clearly against the principle being urged us on the pretext that the case supports the principle. In that case at pages 2413-2415, this Court per Iguh JSC observed:

"I think I ought to state that it cannot be overemphasized that appeals generally are creations of statute and failure to comply with the statutory requirements prescribed by the relevant laws under which such appeals may be competent and properly before the court will deprive such appellate court of jurisdictions to entertain the appeal. See Kudiabor v. Kudanu 6 W.A.C.A. 14. In particular, failure to file an appeal within the statutory period of time prescribed by law without obtaining an extension of time within which to appeal in accordance with the provisions of the Rules or to comply with the statutory requirements which are conditions precedent to the filing of a valid appeal constitutes a grave irregularity, so fundamental that there would be no appeal which the appellate court could lawfully entertain. Such irregularity can by no means be regarded as mere technicality but constitutes an incurable defect that must deprive the appellate court of jurisdiction to entertain the appeal and whether or not the irregularity was noticed or that no objection was taken to it is not an argument which can legitimately be put forward with any effect when the matter comes before the court. See Oranye v. Jibowu (1950) 13 W.A.C.A

41. So, too, in *Ohene Moore v. Akesseh Tayee* 2 W.A.C.A. 43 the Judicial Committee of the Privy Council was concerned, not with any extension of time but with failure by the appellant to fulfil certain statutory conditions requisite for the purposes of the appeal. The first appellate court would appear to have dismissed such failure as mere technicality which could be ignored in order that substantial justice might be done but, Lord Atkin, delivering the judgment of the Judicial Committee of the Privy Council at page 45 of the report made it quite plain that such was not the proper view. Said the noble Lord:-

C 'It is quite true that their Lordships, as every other court, attempt to do substantial justice and to avoid technicalities, but their Lordships, like any other court are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other court to have jurisdiction.'

D The appeal was accordingly allowed and the proceedings and judgment of the then first appellate Supreme Court were declared a nullity. I have gone thus far to emphasise in the clearest terms the very grave and serious consequences that necessarily result from filing an appeal out of time without taking step to have the time extended in accordance with the Rules of Court or from failure by the appellant to comply with statutory mandatory conditions requisite for the purposes of an appeal.

F Learned counsel for the appellant did however attempt to avoid the disastrous consequences that must visit his purported appeal if, in fact, the same was filed out of time. He submitted that that appeal was filed well within the time stipulated by law, that the common practice in the Supreme Court is that during annual vacation, time does not run and that if the period of vacation of either the Court of Appeal or the Supreme Court is subtracted from the period between the 1st July, 1996 when the judgment was delivered and the 4th October, 1996 when the Notice of Appeal was filed well within time.

G It would seem to me that the Practice Direction learned counsel for the appellant appears to be alluding to is that issued by the Honourable The Chief Justice of Nigeria which took effect from the 24th day of June 1985. It went *inter alia* as

'In giving effect to the provisions of Order 6 Rule 5 of the Supreme Court Rules, 1985 the period of the vacation which is declared between July and September each year shall not be taken into account for the computation of the period of filing briefs by either the appellant or the respondent in an appeal before the court'

The above Practice Direction which was rightly issued Pursuant to the provisions of Order 10 Rule 2 of the Supreme Court Rules has since been regarded as part of those Rules. However, the Practice Direction merely pertains to the computation of the period of filing briefs by either parties to an appeal and does not concern the statutory period of time within which to appeal from a decision of the Court of Appeal as expressly provided for under Section 27(2) of the Supreme Court Act, Cap.424, Laws of the Federation of Nigeria, 1990.

At all events, I need, perhaps to stress that neither Practice Directions nor, indeed, Rules of Court can override Statutory Provisions. Section 27(2)(a) of the Supreme Court Act, Cap.424, Laws of the Federation of Nigeria, 1990 which makes provision in respect of the periods of time within which to appeal has neither stipulated nor suggested that the times therein prescribed shall cease to run during periods of vacation and I do not conceive it the duty of this Court to usurp the Legislative powers of the National Assembly under whatever guise by amending laws enacted by them other than to interpret them in accordance with the laws of the land."

It is undisputed that this Court on 25th June 2003 granted the appellant six weeks to file an amended Notice of Appeal. The effect of applying for and obtaining an order to amend an existing Notice of Appeal is to vacate the Notice of appeal and render it non-existent. In any case, the appellant having prepared the appellant's brief before us on the Amended Notice of appeal has himself eloquently conveyed that he was discarding the Notice of appeal previously filed. The six weeks given by this Court on 25/6/03 to the appellant to file its amended Notice of appeal expired on 6-8-2003. The appellant however did not file the amended Notice of appeal until 26-8-03. Neither did it seek a further extension of time. Clearly therefore, the late filing of the Amended Notice of appeal was unauthorized and a clear infraction of

section 27(4) of the Supreme Court Act. In simple language appellant's Amended Notice of Appeal was filed out of time.

