

SUPREME COURT OF NIGERIA

30TH MARCH, 2007 SC. 271/2001

**CORAM:- I. L. KUTIGI CJN, N. TOBI, G. A. OGUNTADE,
A. M. MUKHTAR, W. S. N. ONNOGHEN, JJSC**

1. ENYIBROS FOODS PROCESSING DEFENDANTS/
COMPANY LTD APPELLANTS

2. CHIEF CHRISTOPHER ENYINWA
AND

1. NIGERIAN DEPOSIT INSURANCE PLAINTIFF/
CORPORATION RESPONDENT

2. CHARLES NDUBUISI MBAMALU ... APPLICANT/RESPONDENT

APPEALS - Time - Discretion - Extension of time to appeal - Explanation of the delay - Appellate court will not interfere - Save where exercise of discretion - Is manifestly wrong or reckless (H1)

APPEALS - Leave to appeal - Extension of time - Ground of appeal - Appellate court is to consider - Whether the grounds are substantial and arguable - Not to decide their merit (H2)

APPEALS - Interest - Leave to appeal - Extension to time - 2nd respondent has interest vide s. 243(a) 1999 Constitution - As to entitle him seek leave to appeal (H3)

APPEALS - Jurisdiction - Leave to appeal - Grounds of appeal - That raise issues of failure to observe due process - And condition precedents - Are clearly dealing with issue of jurisdiction (H4)

APPEALS - Time - Extension of time to appeal - Reasons for the delay - Was satisfactorily explained by applicant (H5)

APPEALS - Issues - Reply brief - Where not filed in respect of issue of abuse of court's process - Appellants are deemed to have conceded that

FACTS

This is an appeal against a June 2001 ruling of the Court of Appeal, Enugu Division, granting 2nd respondent extension of time within which to apply for leave to appeal, leave to appeal and extension of time within which to appeal.

In June 1995, the original plaintiff (now replaced by the present 1st respondent) instituted an action against the appellants vide the undefended list procedure, claiming a credit of over N3 million naira with accrued interest. The matter found its way into the general cause list. The defendants/appellants by their statement of defence counter claimed for a declaration that the plaintiff has no right to sell the mortgaged property. However, 2nd respondent purchased the mortgage property at No. 9 Nwosu Street Achara Layout, Enugu (subject matter of the counter claim), from the original plaintiff. The purchase was before the filing of the counter claim. The suit was struck out following the filing of a Notice of Discontinuance by the plaintiff and the counter claim was adjourned to April, 1996, for hearing.

Several other things happened which included granting of judgment in appellants' favour. 1st respondent appealed to the Court of Appeal. 2nd respondent who had not been a party to the case presented an application before the Court of Appeal as an interested party seeking for leave to appeal. The application was granted by that court. Aggrieved, the appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(a) Whether in the circumstances of this case the court below was right in granting the application for extension of time within which to apply for leave to appeal, leave to appeal, and extension of time within which to appeal as an interested party (grounds 1, 3 and 4 of the notice and grounds of appeal).

(b) Whether the application by the applicant/respondent is an abuse of court's process (ground 2 of the notice and grounds of appeal)."

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

APPEALS - Time - Discretion

1. It is settled law that a grant or refusal of an application for extension of time within which to appeal involves the exercise of the discretion of the court before which the application pends and that the said application must be supported by an affidavit which must state sufficient reasons to explain the delay; it must contain the judgment or ruling of the court against which the applicant is seeking to appeal and the proposed grounds of appeal against such judgment or ruling. It should, however, be noted that two instances of delay may be involved in an application for extension of time for leave to appeal which must be explained. These are:-

(a) the reason why the applicant could not appeal within the time statutorily allowed to appeal, and

(b) the reason why the application was not filed earlier than the time it was filed after the time statutorily allowed for the applicant to appeal.

In addition to the above principles of law relevant to a determination of an application for extension of time for leave to appeal etc, there is another very important principle that guides an appellate court when called upon to review, by way of appeal, the discretion exercised by the lower court in granting or refusing to grant an application of that nature. The principle is that the attitude of appellate courts to the exercise of discretion by lower courts is not dissimilar to that adopted over the issue of findings of fact, which is that unless the exercise of discretion by a court of first instance or by a lower court is manifestly wrong, arbitrary, reckless or injudicious, an appellate court would not interfere merely because faced with similar circumstances it would have reacted differently.
(p. 1146 F/ 1147 E)

Leave to appeal - Extension of time

2. It is settled that the duty of the appellate court in the consideration of the grounds of appeal proposed by the appellant and filed in support of the application for leave to appeal is limited to whether the grounds of appeal are substantial and reveal arguable grounds. It is therefore not the

duty of the court at that stage to decide the merit of such grounds as filed in support of the application for to do so would amount to deciding the substantive matter in an interlocutory application which the law frowns upon.

B Suffice it, however, for me to say that the issue raised in the grounds of appeal are really substantial and arguable as has been demonstrated by both counsel in their respective briefs of argument earlier summarized in this judgment. (p. 1147 B/ 1151 A)

C ***Leave to appeal - 2nd respondent has interest vide s. 243(a)***

3. Now the question as to whether the 2nd respondent is a party or person having interest as envisaged under section 243(a) of the 1999 Constitu-

D appeal etc etc. I have no doubt at all and I agree with the lower court that he is. There is no doubt that the 2nd respondent purchased the property from the original plaintiff in the action and before the appellants, by their counter claim, put the issue of title to that property in contention. By that
E token the 2nd respondent acquired a legally recognizable right to the property worthy of protection by appeal against any decision of a court that adversely affect same. (p. 1149 B)

F ***Jurisdiction - Leave to appeal***

4. As I earlier stated in this judgment it is not the duty of the court at this stage to pronounce on the merit of the grounds but applying the principles of law stated by this Court in the case of Madukolu vs Nkemdilim
G supra.

It becomes very clear that where a complaint in any ground of appeal is about failure to observe due process and non - fulfillment of any condition precedent to the exercise of jurisdiction, such as payment of filing fees giving judgment on a matter under the undefended list on plead-
H ings without first and foremost ordering a transfer of the matter from the undefended list to the general cause list and pleadings; and hearing a matter on a date other than the agreed adjourned date by the parties and the court clearly, to my mind raise issues of jurisdiction of the court to

entertain the matter for non fulfillment of conditions precedent. (p. 1151 D/G)

Extension of time to appeal - Reasons for the delay

5. On the issue as to whether the 2nd respondent did satisfactorily explain B his reasons for the delay in presenting the application, I agree with the lower court that he did particularly as the record clearly show that he was not aware of the pendency of the action and that whereas the appellants knew of his interest in the property they deliberately did not put him C on notice of the proceedings neither did they apply to have him joined in the matter. The records show that 2nd respondent took many steps to try to protect his interest in the matter ever since he became aware of the problems, one of which is to apply for leave to appeal against the judgment as a person interested. (p. 1152 B) D

Issues - Reply brief - Where not filed

6. It should be noted that learned counsel for the appellants has not filed a reply brief in this appeal so I take it that the issue as to the discontinu- E ance of suit No. E/326/96 and the parties thereto and their subject matter not being the same have been conceded by counsel for the appellants. In any event, the fact that the suit was discontinued before arguments on the application took the bottom off the complaint of the appellants on that F issue particularly as both suits or matters must co-exist; apart from other requirements such as the parties and subject matter must be the same; for one to legally talk of abuse of court process. In the circumstances I resolve the second issue against the appellants. (p. 1153 D) G

NOTABLE POINTS OF INTEREST

TOBIJSC

1. Determination of whether a person is interested in a suit

The test of interest to determine a person interested is whether the per- H son could have been joined as a party to the suit. A person interested includes a person affected or likely to be affected or aggrieved or likely to be aggrieved by the proceedings. (p. 1159 E)

2. *Lis pendens doctrine - Meaning and purpose*

Both parties have dealt with *lis pendens* which means a pending law suit or simply a pending suit. It is a latinism that has given its name to a notice
B required to warn all parties that certain property is the subject matter of litigation, and that any interest acquired during the pendency of the suit must be subject to the outcome of the litigation.

In other words, the doctrine operates to prevent the effective transfer of any property in dispute during the pendency of that dispute. And
C here, it is quite irrelevant whether the purchaser has notice - actual or constructive. The doctrine is really designed to prevent the vendor from transferring any effective title to the purchaser by depriving him (the vendor) of any rights over the property during the currency of the litigation or the pendency of the suit. That being so, the principle of *nemo dat quod non habet* will apply to defeat any sale or transfer of such property
D made during the currency of the litigation.

