

**SUPREME COURT OF NIGERIA**

27<sup>TH</sup> APRIL, 2007 SC. 326/2001

**CORAM:- U. A. KALGO, G. A. OGUNTADE, A. M. MUKHTAR,  
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH, JJSC**

MADAM AKON IYOHO ..... APPELLANT/APPLICANT  
AND

1. E. P. E. EFFIONG ESQ.

MAGISTRATE GRADE II

SITTING AT THE RENT CONTROL

COURT, CALABAR

..... RESPONDENTS

2. THE HOLY CHAPEL OF MIRACLE

SUING BY ATTORNEY WILFRED ETAASIM

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STATUTES - Interpretation - Plain words - Must be given their plain meanings - Without importing extraneous factors (H1)

RULES OF COURT - Certiorari - Time to apply - Is after period allowed for appeal has elapsed - Vide Cross River State High Court Rules O. 43 r. (6) - "May" used in the provision - Is mandatory (H2)

COURTS - Leave - Regularity of - Certiorari - Where High Court granted leave for the order - Before time limited for appeal had expired - The leave was irregular and incompetent - As rightly held by Court of Appeal (H3)

APPEALS - Issues - Grounds of appeal - Abandonment - Where no issues were formulated - In relation to some grounds - They will be struck out as abandoned (H4)

**FACTS**

The proceedings giving rise to this appeal emanated from the Rent Control Court, Calabar. 2nd respondent/plaintiff instituted an action for arrears of rent and recovery of possession against defendant/appellant.

The trial court ordered the appellant to give up possession of the premises in issue. The appellant vide an application before the trial court prayed that the judgment be set aside. But without waiting for hearing, appellant filed an ex parte application for certiorari before the High Court, seeking that the judgment be quashed and restoration of her possession. She was granted leave and restored by order of the High Court. Appellant did not comply with O. 43 r. (6) of the Cross River State High Court (Civil Procedure) Rules, which provided that order of certiorari can be sought only after the period for appeal in the matter has elapsed.

Respondents' application to strike out appellant's motion ex parte for leave for an order of certiorari was dismissed by the High Court. Their appeal to the Court of Appeal was allowed. Aggrieved, appellant has now appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*Whether the learned Justices of the Court of Appeal were right in law when they held that the period allowed for Appeal in Order 43 of the High Court Procedure rules of Cross River State must expire before the appellant herein can seek the remedy of Judicial Review particularly that of certiorari.*

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

***STATUTES - Interpretation - Plain words***

1. There is a plethora of authorities that has settled this issue of interpretation, which have striven to frown at the tendency to misconstrue the intent or purport of the provision of a law and in the process import extraneous factors into it. It is settled law, that in interpreting a law, plain words must be given their plain meanings. (p. 1610 E)

***Certiorari - Time to apply***

2. The crucial point here is the propriety of the appellant in rushing to the High Court with the motion ex parte, when indeed he had an appeal pending before the said High Court, and the time allowed for appeal had not expired contrary to the provision of Order 43 Rule 6 supra. Although the word 'may' is used in the provision, it does not necessarily mean that it

means permissible. ‘May’ in ‘Black’s Law Dictionary, 8<sup>th</sup> Edition page 1000 has been defined inter alia as ‘Loosely, is required to; shall; must.....

In dozens of cases, courts have held may to be synonymous with shall or must, usually in an effort to effectuate legislative intent.”

Applying the above definition I am satisfied that the requirement of the provision of the said Order 43 Rule 6 needs to be fulfilled. The appellant should have waited until the period allowed for appeal has elapsed. Section 39 (1) of the Rent Control Edict allows 30 days within which to appeal, and that 30 days had not expired in this case before the appellant filed the application for leave to apply for an order of certiorari, contrary to the provision of Order 43 Rule 6 of the High Court Civil Procedure Rules *supra*. (p. 1610 H)

### ***Leave - Regularity of***

3. As can be seen from the record of proceedings the judgment of the Rent Control Court was on 9/4/98, and the application was dated 17/4/98. In the circumstance I fail to see that the lower court, as per Edozie JCA (as he then was) was in error when it held as follows in its judgment.

*“In the instant case where the lower court granted leave for an order of certiorari to quash the decision of the Rent Control Court before the time limited for appeal against that decision had expired, the leave so granted was irregular and incompetent. It is therefore my view that the application for judicial review by certiorari proceedings commenced in the High Court in suit No C/MS68/98 to quash the judgment of the Rent Control Court delivered on 9/4/99 before the period of appealing against that judgment is in breach of Order 43 Rule 3 (6) of the High Court Civil Procedure Rules of Cross River State 1987.”* (p. 1611 E)

### ***Grounds of appeal - Abandonment***

4. I would like to visit the appellant’s Notice of Appeal on pages 238 - 242 of the printed record of proceedings, which contains four grounds of appeal. The whole discussion *supra* centers around only one ground of

appeal i.e. ground (3), from which the lone issue has been distilled, and which the argument in the appellant’s brief of argument covers. No issues were formulated in relation to grounds (1) (2) and (4), and so no argument was proffered to cover them, which situation translates to the fact that the said grounds of appeal have been abandoned. The position of the law is that a ground of appeal from which no issue has been distilled and upon which no argument have been canvassed is deemed abandoned by an appellant, and so should be struck out. In this wise grounds (1) (2) and (4) of appeal in the appeal are struck out. (p. 1612 A)

**NOTABLE POINTS OF INTEREST**

**ONNOGHENJSC**

*1. Decision not appealed against is deemed accepted*

The above are two reasons why the lower court allowed the appeal of the present respondent.