In *Idiang v. State* [1981] 6-7 S.C. 95 at 96, this Court per Bello, JSC (as he then was) observed:

B *“The appellant was convicted of murder and sentenced to death on 18th May, 1976, in the High Court, sitting at Uyo. His appeal to the Federal Court of Appeal was struck out on 15th January 1979. By reasons of Section 31 (2)(b) of the Supreme Court Act, the purported appeal is incompetent in that the appellant did not appeal within 30 days from the*
C *date of the decision of the Court of Appeal. The purported appeal shall accordingly be struck out.”*

See also *Kiren v. Pascal and Ludwig* [1978] 11 & 12 S.C. 77.

The consequence of the failure of the appellant to file its Amended Notice of Appeal within six weeks as ordered by this Court
D **on 25-6-03 is that there is no competent appeal before this Court. The purported appeal is incompetent. It must be and is accordingly struck out.**

I now consider the cross-appeal from which the respondent/
E cross-appellant distilled one issue. That issue raises the question whether or not the court below was right not to have awarded the amount claimed by the Respondent/cross-appellant as special damages in the foreign currency involved in the transaction. In responding to this issue, it is necessary to
F consider the facts as pleaded by the plaintiff/cross-appellant. In paragraph 3 to 10B of his statement of claim, the plaintiff/cross-appellant pleaded thus:

“3. The Plaintiff transacts business with his overseas customers through the Defendant Bank.

G *4. The Plaintiff about September 1981, negotiated with his overseas customer namely NEWBY IRON FOUNDERS LTD. Of WEST MIDLANDS ENGLAND FOR THE SUPPLY to him of water pipe fittings.*

5. The said Newby Iron Founders Ltd. Granted credit facilities to the Plaintiff and allowed him time after the sales, to remit to him the value of the goods supplied, the remittance must be done through Bankers
H *nominated by the Plaintiff and accepted by the said Newby Iron Founders Ltd. According to their agreement.*

6. *The Plaintiff following this agreement nominated the Defendant Bank and this was accepted by the Newby Iron Founders Ltd.*

7. *Sometimes in December 1981, the said Newby Iron Founders Ltd shipped to the Plaintiff, quantities of water pipe fittings in line with the agreement pleaded in paragraph 5 above valued at £17,647.00 (seventeen thousand, six hundred and forty seven pound sterling).* B

8. *About the 23rd day of July 1982, the Plaintiff paid for the said supply in local currency (namely in Naira) the equivalent of the said £17,647.00 (seventeen thousand, six hundred and forty seven pounds sterling) at the ruling exchange rate at that time.* C

9. *The defendant on the 5th day of August 1982, applied on the Plaintiffs behalf to the Central Bank of Nigeria for foreign exchange allocation for the transfer of the Bill settled through them on 23rd day of July 1982, and pleaded in paragraph 8 above.* D

10. *By a letter reference No. BILLS/OE/735/83 of 23rd day of August 1983, written on behalf of the Defendant Bank, copy of which was sent to Newby Iron Founders Ltd. the defendant acknowledged the averments in paragraphs 8, 8b, and 9 of this Statement of claim. Copy of the said letter is hereby pleaded and will be founded upon. Notice is hereby given to the defendant to produce the original at the hearing of this suit.* E

10b. *The Defendant again by their letter dated 17th day of February 1983 Ref. No. BILLS/JKO/EAO/144/63 confirmed this application for transfer of the sum of £17,647.00. The said letter is hereby pleaded and will be relied upon at the hearing of this suit. Notice is hereby given to the defendant to produce the original at the hearing of this suit.”* F

The case which the plaintiff/cross-appellant made in the trial court was that he paid the equivalent of £17,647.00 in local currency to the defendant/appellant. The sum was to be transmitted to the plaintiff/cross-appellant's overseas supplies for goods already supplied to the plaintiff/cross-appellant. It was pleaded that the defendant/appellant negligently failed to transmit the money to the overseas suppliers. The transaction was done in 1982. At that time the equivalent of £17,647.00 in local currency was only \$421,717.48. This was the amount the plaintiff/ G H

cross-appellant paid to the defendant/appellant. The court below upheld plaintiff/cross-appellant's entitlement to full compensation for the amount he paid to the defendant/appellant. At page 191 of the record, the court below in its judgment said:

B *"It must not easily be forgotten that the parties entered in the transaction in 1982 when one dollar was less than 1 Naira. At that time £17,000.00 was 1421,000.00 Naira odd. Now £17,000.00 is worth more than N2million).*

