

SUPREME COURT OF NIGERIA
25TH JANUARY, 2008, SC.141/2005
CORAM:- A. I. KATSINA-ALU, S. A. AKINTAN,
W. S. N. ONNOGHEN, I. T. MUHAMMAD,
P. O. ADEREMI, JJSC

OKON BASSEY EBE APPELLANT
V.
COMMISSIONER OF POLICE RESPONDENT

COURTS - Discretion - Exercise of - To be proper - It must be honest and in the spirit of the applicable statute - Or else it will be set aside (H1)

COURTS - Appeals - Discretion - Where exercised bona fide - Uninfluenced by irrelevant considerations - Not arbitrarily or illegally - But justice administered according to law - Appellate court will not interfere (H2)

COURTS - Discretion - Appearance of parties - A judge has no discretion in his ruling on the law - But exercises discretion in penalties or remedies - No law compels any party to appear physically in court - In the circumstances of this case (H3)

STATUTES - Observance - Legal impossibility - Implied by law not contract - Affords a party good excuse for nonperformance - It is impossible for a Commissioner of Police - To be physically present in court - For every case affecting his office (H4)

FACTS

Appellant was among four persons charged before a Cross-River State Chief Magistrate's Court on a four-count charge involving conspiracy to effect unlawful purpose. They were inter alia, accused of forcible entry on a parcel of land which was in actual and peaceable possession of one Chief Andong, malicious damage and threat with intent to intimidate. Three witnesses had testified for the prosecution between 12-5-2000 and 12-1-2001. Prosecuting counsel being absent on the 12-1-2001, the Chief Magistrate dismissed

the charge for want of diligent prosecution. The Commissioner of Police (COP) appealed to the High Court which queried the prosecutor's fiat and struck out the appeal for failure of appellant (COP) to appear in person.

The COP appealed to the Court of Appeal which after taking arguments of counsel allowed the appeal, set aside the decision of the appellate High Court that demanded for revalidation of the Fiat issued by the A-G Cross-River State. The Court below ordered that the appeal be re-listed before the High Court of Cross-River State. Being dissatisfied, present appellant has now appealed to the Supreme Court, which had to consider O. 44 r. 10(1) Cross-River State High Court (Civil Procedure) Rules, 1987. It provided inter alia, that if appellant does not appear, the appeal shall be struck out.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in setting aside the order of the High Court striking out the appeal of the respondent for failure of the respondent to comply with Order 44 Rule 10 (1), of Cross River State High Court Civil Procedure Rules, 1987?"

HELD (Unanimously dismissing the appeal per **ADEREMI JSC**)
COURTS - Discretion - Exercise of

1. This court has said that for a judicial discretion to be properly exercised, it must be founded upon the facts and circumstances presented to the court from which the court must draw a conclusion governed by law and nothing else. The exercise of that discretion must be honest and in the spirit of the statute, otherwise, any act so done will not find a solace in the statute and such a discretionary act must be set aside. (P. 157 D)

Appeals - Discretion - Where exercised bona fide

2. It therefore follows that where a judicial discretion has been exercised bona fide, uninfluenced by any irrelevant considerations and not arbitrarily or illegally, the general rule is that an appellate court, the like of this court, will not ordinarily interfere. Legal discretion or what is termed in Latin Maxim as "Legalis Discretio" requires a court or a judge to administer justice according to prescribed rules of law. (p. 157 F)

COURTS - Discretion - Appearance of parties

3. Let me say that a judge has no discretion in his ruling on the law. But when, having made necessary findings of fact and necessary ruling on law he has to choose between different causes of action, orders, penalties or even remedies, he then exercises discretion. The court below has evaluated the printed evidence and made its inferences from established facts. I cannot fault that exercise. There is no law compelling any party to appear physically in court in the circumstances of the facts of this case. All that is necessary, in the interest of good administration of justice, is that the working of a court of law is not stalled by non-appearance or even the appearance of a party to the court before it. (p. 159 A)

STATUTES - Observance - Legal impossibility

4. As was rightly said by the court below, to expect a Commissioner of Police to be physically present in all cases affecting him in his official capacity is to look for impossibility. Argument deduced from an impossibility always avails in law. Where the law creates a duty or a charge, and the party is disabled to perform it without any default in him and has no remedy over, there the law will, in general, excuse him. I am not unmindful of the principle that impossibility of performance of an obligation which a party has expressly undertaken by contract is, in general, no excuse. But, when the obligation is one implied by law, impossibility of performance by the law affords good excuse. The maxim is *Impotentia Excusat Legem*. I repeat, it is absolutely impossible for a Commissioner of Police to be physically present in court for every court case affecting his office. And, if it is remembered that the law does not compel the impossible, the judgment of the court below cannot but be upheld. (p. 159 D)

NOTABLE POINTS OF INTEREST***AKINTAN JSC******1. Validity of a fiat is throughout duration of the case***

I will however like to add, by way of emphasis, that it was totally erroneous for the trial Judge to have cancelled or declared the fiat granted to the counsel in the case as having expired. I believe that

once a fiat is granted to a counsel to prosecute or defend a case, the validity of the fiat would continue throughout the duration of the case for which the fiat was granted. (p. 160 G)

