

SUPREME COURT OF NIGERIA
15TH FEBRUARY, 2008 SC.107/2004
CORAM:-N. TOBI, W. S. N. ONNOGHEN, I. F. OGBUAGU,
F. F. TABAI, I. T. MUHAMMAD, JJSC

IKENTA BEST (NIG) LIMITED APPELLANT
AND
ATTORNEY-GENERAL,
RIVERS STATE RESPONDENT

APPEALS - Time to appeal - Extension of - O. 3 r. 4 (2) Court of Appeal Rules - Applicant must give good and substantial reasons for the delay - And his grounds of appeal must show good cause prima facie (H1)

APPEALS - Extension of time to appeal - Court's guiding principles that are inexhaustible - Include consideration of length of elapsed time - And satisfactory explanation of the delay (H2)

APPEALS - Time - Extension - Grounds of appeal - In the present application - Are not frivolous - As rightly held by Court of Appeal (H3)

APPEALS - Delay - Unto appealing after 7 years - Reasons given are untenable and contradictory - As defendant is not the one to determine his non liability - Lower court made a wrong deduction - From parts of the affidavit (H4)

COURTS - Findings - Appeals - Delay - Mistake of counsel - Found by Court of Appeal - As reason for appealing out time - Is not implicit in the affidavit - Thereby rendering the perverse finding - One that should be set aside (H5)

APPEALS - Interference - Discretion of lower Court - In granting extension of time to appeal - Will be disturbed for being founded on wrong principles (H6)

EVIDENCE - Affidavits - Extension of time to appeal - Where sub-

stantial reason for the delay was not given under O. 3 r. 4 (2)(a) of Court of Appeal Rules - Extension of time should not be granted (H7)

FACTS

Before the Court of Appeal, Port Harcourt Division, the respondent filed a motion seeking for inter alia, extension of time to apply for leave to appeal, and leave to appeal against the judgment delivered in Suit No. PHC/1097/94. Seven years had elapsed before this application for extension of time to appeal was filed. By a majority decision delivered on 13-11-2003, the Court of Appeal granted the application while the Minority decision refused it. Being dissatisfied, the plaintiff, who was respondent before the lower court has now appealed to the Supreme Court raising two issues. Although the apex Court decided the 1st issue against the appellant, the 2nd was decided in its favour.

ISSUES FOR DETERMINATION

(1) Whether the introduction by the Court of Appeal suo motu of a fact not contained in the affidavit of the parties before it, and applying same in the exercise of the court's discretion to grant leave was proper.

(2) Whether granting of leave to the respondent to appeal out of time was, in the circumstances of the facts before the court, proper in law.

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

Time to appeal - Extension of - O. 3 r. 4 (2) CA Rules

1. This appeal turns on the interpretation and application of Order 3 Rule 4(2) of the Court of Appeal Rules. The parties are in agreement that to earn the court's discretion to extend the time within which to appeal under the rules, the applicant must show through the affidavit evidence:

(a) that there are good and substantial reasons for the failure to appeal within the period prescribed by Section 25(2) (a) of the Court of Appeal Act; and

(b) that there are grounds of appeal which prima facie show good cause why the appeal should be heard. (p. 1021 D)

Extension of time to appeal - Court's guiding principles

2. Let me restate some of the guiding principles in the determination of applications of this nature as laid down in a number of cases.

(a) For the court's exercise at its discretion to grant the extension of time within which to appeal, the two conditions circumscribed by Order 3 Rule 4(2) of the Court of Appeal Rules must be satisfied conjunctively and not disjunctively. See *Williams v. Hope Raising Voluntary Funds Society*.

(b) The length of time that has elapsed between the dates of the judgment sought to be appealed against and the filing of the application is always a material factor in the decisions of whether or not to grant the extension. It is however settled that, the length of time notwithstanding the extension can still be granted if the delay is satisfactorily explained. See *Alagbe v. Abimbola* (1978) 2 S.C. 39.

(c) In view of the settled principle of law that a litigant should not be punished for the mistake or advertence of his counsel, an application for extension of time to appeal ought to be granted if it is satisfactorily established that the failure to appeal within the period prescribed by law was due to the true and genuine mistake or error of judgment of counsel. The court must be satisfied that the excuse is availing having regard to the facts and circumstances of the case. *Iroegbu v. Okwordu* (1990) 6 NWLR (Part 159) 643. (p. 1021 F)

APPEALS - Time - Extension - Grounds of appeal

3. The entire argument of Senior Counsel for the Appellant is premised on the same issue of delay for over seven years before the application. It is my view that at the stage of an application for extension of time to appeal, it is enough if the grounds show that the appeal has some prospects of success and that it is not merely frivolous. I have examined the six grounds of appeal at page 30-33 of the record and I am satisfied that they are not merely frivolous. I do not agree that the court below erred in its conclusion with respect to the grounds of appeal. (p. 1023 C)

APPEALS - Delay - Unto appealing after 7 years

4. The court below reproduced these paragraphs and relied particu-

larly on paragraphs 6 and 10 and concluded as follows:

"Similarly the reasons given for the delay as disclosed particularly on paragraphs 6 and 10 of the affidavit in support, could be attributed to error of judgment on the part of the previous counsel assigned to handle the matter, a situation for which the court is always reluctant at penalizing the litigant."

With respect, the above cannot be a reasonable deduction from the said two paragraphs.

The excuse proffered in paragraph 10 is equally untenable. It is to the effect that no appeal was filed because successive Attorneys-General felt that not being a party to the contract between the appellant and the 1st defendant/respondent liability was exclusively that of the 1st defendant and who had also indicated that the matter would be settled. I agree with learned senior counsel for the appellant that this assertion is contradictory to that in paragraph 6. If the writ of summons, statement of claim the order for joinder of the 2nd defendant/respondent were misplaced, it is not explained how successive Attorneys-General became aware of the details of the claim in the suit to decide the 1st defendant/respondent's exclusive liability and that they were not liable. And in any case it is not the function of a defendant in an action to determine his liability or not to the claim. That is the constitutional function of the court and not a party.
(p. 1027 B)

Appeals - Delay - Mistake of counsel

5. I have, earlier in this judgment reproduced the text in the decision of the court below wherein error of judgment of counsel previously assigned to handle the matter was, from paragraph 6 and 10, ascribed to the respondent as a reason for the delay. Error of judgment or mistake of counsel as a reason for the delay is not implicit, let alone expressly stated in paragraphs 6 and 10 of the affidavit in support of the application. It is clear that this factor was the main reason that influenced the conclusion of the court below that the respondent made out a good case to warrant granting the extension sought. The result is that the finding based on facts not before the court is perverse and ought to be set aside.

Apart from paragraphs 6 and 10 of the supporting affidavit,

none of the other paragraphs contain facts constituting good and substantial reasons for the delay of over seven years in filing the application for extension of time to appeal. (p. 1028 C)

APPEALS - Interference - Discretion of lower Court

6. While the correct position of the law is that an appellate court would not, ordinarily, interfere with a lower court's exercise of its discretion, such an interference becomes necessary where the discretion was not exercised judicially and judiciously. Given the facts and circumstances of this case, it is my view that the discretion exercised by the majority decision of the court below was founded on wrong principles. (p. 1028 F)

Affidavits - Extension of time to appeal

7. In the final result I hold that the affidavit evidence of the respondent does not meet the first mandatory condition of good and substantial reasons for the delay under Order 3 Rule 4(2)(a) of the Court of Appeal Rules. In the light of the foregoing consideration, I hold that the appeal has merit and should be and is hereby allowed. The majority judgment of the court below is accordingly set aside and the minority judgment affirmed. (p. 1028 H)

NOTABLE POINTS OF INTEREST
TOBI JSC

1. Inferences - When court can be said to raise an issue suo motu

A court can only be accused of raising an issue, matter or fact suo motu, if the issue, matter or fact did not exist in the litigation. A court cannot be accused of raising an issue, matter or fact suo motu if the issue, matter or fact exists in the litigation. A judge, by the nature of his adjudicatory functions, can draw inferences from stated facts in a case and by such inferences, the judge can arrive at conclusions. It will be wrong to say that inferences legitimately drawn from facts in the case are introduced suo motu. That is not correct.