Lis pendens as a doctrine applies in respect of title to property and
E it is that when title to property is the subject matter of the litigation, all intending sales must abate, pending the outcome of the litigation. That is good law. It also accords with common sense and good human and societal practice. (p. 1159 G/ 1160 H)

F **REPRESENTATION**

A. I. Ani for the 2nd Respondent.
No appearance for the Appellant.

G **CASES REFERRED TO**

- Ibodo vs. Enarofia (1980) 507 S.C 42
University of Lagos vs Olaniyan (1985) 1 NWLR (pt. 1) 156
Obikoya vs Wema Bank Ltd (1989) 1 NWLR (pt. 96) 157
H Holman Bros (Nig) Ltd vs Kigo (Nig) (1980) 8 - 11 S.C 43
Egbe vs Onogun (1972) 1 All NLR (pt. 1) 95
Ojukwu vs Governor of Lagos State (1985) 2 NWLR (pt. 10) 806
Williams vs Niokwe (2005) 14 NWLR (pt. 945) 249 at 269

Osagie v. Oyeyinka (1987) 3 NWLR (Pt. 59) 144

Abhulimhen v. Namwe (1992) 8 NWLR (Pt. 258) 172

Combined Trade Ltd, v. ASTC Ltd. (1995) 6 NWLR (Pt. 404) 709

Umoh v. Tita (1999) 12 NWLR (Pt. 631) 427

Ojukwu v. Military Governor of Lagos State (1985) 2 NWLR (Pt. 10) B 806

Mbanu v. Mbanu (1961) 1 All NLR 652

Maja v. Johnson (1951) 13 WACA 194

In Re Ogunmowuola (1996) 2 NWLR (Pt. 428) 90

C

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999 s. 243

Court of Appeal Rules O. 3 r. 4(2)

D

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the ruling of the Court of Appeal holden at Enugu in appeal No. CA/E/63M/97 delivered on the 2nd day of June 2001 granting the 2nd respondent extension of time within which to apply for leave to appeal, leave to appeal and extension of time within which to appeal. The appellant is not satisfied with that ruling hence the present appeal in which the issues for determination, as identified by learned counsel for the appellants OBI AKPUDO Esq in the appellants' brief of argument filed on the 19th day of March, 2002 are as follows: -

“(1) In all the facts and circumstances of this appeal, was the order of the Court of Appeal granting leave to the applicant/respondent to appeal against the decision of the trial court as a party having an interest in the subject-matter justified?”

G

“(2) Do the grounds of appeal which the applicant/respondent seeks to argue if his application for, inter alia, leave to appeal as a “party interested” succeeds genuinely question the jurisdiction of the trial court to entertain the substantive suit?”

H

If the answer to issue No. 2 is in the negative then:

“(3) Was the Court of Appeal correct when it did not examine the reasons for the applicant/respondent's failure to appeal within time be-

fore granting the application for inter alia, extension of time within which to file Notice and Grounds on the grounds that all his proposed grounds of appeal raise issues of jurisdiction?

B (4) *Was the Court of Appeal correct in failing or neglecting to consider or pronounce on the issue (raised before it by the defendants/appellants) to the effect that the application for inter-alia, extension of time within which to appeal as an interested party is an abuse of judicial process?"*

C On the other hand, the issues formulated for determination by learned counsel for the 2nd respondent. ANTHONY I. ANI Esq., in the 2nd respondent's brief of argument deemed filed on 10/1/06 are as follows:-

D *"(a). Whether in the circumstances of this case the court below was right in granting the application for extension of time within which to apply for leave to appeal, leave to appeal, and extension of time within which to appeal as an interested party (grounds 1, 3 and 4 of the notice and grounds of appeal).*

E *(b) Whether the application by the applicant/respondent is an abuse of court's process (ground 2 of the notice and grounds of appeal)."*

F On the 27th day of June 1995 the original plaintiff/respondent, Merchant Bank of Africa Ltd instituted suit No. 0/394/95 against the present appellants under the undefended list claiming the following reliefs:-

"(a) N3,045,058.17 being money due to the plaintiff together with accrued interest arising from a credit facility granted to the defendants.

(b) 21% interest thereon from 30/4/95 till judgment,

G *(c) 5% interest on the judgment debt until the money is fully liquidated."*

For reasons not contained in the record of appeal the matter somehow found its way into the general cause list and the plaintiff filed a Statement of Claim on the 22nd day of September 1995 while the appellants filed their Statement of Defence on the 13th day October 1995. In the Statement of Defence the appellants counter-claimed for the following reliefs:-

"(a) Declaration that the property in paragraph 22 of the State-

ment of Defence/counter claim is the personal property of the second defendant.

(b) Declaration that on the construction of the Deed of Legal Mortgage the plaintiff had no right to sell

(c) Declaration, that all steps, acts, things done or purported to have been done by the plaintiff to the aforesaid deed are ineffectual, null and void.

(d) Perpetual injunction.”

However, on the 11/8/95 the respondent purchased the property at No. 9 Nwosu Street, Achara Layout, Enugu, subject matter of the counter claim from the original plaintiff. The purchase was before the filing of the counter claim on 13/10/95. On the 28/2/96 suit No. 0/394/95 was struck out following the filing of a Notice of Discontinuance by the original plaintiff and the counter claim was adjourned to 18/4/96 for hearing. Before the date fixed for hearing the appellants filed a motion praying the court for judgment which was fixed for, heard and granted on 8/3/96.

During the pendency of the action the original plaintiff went into liquidation and was substituted for by the present 1st respondent who appealed against that decision to the Court of Appeal. The 2nd respondent was not a party to the action at the trial court neither was his application to join that appeal granted. Following the refusal of that application the 2nd respondent presented an application before the lower court for the prayers earlier reproduced in this judgment which were duly granted resulting in this appeal.

It must be pointed out that the way learned counsel argued the issues leave much to be desired. At page 4 of the appellants' brief is the beginning, of the argument on appellants' issue No. 1 which runs through to page 18 where argument on issue No. 2 commences and ends at page 20. It means that though appellants' learned counsel formulated three substantive issues with a fourth in the alternative, arguments have been presented on two or rather arguments on issues 1-3 have been lumped into issue No. 1 without learned counsel specifically saying so. That apart, what learned counsel argued as issue No. 2 from page 18 of the brief is actually his issue No. 4. It is having regard to the way the issues

were formulated and argued by learned counsel for the appellants that I prefer the two issues formulated by learned counsel for the 2nd respondent. In fact the way learned counsel for the appellants presented his argument confirms the fact that there are substantially only two issues calling for determination in this appeal.

B In arguing the appeal, learned counsel for the appellants submitted that the property in issue in the case belongs to the 2nd appellant who never took a loan from the original plaintiff; that a study of exhibit C - the Deed of Mortgage will reveal that it is not a third party legal Mortgage C and that there is nothing to show that the 2nd appellant, who is not a party to exhibit C, authorized the use of his property as security for the loan granted to the 1st appellant by the original plaintiff; that the purported deed of guarantee exhibit D was not signed by the 1st appellant. On the D premises of the above, learned counsel submitted that the original plaintiff had no authority to sell or transfer interest in the property to the 2nd respondent.

E Learned counsel further submitted that the mere fact that a person has some interest in or over the subject matter of a case is not, without more, sufficient to qualify him as a “*party interested*” particularly as the law insists that the time and circumstances of the acquisition of the alleged interest must be examined to determine whether the alleged interest is worthy of protection, relying on *Societe Generale Bank (Nig) Ltd* F *vs Afekoro* (1999) 11 NWLR (pt. 628) 521; that for an interest to be so recognized it must be a genuine and legally recognizable interest in respect of the decision which prejudicially affects such interest.

G Learned counsel then submitted that the interest which the 2nd respondent claims was acquired during the tendency of the case that the action was instituted on 27/6/95 while the property was purchased on 11/8/95 but paid for on 16/8/95; that the argument that the property was not an issue in the case initiated under the undefended list until the filing H of the counterclaim on 13/10/95 begs the issue; that even after the purchase of the property, 2nd respondent who was aware of the pendency of the action did not join to protect his alleged interest and as such he should not be granted leave to appeal against any judgment pronounced in the

case, relying on *Ojogbo vs Itshekiri Communal Land Trustees* (1973) NSCC 661; *Re Ugadu* (1988) 5 NWLR (pt. 93) 189.