2. Party's presence in court - Misconception of O. 44 r. 10(1)

B Also on the question whether an appellant needs to be in court while his appeal is being heard even though he is represented by a Counsel, I believe and hold that the stand taken by the High Court in striking out the appeal before it on ground that the appellant, the
C Commissioner of Police, was not in court, was totally wrong and a misconception of the provisions of Order 44 Rule 10 (1), of the High Court Civil Procedure Rules. That Rule provides as follows:

"(1) *If, on the day of hearing or any adjournment of the case, the appellant does not appear, the case shall be struck out and the*
D *decision shall be affirmed unless the court thinks fit, for sufficient cause, to order otherwise.*"

The appellant, in the instant case, was the Commissioner of Police of the State. He was represented by a counsel on the day of hearing. The court ought to take judicial notice of the fact that it was
E possible for the Commissioner of Police to be involved in many court cases at the same time. It would therefore be impossible for him to be physically present in all the courts at the same time and at the same time be able to carry on his duties as Commissioner of Police apart
F from the prosecution of cases instituted in his official capacity. The correct and proper interpretation to be given to the phrase: "the appellant" in the Order 44, Rule 10 (1), should therefore cover representation by a counsel or anyone so designated by the Commissioner. (p. 160 H)

G
ONNOGHEN JSC

3. Appearance in court defined

The word "appearance" is defined by Black's law Dictionary, 8th Ed. page 107, as follows: -

H "*A coming into court as a party or interested person, or as a lawyer on behalf of a party or interested person; especially; a defendant's act of taking part in a law suit, whether by formally participating in it or by an answer, demurrer, or motion, or by taking*

post judgment steps in the law suit in either the trial court or an appellate court."

From the above, it is very obvious and I hereby hold that appearance can be either personal by the party to the action or appeal or through his legal practitioner. The word signifies or designates the express or overt act by which a party against whom an action has been instituted or who seeks redress from the court of law submits himself to the jurisdiction of the court. The act of appearing in court may be expressly made by formal memorandum of appearance or to physically appear and make oral declaration or statement to that effect or may be implied from some act done with the intention of appearing and submitting to the jurisdiction of the court. (p. 166 A)

MUHAMMAD JSC

4. Representation by counsel is constitutional

I will add that the Constitution of the Federal Republic of Nigeria which is the supreme law entitles every person to a fair trial which includes the personal appearance or appearance through a legal practitioner of a person's choice. A person here, I think, includes both the natural and artificial. To tie down a trial to personal appearance of a party whether in criminal or civil matters, when the constitution and other statutes allow for representation, will in my view, grind the progress of a trial to a halt. Numerous inhibiting factors as highlighted by the court below as shown above, abound to disable a person from putting up personal appearance. I agree that court rules are meant to be obeyed. They should not however, render Judges subservient to them to the extent of stalling the proceedings of a court. I am surprised that it is a lawyer that is promoting that retrogressive practice when the whole world is fastly adopting to a more progressive and speedier methods of resolving legal disputes. (p. 171 E)

5. Fiat - Definition - Duration

On the issue of expiration of fiat raised by the appellant's learned counsel, the learned counsel should appreciate the connotation and efficacy of a fiat. Firstly, it is a Latin word which means "Let it be done". Technically, therefore, it denotes the grant or conferment of power on another by a person having complete authority on the

issue upon which the fiat was given in matters of prosecution, the Attorney General of a state or of the Federation can give such a fiat. A Commissioner of Police can delegate his officers or private legal practitioners to represent him in a case. The life span of such an authority or fiat may extend to the conclusion of the case in question.

It was certainly wrong of the learned High Court Judge on appeal to have refused audience to the learned counsel who appeared for the respondent which resulted in the striking out of the appeal before him. His lordship was misled and misdirected, unfortunately. (p. 172 A)

REPRESENTATION

Chief O. O. Ogbodu, for the Appellant
Mr Mba E. Ukwenu, with him Okanga O. Okanga, for the Respondent

CASES REFERRED TO

- Saffieddine v Commissioner of Police (1965) 1 ALL NLR 54
Solanke v Ajibola (1968) 1 ALL NLR 46
Mobil Oil v Federal Board of Inland Revenue (1977) 3 S-C. 97
Unilag & Ors v Olaniyan & Ors. (1985) 1 S.C 295
Kehinde v Ogunbunmi & Ors. (1968) NMLR 37
Atake v Afejuku (1994) 9 NWLR (pt.368) 379
Niger Progress Ltd v. North East Line Corp. (1989) 3 NWLR (pt. 107), 68
Amokeodo v. IGP (1999) 6 NWLR (pt. 607) 467 at 488
Egbe v. Alhaji (1990) 1NWLR (pt.128) 546 at 581
Ibrahim v. Barde (1996) 9 NWLR (pt. 474) 513 at 577
Schroder v. Major (1989) 2 NWLR (pt. 101) 1 at 121
George I. Obayuwana v. Governor, Bendel State (1982) 12 S.C 147
Ibekwe v. Maduka (1995) 4 NWLR (pt 392) 716 at 724
Kehinde v. Ogunbunmi (1967) 1 All NLR 306 at 309 - 311
Metro Gas Ltd v. Eferakeya (2001) FWLR (pt. 39) 1442 at 1451

RULES REFERRED TO

High Court (Civil Procedure) Rules of Cross River State, 1987 O.
44 r. 10(1), O. 11 r. 33