The Court of Appeal drew an inference, particularly from paragraph 10 of the affidavit in support that the delay "could be attributed to error in judgment on the part of the counsel assigned to

handle the matter". This is a capable inference drawn from paragraph 10 of the affidavit and I cannot see any justification for castigating the majority ruling of the Court of Appeal. (p. 1031 E)

2. Extension of time to appeal - Role of grounds of appeal

B Grounds of appeal provide the mirror through which the court takes a peep at the appeal. Although grounds of appeal are not barometers for the initial determination of the strength of the appeal, they provide some useful information, even if speculatively, on the likely trend or outcome of the appeal. As the first point of contact with the appeal, the grounds of appeal should, at the first sight of the appellate Judges or on their face, show good cause why the appeal should be heard. And here good cause means good reason. It should be emphasised that the good reason is for the hearing of the appeal and not that the appeal will succeed. No. That will be jumping the gun. At the stage of considering an application for extension of time to appeal, the court is concerned with the strength of the grounds of appeal and not with the success of the appeal. (p. 1032 E)

E **ONNOGHEN JSC**

3. Discretion of trial Judge - Appellate court's attitude thereto

It is settled law that it is not in all cases that an appeal court will interfere with the exercise of discretion by a trial judge or lower court simply because it did not favour one of the parties before it; the court will not interfere in the absence of proof that the discretion was wrongly exercised in favour of the winning party - See Anyah v. Ann Ltd (1992) 6 NWLR (Pt.247) 319 at 323, 334 Per Wali, JSC. It is also settled that an appellate court should be wary of setting aside the exercise of discretion by the lower court as the court is not at liberty to substitute its own exercise of discretion for the discretion already exercised by the judge or lower court except where the appellate court or tribunal reaches a clear conclusion that there has been a wrongful exercise of discretion, that no weight or no sufficient weight was given relevant consideration, or that the exercise was done mala fide, arbitrarily, illegally, or either considering extraneous matter or, I may add, based on speculated fact(s). (p. 1037 A)

4. Appeal out of time - When applicant will have a greater burden

I am not saying that in an appropriate case with appropriate facts an applicant would not be allowed to appeal after the expiration of more than seven years of the delivery of the judgment or the expiration of the right of appeal. He can, but must proffer good and substantial reasons for not appealing within time, the longer the time after expiration of the time to appeal, the more difficult it becomes for an applicant to satisfy the court of the reasons for his failure to appeal within time as he has not only to explain the reason why he failed to appeal within the time allotted him by law to exercise his right of appeal, but also the delay in presenting the application for extension of time, leave to appeal, etc. In the instant case, the applicant was not only to explain why he did not appeal within the three months allowed him by law but why he waited for more than seven years after delivery of the judgment before presenting the application. (p. 1038 B)

OGBUAGU JSC

5. Speculation has no place in our courts

The majority of the court below - per Akintan, JCA., (as he then was), found the reason for the failure to appeal within time at page 226 of the records, as follows:

"Similarly, the reason given for the delay as disclosed particularly in paragraphs 6 and 10 of the affidavit in support, could be attributed to error of judgment on the part of the previous counsel assigned to handle the matter, a situation for which the court is always reluctant at penalizing the litigant." (The underlining mine)

The above, to say the least with respect, is unfortunate. I agree with the learned SAN., for the Appellant, that "could be", is speculative. The expression in my respectful view, means that it "may be" not that it was. It also means that the reason was not certain or positive. This is because, nothing could have prevented the respondent, from appearing in person. Speculation has no place in our courts. Neither the parties nor the court is permitted or entitled, to speculate anything. As rightly submitted in the appellant's Reply Brief, there is no deposition that corporate respondent, ever referred the matter to any other counsel in his Ministry. (p. 1042 H)

MUHAMMAD JSC

6. How to exercise judicial discretion properly

However, the exercise of judicial discretion has not been left unfettered. There are authorities which require that it has to be exercised judicially and judiciously. That of course will naturally and inevitably entail the weighing of the evidence at the court's disposal, the surrounding circumstances thereof and addresses delivered where necessary, all in the interest of justice. If that happens, then an appeal court will have no right to interfere with such exercise of discretion. But, where judicial discretion is wrongly or improperly applied, it is the duty of the appeal court to interfere. (p. 1053 F)

REPRESENTATION

D Chief M.I. Ahamba, SAN., (with him Chief T. Nkire Esq., C.U. Ekomaru Esq., U. Emenyonu), for the Appellant
Respondent, not represented.

CASES REFERRED TO

- E Overseas Construction Ltd v. Creek Enterprises Ltd (1985) 3 NWLR (Part 13) 407
Kato v. C.B.N. (1991) 9 NWLR (Part 214) 126 at 145
Oyeyemi v. Irewole Local Govt. (1993) 1 NWLR (Part 270) 462 at 475
F Anyah v. ANN Ltd (1992) 6 NWLR (Part 247) 319 at 323 and 334
Yonwuren v. Modern Signs Ltd (1985) 1 NWLR (Part 2) 244
University of Lagos v. Algoro (1985) 1 NWLR (Part 1) 143
Orizu v. Anyaegbunam (1978) 1 LRN 216 at 222
G General & Aviation v. Thahal (2004) Vol.6 NJSC 120 at 128
Ojara v. Bakare (1976) 1 S.C. 47
Bowaje v. Adediwura (1976) 6 S.C. 145
Lamai v. Orbih (1980) 5-7 S.C. 26
Ibodo v. Enarofia (1980) 5-7 S.C. 42
H Re Adewunmi (1983) 3 NWLR (Pt.83) 483
Oloko v. Ube (2001) 13 NWLR (Pt.729) 161

STATUTES & RULES REFERRED TO

Court of Appeal Act, 1976 s. 25

Court of Appeal Act, Laws of the Federation, 2004 s. 24(2)

Court of Appeal Rules, 2000 O. 3 r. 4(2)

Court of Appeal Rules, 2002 O. 3 r. 4(1) & (2)

LEAD JUDGMENT BY TABAI JSC

The process which has given rise to this appeal was initiated at the Court of Appeal, Port Harcourt division. It was a motion filed therein on the 19/8/2003 by the Respondent herein. The motion prayed for:-

(i) Extension of time within which the appellant/applicant can apply for leave to appeal against the judgment of Justice T.K. Osu, of the Rivers State High Court delivered on the 16th April 1996 in Suit No PHC/1097/94.

(ii) Leave to appeal against the judgment of T.K. Osu, J., delivered on the 16th April 1996 in Suit No PHC/1097/94.

(iii) Extending the time within which to appeal against the judgment of T.K. Osu, J., delivered on 16th April, 1996 in Suit No PHC/1097/94.

(iv) Deeming as properly filed and served the notice of appeal already filed and served in this Suit.

By a split decision on the 13th of November, 2003 the application was granted. Implicit in the majority decision of Akintan, (J.C.A) (as he then was) and Adeniji, J.C.A was that the deeming order sought was refused and the applicant was given 14 days within which to file his notice of appeal. In his minority opinion Aboyi John Ikongbeh J.C.A (of blessed memory) refused the application and dismissed it.

The plaintiff who was respondent therein was aggrieved by the decision and has come on appeal to this court. Before this court the parties have filed and exchanged their briefs of argument. For the appellant were filed the appellant's brief and appellant's reply brief. Both were prepared by Chief M.I. Ahamba SAN. The respondent's brief was prepared by I.R. Minakiri (Mrs.) Director of Civil Litigation, Ministry of Justice Port Harcourt. In the appellant's brief, Chief Ahamba, SAN., identified two issues for determination which he framed as follows:

"1. Whether the introduction by the Court of Appeal suo motu,

of a fact not contained in the affidavit of the parties before it, and applying same in the exercise of the court's discretion to grant leave was proper.

2. *Whether grant of leave to the respondent to appeal out of time was, in the circumstances of the facts before the court, proper in law."*

In framing the first issue, Chief Ahamba, SAN., seemed to have proceeded on the assumption that the Court below suo motu introduced facts not contained in the affidavit evidence of the parties and applied same. Minakiri (Mrs.) identified only two issues which are in substance the same as those of the Appellant. She did not seem to agree that the Court below suo motu introduced and applied facts not contained in the affidavit evidence and in reaction framed her two issues in the following terms:

1. Whether in the face of the affidavit evidence of the parties before the Court of Appeal, the court suo motu introduced facts and applied same in granting leave to the respondent.

2. Whether granting of leave to the respondent to appeal out of time was in the circumstances of the facts before the court proper in law.

In their respective briefs the two issues were argued together and I shall also consider the two issues together.

The substance of the argument of Chief Ahamba, SAN on the two issues is this. He referred to the provisions of Order 3 Rule 4(2) of the Court of Appeal Rules 2000 and submitted that for the grant of an application for enlargement of time within which to appeal the Applicant must satisfy the court, through affidavit evidence (a) that there are good and substantial reasons for not filing the appeal within time, and (b) that there are prima-facie grounds of appeal raising substantial questions for resolution in the appeal. It was his further submission that a conjunctive satisfaction of the two conditions is a sine qua non to the court's exercise of its discretion to grant an application and that it was mandatory for the two conditions to be satisfied. Learned senior counsel submitted that none of the two conditions was met by the applicant/respondent for the lower court's exercise of its discretion to grant the extension particularly in view of paragraphs 6 and 10 of the affidavit in support of the application on

which the court below relied. Learned senior counsel pointed out that error of judgment of the Applicant/Respondent was one of the reasons for the lower court's discretion to grant the extension and submitted that the applicant's error of judgment was not contained in the affidavits in support of the motion. It was submitted that the court is bound to decide an issue before it on the facts presented by the parties. Learned senior counsel argued that since the decision for extension was based on a fact or reason not before the court, it was speculative and perverse and ought to be set aside. For these submissions he relied on *Overseas Construction Ltd v. Creek Enterprises Ltd* (1985) 3 NWLR (Part 13) 407; *Kato v. C.B.N.* (1991) 9 NWLR (Part 214) 126 at 145; *Orizu v. Anyaebunam* (1978) 1 LRN 216 at 222. B C