Learned Counsel further submitted that to succeed in an application of the nature under appeal, the applicant must establish.

(a) that there are grounds of appeal which *prima facie*, deserve consideration by the courts and B

(b) that there are good and substantial reasons for his failure to appeal within time relying on *UKWU vs Bunge* (1997) 8 NWLR (pt. 518) 527; that the lower court did not consider the reasons for the applicant's failure to appeal within time before granting the application on the ground that the grounds of appeal raise issues of jurisdiction whereas an examination of the said grounds do not support that contention; that ground one of the grounds of appeal does not raise an issue of jurisdiction in that it does not complain that the matter is either outside the jurisdiction of the court or that the court has no territorial jurisdiction to entertain it; that it only complains that an error of procedure was committed. C D

Learned Counsel also submitted that the second ground of appeal does not raise an issue of jurisdiction relying on the dictum of Oguntade, JCA (as he then was) in *A.C.B vs Henshaw* (1990) 1 NWLR (pt. 129) at 651; *Noibi vs Fikolati* (1987) 1 NWLR (pt. 52) 619 particularly as it is the duty of the administrative staff of the court to assess and collect adequate fees for processes filed and that their failure cannot be visited on litigants relying on *Eke vs Eluwa* (2000) 14 NWLR (pt. 688) 560; that the third ground is also not an issue of jurisdiction particularly as a motion can intervene before the date fixed for hearing; that the failure of the Court of Appeal to consider the reason for the 2nd respondent's failure to appeal within time has occasioned a miscarriage of justice. E F G

On his part, learned counsel for the 2nd respondent conceded that an applicant for extension of time to appeal must satisfy the court that:

(a) there exists good and satisfactory reasons for not filing his appeal timeously and that; H

(b) he has substantial and arguable grounds of appeal.

Learned Counsel then submitted that the duty of the court in the consideration of the proposed grounds of appeal at that stage is limited to

whether the grounds of appeal, are substantial or arguable; that it is not the business of the court at that stage to decide the merit of the grounds of appeal, relying on C.B.N vs AHMED (2001) 11 NWLR (pt 724) 369 at 392 - 393.

B It is the further submission of learned counsel that the term a
 'person having interest" under section 243(a) of the 1999 Constitution
 which grounded the application in issue means "*person aggrieved, or
 person who has suffered legal grievance against whom a decision has
 been pronounced which has wrongfully deprived him of something or
 wrongfully affected his title to something*" relying on Owena Bank (Nig)
 C Plc vs N.S.E Ltd (1997) 8 NWLR (pt. 515) 1 at 19; IN RE UGADU
 (1988) 5 NWLR (pt. 93) 189 at 199; that the 2nd respondent will suffer
 injury or hardship arising from the decision in suit No. 0/394/95 delivered
 D on 8/3/96 if the decision is not appealed against; that the interest acquired
 by the 2nd respondent is not extinguished by lis pendens in that at the time
 2nd respondent paid for the property, the title to it was not in issue in 0/
 394/95 since the 2nd respondent paid for it on 11/8/95 and got receipt on.
 E 16/8/95; the issue of title was raised for the first time in the counter claim
 filed on 13/10/95 by the appellant; that for a party to be caught by the
 doctrine of lis pendens the following conditions must co-exist:-

(a) it must be shown that at the time of sale of the property the suit
 F regarding the dispute about the said property was already pending.

(b) it must be an action in respect of real property, not personal
 property;

(c) the object of the action must be to assert title to a specific real
 property;

G (d) the other party must have been served with the process, rely-
 ing on Bua vs Dauda (2003) 13 NWLR (pt. 838) 657 at 686;

that the case of Societe Generale Bank (Nig) Ltd vs Afekoro supra relied
 upon by counsel for the appellants is not relevant as this Court held in
 H that case that the transfer of the money at the instance of the police into
 the appellant's account was illegal ab initio whereas in the instant case,
 there is nothing illegal in the transfer at the time when o case was pend-
 ing in respect of the property, and therefore the respondent acquired

legally recognizable interest in the subject matter of the decision of the trial court.

On the reasons for the delay in filing the application for extension of time learned counsel urged the court to note that the 2nd respondent was not a party to suit No. 0/394/95 filed on 22/9/95 i.e. the counter B claim, after the 2nd respondent had acquired interest in the property; that 2nd respondent sued the bank at Enugu High Court in suit No. E/568/95 claiming declaration that the transfer of the property is null and void and of no effect; that at the time appellants filed the motion for judgment in 0/394/95, they were aware of the interest of the 2nd respondent and the C caveat entered at Enugu Land Registry on behalf of the respondent dated 17/10/95 and filed on 2/11/95 prior to the motion for judgment filed on 5/3/96, but failed or neglected to join the 2nd respondent so as to put him on notice; that 2nd respondent's motion to set aside the judgment in issue D in 0/394/95 was dismissed while his application to be joined in the existing appeal by the original plaintiff was struck out on 20/1/2000. In addition, the application giving rise to the instant appeal was filed on 2/3/2000; that the events show that the applicant did not sleep over his right, E and that the delay cannot be called inordinate.

Learned Counsel further submitted that the grounds of appeal raise the issue of jurisdiction of the court to hear and determine the case filed under the undefended list on pleadings without first making an order F placing the case, in the general cause list, the competence of the counter claim without payment of the appropriate fees and the jurisdiction of the court to hear and determine a case on a date other than the date adjourned to in open court. Citing and relying on *Madukolu vs Nkemdilim* (1962) G 2 All NLR 341 learned counsel submitted that the case was not initiated by due process in that certain conditions precedent were not fulfilled before the exercise of the court's jurisdiction; that the case of *Ukwu vs Bunge supra* is relevant to this appeal in that this court allowed the extension of time after a delay of 9 years and 6 months because the H proposed grounds of appeal raised fundamental issue of jurisdiction; citing and relying of *Olaniyan vs. Awah* (1989) 5 NWLR (pt. 122) 493; *Ilukwe vs Anah* (1999) 5 NWLR (pt.. 603) 476; *Okpoido vs Kpong* (1999)

5 NWLR (pt, 604) 595, learned counsel submitted that non payment of filing fees is a fundamental vice that can rob the court of jurisdiction to entertain a matter, and that the only requirement is that the party raising the issue must raise it timeously before taking steps in the proceedings, but that since the 2nd respondent did not participate in the proceedings at the trial court, his only opportunity to raise the issue is in the court below which he has done.

Learned Counsel further submitted that the cases cited and relied upon by his learned friend for the appellants on the issue of standing by are not applicable to the facts of this case particularly as the appellants have not shown that the respondent was aware of the existence of the counter claim which raised the issue of title to the property. Relying on the case of University of Lagos vs Olaniyan (1985) 1 NWLR (pt. 1) 156 at 163; Williams vs Mokwe (2005) 14 NWLR (pt. 945) 249 at 269; University of Lagos vs Aigoro (1985) 1 NWLR (pt. 1) 143 at 148 and Shittu vs Osibanjo (1988) 7 SCNJ 37 at 45, learned counsel submitted that an appellate court will not interfere with the exercise of discretion by a lower court if the exercise is not manifestly wrong, arbitrary, reckless or injudicious and urged the court to resolve the issues against the appellants.

Both counsel have agreed that an applicant under Order 3 Rule 4(2) of the Court of Appeal Rules must satisfy the following requirements:-

- (a) there must exist good and satisfactory reasons for not filing his appeal timeously, and
- (b) that he has substantial and arguable grounds of appeal.