BOOK REFERRED TO

Black's Law Dictionary 8th Ed. p. 107

B

LEAD JUDGMENT BY ADEREMI JSC

The appeal is against the judgment of the Court of Appeal [Calabar Division] in appeal No CA/C/77/2002; Okon Bassey Ebe v Commissioner of Police delivered on the 29th of November 2004 in which the court below had allowed the appeal of the appellant [Commissioner of Police] before it, set aside the decision of the High Court (sitting as an appellate court) demanding for the invalidation of the fiat issued by the Attorney-General of Cross Rivers State and also set aside the order made by the appellate High Court striking out the appeal for failure to comply with the provisions of Order 44 Rule 10 (1) of the Cross River State High Court Civil Procedure Rules, 1987. D

Briefly, the facts leading to this appeal are thus: - four persons including the appellant were charged before the Chief Magistrate's Court, Akpap Okonyong in Odukpani Local Government Area of Cross River State on a four-count charge involving conspiracy to effect unlawful purpose e.g. forcible entry on a parcel of land which was in actual and peaceable possession of one Chief Effiong Offiong Andong, malicious damage and threat with intent to intimidate. Their trial commenced on the 12th of May 2000. As at 27th October 2000, three witnesses had given evidence for the prosecution. On the 12th of January 2001, the trial Chief Magistrate dismissed the charge for want of diligent prosecution, the prosecuting counsel was absent. Dissatisfied with the order dismissing the charge, the appellant (Commissioner of Police) before the appellate High Court appealed there from to the High Court, Calabar Judicial Division. On 1st August 2001 when the appeal came up for argument before the appellate High Court, an objection was raised to the appearance of one Ukwani to prosecute the appeal on behalf of the Commissioner of Police on the ground that he had no fiat. The appeal was adjourned from that date to 8th November 2001 presumably to take argument on the H

objection. There is no record of what transpired in the court on the 8th of November 2001. But on 8th May 2002, the appearance of Ukweni as a prosecutor in the appeal was disallowed by the appellate High Court until evidence of issuance of fiat to him by the Attorney-General was produced. Meanwhile, on the same date (8th May, 2002), the learned judge presiding over the High Court sitting on appeal struck out the appeal for non-appearance of the appellant. The Commissioner of Police, as the appellant, being dissatisfied with this judgment, appealed to the court below (the Court of Appeal) which after taking arguments of counsel, which, in a considered judgment delivered on the 29th of November 2004, allowed the appeal of the Commissioner of Police, set aside the decision of the High Court, as an appellate court, demanding for the invalidation of the fiat issued by the Attorney-General of Cross River State so also was the order striking out the appeal was set aside. The court below finally pronounced that the appeal was still valid and should be relisted and heard by another judge as the Chief Judge of Cross River State may so assign.

It is the appeal against the said judgment of the court below that is now before us. Both parties filed their respective briefs of argument. In the appellant's brief of argument filed on the 22nd of May 2006, only one issue was identified for determination by this court, and as set out in the said brief, it is as follows: -

"Whether the Court of Appeal was right in setting aside the order of the High Court striking out the appeal of the respondent for failure of the respondent to comply with Order 44 Rule 10 (1), of Cross River State High Court Civil Procedure Rules, 1987?"

While the respondent adopted the only issue raised up by the appellant, he modified same. The modified issue as couched in the brief of the respondent is in the following terms: -

"Whether the learned justices of the Court of Appeal were right in holding that the insistence of the High Court Judge on the personal appearance of the respondent was wrong in law and not in consonance with the relevant provisions of Order 44 Rule 10 (1) and (2); and Order 11 Rule 33 of the High Court of Cross River State (Civil Procedure) Rules, 1987?"

When the appeal came to us for argument on the 1st of No-

vember 2007, Chief Ogbodu, learned counsel for the appellant referred to, adopted and relied on the appellant's brief filed on 22nd May 2006 and he urged that the appeal be allowed. Mr. Ukwani, learned counsel for the respondent, for his part, referred to, adopted and relied on the respondent's brief filed on 20th July 2006; he urged that the appeal be dismissed and the judgment of the court below be affirmed. B

The issues raised by the appellant and respondent are materially the same. Before I start the consideration, I am of the view that I should reproduce the provisions of Order 44 Rule 10(1) of the High Court Civil Procedure Rules; they are thus: - C

"If on the day of hearing or at any adjournment of the case, the appellant does not appear, the appeal shall be struck out and the decision shall be affirmed unless the court thinks fit, for sufficient cause, to order otherwise." D

The above provisions of the rules of court confer some degree of discretion on the judex; in the instant case, what is conferred is a judicial discretion. ***This court has said that for a judicial discretion to be properly exercised, it must be founded upon the facts and circumstances presented to the court from which the court must draw a conclusion governed by law and nothing else. The exercise of that discretion must be honest and in the spirit of the statute, otherwise, any act so done will not find a solace in the statute and such a discretionary act must be set aside.*** See *Unilag & Ors v Olaniyan & Ors.* (1985) 1 S.C 295. E F

It therefore follows that where a judicial discretion has been exercised bona fide, uninfluenced by any irrelevant considerations and not arbitrarily or illegally, the general rule is that an appellate court, the like of this court, will not ordinarily interfere- See *Saffieddine v Commissioner of Police* (1965) 1 ALL NLR 54; *Solanke v Ajibola* (1968) 1 ALL NLR 46 and *Mobil Oil v Federal Board of Inland Revenue* (1977) 3 S.C. 97. ***Legal discretion or what is termed in Latin Maxim as "Legalis Discretio" requires a court or a judge to administer justice according to prescribed rules of law.*** In applying the provisions of Order 44 Rule 10 (1) of the High Court Civil Procedure Rules, the judge of the G H