On the second condition of whether there were grounds of appeal which prima facie showed good cause why the appeal should be heard, it was the submission of learned senior counsel that there were no such grounds of appeal that raised substantial issues. He referred to the proceedings at the High Court, the joinder of the respondent thereto and up to the dismissal of the 1st defendant's appeal at the court below on the 29/6/2000, the fact that all the processes both at the High Court and the court below were served on the respondent and the refusal of the respondent to participate in these proceedings and submitted that respondent cannot claim to be aggrieved by the decision. In support of these submissions he referred to *Ikonne v. Commissioner of Police & Anor* (1986) 4 NWLR (Part 36) 473 at 504. In conclusion learned senior counsel referred to *U.B.A. v. Stahlbau G.M.B.H.* (1989) 3 NWLR (Part 110) 374 at 388 and urged that the appeal be allowed. D E F

In the respondent's brief, I. R. Minakiri (Mrs.), proffered arguments the substance of which were as follows: She reviewed the depositions in paragraphs 6 and 10 and submitted that they were complementary and not contradictory. Learned counsel, relying on *Attorney-General of the Federation v. A.N.P.P.* (2004) 1 MJSC Page 1 at page 28, drew the distinction between the office of Attorney-General of the Federation or of a State which is a creation of the Constitution and the human functionaries manning or occupying the office referred to in paragraph 10 of the respondent's affidavit. She further G H

contended that it was the delay occasioned by the error of these human functionaries of the office of the Attorney-General that were referred to in the affidavit and relied upon by the court. There was therefore no question of the court below suo motu introducing and relying on facts not contained in the affidavit, she argued. Learned
B counsel argued that Ikonne v. Commissioner of Police & Ors (supra) is distinguishable from this case in that in Ikonne's case the default was attributed to the litigant/party himself and not to his counsel as in this case. It was further submitted that the decision being challenged
C on appeal is against the lower court's exercise of its discretion which ought not to be disturbed unless it was established that the discretion was exercised mala fide, arbitrarily illegally or without sufficient weight given to the evidence. Reliance was placed on Oyeyemi v. Irewole
D Local Govt. (1993) 1 MWLR (Part 270) 462 at 475; General Aviation Services Ltd v. Thahal (2004) 6 MJSC page 120 at 128; Anyah
v. ANN Ltd (1992) 6 NWLR (Part 247) 319 at 323 and 334. In conclusion, learned counsel urged that the appeal be dismissed.

In the appellant's reply brief Chief Ahamba, SAN., once more referred to paragraphs 6 and 10 of the respondent's affidavit in support of the application and contended that no reference was therein
E made either directly or by implication to any act or omission of counsel to the Attorney-General of Rivers State.

I have carefully considered the affidavit evidence before the court, the decision of the court below and the address of counsel for
F the parties. Let me start my attempt to resolve the issues raised by reference to the Court of Appeal Act, with respect to periods within which to appeal from decisions of lower courts or tribunals to the Court of Appeal. Section 25(2) of the Court of Appeal Act, 1976
G (now section 24(2) of the Court of Appeal Act, Laws of the Federation, 2004) provides:

"The period for the giving of notice of appeal or notice of application for leave to appeal are:

*(a) in an appeal in a civil case or matter, fourteen days where
H the appeal is against an interlocutory decision and three months where the appeal is against a final decision.*

(b) in an appeal in a criminal cause or matter, ninety days from the date of the decision appealed against."

And Section 25(4) provides:

"The Court of Appeal may extend the periods prescribed in subsections (2) and (3) of this section."

Now Order 3 Rule 4(1) and (2) of the Court of Appeal Rules 2002 provides for the court's exercise of its discretion to extend the time within which to appeal. These provide:-

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

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

This appeal turns on the interpretation and application of Order 3 Rule 4(2) of the Court of Appeal Rules. The parties are in agreement that to earn the court's discretion to extend the time within which to appeal under the rules, the applicant must show through the affidavit evidence:

(a) that there are good and substantial reasons for the failure to appeal within the period prescribed by Section 25(2) (a) of the Court of Appeal Act; and

(b) that there are grounds of appeal which prima facie show good cause why the appeal should be heard.

The Court of Appeal reasoned that the respondent met these prerequisites in the application and so granted the extension. The appellant contends strenuously that the conditions were not met.

Before examining the affidavit evidence, ***let me restate some of the guiding principles in the determination of applications of this nature as laid down in a number of cases.***

(a) For the court's exercise at its discretion to grant the extension of time within which to appeal, the two conditions circumscribed by Order 3 Rule 4(2) of the Court of Appeal Rules must be satisfied conjunctively and not disjunctively. See Williams v. Hope Raising Voluntary Funds Society (1982) All NLR (Part 1); Yonwuren v. Modern Signs Ltd (1985) 1 NWLR (Part

2) 244; *University of Lagos v. Algoro* (1985) 1 NWLR (Part 1) 143.

(b) *The length of time that has elapsed between the dates of the judgment sought to be appealed against and the filing of the application is always a material factor in the decisions of whether or not to grant the extension. It is however settled that, the length of time notwithstanding the extension can still be granted if the delay is satisfactorily explained. See *Alagbe v. Abimbola* (1978) 2 SC 39; *Ojora v. Bakare* (1976) 1 SC 47; *Re Adewunmi & Ors* (1988) 3 NWLR (Part 83) 483.*

(c) *In view of the settled principle of law that a litigant should not be punished for the mistake or advertence of his counsel, an application for extension of time to appeal ought to be granted if it is satisfactorily established that the failure to appeal within the period prescribed by law was due to the true and genuine mistake or error of judgment of counsel. The court must be satisfied that the excuse is availing having regard to the facts and circumstances of the case. *Iroegbu v. Okwordu* (1990) 6 NWLR (Part 159) 643,* is very instructive on the point. Where it appears to the court that the delay was occasioned by the genuine mistake of counsel it will be up to the Respondent to show in what respect he would be prejudiced if the indulgence sought is granted.

(d) An applicant for extension of time within which to appeal must show that he has arguable grounds of appeal and not a frivolous appeal. Although he is not expected to show that the appeal will succeed, he is not expected to show that the appeal will succeed, he will nevertheless exhibit good grounds showing reasonable prospects of success in the appeal. *Homas Bros. (Nig.) Ltd v. Kigo (Nig.) Ltd* (1980) 8-11 SC (Reprint) 27.

(e) In determining applications for extension of time within which to appeal, each case has to be decided on its own peculiar facts and circumstances. The corollary of this is that the facts to be taken into consideration are in-exhaustive. See *University of Lagos v. Olaniyan* (1985) 1 NWLR (Part 1) 156, *C.C.B. (NIG) LTD v. Ogwuru* (1993) 3 NWLR (Part 284) 630.

From the volume of affidavit evidence can it be said that the respondent fulfilled the two prerequisites dictated by Order 3 Rule

4(2) of the Court of Appeal Rules to warrant the extension granted? On this question let me treat the second condition of whether there are grounds of appeal which prima facie show good cause why the appeal should be heard. With respect to this question the view of the court below was expressed as follows:

"There is no doubt that most of the grounds of appeal raised substantial issues and reveal arguable grounds." (See page 226 of the record.)

The Appellant tried to fault this reasoning and conclusion from page 7 paragraph 4.07 - page 9, paragraph 4.12 of the Appellant's Brief without really demonstrating that the grounds do not raise substantial issues for trial and that they are merely frivolous. ***The entire argument of Senior Counsel for the Appellant is premised on the same issue of delay for over seven years before the application. It is my view that at the stage of an application for extension of time to appeal, it is enough if the grounds show that the appeal has some prospects of success and that it is not merely frivolous. I have examined the six grounds of appeal at page 30-33 of the record and I am satisfied that they are not merely frivolous. I do not agree that the court below erred in its conclusion with respect to the grounds of appeal.***

The crucial question in this appeal is whether the affidavit evidence shows good and substantial reasons for the failure to appeal within the period stipulated in Section 25(2)(a) now 24(2)(a) of the Court of Appeal Act. For the purpose of answering this question it is necessary to restate the salient undisputed facts as can be garnered from the affidavit evidence.

This action was initiated by a writ of summons dated and filed on the 20/12/94. The West African Glass Industries was the sole defendant. By a letter dated 11/8/95 the Appellant intimated the Respondent of its intention to join him in the suit. On the 27/9/95 a motion dated 26/9/95 was filed. It prayed for the joinder of the respondent as the 2nd defendant and amendment of the processes to reflect the joinder. In support of the application was a seven paragraph affidavit. Paragraphs 3, 4 and 5 thereof deposed as follows:-

3. That I am informed by the plaintiff/applicant's solicitor, G.A. Onuoha Esq. and I verily believe that the Rivers State Government

has a substantial interest in the defendant/respondent by way of share holding.

4. That it is necessary in the circumstances to join the said Government of Rivers State to enable the honourable court to completely and effectually determine all the issues in controversy in this case.

B 5. That an order joining the said government of Rivers State as the second defendant in the case and granting leave to the plaintiff/appellant to amend the writ of summons and all other processes in the suit to reflect the said joinder will serve the ends of justice in this matter.