C *The respondent will pay the sum of N21,717.48 Lodged with it at the instant rate of 20% until today the judgment day and interest of 4% on the judgment debt till it is completely liquidated.*" (underlining mine)

D **It seems to me that the award of N21,717.48 to the Plaintiff/cross-appellant in the circumstances of this case is grossly unfair. If the case of the plaintiff/cross-appellant was that the defendant/cross-appellant negligently failed to pay £17,647.00 to the plaintiff/cross-appellant's overseas supplier and there was evidence that the debt remained unpaid, it ought to have occurred to the court below that in order to restore the plaintiff/cross-appellant to its pre-trans-**
E **action position that judgment for the £17,647.00 ought to have been given in foreign currency. This was the only conclusion, which would enable the plaintiff/cross-appellant have enough money to pay to the overseas suppliers. This, the defendant/appellant ought to have done in 1982.**
F

The plaintiff/cross-appellant claimed 20% interest per annum on the amount claimed and the court below awarded interest at the rate claimed. In paragraph 34 of the Statement of Claim, the plaintiff pleaded:

G *"The plaintiff shall lead evidence to show that he is entitled to all the interest accruing on this deposit since entitled to all the interest accruing on this deposit since 1982 the deposit was made."*

The plaintiff in his evidence-in-chief at page 38 of the record testified thus:

H *"The defendant still withholds the amount. I want the court to direct the defendant to transfer to My customers Newby Iron Founders*

Ltd. The sum of £17,643,00. The defendant should pay 20% interest of the amount to me they have been using the money from 1982 until judgment is given. ”

Under cross-examination at page 42 of the record of proceedings, the plaintiff said:

“There was no agreement the defendant ’would pay 20% interest.”

It is apparent that the plaintiff/cross-appellant did not call satisfactory evidence in support of his claim for 20% interest as awarded by the court below. There was no evidence that the plaintiff/cross-appellant’s overseas suppliers had charged against him interest at 20% for his failure to pay promptly.

The defendant/appellant whose appeal I have struck out earlier has for that reason been unable to contend that the 20% interest awarded by the court below was unjustified. In the light of my decision to award to the plaintiff/cross-appellant the claim for £17,647.00 in the currency claimed, it seems to me unjust to sustain interest on the said sum at 20%. I believe that the court below was swayed to award as high an interest as 20% because it did not consider awarding the claim in foreign currency.

In Saeby Jernslober MF A/S v. Olaogun Enterprises [1999] 14 NWLR (Pt.637) 128 at 146, this Court recognized the jurisdiction of the Court of Appeal to give judgment in foreign currency if the facts so justified. See also Koya v. U.S.A. Ltd. [1997] 1 NWLR (Pt.481) at 289; Millianges v. George Frank (Textile) Ltd [1975] 3 All E.R. 801 (HL); Barclays Bank International Ltd. V. Levin Brothers (Bradford) Ltd [1976]3 All E.R 900 and The Despina R. [1979] 1 All E.R. 421.

The cross-appeal accordingly succeeds. The judgment of the court below only in so far as it concerns the award of N21,717.48 being amount deposited with the defendant/appellant to purchase £17,647.00 is set aside. In its place, I award to the plaintiff/respondent/cross-appellant the sum of £17,647.00 (seventeen thousand, six hundred and forty seven pounds). The said amount shall attract interest at the rate of 4% per annum from the date of the judgment of the court below (i.e 25-5-2000) until the amount is completely liquidated. There will be costs in favour of the plaintiff/respondent/cross-appellant against the

20 Afribank Plc. v. Akwara (2006) 1 KLR Oguntade JSC
defendant/appellant assessed and fixed at N10,000.00.

ONU JSC

B Having been privileged to read in draft form the judgment of my learned brother Oguntade, JSC just delivered, I am in agreement with him that the instant appeal is incompetent and must perforce fail. Accordingly, it is struck out.

C The cross appeal succeeds and it is accordingly with costs as assessed in the leading judgment.

TOBI JSC

D I have read the judgment of my learned brother, Oguntade, JSC in draft and I entirely agree with him. There are two issues worth considering in this appeal. The first is in respect of the Amended Notice of Appeal filed out of time and the second is the issue of damages raised in the cross-appeal.

