

SUPREME COURT OF NIGERIA

16TH JUNE, 2006. SC. 381/2001

**CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, D. MUSDAPHER,
I. C. PATS-ACHOLONU, G. A. OGUNTADE, JJSC**

SAIDI OGUNDIMU & 3 ORS

(For and on behalf of themselves
and the Ogundimu Family of Ota)

.... PLAINTIFFS/
RESPONDENTS

AND

1. BELLO KASUNMU

(For Bello Kasunmu Fabolude family)

2. ALHAJI LATEEF BURAIMO

(For Seriki Musa family)

3. PEPESILE OGUNJUWON

(For Ogunjuwon family)

..... 1ST - 6TH DEFENDANTS/
RESPONDENTS

4. BELLO ESORUN

(For Banjoko Esorun family)

(1ST SET OF DEFENDANTS)

5. ADENIJI ADEKUNLE

(For Arifania family)

6. ALHAJA ADIDATU ELEGBA

(For Imoru family)

AND

7. PRINCE ASHIMU ISIKA

& 5 ORS.

(For themselves and all other
members of the Olofin of Isheri
Chieftaincy family)

..... 7TH-12TH DEFENDANTS/
APPLICANTS/APPELLANTS
(2ND SET OF DEFENDANTS)

AND

8. PRINCE SUBERU AINAAKO

& 6 ORS.

(For themselves and on behalf of
members of Ojo Seriki/Kudoro
Aperin family of Ota)

..... 13TH - 19TH DEFENDANTS/
RESPONDENTS
(3RD SET OF DEFENDANTS)

APPEALS - Extension of time - Within which to appeal - Application for
- Must justify failure to appeal within time - And show good cause why
appeal should be heard (H1)

APPEALS - Extension of time - Within which to appeal - Length of time
of delay is immaterial - In an application for extension of time - What
matters is reason for the delay (H2)

LEGAL PRACTITIONERS - Engagement of - Litigant is free to engage -
And to disengage counsel of his choice - At any time (H3)

APPEALS - Extension of time - Within which to appeal - Application
should normally be granted - Where delay was due to pardonable inad-
vertence of counsel as in this case - Court of Appeal was wrong to have
refused it (H4)

FACTS

The Applicants/Appellants were the 2nd set of defendants in the High Court suit giving rise to this appeal. They were sued by the plaintiffs/Respondents alongside the 1st set of defendants, now 2nd set of Respondents, and the 3rd set of defendants, now 3rd set of Respondents, all in the Ogun State High Court. That Court gave judgment to the plaintiffs/Respondents on 28th day of May, 1990. And 18 months latter, the Appellants by a motion dated 19th day of November, 1991, applied to the Court of Appeal, Ibadan, for enlargement of time within which to appeal and to seek leave to appeal and for leave to appeal against that judgment of the High Court. The application was supported by an Affidavit, Further and Better Affidavit, the proposed Notice and Grounds of Appeal as well as the proposed Appellants' Brief for the appeal should the application succeed. It was averred by them in their affidavit that immediately upon the said judgment they had instructed their solicitor to enter an appeal against it. He later assured them that the appeal had been entered.

Unfortunately the said solicitor died and due to the difficulties at-

tendant to settling his estate, appellants could not retrieve their file until sometime in October, 1991, by which time the plaintiffs/Respondents had filed a writ of *fifa* to levy execution on the property of Appellants. Moreover upon retrieving their file, Appellants found that their late solicitor had not filed the appeal as instructed. Hence they brought the motion for extension of time. The plaintiffs/Respondents filed counter-affidavits in opposition to the Appellants motion. The motion was taken in the court of Appeal on 20/09/1993 and in their ruling delivered the same day, their Lordships refused and dismissed the Appellants' application. Aggrieved, Appellants brought the instant appeal to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the appellants have shown by affidavit, good and substantial reasons for their failure to appeal within the prescribed time”.

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

Extension of time to appeal - Need to justify failure to appeal in time

1. Now, it is settled by a chain of authorities that for an application for extension of time in which to appeal, etc., to succeed, the applicant must show:

(a) good and substantial reasons for failure to appeal within the prescribed period, and

(b) the Grounds of Appeal must *prima facie* show good cause why the appeal should be heard.