It is settled law that a grant or refusal of an application for extension of time within which to appeal involves the exercise of the discretion of the court before which the application pends and that the said application must be supported by an affidavit which must state sufficient reasons to explain the delay; it must contain the judgment or ruling of the court against which the applicant is seeking to appeal and the proposed grounds of appeal against such judgment or ruling. It should, however, be noted that two instances of delay may be involved in an application for extension of time for

leave to appeal which must be explained. These are:-

(a) the reason why the applicant could not appeal within the time statutorily allowed to appeal, and

(b) the reason why the application was not filed earlier than the time it was filed after the time statutorily allowed for the applicant to appeal. B

It is settled that the duty of the appellate court in the consideration of the grounds of appeal proposed by the appellant and filed in support of the application for leave to appeal is limited to whether the grounds of appeal are substantial and reveal arguable grounds. C It is therefore not the duty of the court at that stage to decide the merit of such grounds as filed in support of the application for to do so would amount to deciding the substantive matter in an interlocutory application which the law frowns upon. See *Ibodo vs. Enarofia* (1980) 507 S.C 42; *University of Lagos vs Olaniyan* (1985) 1 NWLR (pt. 1) 156; *Obikoya vs Wema Bank Ltd* (1989) 1 NWLR (pt. 96) 157; *Holman Bros (Nig) Ltd vs Kigo (Nig)* (1980) 8 - 11 S.C 43; *Egbe vs Onogun* (1972) 1 All NLR (pt. 1) 95; *Ojukwu vs Governor of Lagos State* (1985) E 2 NWLR (pt. 10) 806. D

In addition to the above principles of law relevant to a determination of an application for extension of time for leave to appeal etc, there is another very important principle that guides an appellate court when called upon to review, by way of appeal, the discretion exercised by the lower court in granting or refusing to grant an application of that nature. The principle is that the attitude of appellate courts to the exercise of discretion by lower courts is not dissimilar to that adopted over the issue of findings of fact, which is that unless the exercise of discretion by a court of first instance or by a lower court is manifestly wrong, arbitrary, reckless or injudicious, an appellate court would not interfere merely because faced with similar circumstances it would have reacted differently. See *H* *University of Lagos vs Olaniyan* supra at 163, *Williams vs Niokwe* (2005) 14 NWLR (pt. 945) 249 at 269. F G

The following facts are not disputed:

(i). Suit No. 0/394/95 instituted by the original plaintiff claimed recovery of debt simpliciter from the appellants, under the undefended list.

B (ii) There is no evidence on record to explain how the suit came to be on the general cause list and when pleadings were ordered. Though learned counsel for the appellants has stated that the record compiled by the respondent for the appeal was incomplete, he never told the courts the date, if any, when the order transferring the matter from the Undefended List to the General Cause List was made by the court of trial, C which would have normally have been the case if such a date existed.

(iii) that the respondent paid for the property in question on the 16/8/95 and at that time there was no claim on the title of that property in court.

D (iv) that the dispute as to the title to the property only came into court when appellants filed a Counter Claim in suit *No. 0/394/95* on the 13th day of October 1995.

(v) that the respondent was never a party to the original claim or E the counter claim even though from the facts the appellants were aware of the fact that he had acquired interest in the said property nor was he served with any process relating thereto.

F (vi) that on the 2/11/95 the respondent, through his solicitor filed a caveat at the Enugu Land Registry indicating his interest on the property well before the appellants filed their motion for judgment on 5/3/96 which was granted on 8/3/96 but without joining the respondent.

G (vii) that of all the three reliefs sought by the appellants in the counter claim two were declaratory while the third was for injunctive relief.

(viii) that the trial court on the 8/3/96 granted the motion for judgment and granted all the reliefs including the declarations without the appellants giving evidence at the proceedings.

H (ix) that the counter claim as a fresh action ought to have been paid for as an originating process but was not.

(x) that the 8/3/96 when the motion was heard and judgment entered for the appellants was not the original date agreed upon by both

counsel and to which the case was adjourned in open court.

(xi) that at the time judgment was entered there was an application by the original plaintiff praying the court for extension of time to file a defence to the counter claim filed on 8/3/96 - see pages 57 - 62 of the record.

Now the question as to whether the 2nd respondent is a party or person having interest as envisaged under section 243(a) of the 1999 Constitution so as to entitle him to apply for extension of time to seek leave to appeal etc etc. I have no doubt at all and I agree with the lower court that he is. There is no doubt that the 2nd respondent purchased the property from the original plaintiff in the action and before the appellants, by their counter claim, put the issue of title to that property in contention. By that token the 2nd respondent acquired a legally recognizable right to the property worthy of protection by appeal against any decision of a court that adversely affect same. In my view, it cannot, under the circumstances and the facts of this case be said that the 2nd respondent bought the property during the pendency of the case when the title to that property was not in issue in the litigation as at the time 2nd respondent bought the property; it only became an issue after the filing of the counter claim and at that time the property held already been bought. In any event, it is the contention of learned counsel for the 2nd respondent that the principle of *lis pendens* does not apply to action for personal property such as recovery of money as was the case in the original action but to real property which was the action initiated by the counter claim after the property had been bought and paid for. The above submission obviously make the issue arguable and subject to resolution by the Court of Appeal at the hearing of the appeal, particularly as the payment of the purchase price for the property automatically confers a right to same on the respondent which right is enforceable unless otherwise determined.

Turning to the proposed grounds of appeal in issue, the complaints are as follows:-

“GROUND OF APPEAL

1. The learned trial judge lacked the jurisdiction to determine the

suit on pleadings without first giving a decision on the suit as in the Undefended List.

PARTICULARS OF LACK OF JURISDICTION

(i). *The claim in the suit dated 27/6/95 and filed on 29/6/95 was placed on the Undefended List, and as such ought to be determined under Order 24 Rule 9 of the Anambra State High Court.*

(ii) *The trial judge did not make any order for transfer of the suit from the Undefended List to the general cause list as shown from the record.*

(iii). *The Defendants/Respondents did not at all file a Notice of Intention to defend, but given judgment upon their Counter-Claim.*

2. *The learned trial judge erred in law in giving judgment for the respondents on their counterclaim when appropriate fees were not paid therefor.*

PARTICULARS OF ERROR

(i) *The Defendants/Respondents filed their Statement of Defence and Counter-Claim*

(ii). *There was no suit properly commenced on the counter-claim before the judge at the time he entered judgment for the Respondents.*

3. *The learned trial judge lacked jurisdiction to entertain the suit on the day he did.*

PARTICULARS OF ERROR

(i). *On 23/11/95 the suit was adjourned to 28/2/96.*

(ii). *On 28/2/96 the suit was struck out and the counter-claim adjourned to 18/4/96*

(iii). *The court heard the case which was properly adjourned in the presence of parties and their counsel on 5/3/96 instead of 18/4/96 when it was properly adjourned.”*

These are the grounds of appeal which learned counsel for the 2nd respondent and the lower court agreed to have raised issues of jurisdiction of the trial court but which learned counsel for the appellants contend do not. I had earlier in this judgment stated the principles of law that guide the courts in considering the substantiality of proposed grounds of appeal at the stage of considering whether or not to grant an applica-

tion of the nature giving rise to the instant appeal. It is generally accepted that the merits of the proposed grounds of appeal are not to be gone into at that stage of the proceedings. **Suffice it, however, for me to say that the issue raised in the grounds of appeal are really substantial and arguable as has been demonstrated by both counsel in their respective briefs of argument earlier summarized in this judgment.** For instance taking the question as to whether the non-payment of filing fees for the counter claim robs the Court of the jurisdiction to entertain the counter claim both counsel have cited cases in support of their contentions and it is only left for the Court of Appeal to determine which version is the correct one having regard to the law on the matter. The question, simply put is whether a suit can be said to have been legally filed or instituted when the requisite filing fees has not been paid by the appellants and, as a follow-up whether the court can be said to be without jurisdiction in the circumstance to entertain the said ‘suit’ or ‘action’. **As I earlier stated in this judgment it is not the duty of the court at this stage to pronounce on the merit of the grounds but applying the principles of law stated by this Court in the case of Madukolu vs Nkemdilim supra** to the effect that a court is competent when:-

“(a) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another,

(b). the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising jurisdiction; and

(c) the case comes before the court initiated by due process of law and upon, fulfillment of any condition precedent to the exercise of jurisdiction.”

particularly (c) above, **it becomes very clear that where a complaint in any ground of appeal is about failure to observe due process and non - fulfillment of any condition precedent to the exercise of jurisdiction, such as payment of filing fees giving judgment on a matter under the undefended list on pleadings without first and foremost ordering a transfer of the matter from the unde-**

fended list to the general cause list and pleadings; and hearing a matter on a date other than the agreed adjourned date by the parties and the court clearly, to my mind raise issues of jurisdiction of the court to entertain the matter for non fulfillment of conditions precedent.

On the issue as to whether the 2nd respondent did satisfactorily explain his reasons for the delay in presenting the application, I agree with the lower court that he did particularly as the record clearly show that he was not aware of the pendency of the action and that whereas the appellants knew of his interest in the property they deliberately did not put him on notice of the proceedings neither did they apply to have him joined in the matter. The records show that 2nd respondent took many steps to try to protect his interest in the matter ever since he became aware of the problems, one of which is to apply for leave to appeal against the judgment as a person interested. That apart, having found as a fact that the grounds of appeal raise substantial and arguable, issues of jurisdiction of the trial court, that alone is enough for the lower court to have granted the application particularly as jurisdiction is the live wire of any adjudication. One must also not loss sight of the glaring fact that the judgment of the trial court was entered without taking evidence in prove of the declaratory reliefs claimed by the appellants.