C The motion was heard and granted on the 11/10/95, the respondent herein being the 2nd defendant. Pleadings were filed and exchanged between the appellant and the West African Glass Industries Ltd (1st defendant). The respondent never entered appearance and did not
D file a defence to the statement of claim. The matter went to trial and on the 16/4/96 judgment was entered against the two defendants jointly and severally in the sum of N42,100,000.00 with costs of N1000. The appellant made several attempts to recover the judgment debt from both defendants/judgment debtors without success.
E These included letters by counsel to the appellant, the Hon. Attorney-General of Rivers State and the Military Administrator of Rivers State.

Meanwhile on or about the 15/7/96 the 1st defendant/appellant filed a notice of appeal. The appeal was not diligently pursued.
F In reaction thereto the appellant filed a motion to dismiss the appeal. In the wake of this application the 1st defendant/appellant filed a motion for leave to amend the original notice of appeal. This was on the 7/5/98. On the 22/6/99 learned counsel for the appellant herein
G withdrew the motion for dismissal of the appeal and same was struck out. The 1st defendant/appellant was granted leave to amend its notice and grounds of appeal and filed the amended notice within 14 days. It was also granted 45 days extension of time to file the appellant's brief. The brief was not filed and no other processes were filed. The
H appeal was abandoned.

In reaction thereto the appellant again by a motion dated 14/10/99 and filed on the 18/10/99 sought the order of court to dismiss the appeal. This was served on both the 1st defendant and the 2nd

defendant/respondent. There was no reaction from them. On the 20/3/2000 the court below, on its own motion, ordered that hearing notices be further served on the 1st defendant/appellant and 2nd defendant. They were accordingly served. But there was no reaction from either of the 1st defendant/appellant or the 2nd defendant/respondent. And so on the 29/6/2000 the appeal was dismissed. B

The above represents the state of affairs from the date the suit was initiated through the date the motion for joinder of the respondent was served on the Respondent and up to the 29th of June 2000, when the appeal of the 1st Defendant was dismissed. Of specific importance is the evidence that the motion for joinder of the Respondent as 2nd defendant filed on the 27/9/95 was served on the Respondent at 3 p.m. on the 3/10/95. (See page 88 of the record). The motion was argued and granted on 11/10/95. And the order granting the joinder was served on the respondent at 2 p.m. on the 20/10/95. (See page 91 of the record). The assertion by the appellant and which is not denied is that all the processes filed in the proceedings both at the High Court and at the Court of Appeal were served on the respondent. Yet the Respondent did nothing to participate in the proceedings until the dismissal of the 1st defendant's appeal and waited further for another period of nearly three years before filing this application for extension of time within which to appeal. The judgment of the trial court was given on the 16th of April 1996. This application was filed on the 19/8/2003. On his own showing the respondent deposed in paragraph 5 of this affidavit on support of the motion thus: D E F

"5. The time for the 2nd defendant/Appellant to appeal expired on July 15th, 1996. Consequently the order of this honourable court is needed to extend the time within which the applicant can apply for leave to appeal, leave to appeal and extending the time within which to appeal against the judgment of 16th April, 1996." G

Thus, the application was filed seven years one month and four days outside the period allowed by law to file it. Was this delay of over seven years satisfactorily explained in the affidavit evidence to warrant the grant of the indulgence? The answer to this is contained in the supporting affidavit. H

Paragraphs 6-12 of the affidavit are relevant. They are:-

6. That the court processes in Suit No PHC/1097/94, comprising the writ of summons, statement of claim, order for joinder of the 2nd defendant etc. were served on the 2nd Defendant but were misplaced in the Attorney-General's Chambers, hence no appearance was entered or defence filed in the said suit, until judgment was entered against the 1st defendant/respondent and 2nd defendant/appellant jointly and severally and steps taken to execute the judgment with the Attorney-General's approval. A copy of the said judgment of 16th April, 1996 is hereby attached as "Exhibit A."

7. That between April, 1996 and the 2000, the 1st defendant/respondent entered into prolonged negotiations with the plaintiff/respondent towards the settlement of judgment debt which broke down.

8. That the 1st defendant's thereafter filed an appeal against the judgment and filed several court processes including Motions for Stay of Execution of the judgment, and motions for instalment payment of the judgment debt before this honourable Court and the State High Court.

That the 1st defendant/respondent appeal was eventually dismissed for want of prosecution on the 29th June, 2000.

9. That several unsuccessful petitions (dated 25th November, 2001, 9th August, 2001, 8th May, 2001 etc.) have been made to the Rivers State Government and the office of the Attorney-General for payment of the judgment debt.

10. That no steps were taken to appeal against the judgment of 16th April, 1996 on the part of the Attorney-General because successive Attorneys-General felt that not being a party to the contract between the plaintiff and West African Glass Industries Plc, the 1st defendant/respondent, the liability was exclusively that of the 1st defendant/respondent and the 1st defendant/respondent had indicated that the matter would be settled. Thereafter, when settlement negotiations broke down, the 1st defendant/respondent indicated that it had appealed against the judgment and had substantial grounds of appeal against the judgment.

11. The 1st defendant/respondent's appeal was however dismissed on June 29th, 2000 for want of prosecution.

12. That on the assumption of duty of the new Attorney-Gen-

eral, H. Odein Ajumogobia, Esq, on or about July 18, 2003, he reviewed the facts and circumstances of the case after discussion with counsel in the Ministry of Justice and 1st defendant's/respondent's counsel and concluded that there are substantial grounds for an appeal against the judgment of the lower court on behalf of the Appellant. The said grounds of appeal are hereby attached as "Exhibit B." B

The court below reproduced these paragraphs and relied particularly on paragraphs 6 and 10 and concluded as follows:

"Similarly the reasons given for the delay as disclosed particularly on paragraphs 6 and 10 of the affidavit in support, could be attributed to error of judgment on the part of the previous counsel assigned to handle the matter, a situation for which the court is always reluctant at penalizing the litigant." C

With respect, the above cannot be a reasonable deduction from the said two paragraphs. In paragraph 6 the respondent deposed to the effect that the writ of summons, statement of claim the order for joinder of the respondent as second defendant and other processes were served on them but that these were misplaced in the attorney-General's Chamber and that, it was this misplacement that accounted for their failure to enter appearance or file a defence until judgment was entered against them. Learned senior counsel contended that the above deposition was manifestly unreliable and gave a number of reasons for that assertion. I am inclined to agree with that assertion. It is not disputed that numerous documents were filed and served on the respondent and at different dates. The first question is the stage at which the documents were misplaced. Was it shortly after the respondent's joinder or long after the joinder? In any case the respondent was aware of his joinder as the 2nd Defendant before the purported misplacement. If the respondent were desirous of defending the action he had all the opportunity to do so. D E F G

The excuse proffered in paragraph 10 is equally untenable. It is to the effect that no appeal was filed because successive Attorneys-General felt that not being a party to the contract between the appellant and the 1st defendant/respondent liability was exclusively that of the 1st defendant and who had also indicated that the matter would be settled. I agree H

with learned senior counsel for the appellant that this assertion is contradictory to that in paragraph 6. If the writ of summons, statement of claim the order for joinder of the 2nd defendant/respondent were misplaced, it is not explained how successive Attorneys-General became aware of the details of the claim in the suit to decide the 1st defendant/respondent's exclusive liability and that they were not liable. And in any case it is not the function of a defendant in an action to determine his liability or not to the claim. That is the constitutional function of the court and not a party.

I have, earlier in this judgment reproduced the text in the decision of the court below wherein error of judgment of counsel previously assigned to handle the matter was, from paragraph 6 and 10, ascribed to the respondent as a reason for the delay. Error of judgment or mistake of counsel as a reason for the delay is not implicit, let alone expressly stated in paragraphs 6 and 10 of the affidavit in support of the application. It is clear that this factor was the main reason that influenced the conclusion of the court below that the respondent made out a good case to warrant granting the extension sought. The result is that the finding based on facts not before the court is perverse and ought to be set aside.

Apart from paragraphs 6 and 10 of the supporting affidavit, none of the other paragraphs contain facts constituting good and substantial reasons for the delay of over seven years in filing the application for extension of time to appeal.

While the correct position of the law is that an appellate court would not, ordinarily, interfere with a lower court's exercise of its discretion, such an interference becomes necessary where the discretion was not exercised judicially and judiciously. Given the facts and circumstances of this case, it is my view that the discretion exercised by the majority decision of the court below was founded on wrong principles.

In the final result I hold that the affidavit evidence of the respondent does not meet the first mandatory condition of good and substantial reasons for the delay under Order 3 Rule 4(2)(a) of the Court of Appeal Rules. In the light of the forego-

ing consideration, I hold that the appeal has merit and should be and is hereby allowed. The majority judgment of the court below is accordingly set aside and the minority judgment affirmed.