The two conditions, (a) & (b) above, must be satisfied together at the same time. If one fails, the entire application will fail. Therefore, the affidavit in support of the application must state clearly the reasons for the delay in complying with the Rules of Court. (p. 2163 B)

Length of time of delay is immaterial

2. The length of time of delay is immaterial provided the applicant is able to explain the delay and show good cause why the appeal should be heard. If there is no good and substantial reason for the delay, the court may refuse the application as was done by the Court of Appeal herein. (p. 2163 F)

LEGAL PRACTITIONERS - Engagement of

3. And for them to have argued in court that the applicants did not brief the deceased counsel, Mr. Odelusi to appeal and that it was one Mr. Adeeko, Counsel in the High Court who was briefed is rather intriguing.
 B Who was doing the briefing? The appellants or the respondents? It must have been the appellants. Chief Odelusi who was briefed and who could have settled the issue had died! Also the point about the date when Mr. Odelusi was briefed by the appellants and the receipt of fees he issued to
 C the appellants thereof, were in my view unnecessary in the circumstances of the case. Again, the point about the evidence of termination of services of Counsel, Mr. Adeeko, was unnecessary and irrelevant. A litigant is free to engage counsel of his choice at any time and may equally terminate
 D such engagement at any time. (p. 2165 G)

Extension of time to appeal - When to be granted

4. The Court of Appeal undoubtedly was largely influenced by these extraneous and irrelevant considerations which the court itself surprisingly,
 E though rightly in my view, referred to as “insinuations” or “hypothesis” in the ruling appealed. It is my view that if the Court of Appeal in the exercise had not taken the “insinuations” or “hypothesis” into consideration, it would have arrived at a different conclusion. The discretion was
 F therefore wrongly exercised. It must not be allowed to stand. A court of law would normally exercise its discretion in favour of an applicant where his being out of time is due to pardonable inadvertence caused by the negligence or inadvertence of counsel as in this case where counsel died
 G after instruction to him by the appellants. (p. 2166 B)

NOTABLE POINT OF INTEREST

OGUNTADE JSC

H *1. Appellate Court would interfere with discretion of lower court where exercised on wrong material*

It was not and it could not however be argued that the unwillingness of an appellate court to interfere with the discretion of the lower court was an immutable principle of law. In *Enekebe v. Enekebe* (1964) 1 All NLR

95 at 100 (Reprint), this court per Bairamian, JSC., explained the approach of an appellate court in these words:

“The discretion conferred on the trial Judge is unfettered but there is a right of appeal, and, to quote from Lord Simon’s speech in Blunt v. Blunt (1943) AC 517 at p. 526: (Reference supplied by me)

‘If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case, the exercise of discretion might be impeached, because the court’s discretion will have been exercised on wrong or inadequate materials.

Now in this appeal, it would appear that the court below had refused appellants’ application under a misapprehension of fact in that it failed to take into account matters that are relevant. It ought to have dawned on the court below that the facts relied upon by the appellants, unchallenged, as they were, confronted them with no alternative other than seek an extension of time to appeal. (p. 2170 B)

REPRESENTATION

7th-12th Defendants/Applicants/Appellants absent not represented.

O. O. Delano (with him, A. Adenuyega), for the Plaintiffs/Respondents.

I. N. I. Iheanacho for the 1st - 6th Defendants/Respondents.

13th - 19th Defendants/Respondents absent and not represented.

CASES REFERRED TO

Bowaje v. Adediwura (1976) 6 S.C. (Reprint) 95; (1976) 6 S.C. 143

Akinyede v. The Appraiser (1971) 1 All NLR 162

Ahmadu v. Salawu (1974) 11 S.C. (Reprint) 33; (1974) 1 All NLR (Pt. 3) 318)

Ojora v. Bakare (1976) 1 S.C. (Reprint) 26; (1976) 1 S.C. 47

Akano & Anor. v. Adediran (1975) 1 NMLR 39

Ibodo v. Enarofia (1980) 5-7 S.C. (Reprint) 29; (1980) 5-7 S.C. 42

Williams v. Hope Rising Voluntary Funds Society (1982) 1-2 S.C. (Reprint) 70; (1982) 1-2 S.C. 145