When one looks closely at the facts of this case it becomes obvious that the more you look the less you see! and that the proceedings leave much to be desired. Learned counsel for the appellants appears bent on sweeping things under the carpet whereas it is in the interest of justice that parties are heard in support of their contending positions. This appeal has come before this court simply because learned counsel for the appellants believes that the court ought to shut out the respondent by determining the appeal on the merit at the interlocutory stage of the proceedings. This has led to the time of the parties and the courts being wasted.

On issue No. 2 learned counsel for the appellants stated that suit No. E/326/96 was pending at the Enugu High Court at the time the appli-

cation resulting in the instant appeal was filed; that both the suit and the application were commenced by the respondent and have in substance the same subject matter; that the 2nd respondent should not be allowed to approbate and reprobate at the same time since to do so amounts to abuse of court process; that the lower court erred in failing to pronounce B on the issue which was placed before it and that this has led to a miscarriage of justice.

On his part, learned counsel for the 2nd respondent submitted that the application is not in abuse of court process because the parties and the subject matter in the two suits are different; that in any event the suit C before the Enugu High Court was discontinued and that the failure of the lower court to consider the effect of suit No. E/326/96 on the application before it does not result in a miscarriage of justice as argued by counsel D for the appellants.

It should be noted that learned counsel for the appellants has not filed a reply brief in this appeal so I take it that the issue as to the discontinuance of suit No. E/326/96 and the parties thereto and their subject matter not being the same have been conceded by E counsel for the appellants. In any event, the fact that the suit was discontinued before arguments on the application took the bottom off the complaint of the appellants on that issue particularly as both suits or matters must co-exist; apart from other requirements F such as the parties and subject matter must be the same; for one to legally talk of abuse of court process. In the circumstances I resolve the second issue against the appellants.

In conclusion I hold the view that the Court of Appeal has the G discretion in granting or refusing an application before it for leave to appeal as an interested party and that any such discretion exercised by it remains valid unless it is shown to have been wrongly exercised on erroneous principles of law or tainted with illegality, particularly as this Court does not make a practice of substituting its own discretion for that of the H Court of Appeal in applications of that nature. Having gone through the record I hold the further view that the decision of the Court of Appeal was right and ought not to be tempered with. I therefore affirm same and

dismiss the appeal with N10,000.00 costs in favour of the 2nd respondent.

Appeal dismissed.

B

KUTIGI CJN

I read in advance the judgment just rendered by my learned brother Onnoghen J.S.C. I agree with his reasoning and conclusions. The appeal has no merit. It is hereby dismissed with N10,000.00 costs in favour of the 2nd Respondent.

TOBI JSC

D In Suit No. 0/394/95, the plaintiff/respondent sought three reliefs from the defendants/appellants. The defendants/appellants also sought three reliefs in a counter claim. While the proceedings were pending, the respondent/applicant purchased the property in dispute from the plaintiff/respondent having sold the property to the applicant/respondent. The suit was discontinued at the instance of Merchant Bank of Africa (Nigeria) Limited. It was accordingly struck out. The counter claim was adjourned to 18th April, 1996 for hearing.

F The Bank filed no Reply to the counter claim. The applicants brought an application to the Court of Appeal for an order:

“(a) *Enlarging the time within which the applicant may apply for leave to appeal from the decision of the High Court Onitsha as a party having an interest in the case.*

G (b) *Granting leave to the applicant to appeal to this court as a party affected and having interest in the matter.*

(c) *Extending the time within which to file Notice, and Grounds of Appeal as a party affected/ interested in the case.*

H (d) *An Order permitting the Applicant to use the Records already compiled for the prosecution of this appeal.”*

The Court of Appeal granted prayers (a) to (c). The Court refused prayer (d). The Merchant Bank of Africa (Nigeria) Limited was substi-

tuted with Nigerian Deposit Insurance Corporation who were appointed their provisional liquidators when the bank failed. In the appeal, the appellants formulated the following issues for determination:

“1. *In all the facts and circumstances of this appeal, was the Order of the Court of Appeal granting leave to the Applicant/Respondent to appeal against the decision of the trial court as a party having an interest in the subject matter justified?*

2. *Do the Grounds of Appeal which the Applicant/Respondent seeks to argue if his application for, inter alia, leave to appeal as a “party interested” succeeds genuinely question the jurisdiction of the trial court to entertain the substantive suit?”*

If the answer to Issue No. 2 is in the negative, then:

“3. *Was the Court of Appeal correct when it did not examine the reasons for the Applicant/Respondent’s failure to appeal within time before granting his application for inter alia, extension of time within which to file Notice and Grounds on the ground that all his proposed grounds of appeal raise issues of jurisdiction?*

4. *Was the Court of Appeal correct in failing or neglecting to consider or pronounce on the issue (raised before it by the defendants/appellants) to the effect that the application for inter alia, extension of time, within which to appeal as an interested party is an abuse of judicial process?”*

The 2nd respondent formulated the following issues for determination:

“(a) *Whether in the circumstances of this case the court below was right in granting the application for extension of time within which to apply for leave to appeal, leave appeal and extension of time within which to appeal as an interested party.*

(b) *Whether the application by the applicant/respondent is an abuse of court’s process.”*

Learned counsel for the appellants, Mr. Obi Akpudo, submitted on Issue No.1 that the mere fact that a party has some interest in or over the subject matter of a case is not, without more, sufficient to qualify him as a “party interested” within the meaning and intendment of the Constitu-

tion. The law insists that the time and circumstances of the acquisition of the alleged interest must be examined to determine whether the alleged interest is worthy of protection, counsel argued. He cited *Societe Generate Bank (Nig) v. Afekoro* (1999) 11 NWLR (Pt. 628) 521 and *In Re Ugadu* (1988) 5 NWLR (Pt. 93) 189. He contended that the interest which the applicant/respondent now claims over the subject matter of the proceedings was acquired during the pendency of the case and with knowledge of its pendency. He pointed out that the suit had not been discontinued as at the time the applicant/respondent purported to purchase the property. He said that there is a sharp or underhand motive in the entire sale transaction between the bank and the applicant/respondent in this matter. Contending that the courts frown at conducts which preempt or frustrate their decisions or orders, counsel urged the court to hold that in all circumstances, the interest purportedly acquired by the applicant/respondent in this case was not genuine and/or legally recognizable.

It is the law that one who being aware of the pendency of proceedings affecting his interest stands by and watch as others fight it cannot be granted leave to appeal against any judgment pronounced in the case as a party Interested, learned counsel argued. He cited *Ojogbo v. Itshekiri Communal Land Trustees* (1973) NSCC 661 and *Re Ugadu* (supra). He pointed out that if the applicant/respondent bought the property; he did nothing to join to protect his alleged interest in the proceedings, though aware of the proceedings. He waited till judgment was entered and now seeks to appeal against the judgment; an action counsel argued is too late.

Learned counsel submitted that the Court of Appeal did not comply with Order 3 Rule 4(2) of the Court of Appeal Rules. He argued that the Court of Appeal was wrong in coming to the conclusion that “*all the grounds of appeal in the applicant’s proposed Notice of Appeal raise issues of lack of the lower court’s jurisdiction.*” He cited *Ukwu-v. Bungo* (1997) 8 NWLR (Pt. 518) 527. Counsel examined the grounds of appeal and submitted that the issue involved is not one of jurisdiction but a complaint bordering on the procedure adopted by the trial court in the

course of the trial and so does not relate to the competency of the trial court to adjudicate over the matter. He cited Kossen (Nigeria) Ltd. v. Savannah Bank (Nig) Limited (1995) 9 NWLR (Pt. 420) 439. He faulted the applicant/respondent for not placing all relevant materials before the court to enable it exercise its discretion in his favour. He argued that the failure of the Court of Appeal to consider the reasons for the applicant/respondent's inability to appeal within time has occasioned a miscarriage of justice. He pointed out that Ukwu v. Bunge (supra) does not apply in favour of the applicant/respondent. He said that the reasons put forward for failure to appeal within time in the affidavit is unimpressive and un-availing. He dealt with the reasons in paragraphs 29, 30, 32, 33, 34, 35, 37, 42 to 46 and 49 and cited Kotoye v. Saraki (1995) 5 NWLR (Pt. 395) 256 at 264 and Anyaduba v. NRT Co. Ltd. (1990) 1 NWLR (Pt. 127) 397.