High Court of Cross River State sitting on appeal on the case reasoned thus: -

- "Let me on my own introduce or add to the cannon of interpretation the element of commonsense. Applying this principle to that provision, it would make no sense to expect the lawyer to be present at any or all adjournments be they for mention or even interlocutory ruling as well as the final judgment of the appeal. It seems to me that the plausible instances when both the lawyer and the appellant have to appear simultaneously are hearing or argument of the appeal; but the appellant is expected to appear in all other respects. If he fails then the consequences of the infringement of that provision lies on his door-step personally. I hold that the cup of his absence will immutably be taken by him and will not pass to his lawyer or be shared by both of them....."*
- D For non-appearance of the appellant on all adjournment dates so far before me, this appeal shall be and is hereby struck-out."*

It should be noted that the appellant before the High Court sitting on appeal is the Commissioner of Police. The court below (Court of Appeal) before whom the appeal against the judgment of the High Court came, on the issue of non-appearance of the appellant said and I quote: -

- "I therefore hold that the insistence on the personal appearance of the Commissioner of Police, who was the appellant, before the lower court, was absolutely wrong because a counsel was regularly appearing for the appellant being a criminal appeal*

With the cited precedents laid by the apex court, I am sure that the lower court judge, was slavish to Order 44 Rule 10 (1) supra with the intent to scuttle the appeal by striking out same on the wrong basis that, the legal practitioner, had no right to announce appearance for the appellant - Commissioner of Police.

- In my final analysis, I allow the appeal of the appellant I set aside, the decision demanding for a revalidation of the fiat issued by the Attorney-General of Cross River State which is still binding and I also set aside the striking out of the appeal*

I hold that the appeal is still valid and should be relisted in the court's cause list for hearing before another judge as the Chief Judge

of Cross River State, may assign."

As I have said above, it is the appeal against the judgment of the court below the extract of which I have reproduced above that is now before us. ***Let me say that a judge has no discretion in his ruling on the law. But when, having made necessary findings of fact and necessary ruling on law he has to choose between different causes of action, orders, penalties or even remedies, he then exercises discretion. The court below has evaluated the printed evidence and made its inferences from established facts. I cannot fault that exercise. There is no law compelling any party to appear physically in court in the circumstances of the facts of this case. All that is necessary, in the interest of good administration of justice, is that the working of a court of law is not stalled by non-appearance or even the appearance of a party to the court before it.*** See *Kehnde v Ogunbunmi & Ors.* (1968) NMLR 37 and *Atake v Afejuku* (1994) 9 NWLR (pt.368) 379. ***As was rightly said by the court below, to expect a Commissioner of Police to be physically present in all cases affecting him in his official capacity is to look for impossibility. Argument deduced from an impossibility always avails in law. Where the law creates a duty or a charge, and the party is disabled to perform it without any default in him and has no remedy over, there the law will, in general, excuse him. I am not unmindful of the principle that impossibility of performance of an obligation which a party has expressly undertaken by contract is, in general, no excuse. But, when the obligation is one implied by law, impossibility of performance by the law affords good excuse. The maxim is Impotentia Excusat Legem. I repeat, it is absolutely impossible for a Commissioner of Police to be physically present in court for every court case affecting his office. And, if it is remembered that the law does not compel the impossible, the judgment of the court below cannot but be upheld.*** It is for what I have been saying above that I hereby answer each of the only issue raised by the appellant and the respondent in their respective briefs of argument, in the affirmative.

In concluding this appeal, it is my judgment that this appeal is

very much unmeritorious. It must be dismissed and I hereby dismiss it. I uphold the judgment of the court below setting aside the decision demanding for a revalidation of the fiat issued by the Attorney-General of Cross River State and also the order setting aside the striking out of the appeal. I also endorse the consequential order of the court below that the appeal is still very much valid and should be relisted in the court's cause list for hearing before another judge as the Chief Judge of Cross River State, may assign.

C

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Aderemi, JSC in this appeal. For the reasons he has given I also dismiss the appeal and affirm the decision of the Court below.

AKINTAN JSC

The two questions raised in this appeal are whether a fiat granted to a counsel to prosecute or defend a case could be declared by the trial Judge as having lapsed while the case for which the fiat was granted was yet unconcluded; and whether an appellant's absence at the hearing of his appeal could warrant striking out his appeal even though he was represented by a counsel. The two questions were adequately answered in the lead judgment written by my learned brother, Aderemi, JSC, the draft of which I had the privilege of a pre-view. I entirely agree with his reasoning and conclusions expressed in the said lead judgment.

I will however like to add, by way of emphasis, that it was totally erroneous for the trial Judge to have cancelled or declared the fiat granted to the counsel in the case as having expired. I believe that once a fiat is granted to a counsel to prosecute or defend a case, the validity of the fiat would continue throughout the duration of the case for which the fiat was granted.

Also on the question whether an appellant needs to be in court while his appeal is being heard even though he is represented by a Counsel, I believe and hold that the stand taken by the High Court in

striking out the appeal before it on ground that the appellant, the Commissioner of Police, was not in court, was totally wrong and a misconception of the provisions of Order 44 Rule 10 (1), of the High Court Civil Procedure Rules. That Rule provides as follows:

"(1) If, on the day of hearing or any adjournment of the case, the appellant does not appear, the case shall be struck out and the decision shall be affirmed unless the court thinks fit, for sufficient cause, to order otherwise."