E There is no dispute that the Amended Notice of Appeal dated 21st August, 2002 was filed on 26th August, 2002. Flowing from the above, the respondent raised a preliminary objection in his brief as follows:

F *“The respondent will by way of an objection in limine contend that the applicant’s amended grounds of appeal, dated 21st August, 2002 but filed in court on 26th August, 2002 is consistent with Form 12, Order 8 Rule 2 of the Supreme Court Rules. If it is so, the said application is incompetent as the time allowed to appeal consistent with section 27(2) Supreme Court Act Cap. 424 Laws of the Federation 1990 had expired. The Court is urged to strike out the said Amended Notice of Appeal.”*

G Section 27(2) of the Supreme Court Act, 1990 reads:

“The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are -

(a) in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision;

H

(b) in an appeal in a criminal case, thirty days from the date of the decision appealed against”

The applicable provision is section 27(2)(a) and not section 27(2) (b), as the latter deals with appeal in criminal matters. As it is, section 27(2) (a) is straightforward and it is fourteen days in respect of an interlocutory decision. Unless the period of fourteen days is extended by virtue of section 27(4), it remains fourteen days and no more. B

The appeal decision and the right of appeal persist as long as the appellant files the Notice of Appeal within the statutory period or within an extended period to do so. It is elementary law that it is only the court that can extend the period within which an appeal can be filed. A party cannot on its own be indolent and suddenly wake up from the indolence or slumber to file an appeal out of time without seeking the leave of court. That will be against the rules of court and the court will strike out the application effortlessly. C D

Rules of court are not made for fun but are made to be obeyed by the parties and must be obeyed by the parties. There will be no order in the judicial process where the rules governing the process are not obeyed or where parties are free like the air to seek relief from a court as and when they like without any regard to the rules providing for time within which a relief could be sought in the court. That will result in the already congested causes and delayed justice which are becoming most unbearable and irksome. We will not add one bit to the malady. E F

Learned counsel for the appellant argued in the Reply Brief that time does not run during vacation and so the six weeks granted by this Court from 25th June, 2003 should have expired about the 20th of September, taking into consideration the fact that time will not run in August which was the vacation period. He relied on the 1985 Practice Direction of the Chief Justice of Nigeria dated 24th June, 1985. G

Can the appellant be heard to invoke the 1985 Practice Direction in the light of section 27(4) of the Supreme Court Act which vests in the Court the power to extend the periods prescribed in section 27(2) of the Act in the circumstances of this appeal? Can this Court automatically apply the Practice Direction willy-nilly qua rule of Court? I think not. A Practice H

Direction made by the Chief Justice of Nigeria under Order 10 Rule 2 which will be regarded as a rule, will also be subject to the interpretation of the Supreme Court, like any other Order or Rule of the Court.

Order 10 Rule 2 provides as follows:

B *“The Chief Justice may, at any time, by notice declare a practice of the Court as a Practice Direction and whenever so declared, such Practice Direction shall be regarded as part of these Rules.”*

C It is the above rule that vests in the Chief Justice of Nigeria the power to declare a Practice Direction, which relevantly is traced or traceable to Order 6 Rule 5 of the Supreme Court Rules. The rule is not open ended. It is clearly restricted to briefs and so counsel cannot invoke the rule to cover the present situation of filing Notice of Appeal. My learned brother has made the point and I entirely agree with him. In the circumstances, the Amended Notice of Appeal filed on 26th August 2003 was not filed
D within the extended period of six weeks and is therefore incompetent. I therefore strike it out.

And that takes me to the cross-appeal. It is the case of the respondent that following the information to the Central Bank of Nigeria by the appel-
E lant portraying the respondent as an impecunious businessman incapable of fulfilling his financial obligations and therefore totally unreliable, the Central Bank of Nigeria rejected the respondent’s application for release of foreign exchange allocation in payment of the Bill No. BC/1406/81
F AB. This gave birth to the claim by the respondent of damages for libel and negligence.

The Court of Appeal awarded damages but in the Nigerian currency of the naira. The Court said:

G *“For libel and negligence, I award N4.5 Million. It must not be easily forgotten that the parties entered in the transaction since 1982 when 1 dollar was less than 1 Naira. At that time £17,000.00 is worth more than N2 million.”*

This has vexed the respondent and so he raised the issue whether the award of damages for libel and negligence by the Court of Appeal was not against the law.

H The appellant has a different case and it is that in the circumstances

of the case, the words ‘NO NAIRA AVAILABLE’ were not defamatory of the character of the respondent. Learned counsel submitted that no reasonable man could infer any defamatory concept on the person or integrity of the respondent. He relied on the common law celebrity, *Donogue v. Stevenson* (1932) AC 562. Counsel also submitted that the information B given to the Central Bank is true and therefore very justifiable, as the respondent failed to make up for the shortfall and the sum initially paid by him was not enough to meet up the application he made for foreign exchange. He cited the case of *Emeagwara v. Star PPCL* (2000) 78 LRCN C 1701.