The costs of this appeal is assessed at N10,000.00 in favour of the Appellant. B

TOBI JSC

The fulcrum of this appeal is whether the delay on the part of the respondent to appeal against the decision of the High Court was proper in the circumstances of the case. The respondent was the 2nd defendant in the High Court. He was brought into the proceedings by an order of the High Court joining him. This was at the instance of the appellant. Court processes were served on the respondent but he did not participate in the proceedings. Judgment was entered against the defendants (including the respondent). The respondent sought leave to appeal out of time against the judgment of the High Court delivered on 16th April, 1996. That was on 19th August, 2003. Adducing reasons for the delay in the affidavit in support of the motion for leave to appeal, the respondent said in paragraph 10: C
D
E

"That no steps were taken to appeal against the judgment of 16th April, 1996 on the part of the Attorney-General because successive Attorneys-General felt that not being a party to the contract between the plaintiff and the West African Glass Industry Plc, the 1st defendant/respondent, the liability was exclusively that of the 1st defendant/respondent and the 1st defendant/respondent had indicated that the matter would be settled." F

On 13th November, 2003, the Court of Appeal, in a majority ruling, granted respondent leave to appeal. Delivering the majority ruling, Akintan, JCA, (as he then was) said at pages 226 and 227 of the record: G

"In the result, I hold that the applicant has made out a good case to warrant granting the prayers sought in the motion. The motion is therefore granted as prayed." H

(1) Time is accordingly extended till today within which the applicant is to apply for leave to appeal to this court against the judg-

ment delivered at the Port Harcourt High Court on 16th April, 1996 in Suit No PHC/1097/94.

(2) Leave is also granted to the applicant to appeal against the said judgment; and

(3) Time is hereby extended by 14 days from today within which the applicant is to file his notice and grounds of appeal against the said judgment. I make no order on costs."

Ikongbeh, JCA, was unable to go along with the majority ruling. He dissented:

"I have pondered all the questions I have posed and the facts before the court and have come to the conclusion that it will not be in the interest of justice that the execution of this overdue judgment debt be further delayed by allowing any of the judgment debtors to engage in what the plaintiff/judgment creditor has in its counter-affidavit aptly described as 'legal gymnastics in court'. It is for all the reasons that I have given, especially the fact that no good reason has been given for failure to appeal within time and for delaying in bringing this application that I have decided to refuse the application. Accordingly I dismiss the motion for it. I make no order as to costs."

Dissatisfied with the majority ruling, the appellant has come to the Supreme Court. Two issues are raised. They are

(1) Whether the introduction by the Court of Appeal suo motu of a fact not contained in the affidavit of the parties before it, and applying same in the exercise of the court's discretion to grant leave was proper.

(2) Whether granting of leave to the respondent to appeal out of time was, in the circumstances of the facts before the court, proper in law. The respondent's issues are formulated along similar line. The first issue is whether the Court of Appeal raised facts suo motu.

I should reproduce paragraphs 6 and 10 of the affidavit in support as the complaint of the appellant zeros on them:

"6. That the court processes in Suit No PHC/1097/94, comprising the writ of summons, statement of claim, order for joinder of the 2nd defendant etc. were served on the 2nd Defendant but were misplaced in the Attorney-General's Chambers, hence no appearance was entered or defence filed in the said suit, until judgment was entered against the 1st defendant/respondent and 2nd defendant/

appellant jointly and severally and steps taken to execute the judgment with the Attorney-General's approval. A copy of the said judgment of 16th April, 1996 is hereby attached as "Exhibit A."

10. That no steps were taken to appeal against the judgment of 16th April, 1996 on the part of the Attorney-General because successive Attorneys-General felt that not being a party to the contract between the plaintiff and West African Glass Industries Plc, the 1st defendant/respondent, that liability was exclusively that of the 1st defendant/respondent and the 1st defendant/respondent had indicated that the matter would be settled. Thereafter, when settlement negotiations broke down, the 1st defendant/respondent indicated that it had appealed against the judgment and had substantial grounds of appeal against the judgment."

The Court of Appeal examined the above paragraphs and came to the following conclusion at page 226 of the record:

"Similarly, the reason given for the delay as disclosed particularly in paragraphs 6 and 10 of the affidavit in support could be attributed to error of judgment on the part of the previous counsel assigned to handle the matter, a situation for which the court is always reluctant at penalizing the litigant."

I do not agree with learned senior advocate that by the above, the Court of Appeal raised an issue suo motu. A court can only be accused of raising an issue, matter or fact suo motu, if the issue, matter or fact did not exist in the litigation. A court cannot be accused of raising an issue, matter or fact suo motu if the issue, matter or fact exists in the litigation. A judge, by the nature of his adjudicatory functions, can draw inferences from stated facts in a case and by such inferences; the judge can arrive at conclusions. It will be wrong to say that inferences legitimately drawn from facts in the case are introduced suo motu. That is not correct.

The Court of Appeal drew an inference, particularly from paragraph 10 of the affidavit in support that the delay "could be attributed to error in judgment on the part of the counsel assigned to handle the matter". This is a capable inference drawn from paragraph 10 of the affidavit and I cannot see any justification for castigating the majority ruling of the Court of Appeal. Accordingly, issue No 1 fails.

I go to the second issue. This is where the real problem is. Order 34 rule 4(2) of the Court of Appeal Rules reads in part:

"Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within a prescribed period, and
 B *by grounds of appeal which prima-facie show good cause why the appeal should be heard ..."*

As it is, Rule 4(2) provides for two conjunctive conditions for enlargement of time to appeal. They are good and substantial reasons and the grounds of appeal prima-facie showing good cause. I
 C want to say again that the two conditions are conjunctive, not disjunctive. This means that the two conditions must be present in the affidavit or proved by the applicant.

The reasons must be good. In other words, the reasons must
 D possess the quality that is satisfactory, favourable, useful or suitable to the application. The reasons must not be bad in the sense that they are unacceptable. Substantial reasons are essential, material and important reasons. Reasons which are peripheral or dance around the periphery strangely cannot suffice. The pendulum should weigh in
 E favour of granting the application and not just enough to balance the weight or on an even keel.

Grounds of appeal provide the mirror through which the court takes a peep at the appeal. Although grounds of appeal are not barometers for the initial determination of the strength of the appeal,
 F they provide some useful information, even if speculatively, on the likely trend or outcome of the appeal. As the first point of contact with the appeal, the grounds of appeal should, at the first sight of the appellate Judges or on their face, show good cause why the appeal
 G should be heard. And here good cause means good reason. It should be emphasised that the good reason is for the hearing of the appeal and not that the appeal will succeed. No. That will be jumping the gun. At the stage of considering an application for extension of time to appeal, the court is concerned with the strength of the grounds of
 H appeal and not with the success of the appeal.

What was the reason given for the inability or failure to appeal within time? The reason is deposed to in paragraph 10 of the affidavit in support and it is *"because successive Attorneys-General felt*

that not being a party to the contract between the plaintiff and West African Glass Industries Plc, the 1st defendant/respondent, that liability was exclusively that of the 1st defendant/respondent ..."

Is that a good reason? The answer is "No". How can Attorneys-General, first law officers of the state and leaders of the State Bar and expert of the law, not able to take a decision on the law of contract? Attorneys-General know better than that or should know better than that. I entirely agree with the minority ruling of Ikongbeh, JCA.

It is for the above reasons and the fuller reasons given by my learned brother, Tabai, JSC, in his judgment that I too allow the appeal. I abide by his order as to costs.

ONNOGHEN JSC

This is an appeal against the ruling of the Court of Appeal, holden at Port-Harcourt in appeal No. CA/PH/220M/2003, delivered by that court on the 13th day of November, 2003 granting extension of time and leave to appeal against the judgment of the High Court of Rivers State holden at Port Harcourt in suit No. PHC/1097/94, delivered by that court on the 16th day of April, 1996.

The appellant before this court instituted the action as plaintiff at the trial court against the West African Glass Industries Plc and the respondent in this appeal, claiming jointly and severally, the sum of N50,000,000.00 (Fifty Million Naira) only being special and general damages arising from the defendant's breach of contract entered into by the parties on the 20th day of October, 1990 for the acquisition of industrial moulds by the defendants on behalf of the plaintiff for which transaction the plaintiff paid to the defendants the sum of N500,000.00 (Five Hundred Thousand Naira) only in October, 1990; that the failure of the defendants to acquire the said moulds as per the terms of the joint venture agreement has cost the plaintiff millions of naira in agreed commission from the defendants.

As stated earlier, the judgment of the High Court, now sought to be appealed against, was delivered on 16th day of April, 1996 which meant the time statutorily allowed for the Appellant/Applicant to appeal against that judgment expired on 15th July, 1996. The respondent before this court took no action in the matter until the 19th day of August, 2003 when a motion No.CA/PA/220M/2003

was filed praying the lower court for an order for:

(i) *"Extension of time within which the appellant/applicant can apply for leave to appeal to the Court of Appeal against the judgment of Justice T. K. Osu of the Rivers State High Court delivered on the 16th April, 1996 in suit No. PHC/1097/94.*

B (ii) *Leave to appeal against the judgment on 16th April, 1996 in suit No PHC/1097/94.*

(iii) *Extending the time within which to appeal against the judgment of Justice T. K Osu J. delivered on 16th April, 1996 in suit No. PHC/1097/94.*

C (iv) *Deeming as properly filed and served the notice of Appeal already filed and served in this suit."*

The application is supported by an affidavit of 19 paragraphs on which the applicant relied in moving the court.