However, going through the grounds of appeal at pages 238-242 of the record, there is no ground attacking the decision of the lower court on the issue of abuse of court process neither has any issue been formulated before this court relating thereto. It is settled law that a decision of the court not appealed against is deemed accepted by the party against whom the decision was entered and therefore binding. I hold the view that granted, without conceding, that appellants issue for consideration in this appeal succeeds, the legal effect of that decision would not be sufficient to set aside the decision of the lower court in view of the fact that that court had held in addition that the suit giving rise to the appeal before it was instituted in abuse of process and that decision remained subsisting and binding. Such a victory would be meaningless indeed. (p. 1618 C)

**CHUKWUMA-ENEHJSC**

*2. Struck out suit cannot ground appeal on a different issue*

I am, all the same, to observe pointedly even though briefly that where as in this instance an application as per suit No. C. /Misc.68/98 has been struck out as constituting an abuse of process it goes without more that

the said case has terminated; the bottom having been knocked off the case. And on the authorities of Amefule v. State (1988) 1 NSCC (Vol. 19) 669 LL35 - 50, Woluchem v. Dr. Inko - Tariah (1974) ECSLR (Vol. 4) 616, the Court cannot, however much it tried, revive the matter which it has struck out save on the application of either of the parties. The instant motion No. C./Misc. 68/98, having been struck out is automatically terminated and, until the said suit No. C./Misc. 68/98 is restored in the general cause list, if at all, no proceedings including the instant proceeding on non-compliance with the provisions under Order 43 (supra) has any footing at all on which to stand to be discussed. (p. 1621 C)

### **REPRESENTATION**

Appellant and counsel absent.

Respondents and counsel absent.

### **CASES REFERRED TO**

Lawal v. Olivant 1972 3 S.C. 124

Ifezue v. Mgadugha 1984 1 S.C.L.R. 427

I.B.W.A. v. Imano (Nigeria) Ltd. 1988 3 NWLR part 85 page 633

Aro v. Aro 2000 3 NWLR part 649 page 443

J. E. Elukpo & Sons Ltd. v. F.H. A. 1991 3 NWLR part 179 page 322

Ikpuku v. Ikpuku 1991 5 NWLR part 193 page 571

Amefule v. State (1988) 1 NSCC (Vol. 19) 669 LL35 - 50

Woluchem v. Dr. Inko - Tariah (1974) ECSLR (Vol. 4) 616

Registered Trustees of Ifeloju Friendly Union v. Kuku (1991) 5 NWLR (Pt. 189) 65 at 75 E-F

A.M. Soetan v. Total Nig. Ltd. (1972) 1 SG 86

Adisa v. Oyinwale 2000 10 NWLR part 674 page 116

Amadi v. N.N.P.C. 2000 10 NWLR part 674 page 76

Skenconsult (Nig.) Ltd & Anor. v. Godwin Sekondy Ukey [1981] 1 S.C. 4 at 14 & 15

Craig v. Kansen [1943] K.B. 256 at 262-263

Shanu v. Afribank Nig. PLC (2000) 10-11 SC 1 (2000) 13 NWLR (Pt. 684) 392

**STATUTES & RULES REFERRED TO**

Rent Control Edict of Cross River State s. 39(1)

Constitution of the Federal Republic of Nigeria 1999 s. 6(6)(b)

B Cross River State High Court (Civil Procedure) Rules O. 43 r. 3(6)

**BOOKS REFERRED TO**

Oxford Dictionary of Law, 4<sup>th</sup> Edition

C Administrative Law 2<sup>nd</sup> Edition P. P. Craig page 6

**LEAD JUDGMENT BY MUKHTAR JSC**

The suit from which this appeal emanated originated in the Rent Control Court, Calabar, Cross-River State, which ordered the appellant then the defendant to give up possession of House No. 3B Archibong Eso Lane, Calabar, in suit No. CRT/17/97. The respondents had instituted an action for arrears of rent and to recover possession from the appellant, who was his tenant. The appellant sought that the judgment be set aside, but she did not wait for the application to be heard when she filed an application for certiorari in the High Court, seeking that the judgment in CRT/17/97 be quashed, and she be restored to possession of the premises. She was granted leave and restored to possession by order of the High Court. Consequently, the respondents filed and moved an application to strike out suit No. C/MSK; 68/98 in which she sought for leave for an order of certiorari, but the trial judge dismissed the application. Unhappy with the turn of event, the respondents appealed to the court below, which allowed the appeal. Aggrieved by the decision the appellant has now appealed to this court on four grounds of appeal. Learned counsel for both sides exchanged briefs of argument, wherein issue for determination was formulated. In the appellant's brief of argument is one single issue, which was adopted by learned counsel for the respondents in their brief of argument. The issue is "*Whether the learned Justices of the Court of Appeal were right in law when it (sic) held that the period allowed for Appeal in Order 43 of the High Court Procedure rules of Cross River State must expire before the appellant herein can seek the*