The above submission necessitates examining whether the Court of Appeal was right in holding that there was negligence and defamation on the part of the appellant, giving rise to the damages awarded by the Court. And that will take me to the evidence on the issue. The respondent D as plaintiff gave evidence in-chief at page 34 of the Record:

“The Central Bank in the report required the defendant to give to the Central Bank a debtors report on each individual transaction. In my own case the Central Bank required the defendant to inform them E whether or not I had paid for the transaction. In my own case if the answer was positive, the Central Bank would have paid the overseas debt. If the answer was negative, the Central Bank would not pay... In my own case the defendant negligently informed the Central Bank that I had not F paid for the transaction. In consequence the Central Bank did not pay my overseas customers. The Central Bank wanted the defendant to write ‘A’ if money has been paid and ‘N’ if no money was paid. The Central Bank wanted the defendant to write only one letter and not more than one G letter. The defendant wrote ‘N’ meaning no naira was available, in other words that I had not paid for the transaction. At that time I had paid for the transaction years back in 1982 and the defendant acknowledged the payment. If I had not paid, the defendant would not have applied to the Central Bank for foreign exchange. The Central Bank did not therefore H pay for my transaction.”

On the issue, PW1, Ndukwe Nlemadim, of the Central Bank said in his evidence in-chief at pages 42 and 43 of the Record:

“If naira was available the confirmation would be ‘A’, the infor-

B
mation was entered on a form called Report G... I see plaintiff's Exhibit No. 3. It is a Report G... The claim station was approved by Central Bank pending naira availability. In effect it means the defendant did not confirm naira availability to Central Bank. The application was rejected for no naira payment."

DW1, T. A. Aderounmu, another staff of the Central Bank, this time for the appellant, said in his evidence in-chief at page 50 of the Record:

C
"The Bank in London was to issue promissory note on all items that were marked 'A'. This particular one was marked 'N' on the red copy the Central Bank had, hence promissory note was not issued."

On the issue of negligence, the Court of Appeal said in its judgment at page 189 of the Record:

D
"Where a Bank is requested by the Central Bank to give it information relating to the credit-worthiness of a Customer as regards an application for Exchange Control and to the knowledge of the Bank there was money in the account or lodged for such an application, if it gives an adverse information, it is total breach of care and is liable for negligence as well as breach of contract."
E

On the issue of defamation, particularly as it relates to publication, the Court of Appeal said in its judgment on the same page of the Record:

F
"The next question is whether the issuance of No Report was published and circulated to third parties apart from the Central Bank. Well in the first place, the 'report was given to and therefore published to the Central Bank. Newby Foundry Ltd. of UK got to know about it. Equally too the information was given to other companies with whom the Appellant did business with. The information given to the Central Bank shows that on the face of it the Appellant was impecunious and therefore defamatory as such was not the case. Defamation connotes publishing of words calculated to hold one in hatred contempt in SLIM V STRECH (1936) TLR 669 at 671 as publication which would cause someone to be shunned or avoided."
G

H
 I do not see any reason to disagree with the above position taken by the Court of Appeal because the Court is correct. It is clear from the

evidence of the three witnesses quoted above that there was negligence on the part of the appellant and by the publication of the defamatory statement, the appellant committed libel. It is a most serious slur on the part of the appellant to publish to the immediate business community that the respondent was impecunious, a publication which resulted in damage to the business life of the respondent. By the publication, the whole business reputation, integrity and well being of the respondent crashed within the business community and that did damage to him and his business. The appellant cannot get out of it.

The appellant would appear to have pleaded justification when counsel submitted that “*the information given to the Central Bank, looking at the surrounding circumstances of the case, is true and therefore very justifiable.*” Learned counsel tried to justify the above by referring to what he called the “*shortfall*”. The burden is on the appellant to prove that there was a shortfall which justified the libel. I do not think there was any such proof. The only witness of the appellant was not dogmatic on the issue of shortfall. As a matter of fact, he did not initially give evidence on it. It came out under cross-examination and he seems to have prevaricated when he said at page 51 of the Record:

“If there was a shortfall, this means by which the commercial banks informed their customers was their internal affair. I would not know.”

Frankly, I do not seem to understand this sentence. Perhaps the learned trial Judge and his counsel understood it. I leave the sentence to rest, particularly as it is not of any use to the appellant. The above answer, sweated out from cross-examination, cannot be legal basis for the defence of justification in an action on defamation. The ingredients of justification as defence in the tort of negligence are much more serious than the above.

With the collapse of the defence put forward by the appellant on the torts of negligence and defamation, I should now take the award of damages by the Court of Appeal in naira.

My learned brother has dealt exhaustively on the issue and I cannot improve on his analysis of the legal position. In view of the fact that the entire case had so much foreign exchange content, the Court of Appeal was wrong in upholding the claim in the foreign currency and making the award in naira. I therefore award the respondent/cross-appellant the

sum of £17,647.00 damages. The amount shall attract interest at the rate of 4% per annum from the date of the judgment of the Court of Appeal, which date is 25th May, 2000, until the amount is completely liquidated, award N10,000.00 costs in favour of the respondent/cross-appellant.