The appellant, in the instant case, was the Commissioner of Police of the State. He was represented by a counsel on the day of hearing. The court ought to take judicial notice of the fact that it was possible for the Commissioner of Police to be involved in many court cases at the same time. It would therefore be impossible for him to be physically present in all the courts at the same time and at the same time be able to carry on his duties as Commissioner of Police apart from the prosecution of cases instituted in his official capacity. The correct and proper interpretation to be given to the phrase: "the appellant" in the Order 44, Rule 10 (1), should therefore cover representation by a counsel or anyone so designated by the Commissioner.

In conclusion, I also agree that the appeal lacks any merit. I accordingly dismiss it and make similar consequential orders as are made in the lead judgment.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Calabar in appeal No CA/C/77/2002, delivered on 29/11/04, allowing the appeal of the present respondent against the judgment of the High Court of Cross River State sitting on appeal in appeal No HC/2AC/2001.

The appellants were standing trial before the Chief Magistrate's Court, Akpap Okoyong in Cross River State presided over by L.B. Otu. Esq, and the matter was part heard at the time the incident leading to the appeals occurred; in fact, three witnesses had testified on behalf of the prosecution which was being conducted by learned counsel for the respondent in this court, a private legal practitioner

upon a fiat from the Attorney General of Cross River State duty filed in that court. On the 12th day of January, 2001 the learned trial Chief Magistrate, who was at the material time on transfer, sat and upon calling the charge without the presence of learned counsel for the prosecution, dismissed the charge and discharged the accused persons. Learned counsel for the respondent was not happy with the result of the proceedings of that day so he lodged an appeal in the High Court of Cross River State, holden at Calabar against the said decision.

When the matter came up for hearing, an objection was taken by learned counsel for the respondent in that appeal to the appearance of learned counsel for the appellant in the appeal, on the ground that he had not obtained the Attorney General's fiat, and secondly that by virtue of the provisions of Order 44 Rule 10 of the Cross River State High Court (Civil Procedure) Rules, 1987, the absence of the appellant in person in court on the date fixed for the hearing of the appeal, was fatal to the appeal and urged the court to strike out the appeal. Learned counsel for the appellant argued that the appellant need not appear in court personally being a nominal party but that appearance by counsel on his behalf constitutes appearance by the appellant particularly as the appellant was not needed to testify in the appeal. The learned judge upheld the objections of the counsel for the respondent and consequently struck out the appeal.

Learned counsel for the appellant in that appeal was dissatisfied with the ruling and appealed to the Court of Appeal which allowed the appeal and ordered that the appeal be heard by another judge of the Cross River State High Court, holden at Calabar. The respondents in that appeal are not satisfied with that judgment and have consequently appealed to this court where the issue for determination, as formulated by learned counsel for the appellant, Chief H.O. Ogbodu, in the appellant's brief filed on 22/5/06 is as follows:-

"Whether the Court of Appeal was right in setting aside the order of the High Court striking out the appeal of the respondent for failure of the respondent to comply with Order 44 Rule 10(1) of Cross River State High Court Civil Procedure Rules 1987."

In arguing the issue, learned counsel for the appellants referred to the provisions of Order 44 Rule 10(1) of the High Court Rules

and submitted that since the provisions are clear and unambiguous, the words must be given their literal meaning, relying on the case of *Niger Progress Ltd v. North East Line Corp.* (1989) 3 NWLR (pt. 107), 68; *Amokeodo v. IGP* (1999) 6 NWLR (pt. 607) 467 at 488; that the judge did not insist on the appearance of the Commissioner of Police but that the rules of court must be obeyed; that the rule does not say that if the appellant is a Commissioner of Police he should be absent from court during the hearing of the appeal without explanation neither does the rule say that because counsel regularly appear for a party in a criminal case, the appearance of the client can be dispensed with contrary to what the lower court held which, in effect meant, that the lower court read into the rule what was not there, which is not allowed, relying on *Egbe v. Alhaji* (1990) 1NWLR (pt.128) 546 at 581; *Ibrahim v. Barde* (1996) 9 NWLR (pt. 474) 513 at 577; that no reason was given for the absence of the appellant in court on the day in question; that an appellate court ought not to substitute its own exercise of discretion for the discretion already exercised by the trial court, relying on *Gen and Aviation Serv. Ltd v. Thahal* (2004) 10 NWLR (pt. 880) 50 90-91; that the lower court erred in resorting to the provisions of Order 11 Rule 33 of the Cross River State High Court (Civil Procedure) Rules 1987 which deal with a general situation, in interpreting Order 44 Rule 10 thereof dealing with specific situations, relying on *Schroder v. Major* (1989) 2 NWLR (pt. 101) 1 at 121 and urged the court to resolve the issue in favour of the appellant and allow the appeal.