- Egbe v. Onogun (1972) 2 S.C. (Reprint) 90; (1972) 1 All NLR (Pt. 1) 95
Mortune v. Gambo (1979) 3-4 S.C. (Reprint) 36; (1979) 3-4 S.C. 54
Adewunmi (1988) 3 NWLR (Pt. 837) 483
Cooperative & Commerce Bank (Nig.) Ltd. v. Ogwuru (1993) 3 NWLR
B Olumegbon v. Kareem (2002) FWLR (Pt. 107) 1145 at 1151
Ikennah v. Bosah (1997) 3 NWLR (Pt. 495) 503
Dongtoe v. Civil Service Commission of Plateau State (2001) 4 S.C. (Pt. II) 43; (2001) 9 NWLR (Pt. 717) 132
Ojora v. Bakare (1976) 1 S.C. (Reprint) 26; (1976) Vol. 10 NSCC 15
C Falobi v. Falobi (1976) 9-10 S.C. (Reprint) 1; (1976) 9-10 S.C. 1

RULES REFERRED TO

Court of Appeal Rules 1981, O. 3 r. 4(1) & (2)

D

LEAD JUDGMENT BY KUTIGI JSC

Following the judgment of the Ogun State High Court holden at Abeokuta delivered on the 28th day of May, 1990, the 7th - 12th defendants or 2nd set of defendants (now appellants) by motion dated 19th day of November, 1991, applied to the Court of Appeal, Ibadan, for enlargement or extension of time within which to appeal and to seek leave to appeal, as well as for leave to appeal against the judgment delivered some eighteen months earlier. The application was supported by an affidavit, Further and Better Affidavit, the proposed Notice and Grounds of Appeal as well as the proposed Appellants' Brief for the appeal should the application succeed. The respondents filed counter-affidavits in opposition.

G The motion was taken in the Court of Appeal on 20/9/93 and the Ruling was delivered on the same day. The application was refused and dismissed. The court in its ruling concluded on page 179 of the record as follows:

H *"In the result, the applicants have not successfully explained why they did not appeal within time. This is a discretionary power which can only be exercised after consideration of the reasons given for the delay. It is settled law that it is successful explanation of the same. A delay of two*

to three years may be waived if it is properly explained, while a delay of even three months may not be countenanced. The application is refused and it is dismissed.”

Aggrieved by the decision of the Court of Appeal, the defendants/applicants/appellants have now appealed to this court. The parties filed B and exchanged briefs of argument which were adopted at the hearing of the appeal.

The appellants have in their brief identified the sole issue for determination to be:

“Whether the appellants have shown by affidavit, good and substantial reasons for their failure to appeal within the prescribed time”. C

That being the only ground upon which the Court of Appeal had refused the application as shown in the extract of the Ruling above.

Learned counsel for the appellants submitted that the application D before the Court of Appeal was supported by facts verified by oath and that the only way by which those facts can be effectively contradicted is by filing affidavit evidence in opposition. He said “insinuations” and “hypothesis” which the Court of Appeal had alluded to as factors in evaluating the evidence were misplaced. It was also submitted that the respondents were clearly unable to deny affirmatively the affidavit evidence of the appellants. He cited extensively the affidavit evidence of Prince Murtala Sofela, a senior member of appellants’ family, in support of the application. F He said if the Court of Appeal had found conflicts in the affidavits, such conflicts could only have been resolved by oral evidence relying on Falobi v. Falobi (1976) 9-10 S.C. (Reprint) 1; (1976) 9-10 S.C. 1. We were urged to allow the appeal especially when the facts upon which the application was based were undisputed. G