B _____

MOHAMMED JSC

This appeal is against the judgment of the Court of Appeal Port Harcourt delivered on 25-5-2000 allowing an appeal against the judgment of Chianakwalam J. of the High Court of Justice of Imo State Aba delivered on 5-7-1991. The respondent in this appeal was the plaintiff at the trial High Court and claimed in his statement of claim the following reliefs against the appellant which was the defendant in that court:-

D "(a) An order of this Honourable Court directing the Defendant to transfer to the plaintiffs Overseas Customer as contained in Bill NUMBER BC/1406/81 AB namely NEWBY IRON FOUNDERS LIMITED OF WEST MIDLANDS THE SUM OF £17,647.00 (seventeen thousand six hundred and forty seven pounds sterling) as contracted between them.

E (b) 20% (twenty percent) interest on the said sum of £17,647.00 from July 1982 till judgment is delivered.

(c) 4% (four percent) interest on the said sum from the date of judgment until completely liquidated.

(d) N4million (Four Million Naira) damages for libel.

(e) N6 million (Six Million Naira) Special and General Damages for negligence.

PARTICULARS OF SPECIAL DAMAGES

(i) 252,000 pieces of water pipe fittings at N17 (Seventeen Naira)
loss per pipe fittings N4,284,000.00

(ii) 1,400 tonnes of Mild Steel Sections from John Williams Steel Services Ltd at N940.00 loss per tonne	N1,316,000.00
--	---------------

(iii) Air Tickets/Transportation	N30,000.00
----------------------------------	------------

(iv) Hotel Bills/Accommodation	N144,000.00
--------------------------------	-------------

(v) Telex Messages/Telephone Calls	N5000.00
------------------------------------	----------

H	(vi) General Damages	N221,000.00
---	----------------------	-------------

TOTAL = N6,000,000.00

GRAND TOTAL

N10,000,000.00"

After hearing the parties in support of and in defence of these claims, the learned trial judge dismissed them in his judgment in the following words:-

"It is hereby ordered that the defendant should refund to plaintiff the sum of N21,492.25 he deposited with the defendant in settlement of the bill, the subject-matter of these proceedings. Subject to this order, plaintiffs claim lacks merit. In consequence, the claim as set out in paragraph 41 of the statement of claim is deemed to have been set out specifically in this judgment and dismissed seriatim."

It is noted here that the order for the refund of the sum of N21,492.25 to the plaintiff made by the learned trial judge was not part of the reliefs claimed by the plaintiff.

Aggrieved by this judgment, the plaintiff then appealed to the Court of Appeal which allowed his appeal and granted him the following reliefs:-

"For libel and negligence I award N4.5 million. It must not be easily forgotten that the parties entered in the transaction since 1982 when 1 dollar was less than 1 Naira. At that time 7,000 was N21,000 Naira odd. Now £17,000.00 is worth more than (N2 million)."

The respondent will pay the sum of N21,717.48 lodged with it at the instant (sic) rate of 20% until today the judgment day and interest of 4% on the judgment debt till it is completely liquidated. The proof of Special Damage is scanty. But there is a proof of travels. On Air tickets for overseas travels I find as proved a sum totalling only N5,940.00."

The defendant at the trial court which was the respondent at the Court of Appeal having lost in the contest, has now appealed to this court and shall henceforth be referred to as 'appellant' in this judgment. Apparently, the winner of the contest at the Court of Appeal now the respondent in this court is also not happy with part of the judgment of the Court of Appeal delivered in his favour and therefore has cross-appealed against it.

In accordance with the rules of this court, appropriate briefs of argument in both the main appeal and the cross-appeal were duly filed and served. These briefs of argument comprised appellant's brief, respondent's

brief and the appellant's reply brief in the main appeal. In the cross-appeal, the cross-appellants brief and the cross-respondent's brief of argument were duly filed and served.

In the appellant's brief of argument, from the 17 grounds of appeal filed by the appellant, 7 issues for the determination of the appeal were formulated. In the respondent's brief of argument on the other hand only four issues were identified. However a preliminary objection to the appellant's amended Notice of Appeal was raised by the respondent in that the amended Notice of Appeal dated 21-8-2002 and filed in court on 26-8-2002, was filed out of time and therefore incompetent to support the appellant's appeal. The lead judgment of my learned brother, Oguntade JSC, has comprehensively dealt with the fundamental issue arising from this preliminary objection and I entirely agree with him in his reasoning and conclusion that the Amended

Notice of Appeal filed by the appellant having been filed outside the time granted by this Court, is incompetent. I agree that the appeal ought to be struck out. Accordingly the appeal is hereby struck out.