On his part, learned Counsel for the respondent, Mba Ukwani, Esq, in the respondent's brief of argument filed on 20/7/06 submitted that the appeal calls for the interpretation of the provisions of Order 44 Rule 100 of the Cross River State High Court (Civil Procedure) Rules 1987 and submits that the provision does not make the appearance of an appellant before the High Court mandatory during an appeal before that court but gives the court discretion on the issue; that the judge did not exercise his discretion judiciously and judicially. Learned counsel then referred to Order 11 Rule 33 of the High Court Rules and submits that Order 44 Rule 10(1) of the High Court Rules does not debar appearance of an appellant by counsel as in the instant case, that provisions of statute or rules are to be read

together and interpreted as a whole, relying on *George I. Obayuwana v. Governor, Bendel State* (1982) 12 S.C 147, *Anoh v. Hirhyam* (1997) 2 NWLR (pt 486) 174 at 188; *Ibekwe v. Maduka* (1995) 4 NWLR (pt 392) 716 at 724; that once a party has engaged the services of counsel, he is not expected to be physically present in court, relying on *Haruna v. Ladeinde* (1987) 4 NWLR (pt. 67) 941 at 945; that a party represented in court by counsel need not appeal in person in the court as the appearance of his counsel constitutes his own appearance within the meaning of appearance in Order 44 Rule 10 (1) of the High Court Rules, relying on *Kehinde v. Ogunbunmi* (1967) 1 All NLR 306 at 309 - 311; *Metro Gas Ltd v. Eferakeya* (2001) FWLR (pt. 39) 1442 at 1451; that to insist on the personal appearance of the Commissioner of Police in a criminal appeal will pose serious set back to the prosecution of criminal cases in the courts, learned counsel further submitted; that though the rules of court must be obeyed, they are not to be interpreted in a mechanical manner to frustrate the essence of administration of justice; that substantial justice as opposed to justice according to technicalities demands that the appeal be dismissed and urged the court to order accordingly.

Order 44 Rule 10(1) of the Cross River State High Court (Civil Procedure) Rules 1987 provides as follows:-

"If on the day of hearing or at any adjournment of the case, the appellant does not appear, the appeal shall be struck out and the decision shall be affirmed, unless the court thinks fit for sufficient cause, to order otherwise."

Order 44 is headed:

Appeals from Magistrate's while the side note reads:

from the provisions of Order 44 Rule 10 (1) supra that the court is given the discretion in dealing with "where appellant fails to appear." It is very clear the appeal where the appellant fails to appear in court at the hearing of his appeal. The provision is very clear as the words used therein are not ambiguous at all but straight forward and therefore need no judicial interpretation except the pivot of that provision which lies on the meaning of word "appear" as used therein. Unfortunately that word is nowhere defined either in the Edict enacting the Rules i.e. Cross River State Edict No 7 of 1987 nor in the Rules in question. I am of the considered view that the solution to the issue

under consideration lies in what we mean by appearance by the appellant at the hearing of an appeal.

There is no disputing the fact that in the instant case, the appellant before the High Court was the Commissioner of Police who was represented by learned counsel. Also true is the fact that parties to any case are either individuals or corporate or even an office such as the State, the Federal Republic, the Inspector General of Police, the Attorney General, the Commissioner of Police, etc. In criminal matters, such as the one from which this appeal arose, it is common knowledge that the parties are usually either the State, or the Federal Republic, or the Inspector General of Police, or Commissioner of Police, or Attorney General e.t.c against the individual(s) charged with the relevant offence. These offices though not individuals, are occupied by individuals except of course the Federal Republic and the State, in which case such parties are usually represented in court by representatives - not the actual individuals. It is clear to me that the provision of Order 44 Rule 10(1) of the Rules must have had the peculiarities of the administration of criminal justice system in mind when it talks of appearance at the hearing of an appeal since it is the Constitutional right of parties who are dissatisfied with the decision of the court to appeal against such. By parties I mean both individuals and corporate.

The word "appearance" by the appellant at the hearing of the appeal as used in order 44 Rule 10(1) of the Rules has no difficulty in meaning where the appellant happens to be an individual - he has to appear in court or offer satisfactory reasons for the non appearance at the hearing. The difficulty, however, lies in the use of the word "appearance" in relation to corporate appellant as in the instant case on appeal. If one says that appearance means personal appearance, who would appear where appellant happens to be the State or Federal Republic of Nigeria as it sometimes happens? I hold the view that in such a situation a representative of the State or Federal Republic at the hearing will do just fine and be in accordance with the relevant provisions of the Rules. The question one may ask is: who is a representative? The answer may lie in the meaning of the word -"appearance" as used in Order 44 Rule 10(1) supra. As stated earlier in this judgment, the word is not defined in the Rules so we have to look

elsewhere.

The word "appearance" is defined by Black's law Dictionary, 8th Ed. page 107, as follows: -

"A coming into court as a party or interested person, or as a lawyer on behalf of a party or interested person; especially; a defendant's act of taking part in a law suit, whether by formally participating in it or by an answer, demurrer, or motion, or by taking post judgment steps in the law suit in either the trial court or an appellate court."

From the above, it is very obvious and I hereby hold that appearance can be either personal by the party to the action or appeal or through his legal practitioner. The word signifies or designates the express or overt act by which a party against whom an action has been instituted or who seeks redress from the court of law submits himself to the jurisdiction of the court. The act of appearing in court may be expressly made by formal memorandum of appearance or to physically appear and make oral declaration or statement to that effect or may be implied from some act done with the intention of appearing and submitting to the jurisdiction of the court.