On behalf of the plaintiffs/respondents, it was contended that the onus was on the appellants to provide good and convincing reasons for the delay in bringing the application and also present sufficient material upon which the court can exercise its discretion in their favour. That the affidavit evidence offered by Prince Sofela for the appellants, was inconclusive, and that the plaintiffs/respondents’ counter-affidavit contradicted the assertions in the appellants’ affidavit. It was also submitted that a H

careful consideration of the evidence will show that the Court of Appeal rightly dismissed the application because the appellants had not sufficiently explained why they did not appeal within the statutory period. We were referred to the cases of Ikennah v. Bosah (1997) 3 NWLR (Pt. 495) 503; Dongtoe v. Civil Service Commission of Plateau State (2001) 4 S.C. (Pt. II) 43; (2001) 9 NWLR (Pt. 717) 132; Ojora v. Bakare (1976) 1 S.C. (Reprint) 26; (1976) Vol. 10 NSCC 15. It was again submitted that the Court of Appeal having exercised its discretion based on correct legal principles and after taking into account all the relevant facts, this court would be substituting its own exercise of discretion for that of the lower court if we reversed it and the law does not allow that. That the circumstances for reversing the decision of the Court of Appeal do not exist. He cited the cases of Charles Oseton & Co. v. Johnson (1942) AC 130 at 138; Ohwovoriole v. F.R.N. (2003) 1 S.C. (Pt. I) 1; (2003) 2 NWLR (Pt. 803) 176; Josiah Cornelius Ltd. v. Ezenwa (2002) 6 S.C. (Pt. II) 94; (2002) 16 NWLR (Pt. 298) 298 at 317. The court was urged to dismiss the appeal.

In the brief filed on behalf of the 13th-19th defendants/respondents (the 3rd set of defendants), it was submitted that the appellants failed to advance cogent reasons for their failure to file the appeal within the prescribed time. That there were gaps in the affidavit evidence of Prince Murtala Sofela who was said to be a senior member of appellants' family. The appellants therefore failed to comply with Order 3 Rule 4(2) of the Court of Appeal Rules 1981 (as amended), and that the Court of Appeal rightly dismissed the application of the appellants. The following cases were cited in support:

Re Adewunmi (1988) 3 NWLR (Pt. 837) 483; Cooperative & Commerce Bank (Nig.) Ltd. v. Ogwuru (1993) 3 NWLR; Olumegbon v. Kareem (2002) FWLR (Pt. 107) 1145 at 1151-F. The court was urged to dismiss the appeal.

At the hearing of the appeal, Mr. Iheanacho, learned counsel who appeared for the 1st-6th defendants/respondents (1st set of defendants) 'said he was not opposing the appeal as he had not filed any brief.

This being an interlocutory appeal against the decision of the Court

of Appeal refusing to grant an application by the appellants for extension of time within which to appeal, etc., against the judgment of the High Court, I will in this judgment be brief and go straight to the point or points necessary for the disposal of the issue in the appeal without attempting to prejudge any issue yet to be decided on appeal by the Court of Appeal (see for example *Egbe v. Onogun* (1972) 2 S.C. (Reprint) 90; (1972) 1 All NLR (Pt. 1) 95. *Mortune v. Gambo* (1979) 3-4 S.C. (Reprint) 36; (1979) 3-4 S.C. 54).

Now, it is settled by a chain of authorities that for an application for extension of time in which to appeal, etc., to succeed, the applicant must show:

(a) good and substantial reasons for failure to appeal within the prescribed period, and

(b) the Grounds of Appeal must *prima facie* show good cause why the appeal should be heard.

The two conditions, (a) & (b) above, must be satisfied together at the same time. If one fails, the entire application will fail (see Order 3 Rule 4(2) of the Court of Appeal Rules (1981) (as amended); *Ibodo v. Enarofia* (1980) 5-7 S.C. (Reprint) 29; (1980) 5-7 S.C. 42; *Williams v. Hope Rising Voluntary Funds Society* (1982) 1-2 S.C. (Reprint) 70; (1982) 1-2 S.C. 145. **Therefore, the affidavit in support of the application must state clearly the reasons for the delay in complying with the Rules of Court. The length of time of delay is immaterial provided the applicant is able to explain the delay and show good cause why the appeal should be heard** Vide *Alagbe v. H. H. Samuel Abimbola & Ors.* (1978) 2 S.C. (Reprint) 28; (1978) 2 S.C. 39. **If there is no good and substantial reason for the delay, the court may refuse the application as was done by the Court of Appeal herein** (see *Ojora v. Bakare* (1976) 1 S.C. (Reprint) 26; (1976) 1 S.C. 47; *Akano & Anor. v. Adediran* (1975) 1 NMLR 39.