*remedy of Judicial Review particularly that of certiorari.*” The motion exparte for leave to apply for an order of certiorari under Order 43 Rule 3 of the High Court Civil Procedure Rules of Cross River State, reads: -

“TAKE NOTICE that this Honourable Court will be moved on Tuesday the 21<sup>st</sup> day of April, 1998 at the hour of 9 o’clock in the fore-  
noon or so soon thereafter as the applicant or counsel on her behalf can  
be heard for an Order that the Applicant be granted leave to apply for an  
order of certiorari to bring into the High Court of Cross River State  
Calabar, for the purposes of its being quashed the decision or judgment  
of the 1<sup>st</sup> Respondent or the orders contained therein in suit No. CRT/17/  
97 entered on 6<sup>th</sup> April, 1998 and dated 9/4/98 giving possession of the  
applicants 5 bedroom BUNGALLOW TO THE 2<sup>ND</sup> Respondent and thereby  
depriving her and her children of the consort of her only home and prop-  
erty for the reasons that the said judgment was entered without jurisdic-  
tion and for being in violation of the applicant’s right to fair hearing in  
that suit No. CRT/17/97 was adjourned to the 30<sup>th</sup> April, 1998 for men-  
tion or hearing; and upon the grounds set forth in the statement pursuant  
to Order 43 (3) (29) HCCPR served along herewith.

(2) An order for stay of all proceedings, sale or other Acts from the Rent Control Court”.

The motion exparte was granted, and the enrolled order drawn in respect of the motion contained the following orders.

“1. That the Applicant’s Application for leave to apply for an order of certiorari to being (sic) quashed the judgment delivered by the 1<sup>st</sup> respondent on 6/4/98 in suit No. CRT/17/97 SHALL BE AND IS HEREBY GRANTED.

2. That AN ORDER FOR STAY of all proceedings, Sale of Other acts from the Rent Control court SHALL BE AND IS HEREBY IMPOSED.

3. That the Applicant’s Application for reinstatement into her home SHALL BE AND IS HEREBY GRANTED as prayed.

4. That the Applicant’s properties carted away SHALL BE PRE-SERVED by returning same to her forthwith.”

Then a Motion on Notice for the order of certiorari. The main body of the Motion on notice is as in the motion exparte, which has been

reproduced above.

The pertinent depositions in the supporting affidavit read as follows: -

3. That in 1975 based on a lease relationship between Madam  
B Theresa Asuquo Robert Effiong and myself I proceeded to put up a cement block building, for my occupation and that of my children.

4. That after completing the building in December 1975, I moved  
C into it with my family and remain (sic) in peaceful occupation of the same without any interruption by any person or group.

5. In 1995, my landlady died the said Mrs. T. A. B. Effiong, and  
I took part in her funeral obsequies, thereafter I continued in peaceful  
D occupation until 1995 when the 2<sup>nd</sup> Respondent and his fellow conspirators invaded my privacy in an attempt to impose themselves on me as the new landlord which attempt I resisted, and they left because I did not know them.

6. About 10<sup>th</sup> January 1997, the 2<sup>nd</sup> Respondent sued me before the  
Rent control court, Calabar zone claiming possession of my house.

7. Whilst this case was pending, Mr. Michael Effiong Bonnie the  
E son and successor to my Landlady applied to the Court to be joined as a Defendant in the case. The motion paper together with the Affidavit is attached hereto as "Exhibit A".

8. The motion in "Exhibit A" is still pending the decision of the 1<sup>st</sup>  
F Respondent before the case in CRT/17/97 could proceed to hearing.

9. Subsequently my Counsel on 14/10/97 raised objection to the  
competence of the 2<sup>nd</sup> Respondent as seen on record to sue which objection was overruled on the 15<sup>th</sup> October, 1997.

10. I instructed my counsel to promptly appealed (sic) against the  
G Ruling, which they did on the 15<sup>th</sup> day of October 1997, with proper fees and recognizance, duly entered into by me to prosecute the appeal. The Notice of Appeal served on the 2<sup>nd</sup> Respondent is attached hereto as Exhibit "B".

11. The Ruling of the 1<sup>st</sup> Respondent in the matter referred to in  
paragraph 10 of this my affidavit is attached hereto as Exhibit "C"

12. That the said appeal in paragraph 10, is still pending decision



*in the High Court, of Justice Calabar.*

13. *That despite this appeal the 1<sup>st</sup> Respondent refused to adjourned the case sine die as was requested by 2<sup>nd</sup> Respondent's Counsel Eta Okon and proceeded to adjourn the case to the 21<sup>st</sup> October, 1997 despite the fact that my Counsel S. U. Ndah of Godwin U. Oyong & B Company drew her attention to the provisions of S. 39 of the Rent Edict, which says that Appeal operates as a stay of proceedings.*

14. *It was this attitude of the 1<sup>st</sup> Respondent that made me to instruct my Counsel to seek an order for stay of proceedings in CRT/17/97 before the High Court; Calabar, but on the 30<sup>th</sup> March, 1998, the Application was struck out by Uke J. sitting in Court 5 on the grounds that the application should first have been made to the 1<sup>st</sup> Respondent court before I bring the application to the High Court.*