On the cross-appeal, the only issue for its determination is whether the Court of Appeal was right to uphold the claim in foreign currency and then make the award in Naira; and if so whether the award in local currency for a claim in foreign currency occasioned a miscarriage of justice. I have earlier in this judgment quoted in full the claims of the respondent in his action against the appellant at the trial High Court. It is quite clear from items (a), (b) and (c) claimed by the respondent that those claims were in foreign currency. These reliefs are-

“(a) An order of this Honourable Court directing the defendant to transfer to the plaintiffs overseas customer as contained in BILL NUMBER BC/1406/81 AB namely NEWBY IRON FOUNDERS LIMITED OF WEST MIDLANDS THE SUM OF £17,647.00 (Seventeen thousand six hundred and forty seven pounds sterling) as contracted between them.

(b) 20% (twenty percent) interest on the said sum of £17,647.00 from July 1982 till judgment is delivered.

(c) 4% (four percent) interest on the said sum from the date of judgment until completely liquidated.”

As the Court of Appeal and indeed this court and other superior courts in Nigeria are empowered to entertain and grant reliefs in foreign currency where such reliefs are claimed by litigants before the courts, the action of the lower court in refusing to grant the cross-appellant's reliefs as claimed is an error which deserves correction by this court. In this respect, I agree with my learned brother Oguntade JSC that this cross-appeal deserves to succeed. I therefore allow the cross-appeal and abide by the orders made in the lead judgment including the order on costs.

OGBUAGU JSC

I have had the privilege of a preview of the Judgment just read and delivered by my learned brother, Oguntade, JSC. I agree with him that the instant appeal is incompetent and must perforce, be struck out. However, I wish to add my own contribution by way of emphasis. In respect of the Preliminary Objection, it is no longer in doubt, that pursuant to Order 2 Rule 9 of the Supreme Court Rules, it may be validly raised (as has been done in the instant appeal), to question, the competence of an appeal in the Respondent's Brief of Argument. See *Ajide v. Kelani* (1988) 3 NWLR (Pt.12) 248 @ 257, 258; and *Ogidi v. Egba* (1999) 10 NWLR (Pt.621) 42 @ 71; (1999) 6 SCNJ. 107 just to mention but a few.

In this appeal, what is attacked by the Respondent, is the validity or competence of the Amended Notice of Appeal of the Appellant filed on 26th August, 2003 after this Court, ordered the Appellant, on 25th June, 2003, to file its Amended Notice of Appeal, within six (6) weeks from that date. Surprisingly, it did not do so. The learned counsel for the Appellant, in their Brief, has contended that the Appellant filed the said notice on 26th August, 2003 because, according to him, "*it is trite that time does not run during vacation*". He relied on the 1985 Practice Direction of the Hon. CJN dated 24th June, 1985 and Order 6 Rule 5 (7) of the Supreme Court Rules. He then cited, supplied and relied on the case of *Auto Import Export v. Adebayo & 2 ors* (which he did not cite properly or fully). He put the reference of the Report as (200) 103 LRCN 2397. The case is reported in (2002) 103 LRCN 2397; (2002) 18 NWLR (Pt.799) 554 and (2002) 12 SCNJ. 124 respectively.

Learned counsel, with profound respect and humility, unwittingly, as far as I am concerned, supplied or provided the arsenal/ammunition, that has completely routed or destroyed the Appellant's appeal. I say so because, firstly, it is now firmly settled, that appeals, generally, are creations of Statutes and therefore, failure to comply with statutory provisions/requirements prescribed by the relevant laws under which each appeal, may be competent and properly before an Appellate Court, will deprive such appellate court of jurisdiction to entertain the appeal. So said this Court - per Iguh, JSC, in the above said case - page 137 of the SCNJ. Report.

In other words, Rules of Court, are not as sacrosanct as Statutory provisions of law. A rule of court, cannot confer jurisdiction. It only regulates the practice of the court in the exercise of a power derived aliunde (from another source or from elsewhere) and does not confer power. See *Ogunyemi v. Dada* (1962) 1 ANLR 663 and *Copper v. Smith* (1883) 24 Ch. J. 305 - per Brett, M.R. Rules of Court, cannot override, statutory provisions of the law. See *Alhaji Edun v. Odan Community, Ado Family etc.* (1980) 10-11 SC. 103 @ 124 -127.

Therefore, neither Practice Directions nor Rules of Court, can override Statutory Provisions. Indeed, this Court, in the case *University of Lagos & anor. v. Aigoro* (1984) II S.C. 152 @ 191, held thus.

"Practice Directions do not have the authority of Rules of Court although they are instructions in aid of the practice in court. They cannot by themselves overrule court decisions".