Taking Issue No. 2, learned counsel submitted that it is not proper for the applicant/respondent to seek leave to appeal against the judgment as an interested party when the suit is pending. To counsel, the applicant/respondent cannot blow hot and cold at the same time *or* be allowed to manipulate the process of court to suit his convenience at any given time. He urged the court to allow the appeal.

Learned counsel for the 2nd respondent, Anthony Ani, conceded that the twin requirements of Order 3 Rule 4(2) of the Court of Appeal Rules are that an applicant in an application for extension of time to appeal must satisfy the court that (a) there exists good and satisfactory reasons for not filing his application timeously and that (b) he has substantial and arguable grounds of appeal. The duty of the court in the consideration of the proposed grounds of appeal at that stage is limited to whether the grounds of appeal are substantial and reveal arguable grounds; it is not the business of the court to decide the merit of the appeal at that stage, counsel argued. He cited CBN v. Ahmed (2001) 11 NWLR (Pt. 724) 369 at 392-393.

He submitted that the applicant/respondent is an interested party in the appeal within the meaning of section 243(a) of the Constitution. He cited Owena Bank (Nig) Plc v. NSE Ltd. (1997) 8 NWLR (Pt. 515) 1 at

19; In Re Ugada (supra) and paragraphs 5, 6, 7, 8, 9, 23 and 50 of the affidavit in support.

Learned counsel contended that the interest acquired by the applicant/respondent is not extinguished by *pendens* because at the time he paid for the property the title to the property was not an issue in Suit No. 0/394/95 Merchant Bank of Africa v. Enyibros Foods Processing Coy. Nig. Ltd. He pointed out that while the applicant/respondent paid for the property on 11/8/95 and got receipt on 16/8/95, the issue of title was raised for the first time in the counter claim filed on 13/10/95 by the appellant. He examined the doctrine of *lis pendens* and cited Alhaji Bua v. Dauda (2003) 13 NWLR (Pt. 838) 657 at 686. He contended that Societe Generale Bank (Nig) Ltd, v. Afekoro (supra) referred to by the appellant is not apposite to the appeal because this court held in that case that the transfer of the money at the behest of the police into the appellant's account was illegal *ab initio*. He also contended that Kotoye v. Saraki (supra) cited by the appellant is not applicable because when this court was invited to indulge the applicant in the case owing to mistake of counsel, it declined to do so because the applicant is a lawyer who showed neither diligence nor competence. Learned counsel submitted that there was no delay on the part of the applicant/respondent and that if there was any delay at all, it was that of counsel which should not be visited on the applicant/respondent. He cited Ogundoyin v. Adeyemi (2001) 13 NWLR (Pt. 730) 410 at 419-420. He contended that the grounds of appeal raise issue of jurisdiction of the court to hear and determine a case filed under the undefended list on pleadings without first making an order placing the case in the general cause list, the competence of the counter claim without payment of the appropriate fees and the jurisdiction of the court to hear and determine a case on a date other than the date the case was adjourned to in the open court on agreement of both counsel. He took the grounds of appeal in some detail and cited Ukwu v. Bunge (supra); CBN v. Ahmed (supra); Olaniyan v. Awah (1989) 5 NWLR (Pt. 122) 493; Ilukwe v. Anah (1999) 5 NWLR (Pt. 603) 476; Okpoido v. Kpong (1999) 5 NWLR (Pt. 604) 595; University of Lagos v. Olaniyan (1985) 1 NWLR (Pt. 1) 156 at 163; Williams v. Mokwe (2005) 14 NWLR (Pt. 945) 24 at

269; University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143 at 148 and Shittu v. Osibanjo (1988) 2 SCNJ 37 at 45.

Learned counsel submitted on Issue No. 2 that the application in the Court of Appeal is not an abuse of the court's process because the parties and the subject matters in the two cases are different. He argued that as the case was discontinued, there cannot be an abuse. He contended that Anyaduba v. NRT Co. Ltd, (supra) cannot apply because in that case the respondent filed both respondent's notice and cross appeal at the same time. He urged the court to dismiss the appeal. Section 243 of the Constitution of the Federal Republic of Nigeria provides in part:

"Any right of appeal to the Court of Appeal from the decision of the Federal High Court or a High Court conferred by this Constitution shall be (a) exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Federal High Court or the High Court or the Court of Appeal at the instance of any other person having an interest in the matter.."

By the subsection, a party to civil proceedings need not seek leave to appeal, if he appeals within time. A person having an interest in the matter must seek leave of the Federal High Court, the High Court of a State or the Court of Appeal to do so.

The test of interest to determine a person interested is whether the person could have been joined as a party to the suit. A person interested includes a person affected or likely to be affected or aggrieved or likely to be aggrieved by the proceedings. See Ojukwu v. Military Governor of Lagos State (1985) 2 NWLR (Pt. 10) 806; Mbanu v. Mbanu (1961) 1 All NLR 652; Maja v. Johnson (1951) 13 WACA 194; In Re Ogunmowuola (1996) 2 NWLR (Pt. 428) 90; Aliyu v. Adewuyi (1996) 4 NWLR (Pt. 442) 284; Gbadamosi v. Kano Travels Ltd. (2000) 8 NWLR (Pt. 608) 243; Re: Opekun (2004) 6 NWLR (Pt. 870) 576.

Both parties have dealt with *lis pendens* which means a pending law suit or simply a pending suit. It is a latinism that has given its name to a notice required to warn all parties that certain property is the subject matter of litigation, and that any interest acquired during the pendency of the suit must be subject to the outcome of the litigation.

In other words, the doctrine operates to prevent the effective transfer of any property in dispute during the pendency of that dispute. And here, it is quite irrelevant whether the purchaser has notice - actual or constructive. The doctrine is really designed to prevent the vendor from transferring any effective title to the purchaser by depriving him (the vendor) of any rights over the property during the currency of the litigation or the pendency of the suit. That being so, the principle of *nemo dat quod non habet* will apply to defeat any sale or transfer of such property made during the currency of the litigation. See *Osagie v. Oyeyinka* (1987) 3 NWLR (Pt. 59) 144; *Abhulimhen v. Namwe* (1992) 8 NWLR (Pt. 258) 172; *Combined Trade Ltd. v. ASTC Ltd.* (1995) 6 NWLR (Pt. 404) 709 and *Umoh v. Tita* (1999) 12 NWLR (Pt. 631) 427.

While learned counsel for the appellants submitted that the doctrine applies in the case, learned counsel for the respondent submitted that the doctrine does not apply in the case. Learned counsel for the appellants relied on paragraphs 7 and 8 of the affidavit in support. Let me quickly read them:

“7. That, in exercise of their right under the said mortgage which Deed was registered, as No. 30 at Page 30 in Volume 448 of the Land Registry, Enugu, the Bank sold the said property to me on or about 11th August, 1995.

8. That I duly paid for the said property and on the 16th August 1995, the legal firm of R. I. Kuku and Company of 24 Cambell Street, Lagos issued me a receipt for the sum of N2,000,000.00 (Two million naira) therefore on behalf of the Bank, a copy of which is herewith attached as Exhibit E.”

Let me take the submission of learned counsel for the respondent and it is that the issue of title was raised in the counter claim for the first time filed on 13/10/95. In other words, it is the case of the applicant/respondent that he paid for the property before the issue of title was raised for the first time in the counter claim. Another way of putting it is that the statement did not raise the issue of title.

Lis pendens as a doctrine applies in respect of title to property and it is that when title to property is the subject matter of the litigation, all

intending sales must abate, pending the outcome of the litigation. That is good law. It also accords with common sense and good human and societal practice.

I have carefully examined the 14 paragraph statement of claim and I do not see any averment on title to the property in dispute. On the contrary, the statement of claim averred to a bank loan and failure on the part of the defendants in the suit to liquidate the loan of N3,045,058.17. I have also carefully examined the counter claim where the title is raised specifically in paragraphs 22 and 25 thereof. Counsel for the applicant/respondent is correct in saying that the counter claim was filed on 13/10/95. I therefore come to the conclusion that at the time when the action was filed, issue of title was not before the court. It was only on 13/10/95 that the issue came before the court and through the counter claim. In *Alhaji Bua v. Dauda* (2003) 13 NWLR (Pt. 838) 657, this court held that for the doctrine of *lis pendens* to apply the following must be shown: (a) that at the time of the sale of the property, the suit regarding the dispute about the said property was already pending; (b) that the action or *lis* was in respect of Teal property; it never applies to personal property; (c) that the object of the action was to receive or assert title to a specific real property; that is to say, an action in a subject matter adverse to the owner in respect of some substantive right which is proprietary in nature; and (d) that the other party had been served with the originating process in the pending action.