15. *That prior to this Ruling by the High Court No. 5, my Counsel Godwin U. Oyong of Godwin U. Oyong & Co. was before the 1<sup>st</sup> Respondent on the 19/3/98 and she had adjourned the case CRT/97 to the 30<sup>th</sup> April, 1998, and I was preparing to attend court on that day.*

16. *That in the morning of 14<sup>th</sup> April, 1998 I woke up with (sic) E children and whilst I left for the farm, my children went to school.*

17. *That on my return I saw policemen cordon off my house and when I went near they threaten (sic) to assault (sic) me so I ran away for my dear life, and took refuge in a neighbours (sic) compound who told F me that a pickup van had earlier removed my (sic) from my house and that some people in plain clothes were busy packing out other properties of mine.*

18. *That my children were all away at school, and there was no G person left as I was the last person that locked the door, and had the key."*

The learned counsel for the appellant has argued that the learned Justices of the Court of Appeal erred in law and on the facts when they set aside the decision of the High Court and affirmed the order of the Rent Control Court, and failed to appreciate that there is a technical difference between Judicial Review and Appeal. He went on to state the description of Judicial Review in the Oxford Dictionary of Law, 4<sup>th</sup> Edi H

tion as the simplified procedure by which since 1997, prerogative and other remedies have been obtainable in the High Court against inferior courts, Tribunals and administrative authorities. According to learned counsel, on an application for Judicial Review of a decision, the Court may grant the remedies of certiorari, mandamus, prohibition, declaration B Injunction and may award damages.

The learned counsel for the appellant referred to the book, Administrative Law 2<sup>nd</sup> Edition P. P. Craig page 6, where the author distinguished an appeal and a review thus: -

C *“There is a distinction between appeal and review. The former in sense that the Appellate Court can substitute its own opinion for that of the initial decision maker. Appeals can lie on fact and law, or simply upon law. Such rights of appeal are statutory and the courts possess no D inherent appellate jurisdiction. Review is at least in theory, quite different from this. It is concerned not with the merit of the decision, but with its validity or with the scope of the agency’s powers.”*

The learned counsel for the appellant has argued that the High E Court of Justice has supervisory jurisdiction over the way and manner the Rent Control Court uses its powers. It has a duty to tell the court not to act ultra vires its powers and to quash any such abuse of powers. According to him, in this case, the appellant’s possessory right had clearly F been abused and the Rent Control Court had not acted properly, so the High Court acted properly in quashing the decision of the Rent Control Court.

Section 6 (6) (b) of the 1999 Constitution was referred to by learned counsel for the appellant, and he has argued that the Rent Edict G 1985 supra cannot restrict the right of any citizen to go to court. According to him the provisions of the Rent Edict, which is a state law, cannot derogate from the provisions of the constitution, which allows citizens the rights to go to court without any restriction. Learned counsel further H argued that the provision of the Edict is permissive because it uses the word ‘May’. He placed reliance on the case of Ziza v. Mamman 2002 5 NWLR part 760 page 340.

*In their brief of argument, the respondents’ argument revolved only*

on the interpretation of Order 43 Rule 3 (6) of the High Court Rules of Cross River State. The Rule states as follows: -

“Where leave is sought to apply for an order of certiorari to remove for the purpose of it being quashed any judgment order, conviction or order proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the court may adjourn the application for leave until the appeal is determined or the time for appeal has expired,”

Learned Counsel for the respondent has submitted that the Court of Appeal was right to hold that the application for leave brought within 14 days before the expiration of the date allowed for appeal had expired was wrong. Learned Counsel further submitted that the wordings of Order 43 Rule 3 (6) of the High Court Rules supra and very clear, unambiguous, and admits of only one interpretation. He placed reliance on the cases of Adisa v. Oyinwale 2000 10 NWLR part 674 page 116, and Amadi v. N.N.P.C. 2000 10 NWLR part 674 page 76.

Indeed, the whole appeal revolves around Order 43 Rule 3 (6) of the High Court Rules of River State and is predicated on its interpretation by the lower court, and so I will dwell on this order by first of all reproducing the pertinent provisions of Order 43, hereunder. They read: -

“43(1) No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule.

(2) An application for leave shall be made *ex parte* to the court, F

.....

and shall be supported

(a) by a statement, setting out the name and description of the applicant, the relief sought and the grounds on which it is sought; and  
(b) by affidavit, to be filed with the application verifying the facts relied on. G

(3) The applicant shall file the application not later than the day before the motion is heard and shall at the same time lodge copies of the statement and every affidavit in support. H

(4) The court hearing an application for leave may allow the applicant’s statement to be amended, whether by specifying different or additional grounds or relief or otherwise on such terms, if any, as it

*thinks fit.*

(5) *The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*

B (6) *Where leave is sought to apply for an order of certiorari to remove for the purposes of its being quashed any judgment, order, conviction or, other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the court may adjourn the application for leave until the appeal is determined or the time for appealing*  
 C *has expired”.*

This last provision i.e. (6) above is the relevant one to this discussion, but then in such a situation, and for a clear perception of the purport of the said relevant provision, it is necessary to read the preceding  
 D provisions of the order. As can be seen in the printed record of proceedings, the motion *ex parte* for leave to apply for certiorari was brought under Order 43 (3) and so the said Order 43 *supra* and its rules are the operative rules. Rule (6) regulates when an application for leave for an  
 E order of certiorari can be sought i.e. at what stage of proceedings.