Distinguish Practice Directions of the Hon. President of the Court of Appeal in Election matters and see the case of *Nigerian Airports Authority v. Chief Okoro* (1995) 6 NWLR (Pt.403) 510 @ 522 - 523; (1995) 7 SCNJ. 1 - per Uwais, JSC (as he then was now CJN) where the meaning/definition and efficacy of Practice Direction were stated and *Ojugbale v. Lamidi & ore.* (1999) 10 NWLR (Pt.621) 167, 172, 191 where it was held that it has the full force of law - although it constitutes the Rules of court in Election Petitions appeals and therefore, must be complied with and cannot be circumvented. I agree because, it is settled that Rules of Court, must be strictly obeyed.

Secondly, just as the time for filing and serving pleadings, do not run during Annual Vacation - See Nishizawa Ltd. v. Jethwani (1994) 12 S.C. 234 @ 244 - per Obaseki, JSC, so also, by virtue of Order 6 Rule 5 of the Supreme Court Rules, 1985 and the said Practice Direction of the CJN which became effective from 24th June, 1985 pursuant to Order 10 Rule 2 of the Supreme Court Rules, Time, does not run in the computation of the period of filing Briefs. These, have nothing to do with and does not in any way, concern the statutory period of time within which to appeal or the filing of a Notice of Appeal or within such time that is extended by the court on application by an Appellant.

In the case of Nneji & 3 ors v. Chief Chukwu & 7 ors (1988) 3 NWLR (Pt.81) 184 @ 202-204. (1988) 6 SCNJ. 132 which cited/referred to the case of Mrs. Omo-Ogunkoya v. Omo-Ogunkoya & anor. (1990) 1 NWLR (Pt.129) 690 @ 695 C.A, it was held, that time does not run during vacation against an applicant in respect of any period within which an application may be made. In other words, time within which an application may be made for say an extension of time may be made, is not affected during the vacation period. See also Bamisile v. Adollo & ors. (1990) 1 NWLR (Pt.129) 709 @ 714 C.A.

Thus, by virtue of Section 27 (2) of the Supreme Court Act, Cap 424, Laws of the Federation of Nigeria, 1990, an Appellant, must file his Notice and Grounds of Appeal, or within the period so extended. The Appellant having failed, refused and/or neglected to file the Amended Notice of Appeal within the six (6) weeks so extended by this Court, the said Amended Notice of Appeal, is incompetent and liable to be struck out. I so hold.

It is settled law that where a court finds that a preliminary objection succeeds, there is no need going into the merits of the appeal. See NEPA v. Ango (2001) 15 NWLR (Pt.737) 627 @ 645 - 646 C.A. and Attorney-General of the Federation v. ANPP & 2 ore. (2003) 12 SCNJ. 67 @ 81 - 82 - Per Tobi, JSC. So let the sleeping dog lie.

As regards the Cross-Appeal of the Respondent, I wish to add that it is now settled, that except where parties have agreed on payment of interest, it is not right to award interest pre-dating the date of judgment.

32 Afribank Plc. v. Akwara (2006) 1 KLR Ogbuagu JSC

See Himma Merchants Ltd. v. Alhaji Aliyu (1994) 5 NWLR (Pt.347) 667, (1994) 6 SCNJ. (Pt.) 1) 87@ 95, 97 - per Onu, JSC and Ogbu & 4 ore, v. Ani & 4 ors (1994) 7 NWLR (Pt. 355) 129, (1994) 7 SCNJ. 383, just to mention but a few. There must be express agreement that interest will be charged. See Kaduna State Transport Authority v. Ofodile (1999) 10 NWLR (pt.622) 250 @ 265, 268, 269 C.A. and Nigena Dynamic Ltd. v. Ibrahim (2002) 8 NWLR (Pt 768) 63.

As regards the power of the court to make an award in foreign currency, it is now firmly established, that a Nigerian court, in its discretion, can give judgment in foreign currency, see Broadline Enterprises Ltd, v. Monterey Maritime Corporation (1995) 9 NWLR (Pt. 417) 1; (1995) 10 SCNJ. 1 @ 26; citing Millangos v. George Frank (Textiles) Ltd. (1975) 3 All E.R. 801, U.B.N. Ltd. v. Oduote Bookstores Ltd. (1995) 9 NWLR (Pt 421) 558, (1995) 12 SCNJ. 175 and recently, United Bank For Africa Plc v. BTL Industries Ltd. (2004) 18 NWLR (Pt. 904) 180 C.A. and many others. The cross-appeal therefore, succeeds.

In the end result, it is from the foregoing and the fuller reasoning and conclusions in the lead judgment of my learned brother, Oguntade, JSC, that I also allow the appeal of the Cross-Appellant. I abide by all the consequential orders contained in the said lead Judgment including those on costs

F

G

H