It is clear from the statement of claim, particularly paragraph 14 thereof that the reliefs sought are not on the conditions stated in paragraphs (b) and (c) in the case of *Alhaji Bua v. Dauda*. As indicated above, the reliefs are on liquidation of bank loan of N3,045,058.17. What is more, another consideration is in respect of the date when the action was commenced in relation to the date when the sale was made. *Lis pendens* will apply if the action was filed, before the sale was made. It will not apply if the sale was made before the action was filed. I am unable to place my hand on the specific date the action was filed, I realize that the statement of claim was filed on 22/9/95 and the sale took place on 11/8/95; receipt issued on 16/8/95. On 28/2/96 the action was discontinued

and accordingly struck out. Judgment on the counter claim was given on 8/3/96. As the sale would appear to be first in time, there could not have been a *lis* pending and I so hold. Accordingly, the appellants qualify as persons interested within the provision of section 243 of the Constitution. .

I should now take the application for extension of time to appeal. Extension of time within which to appeal is not granted as a matter of course or routine. The applicant must advance substantial reasons to explain the delay in entering an appeal within the prescribed period and to justify the court in granting extension of time. See *Yiborku v. Republic* (1968) 1 All NLR 343; *Saffieddirie v. Commissioner of Police* (1965) 1 All NLR 54.

An application for extension of time to appeal will be granted if the applicant shows that the grounds of appeal are substantial indicating a good cause why the appeal should be heard. See *Ibodo v. Enarofia* (1980) 5-7 SC 42. The applicant has no duty to show from the grounds of appeal that the appeal will certainly succeed. That is to be considered at the hearing of the appeal and not when an application for extension of time to appeal is made.

The right of appeal is constitutional as it is provided in the Constitution. It stands on the very height of the appeal decision by virtue of the fact that the Constitution provides for it. As a constitutional right, it overrides most other negative principles aimed at foreclosing the right. While the constitutional right cannot be granted if the applicant fails to adduce good and substantial materials and reasons for the application, the court will not hesitate to grant an application where there are sufficient materials and reasons in the affidavit justifying the grant of the application.

An application for extension of time to file an appeal involves so much of the discretionary power of the court hearing the appeal. Where the discretion is exercised judicially and judiciously, this court cannot question why the discretion was exercised. It is good law that this court has no jurisdiction to question a discretion which is exercised judicially and judiciously. I do not see any indiscretion on the part of the Court of Appeal. It is in this regard I agree with my learned brother, Onnoghen,

JSC, that the appeal should be dismissed. I dismiss the appeal. I award N10,000.00 costs to the 2nd respondent.

OGUNTADE JSC

B

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Onnoghen JSC. I agree with his reasoning and conclusion. It seems to me that appellants' arguments before this Court have been hinged mainly on matters of fact which have yet not been finally settled. The question whether or not the ownership of the property in dispute was a distinct issue in the case which the plaintiff/respondent withdrew at the High Court before the appellants raised a counter claim stand to be settled in the appeal before the court below. It is only when those facts are finally settled that it can be determined whether or not the sale of the property in dispute by the plaintiff/respondent to the 2nd respondent was caught by the doctrine of *lis pendens*. This is a matter that I ought not to preclude the court below from determining.

C

D

I would also dismiss this appeal as unmeritorious. I award N10,000.00 costs in favour of 2nd respondent.

MUKHTAR JSC

F

In the Enugu division of the Court of Appeal, the 2nd respondent in this appeal, as an applicant having interest in the case filed and moved a motion for the following orders :-

“(a) *Enlarging the time within which the applicant may apply for leave to appeal from the decision of the High Court, Onitsha as a party having an interest in this case.*

G

(b) *Granting leave to the applicant to appeal to this court as a party affected and having an interest in this matter.*

(c) *Extending the time within which to file notice and Grounds of Appeal as a party affected/interested in the case.*

H

(d). *An order permitting the Applicant to use the Records already Compiled for the prosecution of this appeal.”*

The motion was supported by an affidavit sworn to by the applicant/2nd respondent himself, and the pertinent depositions in the affidavit read as follows :-

B “(5). That one of the properties referred to in the said paragraph 22 of the Statement of defence is the one situate at No. 9 Nwosu Street, Achara Layout Enugu, otherwise known as Plot 3 Block CXIV Achara Layout, Enugu.

C (6). That the said property Plot 3, Block CXIV, Achara Layout, Enugu was mortgaged to Merchant Bank of Africa (Nigeria) Limited (hereinafter called the Bank) by the Enyibros Food Processing Company (Nigeria) Limited, for certain monies granted to her and guaranteed by Chief Christopher Enyinwa (both of whom are hereinafter called the Manager and the guarantor respectively). That the mortgagor and the D guarantor executed a Deed of Mortgage and Deed of guarantee respectively. The Deeds are herewith attached as Exhibits ‘C’ and ‘D’.

E (7). That in exercise of their right under the said mortgage which Deed was registered as No. 30 at page 30 in Volume 448 of the Lands Registry, Enugu the Bank sold the said property to me on or/about 11th August, 1995.

F (8). That I duly paid for the said property and on the 16th of August 1995, the legal firm of R. I. Kuku and Company of 24 Campbell Street, Lagos issued me a receipt for the sum of N2,000,000,00 (two million naira) therefore on behalf of the Bank, a copy of which is herewith attached as Exhibit ‘E’.

G (9). That subsequently, the Bank executed what was described as a Deed of Release of the said property in my favour, a copy is herewith attached as Exhibit ‘F’. The property was eventually transferred to me through a Power of Attorney registered as No. 19 at page 19 in Volume 1421 of the Lands Registry, Enugu herewith attached as Exhibit ‘G’.

H (10). That hardly had the property been transferred to me aforesaid, when the said guarantor filed a suit against the Bank and myself, vide suit No. E/568/95, wherein he claimed inter alia; a declaration that the transfer is null and void, and of no effect, an order setting the transfer aside, and orders for damages and injunction.

(11). That after I submitted the documents transferring the property to me to the Enugu Land Registry for registration and perfection, the Respondents' Counsel — Obi Akpudo Esq. wrote to the Registrar of Deeds, Enugu placing a caveat/protest, of the application. The said letter of protest is attached as Exhibit 'H'

B

(12). That in the course of the proceedings in the said suit No. 0/394/95, the Bank filed a Notice of discontinuance on 28/2/96 and the suit was struck out while the Counter-claim in the suit was adjourned to 18/4/96.

C

(13). That the defendants immediately filed an application for the court to grant their counter-claim in default of the Bank filing any reply to the said counter-claim within the time prescribed by Order 9 Rules 8 of the High Court Rules Anambra State, 1988.

(14) That on 18/3/96 the learned trial judge took the motion filed on 5th March, 1996 and gave judgment to the mortgagor and the guarantor in terms of the counter-claim. A Copy of the judgment is attached as Exhibit 'J'

D

(15). That the judgment was in respect of the Counter-Claim given without the judge taking any evidence.

(16). That on proper scrutiny of the Court records no fees were paid for the said Counter-claim on which the judge based its judgment.

(17). That on the same day that the Court gave judgment the records of court show that the Bank had a Motion on Notice for extension of time within which the Bank will be permitted to file a Defence to the Counter-Claim.

F

(18). That this application which is attached as Exhibit 'K' was not brought to the attention of the Court by Counsel who purported to appear for the Bank and therefore was not considered by the Court.

G

(19). That the affidavit of service of the application for judgment in default of filing a reply to the Counter-claim was allegedly served on the Bank on 5/3/96 without indicating that it was served on any of the Principal Officers of the Bank. A copy of the affidavit of service is attached as Exhibit 'L'.

H

(20). That Counsel who appeared for the Bank on 8/3/96 was not

the Counsel who had appeared earlier and did not seem to be properly seized of the circumstances of the case when he appeared for the Bank on 8/3/96. Besides the Bank was only looking forward to 18/4/96 when the counter claim was earlier adjourned to; and which they had knowledge B of.

(21). That Counsel for the Bank filed an application to set aside the judgment obtained in default of filing a reply to the Counter-claim but the application was refused.