D The relevant paragraphs of the supporting affidavit are paragraphs 6 and 10 which deposed as follows:-

"6. That the court processes in Suit No PHC/1097/94, comprising the writ of summons, statement of claim, order for joinder of the 2nd defendant etc. were served on the 2nd Defendant but were misplaced in the Attorney-General's Chambers, hence no appearance was entered or defence filed in the said suit, until judgment was entered against the 1st defendant/respondent and 2nd defendant/appellant jointly and severally and steps taken to execute the judgment with the Attorney-General's approval. A copy of the said judgment of 16th April, 1996 is hereby attached as "Exhibit A."

10. That no steps were taken to appeal against the judgment of 16th April, 1996 on the part of the Attorney-General because successive Attorneys-General felt that not being a party to the contract between the plaintiff and West African Glass Industries Plc, the 1st defendant/respondent, the liability was exclusively that of the 1st defendant/respondent and the 1st defendant/respondent had indicated that the matter would be settled. Thereafter, when settlement negotiations broke down, the 1st defendant/respondent indicated that it had appealed against the judgment and had substantial grounds of appeal against the judgment."

The Court of Appeal, by a majority ruling, granted the application giving rise to this appeal, the issues for determination of which

have been identified in the appellant's brief filed by Chief M. I Ahamba, SAN and Chief G. A Onuoha, are as follows:-

"1. Whether the introduction by the Court of Appeal, Suo Motu, of a fact not contained in the affidavit of the parties before it, and applying same in the exercise of the court discretion to grant leave, was proper, ground 2.

2. Whether granting leave to the respondent to appeal out of time was, in the circumstance of the facts before the court, proper in law. Ground 1, 3 & 4"

In arguing issue I, learned counsel for the appellant referred the court to Order 3 Rule 4 (2) of the Court of Appeal Rules 2000, which provides that an applicant for leave to appeal out of time must show:

(a) Good and substantial reason for not filing the appeal within time, and;

(b) Prima facie grounds of appeal raising substantial question for determination in the appeal, which requirements are conjunctive and sine qua non to the exercise of the court's discretion in his favour. Learned counsel then submitted that none of the requirements was met by the respondent in the application and that the lower court was therefore wrong in granting same. Referring to the depositions in paragraphs 6 and 10 of the supporting affidavit earlier reproduced in this judgment, learned counsel submitted that neither of the two paragraphs contains good and substantial reasons why the respondent failed to appeal within time. Turning to the reason assigned by the lower court for the cause of the delay in presenting the application, learned counsel referred the court to page 226 of the record where the court referred to the depositions in paragraphs 6 and 10 of the affidavit in support and stated that the reason stated therein "*could be attributed to error of judgment on the part of the counsel assigned to handle the matter, a situation for which court is already reluctant at penalizing the litigant*" and submitted that the said reason does not flow from the said paragraphs 6 and 10; that error of counsel cannot be the reason for the delay as the same was not so stated in the depositions and therefore speculative, relying on *Overseas Construction Ltd v. Creek Ent. Ltd. (1985) 3 NWLR (Pt.13) 407*, that the court was in error in introducing a fact suo motu and use

same to determine the matter, relying on *Katto v. CBN* (1991)9 NWLR (Pt.214)126 at 145, *Orizu v. Anyaegbunam* (1978) ILRN 216 at 222.

On the issue as to whether the respondent satisfied the second requirement of good and substantial grounds of appeal, learned counsel submitted that he did not; that the respondent deliberately refused to participate in the proceedings before the High Court and the appeal filed by the original 1st defendant in the suit which appeal was dismissed upon application for non prosecution, to the knowledge of the respondent in this appeal; that where a party to a proceeding has deliberately, as in the instant case, refused to participate in the case despite being informed of same, the court ought not to grant him leave to appeal against a decision reached in consequence of his default, relying on this case of *Ikonne v C.O.P* (1986) 4 NWLR (Pt.36) 473 at 504 and urged the court to allow the appeal.

On her part, learned counsel for the respondent, I. R Minakiri (Mrs.), submitted in the respondent's brief that the lower court was right in granting the application for leave to appeal out of time in view of the facts before that court. Learned counsel then reproduced paragraphs 6 and 10 of the supporting affidavit and submitted that it was only after judgment was delivered and steps taken by the judgment creditor to execute the judgment with the Attorney-General's approval that the issue of successive Attorney-General decision to appeal or not arose; that the lower court did not suo motu introduce the fact on which it based its decision as the same was derived from the depositions before the court; that the case of *Ikonne v. C.O.P* supra does not apply to the facts of this case in that the delay in that case was attributed to the party, not his counsel as in the instant case; that this court should be wary of setting aside the exercise of discretion of a lower court as the court, being an appellate court, is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the lower court, except where the court reaches the conclusion that there has been a wrongful exercise of discretion etc., relying on the case of *Oyeyemi v. Irewole Local Government* (1993) 1 NWLR (Pt.270) 462 at 475; *General & Aviation v. Thahal* (2004) Vol.6 NJSC 120 at 128 and 155; *Anyah v. Ann Ltd* (1992) 6 NWLR (Pt.247) 319 at 323; that the court would do substantial justice between the parties by allowing the matter to be heard

on the merit not to rely on technicalities and urged the court to dismiss the appeal.

It is settled law that it is not in all cases that an appeal court will interfere with the exercise of discretion by a trial judge or lower court simply because it did not favour one of the parties before it; the court will not interfere in the absence of proof that the discretion was wrongly exercised in favour of the winning party - See *Anyah v. Ann Ltd* (1992) 6 NWLR (Pt.247) 319 at 323, 334 Per Wali. J.S.C. It is also settled that an appellate court should be wary of setting aside the exercise of discretion by the lower court as the court is not at liberty to substitute its own exercise of discretion for the discretion already exercised by the judge or lower court except where the appellate court or tribunal reaches a clear conclusion that there has been a wrongful exercise of discretion, that no weight or no sufficient weight was given relevant consideration, or that the exercise was done mala fide, arbitrarily, illegally, or either considering extraneous matter or, I may add, based on speculated fact(s). It is the exceptions to the general rule that provide the "proof" Hon. Justice Wali, JSC talked about in *Anyah's case supra*.

In the case of *UBA v. Stalbau GMBH* (1989) 3 NWLR (Pt. 10) 317 at 388, Obaseki J.S.C stated thus:-

"If a judge considers matters which are not before him and makes them the basis of the exercise of his discretion, he is exercising his discretion on wrong consideration. If there are facts by affidavit evidence before the judge and he fails to evaluate and assess the facts before exercising his discretion, he has failed to exercise his discretion judicially".

The question then is, whether the appellant has brought his case within the known exceptions to the general rule that an appellate court will usually not make a practice of interfering with the exercise of discretion by a lower court, so as to justify any interference with the exercise of the discretion by the lower court in the instant case? The facts of this case are not disputed and are very straight forward. It is not in dispute that the respondent was kept in the know of every step in the proceeding right from the High Court to the Court of Appeal's dismissal of the co-defendant's appeal; the respondent knew that his interest could be at risk being sued jointly and

severally by the appellant in that suit but refused to participate or take steps to protect its interest even after judgment was entered against the respondent as the co-defendant. The co-defendant appealed also to the knowledge of the respondent, which appeal was dismissed for want of prosecution upon an application by the appellant duly served on the respondent who again, decided not to do anything about the case until more than seven years after the judgment of the trial court!! I am not saying that in an appropriate case with appropriate facts an applicant would not be allowed to appeal after the expiration of more than seven years of the delivery of the judgment or the expiration of the right of appeal. He can, but must proffer good and substantial reasons for not appealing within time, the longer the time after expiration of the time to appeal, the more difficult it becomes for an applicant to satisfy the court of the reasons for his failure to appeal within time as he has not only to explain the reason why he failed to appeal within the time allotted him by law to exercise his right of appeal, but also the delay in presenting the application for extension of time, leave to appeal, etc. In the instant case, the applicant was not only to explain why he did not appeal within the three months allowed him by law but why he waited for more than seven years after delivery of the judgment before presenting the application. The question therefore is what are the facts on which the respondent based his application for extension of time? Both parties and the lower court agree that the relevant facts are as deposed to in paragraphs 6 and 10 of the supporting affidavit which had earlier been reproduced in this judgment.

Have the facts provided good and substantial reasons why the respondent did not appeal within time? I do not think so. It is settled law that in deciding to grant or refuse an application for appeal out of time, the length of time that has elapsed is always a material factor as decided in *Ojora v. Bakare* (1976) 1 S.C 47 at 52. In the instant case more than seven years had elapsed before the presentation of the application and there is no good or substantial reason why the appeal could not have been filed within time or the application brought earlier, except the reason that the respondent considered the judgment to be primarily against the original 1st defendant and that parties were engaged in negotiations after the judgment which are no

good reason for failing to appeal within time as was decided in *Moukarim v. Agbaje* (1982) 11 S.C 122 at 126.