In this appeal, we are only concerned with condition (a) above, that is, whether or not the applicant showed good and substantial reasons for failure to appeal within time. We have to examine the affidavit in support of the application to find out. Prince Murtala Sofela swore to the

affidavit in support of the application. It reads in part -

“2. *That judgment in this case was delivered by the Ogun State High Court on 28th day of May, 1990.*

3. *That the applicants/appellants immediately instructed a solicitor, Chief C. A. Odelusi to enter an appeal against the judgment.*

4. *That our said solicitor, Chief C. A. Odelusi told me on 17th day of July, 1990 in his Chambers at No. 19 Agege Motor Road Yaba, Lagos State and I verily believed him that he had filed an appeal on our behalf (the Applicants) to the Court of Appeal at Ibadan.*

5. *That based on the assurance of our solicitor (Chief C. A. Odelusi) that he had filed an appeal for us, the applicants believed we have an appeal pending at the Court of Appeal.*

6. *That on 14/12/90, I became aware through an obituary captioned in the Daily Times of the death of our solicitor Chief C. A. Odelusi. (A copy of the said obituary is herewith attached and marked Exhibit OLOF No. 1).*

7. *That I went on behalf of the applicants to the late solicitor’s residence and sympathized with his family.*

8. *That the late solicitor’s wife told me and I verily believed her that the late solicitor died as a result of illness which began sometime in August 1990 and that after the final burial ceremony of the solicitor, the family would open his office and look for the applicants’ file.*

9. *That I later made repeated calls on the late solicitor’s wife for the collection of the applicants’ file but on each occasion that I called, she said that the family had not done anything about the solicitor’s estate and therefore she has not been able to locate the file.*

10. *That on 25/10/91, I became aware that the plaintiffs/respondents have filed a writ of *fifa* at the High Court Registry, Abeokuta to levy execution on the property of the 7th-12th defendants.*

11. *That I quickly visited the late solicitor’s wife and told her of this development and the need for the applicants to employ the services of a new solicitor.*

12. *That on 30/10/91, the late solicitor’s wife handed over the applicant’s file to me and I, at about 6 p.m. on the same day passed the*

file to Mr. T. A. Lamina (solicitor) at No. 12, Abe Street, Onipanu, Lagos State.

13. That on the above occasion, Mr. T. A. Lamina told me and I verily believe him that:

(a) There is nothing in the applicants' file which showed that we have filed an appeal; B

(b) That the time within which the applicants are to appeal has since expired;

(c) That the permission of the Court of Appeal will be necessary for the applicants to be able to file appeal. C

14. That on 31/10/91, the plaintiffs/respondents levied execution on the property of the 7th defendant/ Applicant who is a paramount King.

15. That investigation at the High Court Registry revealed that the applicants have no appeal in respect of this case. D

16. That the failure of the applicants to file our appeal within time was due to the assurance of our solicitor that he had filed an appeal on our behalf and the death of the said solicitor (Chief C. A. Odelusi). E

17. That the applicants had no cause to doubt the late solicitor.

18. That our new solicitor. Mr. T. A. Lamina told me and I verily believe him that the applicants' proposed Notice of Appeal shows that there are substantial and good grounds of law and fact to argue if time is enlarged; (A copy of the said Notice and Grounds of Appeal is herewith attached and marked Exhibit OLOF. No.2)." F

On reading through the affidavit above, it would appear that the applicants have sufficiently explained why they did not appeal within time. The affidavit has not in any material particular been contradicted by the counter-affidavits of the respondents. **And for them to have argued in court that the applicants did not brief the deceased counsel, Mr. Odelusi to appeal and that it was one Mr. Adeeko, Counsel in the High Court who was briefed is rather intriguing. Who was doing the briefing? The appellants or the respondents? It must have been the appellants. Chief Odelusi who was briefed and who could have settled the issue had died! Also the point about the date when** G H