**There is a plethora of authorities that has settled this issue of interpretation, which have striven to frown at the tendency to misconstrue the intent or purport of the provision of a law and in the process import extraneous factors into it. It is settled law, that**  
 F **in interpreting a law, plain words must be given their plain meanings.** See *Lawal v. Olivant* 1972 3 S.C. 124, *Ifezue v. Mgadugha* 1984 1 S.C.L.R. 427 and *I.B.W.A. v. Imano (Nigeria) Ltd.* 1988 3 NWLR part 85 page 633.

G Indeed, learned counsel for the appellant has in her brief of argument invoked the provision of Section 6 (6) (b) of the 1999 Constitution which vests the courts with judicial powers for the determination of any question as to civil rights and obligations, and has argued that the Rent  
 H Edict 1985 cannot restrict the right, of any citizen to go to court. I think the applicable constitution in this case is the 1979 one, this action having commenced in 1997. I fail to see that this provision has relevance to this discussion. **The crucial point here is the propriety of the appellant**

in rushing to the High Court with the motion *ex parte*, when indeed he had an appeal pending before the said High Court, and the time allowed for appeal had not expired contrary to the provision of Order 43 Rule 6 *supra*. Although the word ‘*may*’ is used in the provision, it does not necessarily mean that it means permissible. ‘*May*’ B in ‘*Black’s Law Dictionary*, 8<sup>th</sup> Edition page 1000 has been defined *inter alia* as ‘Loosely, is required to; shall; must.....

In dozens of cases, courts have held *may* to be synonymous with *shall* or *must*, usually in an effort to effectuate legislative C intent.”

Applying the above definition I am satisfied that the requirement of the provision of the said Order 43 Rule 6 needs to be fulfilled. The appellant should have waited until the period allowed for appeal has elapsed. Section 39 (1) of the Rent Control Edict allows D 30 days within which to appeal, and that 30 days had not expired in this case before the appellant filed the application for leave to apply for an order of *certiorari*, contrary to the provision of Order 43 Rule 6 of the High Court Civil Procedure Rules *supra*. As can E be seen from the record of proceedings the judgment of the Rent Control Court was on 9/4/98, and the application was dated 17/4/98. In the circumstance I fail to see that the lower court, as per Edozie JCA (as he then was) was in error when it held as follows in its F judgment.

*“In the instant case where the lower court granted leave for an order of certiorari to quash the decision of the Rent Control Court before the time limited for appeal against that decision had expired, the leave so granted was irregular and incompetent. It is therefore my G view that the application for judicial review by certiorari proceedings commenced in the High Court in suit No. C/MS68/98 to quash the judgment of the Rent Control Court delivered on 9/4/99 before the period of appealing against that judgment is in breach of Order 43 H Rule 3 (6) of the High Court Civil Procedure Rules of Cross River State 1987.”*

For the foregoing reasoning, the answer to this lone issue is in the

affirmative, and so ground of appeal No. (3) in the appellant's notice of appeal, related to this issue fails and it is hereby dismissed.

Before I conclude this judgment, **I would like to visit the appellant's Notice of Appeal on pages 238 - 242 of the printed record of proceedings, which contains four grounds of appeal. The whole discussion supra centers around only one ground of appeal i.e. ground (3), from which the lone issue has been distilled, and which the argument in the appellant's brief of argument covers. No issues were formulated in relation to grounds (1) (2) and (4), and so no argument was proffered to cover them, which situation translates to the fact that the said grounds of appeal have been abandoned. The position of the law is that a ground of appeal from which no issue has been distilled and upon which no argument have been canvassed is deemed abandoned by an appellant, and so should be struck out. In this wise grounds (1) (2) and (4) of appeal in the appeal are struck out.** See *Aro v. Aro* 2000 3 NWLR part 649 page 443, *J. E. Elukpo & Sons Ltd. V. F.H . A.* 1991 3 NWLR part 179 page 322, *E and Ikpuku v. Ikpuku* 1991 5 NWLR part 193 page 571.

The end result of this appeal is that it fails in its entirety and it is hereby dismissed. The judgment of the Court of Appeal is hereby affirmed. I assess costs at N10,000.00 in favour of the respondents against the appellant.

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### KALGO JSC

I have read in draft the leading judgment of my lord Mukhtar JSC just delivered, have entirely agreed with the reasoning and conclusions reached therein and have nothing useful to add. I therefore find that there is no merit in the appeal and I dismiss it with costs as assessed in the said leading judgment.