C *(22). That on 5th May, 1997 the Bank's Solicitor then filed a Notice and Grounds of Appeal against the judgment of the High Court given on 5/3/96. A copy of the-Notice and Grounds of Appeal is attached as Exhibit 'M'*

D *(23). That I am informed by my said Counsel — Chief A. O. Mogboh, SAN. and I verily believe him that since I bought the property known as Plot 3 Block CXIV Achara Layout, Enugu which the parties are disputing, I have sufficient interest to enable me to apply to the Court of Appeal to grant me leave to appeal as an Interested Party."*

E The application was brought pursuant to section 243 (a) of the Constitution of the Federal Republic of Nigeria, 1999. The Court of Appeal granted the application and orders (a), (b) and (c) in the motion paper supra. In the process of dealing with the application, the lower F court as per the lead ruling reiterated the following proposition of law :-

G *"The law does not confer the right of appeal to a "party" "with sustainable" or "enforceable" "interest". That is the reason why in the endless list of judicial decisions once a person has signified his interest in the subject matter of the decision he seeks to appeal against and satisfies the other conditions as well, such a person is hardly foreclosed from the exercise of his statutory right."*

H Aggrieved by the decision, the respondents appealed to his court on five grounds of appeal, from which four issues for determination were distilled. Learned counsel exchanged briefs of argument which were adopted at the hearing of the appeal. Two issues for determination were raised in the 2nd respondent's brief of argument, which I find to be more succinct and apt for the determination of this appeal. I will adopt them

for the purpose of this appeal. The issues are :-

(a). Whether in the circumstances of this case the court below was right in granting the application for extension of time within which to apply for leave to appeal, leave to appeal and extension of time within which to appeal as an interested party. B

(b). Whether the application by the applicant/respondent is an abuse of court's process. By virtue of order 3 Rule 4(1) and (2) of the Court of Appeal rules, an applicant under that rule must disclose good and cogent reasons for the delay in filing his notice of appeal, and also his proposed grounds of appeal must prima facie show good cause why the appeal should be heard. In the instant case, in addition to the above requirements, the applicant was required to show that he had-genuine and legally recognizable interest, which will be affected by the decision of the court, as the applicant who is now the 2nd respondent and who was not a party at the court of first instance, but wanted to be joined as an interested party at the Court of Appeal. See INRE OGBUZURU UGADU 1988 5 NWLR part 93 page 189. C D

A careful study of paragraphs 9-23 of the supporting affidavit supra disclose cogent reasons for the delay of the applicant/2nd respondent in applying for leave, to be joined as an interested party. That arm of the requirement, for the success of such application has been met, and I subscribe to the observation of the learned justice in the lead ruling which reads:- E F

‘‘Gathered from applicants affidavit, mistake of counsel and the inability of court to entertain, the application have seriously been pleaded as part for the delay.’’ G

It is instructive to note here and I hereby reiterate the position law that the sins of counsel will not be visited on a party. See Mains Ventures Ltd. V. Petroplast Ind. Ltd 2000 4 N WLR part 651 page 151.

The 2nd respondent/applicant further deposed the following in his affidavit:- H

“50. That I am Interested Party because I paid for the property which the parties are disputing and which has been adjudged to be the defendants by the counter-claim.” In its counter-affidavit to the motion

for extension of time to seek leave to appeal as an interested party, the respondent/appellant deposed the following facts :-

“8. (a) the power of attorney by which the plaintiff/appellant purportedly transferred the property in question to the party interested/applicant i.e. Exhibit ‘O’ to the affidavit in support hereof is dated 28th day of September, 1995.

(b) this suit, is, No. O/594/95 Merchant Bank of African (Nig.) Ltd. Vs. Enyibros Food Processing Company (Nig) Ltd (which was originally on the undefended list) was instituted on 29th June 1995, i.e., three months before the party interested/applicant purportedly acquired interest over the property and three days after the plaintiff/appellant had filed its statement of claim in the suit on 29/5/95.

(c) that I hereby exhibit marked ‘2’ and ‘3’ respectively the writ of summons and statement of claim supra.

(d) that the interest now alleged by the applicant was acquired during the pendency of these proceedings.

9. That the party interested/applicant knew or ought by reasonable diligence to have been aware of the pendency of these proceedings before he concluded his purported transaction with the Bank.

10. That despite being aware of the pendency of the fore going suit, the applicant took no step to join or otherwise protect his alleged interest in the property but stood by.

It is on record vide Exhibit ‘E’ on page 36 of the printed record of proceedings that the 2nd respondent was issued a receipt of the purchase of property at No. 9 Nwosu Street, Achara Layout, Enugu (also known as plot 3 Block CXIV Achara Layout, Enugu) for the sum of N2,000,000.00, the receipt was dated 16/0.8/95. It is also on record that at the time the of the undefended list was filed i.e. 27th of June, 1995, the property had been sold to the 2nd respondent/applicant. It is instructive to note however, that as at the date, the writ was taken out by the 1st respondent the property was neither mentioned, nor was it an issue. Again, after the was transferred from the undefended list, as is evident from the pleadings exchanged, (as pleadings would not have been filed without the transfer of the suit, even though there is nothing on the printed record to

show the proceeding whereby such transfer was recorded) the property was mentioned or made an issue, in the statement of claim dated 22/9/95, after the sale of the property. The position of the properties became an issue in the appellants' statement of defence dated 13/10/95 when they counter- claimed against the 1st appellant after pleading thus:-

"12. The *properties known as and called;*

(a)

(b) *Plot 3 Block CXIV Achara Layout, Enugu covered by an instrument registered as No. 16 at Page 16 in Volume 984 at Lands Registry in the office at Enugu are personal properties of the 2nd defendant.*

23. *The 2nd defendant did not at any time sell, let, lease or otherwise alienate the said properties (or any of them to the 1st defendant)*

24. *The 2nd defendant is not a party to the mortgage Deed supra which is, inter - alia, not by way of a third party legal mortgage. The said document does not thus bind the 2nd defendant or affect his individual interest.*

25. *Purporting to be acting on the strength of the Deed of Legal Mortgage aforesaid, the plaintiff has started to threaten to sell or alienate the afore said private property of the 2nd defendant in a purported attempt to recover funds allegedly owed to it by the 1st defendant.*

WHEREFORE the defendants counter-claim against the plaintiff as follows:-

(a). *Declaration that the properties described in paragraph 22 supra are personal properties of the 2nd defendant.*

(b). *Declaration that upon a true construction, of the Deed of Legal Mortgage (supra) the plaintiff have no right to sell or otherwise alienate or deal in the said properties.*

(c). *a declaration that a.....*

Or purported to have been done by the plaintiff (concerning/affecting the said properties) pursuant to the afore, said Deed of Legal Mortgage are ineffectual, null and void.

(d) *Perpetual Injunction restraining the plaintiff from selling, letting, alienating or however dealing in/with the said properties (or any of them) or from in any manner whatsoever interfering with the said*

defendants possessory right over same.”

I need not repeat myself that as at the time the property was sold to the 2nd interest, in which time he acquired the property, the above facts had not emerged. Then, the pertinent question is, how does the doctrine of *lis pendens* apply here? I wouldn’t want to go any further on this point, lest I venture into the substantive appeal, which I should not at this stage of the proceedings, as is succinctly put by the Justice of the Court of Appeal thus:-

C “*The contention of counsel as to whether applicant would succeed in the appeal or not in the light of the fact that he had stood by while the suit was being determined or because the property had been purchased lis pendis cannot be enquired into now.*”

D The above reproduced portion of the judgment of the court below has drawn my attention to the notice of appeal, of which one of the grounds complained of the above in the present appeal. This brings me to the grounds of appeal, which the law says must be good and substantial. A thorough scrutiny of the grounds in the court below satisfies me that E they are good and arguable grounds, most especially as two of them are hinged on the jurisdiction of the court of first instance. The complaints are premised on the jurisdiction of the court that gave judgment in the suit to do so, when in considering the surrounding facts and circum- F stances the court lacked jurisdiction. There is no doubt whatsoever in mind that the 2nd respondent was sufficiently that he was an interested person within the ambit of section 243 (3)(a) of the Constitution of the Federal Republic of Nigeria.

G I have had the opportunity of reading in advance the lead judgment delivered, and I am in complete agreement with the reasoning and conclusion. In the light of the above discussions and the fuller ones in the lead judgment of my learned brother Onnoghen, JSC, I find no merit whatsoever in this appeal. In this wise, I also dismiss it, and affirm the H ruling of the Court of Appeal. I abide by the consequential orders made in the lead judgment.