Mr. Odelusi was briefed by the appellants and the receipt of fees he issued to the appellants thereof, were in my view unnecessary in the circumstances of the case. Again, the point about the evidence of termination of services of Counsel, Mr. Adeeko, was unnecessary and irrelevant. A litigant is free to engage counsel of his choice at any time and may equally terminate such engagement at any time. The Court of Appeal undoubtedly was largely influenced by these extraneous and irrelevant considerations which the court itself surprisingly, though rightly in my view, referred to as “insinuations” or “hypothesis” in the ruling appealed. It is my view that if the Court of Appeal in the exercise had not taken the “insinuations” or “hypothesis” into consideration, it would have arrived at a different conclusion. The discretion was therefore wrongly exercised. It must not be allowed to stand. A court of law would normally exercise its discretion in favour of an applicant where his being out of time is due to pardonable inadvertence caused by the negligence or inadvertence of counsel as in this case where counsel died after instruction to him by the appellants (see for example *Bowaje v. Adediwura* (1976) 6 S.C. (Reprint) 95; (1976) 6 S.C. 143; *Akinyede v. The Appraiser* (1971) 1 All NLR 162; *Ahmadu v. Salawu* (1974) 11 S.C. (Reprint) 33; (1974) 1 All NLR (Pt. 3) 318).

The appeal therefore succeeds and it is allowed. The ruling of the Court of Appeal is set aside. In its place, an order granting applicants/appellants’ application as prayed is substituted as follows:

- (i) Time within which to appeal is extended up to today.
- (ii) Time within which to seek leave to appeal is also extended up to today.
- (iii) Leave to appeal, is granted.

The applicants/appellants are to file their Notice and Grounds of Appeal within sixty (60) days from today. I make no order as to costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered

by my learned brother, Kutigi, JSC. I entirely agree with it.

It is now settled practice that Rules of Court fordoing an act must be obeyed. Where an applicant fails to do an act within a stipulated period, he must explain away the delay to the satisfaction of the court. Where he fails to do so, no indulgence should be granted to him. B

In the present case, I agree with my learned brother, Kutigi, JSC., that the appellants have given satisfactory reasons why they failed to appeal within the specified period. They had, in my view, discharged the onus placed upon them. C

I would therefore also allow the appeal and would grant the appellants' application as prayed. I too make no order as to costs.

MUSDAPHER JSC

I have read the judgment of my Lord, Kutigi, JSC., just delivered with which I agree. For the same reasons so eloquently stated therein, I too, allow this appeal. I set aside the Ruling of the Court of Appeal. In its place, I grant the appellants/applicants prayers as follows:- E

- (i) Time within which to seek leave to appeal is extended to today.
- (ii) Leave to appeal to the Court of Appeal is granted; and
- (iii) The time within which to appeal is extended to 60 days from today. F

I make no order as to costs.

PATS-ACHOLONU JSC

Editorial Note: The Hon Justice Ignatius Chukwudi Pats-Acholonu, JSC., was in the panel that heard this appeal. He indicated his concurrence with the lead Judgment. G

However, he passed away on the 14th of May 2006, before the date of this Judgment. His pronouncement was read by the Hon. Justice H I. L. Kutigi, JSC. H

OGUNTADE JSC

The present appellants, who were the 7th-12th defendants or the 2nd set of defendants had, following the judgment against them by the trial court, brought before the Court of Appeal, Ibadan Division (hereinafter referred to as ‘the court below’), an application for extension of time within which to seek leave to appeal, leave to appeal and extension of time to appeal. The application was supported, as it should be, by affidavit evidence, which sought to explain why the appeal had not been filed timeously.

The respondents (before us) filed counter-affidavits against the grant of the prayers sought. The court below in the concluding part of its sitting refused the application in these words:

“In the result, the applicants have not successfully explained why they did not appeal within time. This is a discretionary power, which can only be exercised after consideration of the reasons given for the delay. It is settled law that it is not the duration of the delay that matters, rather it is successful explanation of the same. A delay of two to three years may be waived if it is properly explained while a delay of even three months may not be countenanced. The application is refused and it is dismissed.”

The appellants have brought this appeal against the ruling of the court below. They raised one issue for determination in the appeal. The issue reads:

“Whether the appellants have shown by affidavit, good and substantial reasons for their failure to appeal within the prescribed time.”