H

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### OGUNTADE JSC

The 2<sup>nd</sup> respondent in this appeal had, as the plaintiff, commenced

at the Rent Control Court of Calabar, Cross-river State, proceedings for the recovery of possession of a house situate at 3B Archibong Eso Lane, Calabar from the appellant who was the defendant. The 1<sup>st</sup> respondent was the Magistrate sitting at the aforementioned Rent Control Court, which in its judgment ordered that the appellant give up possession of the house. In reaction, the appellant brought an application to set aside the judgment against her. Whilst the application to set aside the judgment was yet to be heard, the appellant filed an appeal against the judgment. In addition, she proceeded further to bring a certiorari application before the High Court that the judgment and proceedings of the Rent Control Court be quashed on the ground of excess of jurisdiction.

The High Court, on the certiorari application, acceded to the appellant's request and the judgment of the Rent Control Court was set aside. The 2<sup>nd</sup> respondent (i.e. the plaintiff before the Rent Control Court) was dissatisfied with the order of the High Court, which set aside the judgment of the Rent Control Court. It brought an appeal against it before the Court of Appeal sitting at Calabar (hereinafter referred to as 'the court below'). The Court below on 26-06-2001, in its judgment, allowed the appeal, thus restoring the judgment of the Rent Control Court. The defendant before the Rent Control Court has now brought this final appeal before this Court. In her appellant's brief, the issue for determination in the appeal was identified as:

*"Whether the learned Justice (sic) of the Court of Appeal were right in law when it (sic) held that the period allowed for appeal in Order 43 of the High Court Procedure Rules of Cross-River State must expire before the appellant herein can seek the remedy of Judicial review particularly that of certiorari."*

The solitary issue for determination necessitates a consideration of the terms of Order 43 rule 6 of the High Court Civil Procedure Rules of Cross- River State which provides:

*"(6) Where leave is sought to apply for an order of Certiorari to remove for the purpose of its being quashed, any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the court may adjourn the appli-*

*cation for leave until the appeal is determined or the time for appealing has expired.”*

The court below at pages 230-231 of the record whilst considering the impact of Order 43 rule 6 above on the facts of this case observed.

*“On appeal to the Court of Appeal, the court referred to Order 37 Rule 3(5) of the Anambra State High Court Rules which is ipssissima verba with Order 43 Rule 3(6) of the Cross River High Court (Civil Procedure) Rules and observed that an applicant seeking an order for leave to apply for certiorari to quash any judgment, order, conviction or other proceedings of a court or tribunal can not bring the application within the period allowed for appealing against that decision, order or conviction. If such an application was brought, then the court may adjourn the application for leave until the appeal is determined or the time for appealing has expired. This decision is consistent with the decision in the case of in Re Umuolu Village Group Court Ex parte Macaulay 20 NLR 111 at 113 in which it was held that where there is a right of appeal from the decision of the court that made the order, a party who is dissatisfied with the order may nevertheless apply for a writ of certiorari instead of appealing but he cannot do so until the statutory time for appealing has elapsed.”*

I am satisfied that the court below correctly approached the matter. It is necessary to bear in mind the purpose that is sought to be achieved in an application for certiorari. In *R v. Electricity Commissioners [1924] 1 K.B. 171* at 204-205, Atkin L. J. discussed the reasons necessitating the grant of the writs of certiorari and prohibition thus:

*“The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorized proceedings of the Commissioners. The matter comes before us upon rules for writs of prohibition and certiorari, which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King’s Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding furthering excess of jurisdiction;*



*certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice."*

I have observed above that the appellant, before bringing her application for certiorari in the High Court had brought an application before the Rent Control Court to set aside the judgment given against her. She relied on the fact that she was not given a hearing date for the proceedings which led to the judgment against her. This was the correct thing to have done as a party not served with the hearing date of proceedings leading to a judgment or order made against him is entitled *ex-debito justitiae* to have the proceedings set aside as a nullity. See *Skenconsult (Nig.) Ltd. & Anor. V. Godwin Sekondy Ukey* [1981] 1 S.C. 4 at 14 & 15; *Craig v. Kansen* [1943] K.B. 256 at 262-263 and *White v. Weston* [1968] 2 All ER 824 at 846.

Now since the appellant had sought to set aside the judgment against her by the application brought before the Rent Control Court, what was she hoping to achieve by the certiorari proceedings? At the end of the day, if as the High Court later found that there has been a fundamental flaw, which includes non-service of the process leading to the judgment the proceedings would be set aside as a nullity. The result of this is that the same reliefs would on the facts have been available to the appellant in the proceedings at the Rent Control Court and the certiorari application before the High Court. However, in order to prevent an abuse of the process of court, which in this case was the pursuit of similar proceedings in different courts for the same relief, Order 43 rule 6 imposes that certiorari proceedings be not brought until the period of time for appealing has expired. Unwisely, the appellant elected to pursue both reliefs at the same time.

It is my firm view that the appellant got what she deserved. The

offending proceeding was the application at the High Court for certiorari. It deserved to be set aside as was done by the court below. I affirm the decision of the court below.

The lead judgment by my leaned brother Mukhtar JSC has explained the situation in greater detail. I agree with her. I would also dismiss this appeal as unmeritorious. I award N10,000.00 costs in favour of the respondents against the appellant.

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C

### **ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal holden at Calabar in appeal No. CA7C/135/99 delivered on the 26<sup>th</sup> day of June 2001 allowing the appeal of the respondent against the decision of the High Court of Cross River. State, holden at Calabar in suit No. C/MSD/68/99 which quashed the decision of the Rent Control Court delivered on 9<sup>th</sup> April 1998.