The lower court held that the reason for the delay as deposed to in paragraphs 6 and 10 of the supporting affidavit is error of counsel and proceeded to hold same sufficient for granting the application as it is usually not the practice of the court to punish the party for the sins of his counsel. Is it correct that the reason adduced for the delay is error of judgment of counsel for the respondent? I do not think so. Paragraphs 6 and 10 of the supporting affidavit are very clear and unambiguous and are incapable of being stretched to include error of counsel as held by the lower court. It is therefore my view that the reason of error of counsel as found by the lower court as constituting the reason for the delay in presenting the application is not borne out of the paragraphs and is consequently speculative; that reason was raised suo motu by the lower court and the decision to exercise that court's discretion in favour of the respondent was based thereon, a situation which the law frowns upon. In the instant case, the reason for the non filing of the appeal within time is clearly a deliberate act of the respondent not to appeal which ought not to be indulged without good and substantial reasons shown to the satisfaction of the court.

In conclusion, I agree with the reasoning and conclusion of my learned brother Tabai, J.S.C that the appeal is meritorious and should be allowed. I consequently allow same and abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal allowed.

OGBUAGU JSC

This is an appeal against the majority decision of the Court of Appeal, Port-Harcourt division (hereinafter called "the court below"), delivered on 13th November, 2003, granting to the respondent, leave to appeal against the judgment of the High Court delivered on 16th April, 1996 - (i.e. seven (7) years) after the said judgment.

Dissatisfied with the said decision, the appellant has appealed to this court on four grounds of appeal. Without their particulars,

they read as follows:

Ground one

B *"The Court of Appeal erred in law in its majority decision by granting the 2nd defendant/applicant leave to appeal against the judgment of the High Court delivered on 16th April, 1996 out of time without the 2nd defendant/applicant providing good and substantial reasons for being out of time".* Ground two

The Court of Appeal in its majority decision misdirected itself in Law which misdirection occasioned a miscarriage of justice when it held:

C *"Similarly, the reason given for the delay as disclosed particularly in paragraphs 6 and 10 of the affidavit in support could be attributed to the error of judgment on the part of the previous counsel assigned to handle the matter, a situation for which the court is always reluctant at penalizing the litigant".*

D Ground three

The court of Appeal erred in Law by granting leave to the 2nd defendant/applicant to appeal when a previous appeal filed against the same judgment by the 1st defendant had been dismissed by the same court.

E Ground Four

"The Court of Appeal in its majority decision erred by exercising its discretion in favour of granting the 2nd defendant/applicant leave to appeal out of time when the facts as deposed to in the affidavit do not support such exercise of discretion"

F The appellant has formulated two (2) issues for determination, namely,

1. Whether the introduction by the Court of Appeal, suo motu, of a fact not contained in the affidavit of the parties before it, and applying same in the exercise of the court's discretion to grant leave, was proper. Ground 2.

2. Whether granting of leave to the respondent to appeal out of time was, in the circumstance of the facts before the court, proper in law. Ground 1, 3 & 4 (sic) (grounds)".

H The respondent on its part, also formulated two (2) issues for determination, namely,

1. *"Whether in the face of the affidavit of the parties before the Court of Appeal, the court suo motu introduced facts and applied*

same in granting leave to the respondent.

2. Whether granting of leave to the respondent to appeal out of time was in the circumstances of the facts before the court proper in law".

As could be seen, the two (2) issues of the parties, are the same or similar in substance, although differently couched. I shall therefore, deal with them together. I adopt in this Judgment, "Some facts relevant to this appeal" as appear in paragraph 2.00 of the appellant's brief except (c) namely,

"(a) The respondent had notice of the proceedings in both the High Court and the Court of Appeal, but opted not to participate in the proceedings.

(b) The affidavit in support of the application for leave to appeal out of time did not proffer any good or substantial reason for the failure to appeal within time.

(c) Not applicable.

(d) The respondent was a party to the decision which it is seeking to set aside in the Court of Appeal."

I have taken this stance, because, the above, are not only borne out by the records, but were/are thoroughly and beautifully reflected in the minority Judgment of Ikongbeh, JCA, (of blessed memory), which I respectfully endorse in this judgment. I note from the records, that:

(i) The appellant was joined as 2nd defendant pursuant to a motion dated 26th September, 1995, which was granted on 11th October, 1995. (See page 89) but it refused/neglected or failed to participate in the proceedings (i.e. it never participated), notwithstanding that it was duly served.

(ii) At the court below, the 1st defendant joined the appellant as a party and all processes in respect of the matter were duly served on the appellant.

(iii) The 1st defendant failed and/or refused to prosecute its appeal. The appellant applied for an extension of time to file its brief which was granted, but it never filed a brief and consequently, the appeal, was dismissed for want of prosecution, (see page 80).

(iv) As noted above, the appellant knew or was aware of the proceedings in the two (2) lower courts. Yet, it did not file a defence/

pleadings to await the result of a negotiation said to be going on.

(v) Leave to appeal, was granted seven (7) years after the said judgment.

(vi) One Chief G.A. Onuoha, appeared for the appellant throughout in the two lower courts and jointly, filed the notice of appeal with Chief Ahamba, (SAN).

For the avoidance of doubt, let me reproduce paragraph 10 of the affidavit sworn on behalf of the appellant which is in fact, was the only reason given by the appellant for his failure to appeal within time. It reads as follows:

"That no steps were taken to appeal against the judgment of 16th April, 1996 on the part of the Attorney-General because successive Attorneys-General felt that not being a party to the contract between the plaintiff and West African Glass Industries Plc, the 1st defendant/respondent, the liability was exclusively that of the 1st defendant/respondent and the 1st defendant/respondent had indicated that the matter would be settled. Thereafter, when settlement negotiations broke down, the 1st defendant/respondent indicted that it had appealed against the judgment and had substantial grounds of appeal against the judgment". (The underlining mine)

Ikongbeh, JCA, (of blessed memory), who also reproduced this said paragraph, stated thereafter, as follows:

"Now, is this a tenable reason for failing to appeal against the decision of a court of competent jurisdiction which positively and expressly found a defendant liable to the plaintiff and which authoritatively orders him and his co-defendant 'jointly and severally' to pay to the plaintiff specified sums of money?" (The underlining mine)

His Lordship, had this to say immediately after the above.

"This is where it has fallen to my unfortunate lot to have to quarrel with my learned brother's answer. In the first place, neither paragraph 10 nor paragraph 6 supports the finding that the reason the failure to appeal (sic) 'could be attributed to error of judgment on the part of the previous counsel assigned to handle the matter.'" (The underlining mine)

The majority of the court below - per Akintan, JCA (as he then was), found the reason for the failure to appeal within time at page 226 of the records, as follows:

"Similarly, the reason given for the delay as disclosed particularly in paragraphs 6 and 10 of the affidavit in support, could be attributed to error of judgment on the part of the previous counsel assigned to handle the matter, a situation for which the court is always reluctant at penalizing the litigant." (The underlining mine)

The above, to say the least with respect, is unfortunate. I agree with the learned SAN., for the Appellant, that "could be", is speculative. The expression in my respectful view, means that it "may be" not that it was. It also means that the reason was not certain or positive. This is because; nothing could have prevented the Respondent, from appearing in person. Speculation has no place in our courts. Neither the parties nor the court is permitted or entitled, to speculate anything. As rightly submitted in the appellant's Reply Brief, there is no deposition that corporate respondent, ever referred the matter to any other counsel in his Ministry. Paragraph 10 reproduced, unequivocally, stated or averred on oath, that no steps were taken to appeal against the said judgment of the trial High Court on the part of successive Attorneys-General because,

"not being a party to the contract between the plaintiff and West African Glass Industries Plc, the 1st defendant/respondent, the liability was exclusively that of the 1st defendant/respondent".

The above, is clear and needs no interpretation. The decision, as rightly submitted in the appellant's reply brief, was that of the party and not that of an unnamed or named counsel.

Let me also reproduce the said paragraph 6 of the affidavit in support which was also reproduced by Ikongbeh, JCA, (deceased). It reads as follows:

"That the court processes of Suit No PHC/1097/94, comprising the writ of summons, statement of claim, order for joinder of the 2nd defendant etc., were served on the 2nd defendant but were misplaced in the Attorney-General's chambers, hence no appearance was entered or defence filed in the said suit, until judgment was entered against the 1st defendant/respondent and 2nd defendant/appellant jointly and severally and steps taken to execute the judgment with the Attorney-General's approval. A copy of the said judgment of 16th April, 1996 is hereby attached as Exhibit A" (The underling mine)

The principles governing the grant of extension of time to apply for leave to appeal, have been stated and restated in a line of decided authorities. See the cases of Chief Victor Ukwu & 3 ors v. Chief Mark Bunge (1997) 8 NWLR (Pt.518) 527; (1997) 7 SCNJ. 262 @ 272-3, citing the cases of Ojara v. Bakare (1976) 1 S.C. 47; B Bowaje v. Adediwura (1976) 6 S.C. 145., Lamai v. Orbih (1980) 5-7 S.C. 26; Ibodo v. Enarofia (1980) 5-7 S.C. 42 and University of Lagos v. Olaniyan (No 1) (1985) 1 NWLR (Pt.1) 156 @ 166, 168, 171. It was held that ordinarily, a party seeking an extension of time C within which to apply for leave to appeal, is expected to satisfy the two conditions laid down in Order 3 rule 4 (2) of the Court of Appeal Rules - i.e.