It must be noted that in applying the definition of the word to the facts of this case, it is relevant to also consider the nature of the proceeding requiring the appearance of the party. In the instant case, the matter was an appeal not a trial, and there is no evidence on record that the appellant was required to give further or additional evidence on appeal neither has such an argument been canvassed before this court or the lower courts; that the appellant was represented by a legal practitioner who was present in court, ready and willing to argue the appeal - in other words, the business of the court for that day was not to be adversely affected by the non-physical appearance of the occupant of the office of Commissioner of Police. By the way, if we agree with Edem. J. that the Rule requires the physical appearance of the Commissioner of Police, is it going to be the Commissioner of Police who occupied that office at the institution of the criminal proceedings or the one in that office during the appeal proceedings? If it is the one in the office during the hearing of the appeal will that satisfy the requirement of the personal physical appearance not being the one in that office when the criminal pro-

ceedings were instituted?

I have carefully considered the submissions of both counsel for the parties and I am of the firm view that the lower court is very correct in the views expressed in the judgment on appeal particularly when one considers the provisions of Order 11 Rule 33, of the Cross River State High Court (Civil Procedure) Rules, 1987, cited and relied upon by the lower court to the effect that:- B

"Where by these rules any act may be done by any party in an action, such act may be done either by the party in person, or by his legal practitioner, or by his agent (unless an agent is expressly debarred under these rules or any written law in force in the State)." C

The above provision is very much in accord with the meaning of the word "appearance" of a party or appellant as defined earlier in this judgment. It is therefore my view that the word "appear" as used in relation to an appellant in Order 44 Rule 10(1) included a legal practitioner retained by the party or appellant for the appeal and that an appearance by such a legal practitioner so engaged cannot in law, be said to be in violation of the said provisions or amount to a non appearance of the appellant at the hearing of the appeal. D

It is for the above and the more detailed reasons given in the judgment of Aderemi J.S.C that I agree that the appeal is very much without merit and should be dismissed. I hereby dismiss same and abide by the consequential orders made in the said lead judgment. E

Appeal dismissed.

F

MUHAMMAD JSC

From the facts made available in the record of appeal before this Court, the High Court of Cross River State holden at Calabar, on the 8th day of May, 2002, refused the appearance of a private legal practitioner on behalf of the Police Commissioner. The Learned Trial Judge struck out the appeal before him on the ground that the Commissioner of Police did not appear in court in person for the hearing of the criminal appeal before him. G H

The appellant with some four others were charged before the Chief Magistrate's Court, Akpap Okoyong, in Odukpani Local Government Area of Cross River State on a four count charge of:

- (i) Conspiracy to effect unlawful purpose
- (ii) Forcible entry on a land in the actual peaceable possession of one Chief Effiong Offiong Andong,
- (iii) Malicious damage and
- (iv) Threat with intent to intimidate.

B The appellant pleaded not guilty to each of the counts. Hearing in the case commenced on the 12th May, 2000. Three witnesses testified for the prosecution when the trial Chief Magistrate was transferred to another magisterial district. It was alleged that though, on transfer, the trial Chief Magistrate resumed to that magisterial district to sit and entertain the charge against the appellant without any authority from the State Chief Judge. He truncated the case by dismissing the charge on the ground that the prosecuting counsel was absent even though the Investigating Police Officer (IPO) who was to testify was in court ready to give his testimony.

D Aggrieved by the dismissal of the case, the appellant appealed to the High Court. An objection was raised concerning the appearance of the counsel representing the Commissioner of Police on the ground that he had no fiat to do so.

E On the 14th of January, 2002, when the matter came up for argument on the objection raised, Mr. Charles Duke, counsel, abandoned the issue raised that is, the objection that the appellant's counsel had no fiat. He now raised and argued an entirely new and different issue which is "whether the appeal can be entertained in the absence of the appellant". While ruling on the objection, the learned Judge of the High Court refused appearance to Mr. Mba Ukwani for the Commissioner of Police and subsequently struck out the appeal for non-appearance of the Commissioner of Police in court.

F G Dissatisfied with that decision, the respondent herein appealed to the Court of Appeal, Calabar Division. The court below allowed the appeal, set aside the decision of the High Court and allowed the respondent's appeal before the High Court to be relisted and heard afresh by another Judge. It is against this decision that the appellant has now come to this court on two grounds set out in his Notice of Appeal which is on pages 134-136 of the record of Appeal.

H The lone issue raised by the appellant for this court to determine is as follows:

"Whether the court of Appeal was right in setting aside the order of the High Court striking out the appeal of the respondent for failure of the respondent to comply with Order 44 Rule 10(1) of Cross River State High Court civil procedure Rules 1978?"

The respondent formulated the following issue;

"Whether the learned Justices of the Court of Appeal were right in holding that the insistence of the High Court Judge on the personal appearance of the respondent was wrong in law and not in consonance with the relevant provisions of Order 44 rule 10 (1) and (2); and order 11 rule 33 of the High Court of Cross River State (Civil procedure) Rules, 1987?"

The issue raised by each of the parties is very crucial to the development of the law in this country, looking at our historical antecedents vis-a-vis the English legal system we inherited and which we supplant and apply. My learned brother, Aderemi, J.S.C, has considered these issues satisfactorily. I will only want to add the following few words: Order 44 Rule 10(1) of the High Court of Cross River State (civil procedure) Rules, 1987 provides as follows:

"(1) If on the day of hearing or at any adjournment of the case, the appellant does not appear, the appeal shall be struck out and the decision shall be affirmed unless the court thinks fit, for sufficient cause, to order otherwise."