Now, Order 3 Rules 4(1) and 4(2) of the Court of Appeal Rules provide:

“4(1) The court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply.

4(2) Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged, a copy of the order granting

such enlargement shall be annexed to the notice of appeal.”

It is settled law, that an applicant who wishes that the discretion of the court below under the above rules be exercised in his favour must satisfy the two conditions prescribed under the rules. It is not enough to satisfy just one of the two: See *Ibodo v. Enarofia* (1980) 5-7 S.C. (Reprint) 29; (1980) 5-7 S.C. The complaint in this appeal touches the failure of the appellants to satisfy the first limb of the rule as decided by the court below. There was never any suggestion that the grounds of appeal raised by the appellants did not show good cause why the appeal should be heard. I shall not therefore dwell on that limb.

My learned brother, Kutigi, JSC., has in his lead judgment, reproduced the relevant paragraphs, from the affidavit evidence filed by the appellants, wherein they explained the circumstances, which made it impossible for them to appeal within the prescribed time. In a summary, the affidavit sought to establish the following:

1. That judgment was given by the trial court on 28/5/90 and that immediately thereafter, appellants instructed a solicitor. Chief C. O. Odelusi to file an appeal on their behalf against the judgment.

2. That Chief Odelusi on 17/7/90 told them the appeal had been filed.

3. That on 14/12/90, an obituary appeared in the Daily Times announcing the demise of Chief C. O. Odelusi.

4. That appellants, following their visit to the family of Chief Odelusi which culminated in the late release of the case file to them later discovered that Chief Odelusi had not filed an appeal as he told them.

5. That another counsel was later briefed to pursue the appeal but that the prescribed time for filing an appeal had then expired.

The facts deposed to by the appellants which were not falsified by the respondents or materially challenged would appear to explain why an appeal was not promptly filed. It is to be borne in mind in this connection that a court would not visit the mistake or negligence of counsel on the client. See *Bowaje v. Adediwura* (1976) 6 S.C. (Reprint) 95; (1976) 6 S.C. 95 at 97 where this court per Bello, JSC., (as he then was) observed:

“This court would readily exercise its discretion to extend the periods prescribed for doing an act if it is shown to the satisfaction of the court that the failure by a party to do the act within the period prescribed was caused by the negligence or inadvertence of his counsel. (See *T. A. Doherty & Anor. v. R. A. Doherty* (1964) 1 All NLR 299 and *G. B. A. Akinyede v. The Appraiser* (1971) 1 All NLR 162).”

The argument has been pressed on us that an appellate court does not readily interfere with the exercise of discretion by the lower court. It was not and it could not however be argued that the unwillingness of an appellate court to interfere with the discretion of the lower court was an immutable principle of law. In *Enekebe v. Enekebe* (1964) 1 All NLR 95 at 100 (Reprint), this court per Bairamian, JSC., explained the approach of an appellate court in these words:

“The discretion conferred on the trial Judge is unfettered but there is a right of appeal, and, to quote from Lord Simon’s speech in *Blunt v. Blunt* (1943) AC 517 at p. 526: (Reference supplied by me)

‘If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case, the exercise of discretion might be impeached, because the court’s discretion will have been exercised on wrong or inadequate materials, but, as was recently pointed in this House in another connection in *Charles Osenton v. Johnston* (1942) AC 130, 138:

‘The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the Judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, *ad (sic) it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations then the reversal of the order on appeal may be justified.*’ ”

Now in this appeal, it would appear that the court below had re-

fused appellants' application under a misapprehension of fact in that it failed to take into account matters that are relevant. It ought to have dawned on the court below that the facts relied upon by the appellants, unchallenged, as they were, confronted them with no alternative other than seek an extension of time to appeal. This was not a case where the court below had taken the position that it did not believe the facts deposed to. I think it would be unfair in the circumstances to refuse to grant to the appellants, the leave to appeal. B

I would also allow the appeal as in the lead judgment of my learned brother, Kutigi, JSC. I therefore make the following orders: C

(1) Time within which to seek leave to appeal is extended till today 16/6/06.

(2) Leave to appeal is granted.

(3) Time to appeal is extended by 60 days from today. I make no order as to costs. D

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