At the hearing of the appeal on 30/1/07 neither party was represented in court so the appeal was deemed argued on the briefs filed in accordance with the Rules of this court.

The appellant was a tenant of the 2<sup>nd</sup> respondent (The Holy Chapel of Miracle) in respect of the property situate and lying at No.3B Archibong Eso Lane, Calabar. Following the inability of the appellant to pay rent, the 2<sup>nd</sup> respondent instituted suit No. CRT/17/97 at the rent Control Court for arrears of rent and recovery of possession and obtained judgment.

Appellant then applied to the Rent Control Court for an order setting aside the said judgment and also prayed the court to restore her to possession of the property. While the above application was pending before the Rent Control Court, learned counsel for the appellant filed an application suit No.C/MSD/68/98, at the High Court of Cross River State, Calabar praying that court for an order of Certiorari bringing up the judgment of the trial court in suit No.CRT/17/97 to the High Court for the purpose of being quashed and prayed the court in addition, for an order that she be restored into possession of the premises.

In reaction to that application before the High Court, learned counsel

for the respondent filed an application praying the court for an order striking out suit No.C/MSc/68/98 on the ground that it violates order 43 of the Cross River State High Court (Civil Procedure) Rules and that the suit is an abuse of process which application was dismissed by the learned trial judge. The respondent was dissatisfied with that judgment and consequently appealed to the Court of Appeal, which allowed the appeal. The instant appeal is against that decision. B

The issue for determination, as identified by learned counsel for the appellant A. O. OKEAYA - INNEH Esq. in the appellant brief filed on 28/1/03 is: - C

*“Whether the learned Justice (sic) of the Court of Appeal were right in law when it (sic) held that the period allowed for Appeal in Order 43 of the High Court Procedure Rules of Cross River State must expire before the appellant herein can seek the remedy of judicial review particularly that of certiorari.” D*

It is very important to note that the decision of the Court of Appeal now on appeal before this court is based on two grounds as can be seen from the following passage from that judgment. At page 232 of the record, E the court held as follows; -

*“It is therefore my view that the application for judicial review by certiorari proceedings commenced in the High Court in suit No. C/MSc/6898 to quash the judgment of the Rent Control Court delivered on 9/4/98 before the period of appealing against that judgment is in breach of order 43 Rule 3(6) of the High Court (Civil Procedure) Rules of Cross River State 1987”. F*

At pages 233-234 of the record another reason/ground for allowing the appeal is also stated by the court thus: - G

*“In the instant case, the Respondent was dissatisfied with the judgment of the Rent Control Court entered against her on 9/4/98 in her absence and according to her without notification of the hearing date of the case in respect to that judgment. Clearly, she had a right to initiate appropriate proceeding to set aside that judgment. In so doing, she commenced two proceedings. One was an application before the Rent Control Tribunal to set aside the default judgment and the other was a judicial H*

review by *ex parte* application for order of certiorari in the High Court in suit No. C/MS/68/98 to remove the default judgment to the High Court for the purpose of it being quashed. To commence these two proceedings in two different Courts for the same remedies involving the same parties B is the gravamen of the Appellant's grouse. The right of the Respondents to commence certiorari proceedings is not seriously disputed. .... However it was improper for the Respondent in the case in hand to commence the certiorari proceedings in suit No. C/MS/68/98 in the face of the C pending application in the Rent Control Court. I hold the view that suit No. C/MS/68/98 was an abuse of the process of the court..." Emphasis supplied.

The above are two reasons why the lower court allowed the appeal of the present respondent.

D However, going through the grounds of appeal at pages 238-242 of the record, there is no ground attacking the decision of the lower court on the issue of abuse of court process neither has any issue been formulated before this court relating thereto. It is settled law that a decision of the court not appealed against is deemed accepted by the party E against whom the decision was entered and therefore binding. I hold the view that granted, without conceding, that appellants issue for consideration in this appeal succeeds, the legal effect of that decision would not F be sufficient to set aside the decision of the lower court in view of the fact that that court had held in addition that the suit giving rise to the appeal before it was instituted in abuse of process and that decision remained subsisting and binding. Such a victory would be meaningless indeed.

G Therefore without even bothering oneself with the issue formulated by learned counsel for the appellant it is clear that this appeal is an exercise in futility and is consequently doomed to fail. I therefore agree with the reasoning and conclusion of my learned brother MUKHTAR, H JSC in the lead judgment that the appeal is without merit and should be dismissed.

I accordingly dismiss same with costs as assessed and fixed in the said lead judgment.