On issue No 1, let me reproduce the submission of learned counsel for the appellant:

"The Learned trial Judge did not insist on the personal appearance of the Commissioner of Police. What the Learned trial Judge did was to go by the provision of the Rules of Court which are meant to be obeyed, that the Appellant must be present in court otherwise the appeal must be struck out if no explanation is given for the absence of the appellant (sic) The rule did not say that if you are a commissioner of police you should be absent (sic) from the court. No matter what you are or the position you are holding once you are an appellant in court you must appear in court when the appeal comes up for hearing or the appeal will be struck out if no explanation is given to convince the court of your absence. Rules of court are meant to be obeyed in order to prevent judicial tyranny and the omnipotence of individual judges see. H.A Willoughby

v. International Merchant Bank (Nig) Ltd 1987 1 SC 137 at 161
The rule also did not say that because counsel regularly appear for a party in a case and the case being criminal, the appearance of that party can be dispensed with ".

I think even, before heading to this court adequate and very
 B potent answer was given to the learned counsel quoted above, by
 Thomas, J.C.A. Although lengthy, it is interesting and instructive to
 listen to what the learned Justice of the Court of Appeal, said:

"Now to consider whether it was proper for the lower court to
 C *strike out the appeal on Order 44 Rule 10 (1) of the High Court. I*
hereby re-quote the rules:

'If on the day of hearing or at any adjournment of the case, the
appellant does not appear, the appeal shall be struck out and the
decision affirmed, unless the court thinks fit, for sufficient cause, to
 D *order otherwise.'*

(underlining is mine)

I am sure the learned judge did not consider the underlined
words above. The intention of the law makers no doubt, knew that
there could, be situations, in which the appellant has either written to
 E *the court explaining his inability to appear on good reasons or has*
engaged the services of a counsel to appear for him, or even in case
due to either ill-health or old age and the appellant can not appear
physically in court, whereby, his representatives are authorized to
 F *appear. The lower judge for no apparent reasons, failed to consider*
the words "unless the court thinks fit, for sufficient cause to order
otherwise." If the judge had in fact adverted his mind totally to the
aforesaid Order 44 and rule 10 (I) (supra), he would know, that on
each occasion the matter was adjourned, the appellant counsel had
 G *announced himself for the appellant. The record of proceedings from*
page 32-34 dated 1-8-2002, (though should look 1-8-2001); 14-1-
2002; 20-2-2002 and lastly, 2-5-2002, the judge stated thus:

'Barrister M. Ukwani, appears for the appellant.'

Therefore, the words - "Appellant is absent, " was just a mere
 H statement that is meaningless as the private legal practitioner had
 announced his appearance for the inanimate person just as the state
 is represented by a counsel or police prosecutor, whether he is an
 Attorney General, State counsel or police prosecutor or a private

legal practitioner duly (sic) issued with a fiat. They always appear for either the Commissioner of police or the Director of public prosecution or Commissioner of Police. It is further necessary that, in applying Order 44 Rule 10 (I) supra, the judge has to read in addition, sub. rule (2) of rule 10 of order 44 and rule 11 of the same Order 44 (supra), at which the judge will understand that on a day for hearing or adjournment, the appearance of the private legal practitioner for the appellant (Commissioner of Police) was sufficient. B

It is trite law that, rules of court, can permit the appearance of any legal practitioner for any party in the case before it, to exercise his lawful right and act in any matter lawfully allowed. This is the intention of the law makers in High Court (civil procedure) Rules, Order 11 rule 33 of Cross River State (1987) In the case of Haruna v. Ladeinde (1987) (supra), it was held sufficient for appearance of an appellant who engaged the services of legal practitioner. The court stated that the physical appearance of the appellant was not necessary. C D

It is therefore, a misconception as argued by learned counsel for the respondent, that the lower court judge was right in applying Order 44 Rule 10 (1) alone without reference to other rules related to same. E
"

I fully endorse that reasoning process of the learned Justice of the Court of Appeal. I will add that the Constitution of the Federal Republic of Nigeria which is the supreme law entitles every person to a fair trial which includes the personal appearance or appearance through a legal practitioner of a person's choice. A person here, I think, includes both the natural and artificial. To tie down a trial to personal appearance of a party whether in criminal or civil matters, when the constitution and other statutes allow for representation, will in my view, grind the progress of a trial to a halt. Numerous inhibiting factors as highlighted by the court below as shown above, abound to disable a person from putting up personal appearance. I agree that court rules are meant to be obeyed. They should not however, render Judges subservient to them to the extent of stalling the proceedings of a court. I am surprised that it is a lawyer that is promoting that retrogressive practice when the whole world is fastly adopting to a more progressive and speedier methods of resolving legal disputes. H

On the issue of expiration of fiat raised by the appellant's learned counsel, the learned counsel should appreciate the connotation and efficacy of a fiat. Firstly, it is a Latin word which means "Let it be done". Technically, therefore, it denotes the grant or conferment of power on another by a person having complete authority on the issue upon which the fiat was given in matters of prosecution, the Attorney General of a state or of the Federation can give such a fiat. A Commissioner of Police can delegate his officers or private legal practitioners to represent him in a case. The life span of such an authority or fiat may extend to the conclusion of the case in question.

It was certainly wrong of the learned High Court Judge on appeal to have refused audience to the learned counsel who appeared for the respondent which resulted in the striking out of the appeal before him. His lordship was misled and misdirected, unfortunately.

For these and the fuller reasons of my learned brother, Aderemi, J.S.C, I too, dismiss the appeal and affirm the decision of the court below.

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