**CHUKWUMA -ENEH**

I have been privileged to read in advance the judgment in the case just delivered by my learned brother Mukhtar JSC and I am in complete agreement that the appeal must fail, and should be dismissed. B

The plaintiff (the respondent in this Court) has commenced this action as per suit No. CRT/17/97 in the Rent Control Court of the Cross River State for recovery of possession and arrears of rents of a disputed property situate at No. 3B, Archibong Eso Lane Calabar. In its judgment the trial Rent Control Court has granted in favour of respondent the rights sought in the suit that is, as claimed. Sequel to this situation the defendant (appellant in this Court) had to be thrown out of the property along with her personal effects. By virtue of the Cross River Rent Control Edict 1985 which also created the Rent Control Court, the defendant has 30 days within which to appeal such decision as the instant one given by of the Rent Control Court. C D

In this particular case the said decision of the Rent Control Court was a default judgment having been obtained behind the appellant's back. She, i.e. the appellant then filed an application before the said Court for it to be set aside. While this application to set aside the judgment of the Rent Control Court was pending; she also commenced another action by way of judicial review as per suit No. C/Misc. 68/98 at the State High Court, Calabar for an order of certiorari to issue to quash the decision of the said Rent Control Court, leave having earlier been obtained. A point well taken in this regard is that leave granted before the expiry of the time limit for appealing against the said decision is irregular and incompetent. See: *Exparte Chijiole Atti* 75 NLR 42; *R v. Wands-worth Justices, Exparte Reed* (1942) 1 KB 281 at 285; (1942) 1A ER 56 at 58, and *The Queen v District Officer & Ors.* (1961) ANLR 55 at 62. This point is also in consonance with the import of the provisions of Order 43 of Cross River State High Court (Civil Procedure) Rules 1987. E F G H

Consequently, the appellant brought an application before the High Court to have the application (C/Misc.68/'98) for Judicial Review pend-

ing before the High Court struck out, for firstly, violating the provisions of Order 43 of Cross River State High Court (Civil Procedure) Rules 1987 in that the application had been filed 14 days within the appeal period of 30 days as provided under the Edict (*supra*) and secondly as constituting an abuse of process (underlining for emphasis) The applicant's application in this regard, on being dismissed by the High Court and being dissatisfied with the decision she ( i.e. the appellant) again, appealed to the Court of Appeal (i.e. the lower Court) which in turn in a considered judgment dismissed the appeal on the two grounds as set out above upon which the appeal had been fought before it. It is important to underscore the point that for having commenced certiorari proceeding as per suit No. C./Misc. 68/98 in the High Court while the application in the Rent Control Court was still pending, has resulted in the application (C./Misc.68/98) being struck out as an abuse of process. There can be no doubt that the appellant's failure to appeal against the decision on the abuse of process clearly indicates her acceptance of the decision *moreso* as this is not a case of Counsel being mistaken as to the choice of the proper channel to challenge the decisions as in the case of *Shanu V. Afribank Nig. PLC* (2000) 10-11 SC 1 (2000) 13 NWLR (Pt. 6 84) 392. Apparently, the appellant had decided in this case to achieve the end 'by any means hence the two applications pending between the parties in two separate Courts at the same time. The appellant being aggrieved by that decision has finally appealed to this Court by a Notice of appeal dated 26/6/2001 containing 4 grounds of appeal and has therein sought the following relief that is to say,

G *"An order setting aside the judgment of Court of the Appeal Calabar Division made on 26/6/2001 and restoring Suit No. C./Misc. 68/98 to the High Court for determination of the substantive motion on merit,*

*(ii) An order setting aside the order as to cost being punitive on the appellant, a widow".*

H *".....subsequently the appellant appeal (sic) to the Supreme Court and canvassed her appeal in her brief on one issue of violation of Order 43 of the High Court Rules and thereby conceding to the issue of abuse of Process"*

The appellant has not filed any reply brief nor answered the question of abuse of Court process as per the appellants brief filed in this case. The parties have more or less dwelt at length on the issue of non-compliance under the provisions of Order 43 only. There is no doubt of a clear intention from the grounds of appeal filed here and the issues B raised therefrom, again of the appellant's clear intention not to challenge the decision on the abuse of Court process. In fact, as asserted in their brief of argument by the respondents, the appellant has appeared to have conceded that question which in my view is to her detriment - thus rendering the appeal nugatory. I am, all the same, to observe pointedly even C though briefly that where as in this instance an application as per suit No. C. /Misc.68/98 has been struck out as constituting an abuse of process it goes without more that the said case has terminated; the bottom having D been knocked off the case. And on the authorities of *Ameful v. State* (1988) 1 NSCC (Vol. 19) 669 LL35 - 50, *Woluchem v. Dr. Inko - Tariah* (1974) ECSLR (Vol. 4) 616, *Registered Trustees of Ifeloju Friendly Union v. Kuku* (1991) 5 NWLR (Pt. 189) 65 at 75 E-F and *A.M. Soetan v. Total Nig. Ltd.* (1972) 1 SG 86, the Court cannot, however much it tried, E revive the matter which it has struck out save on the application of either of the parties. The instant motion No. C./Misc. 68/98, having been struck out is automatically terminated and, until the said suit No. C./Misc. 68/98 is restored in the general cause list, if at all, no proceedings including the F instant proceeding on non-compliance with the provisions under Order 43 (supra) has any footing at all on which to stand to be discussed. See: *Woluchem V. Dr. Inko-Tariah* (supra) and *A.M. Soetan v. Total Nig. Ltd.* (supra). The appeal appears to me to have no basis.

In regard to the questions dealing with the violation of the provisions of Order 43 of Cross River State High Court (Civil Procedure) Rules I have nothing more to add to the reasoning and conclusions as very clearly expounded in the lead judgment. I abide by the order contained therein. H