*"(i) substantial reasons for the failure to appeal within time and
(ii) grounds of appeal which prima facie, show good cause
D why the appeal should be heard."*

That the two must be present. See also the cases of Mobil Oil (Nig.) Ltd. v. Chief Agadaigho (1988) 1 NSCC 777 at 784-785; (1988) 4 SCNJ 174, cited in the case of Kotoye v. Mrs. Saraki & Anor. (1995) 5 SCNJ 1 at 7 and Shanu & Anor. v. Afribank Nig. Plc. E (2000) 10-11 S.C. 1; (2000) 10 SCNJ 1 at 8, - per Ayoola, JSC., just to mention but a few.

I have shown above in this judgment, that the reason relied upon by the court below for granting the application of the respondent, with respect, is not tenable more so, as it was based, again with F respect, on speculation which is forbidden in our adjudicatory process. See the case of Overseas Construction Co. (Nig.) Ltd. v. Creek Enterprises (Nig.) Ltd. & Anor. (1985) 3 NWLR (Pt. 13) 407 at 474 - per Coker, JSC., also cited and relied on in the appellant's Brief G (although not quite properly cited); Bakare v. A.C.B. Ltd. (1986) 5 S.C. 48 at 57-52, Olawuyi v. Adeyemi (1990) 4 NWLR (Pt. 747) 746 at 782, citing the cases of Seismograph v. Ogbeni (1976) 4 S.C. 101; (1976) 3 S.C. (Reprint) 18 and The State v. Aibangbee (1988) 7 S.C. (Pt. I) 96; (1988) 3 NWLR (Pt. 84) 578. See also the cases of H Chief Fawehinmi v. NBA & 4 Ors. (No. 1) (1989) 2 NWLR (Pt. 105) 494; (1989) 4 SCNJ 1, Adelenwa v. The State (1972) 10 S. C. 13 at 19; (1972) 10 S.C. (Reprint) 12, Ihewuzi v. Ekeanya (1989) 1 NWLR (Pt. 96) 239 at 248 and the English case of Barnet v. Cohen & Ors.

(1921) 2 KB 461, just to mention but a few. A court will therefore, interfere to set any speculation aside. Indeed, in the case of Alli & Anor. v. Chief Alesinloye & 8 Ors. (2000) 4 S.C. (Pt. I) 111; (2000) 6 NWLR (Pt. 600) 777 at 203; (2000) 4 SCNJ 264, Iguh, JSC., stated that an appellate court, must decline to decide the point.

In respect of the view of the majority ruling of the court below that most of the grounds of appeal, raised substantial issues and reveal arguable grounds, in my respectful view and as stated in the dissenting ruling of Ikongbeh, JCA., (deceased), it is not enough to show that there are good grounds of appeal. As noted by me above, the two conditions must be present or satisfied. The two reasons, must be met simultaneously. Regrettably, the respondent, did not meet the said two conditions. I so hold.

I am aware and this is settled, that while dealing with an application such as the one that has led to this appeal, it is not for a court to be concerned, at that stage, with the question whether the appeal will succeed. All that is necessary, is that the applicant, should show that his proposed grounds of appeal, disclose arguable issues. Thus, whether during the hearing of the appeal itself, the arguable issues disclosed by the grounds of appeal will succeed, is not material. See the cases of Obikova v. Wema Bank Ltd. & Anor. (1989) 1 NWLR (Pt. 96) 156; (1989) 1 SCNJ. 127, Chief Yesufu v. Co-operative Bank Ltd. (1989) 3 NWLR (Pt. 110) 463; (1989) 6 SCNJ 108 and Iyalabani v. Bank of Baroda (1995) 4 SCNJ 1 at 4.1 am aware that this “fault or negligence” of counsel, is consistently, being exploited or abused by some learned counsel. However, when a court, is satisfied from the facts deposed to by an applicant in support of the application, that the application should or ought to be granted, it will exercise its discretion, in favour of the applicant. See the case of General Oil Ltd, if. Odunkan (1990) 7 NWLR (Pt. 163) 423. I repeat with respect, that since the affidavit in support of this application, did not depose to any substantial reason or reasons why the respondent’s said application should or ought to be granted, the majority of the court below, in my respectful view, was in error to have granted it.

Indeed and in fact, in the case of Kotoye v. Saraki & Anor. (supra), Uwais, JSC., (as he then was), at pages 7 and 8 had this to say, inter alia:

“.....Any act of gambling involves risk-taking and no gambler can claim not to be aware of that. When a counsel makes a mistake, such a mistake or its consequences should not, in general, be visited on his client who, in most cases, is a layman. Can the defendant/applicant who has been or is a legal practitioner be such a client? I certainly think not. There is, therefore, no good reason for the delay in bringing this application.”

In the instant case, the respondent is a lawyer. All along, he knew and was aware, as rightly submitted in the respondent’s Brief - paragraph 4.08, that his interest could be in jeopardy particularly, as he was Joined as a party by a formal application for joinder. But instead of defending that interest, he decided deliberately, not to participate in the suit and when the 2nd defendant filed an appeal and according to the averment in the said paragraph 10 of the said affidavit, which said appeal to his knowledge, was about to be dismissed, (as he was duly served), the respondent, did nothing to protect any interest he may still have had in the proceeding. So, he could not have been aggrieved by any decision in the case. Chief Ahamba (SAN), has cited and relied on the case of Ikonne v. Commissioner of Police & Anor. (1986) 4 NWLR (Pt.36) 473 at 504 - per Karibi-Whyte, JSC., part of which he reproduced and which reads as follows:

“The other ground on which I wish to decide this appeal is that it not (sic) a little difficult and indeed it is unintelligible to appreciate how a person who is aware of his interest in a matter, was constantly kept informed of its progress and deliberately refused to join, can, after a decision has been given against him, be granted leave to appeal on the basis of such an interest. Where a party to an action has deliberately refused to participate in the case the court ought to refuse leave to appeal against a decision reached in consequence of his default. It will, in my opinion, not only be against public policy to grant leave, but will constitute an abuse of process.” (the underlining supplied)

In the above case, the applicant, was a High Court Judge (and a lawyer).

This appeal is a classical case where a debtor, is applying delay tactics, to pay a judgment debt. No court, not this court, will encour-

age him/it.

It is from the foregoing and the more detailed Judgment of my learned brother, Tabai, JSC., that I find absolute merit in this appeal. I too allow the same, set aside the said majority decision of the court below and in its stead, affirm the dissenting ruling of Ikongbeh, JCA. (of blessed memory). I abide by the consequential order in respect of costs.

MUHAMMAD JSC

On the 16th day of April, 1996, the High Court of Rivers State (holden at Port Harcourt) (trial court), delivered its judgment wherein It entered judgment in favour of the plaintiff/appellant against the defendants/respondents jointly and severally in the sum of N42,100.000.00 (forty two million, one hundred thousand Naira) in addition to the costs awarded to the plaintiff/appellant against the defendants/respondents jointly and severally.

On the 13th day of August, 2003, the Attorney General of Rivers State (2nd defendant) as applicant at the court of appeal, Port Harcourt division, filed a motion on notice asking for the following reliefs:

"(i) Extension of time within which the appellant/applicant can apply for leave to appeal to the court of appeal against the judgment of Justice T. K. Osu of the Rivers State High Court delivered on the 16th April, 1996 in suit No PHC/1097/94

(ii) Leave to appeal against the judgment of Justice T. K. Osu, Judge, delivered on 18th April, 1996 in suit No PHC/1097/94

(iii) Extending the time within which to appeal against the judgment of Justice T. K. Osu, Judge, delivered on 16th April, 1996 in suit No. PHC/1097/94

(iv) Deeming as properly filed and served the Notice of appeal already filed and served in this suit."

After having considered the affidavit evidence before them, the learned Justices of the court below were divided in their opinions: two were in favour of granting the reliefs asked and one was against it. Thus, the judgment of that court was in the majority: Akintan and Adeniji, JJCA. Akintan, JCA (as he then was) delivered the lead

judgment wherein he held that the applicant had made out a good case to warrant granting the prayers sought in the motion. The motion was thus granted as prayed. Adeniji, JCA, agreed wholly with the reasoning and conclusion arrived at by Akintan, JCA Ikongbeh, JCA, of blessed memory, while dissenting remarked as follows:

- B *"I have read in advance the ruling just delivered by my learned brother, Akintan, JCA. I regret to say that I find myself unable to agree with his decision to grant this application because the applicant has not fulfilled the second of the two mandatory conditions that he has to fulfill before getting an extension of time within which to appeal. He has not shown good reasons for failing to appeal within time or for delaying for an inordinate length of time before bringing this application. My learned brother adequately and accurately exposed the law governing the subject. It is with his application of the law to*
- C *the facts of this case that I find myself in the unfortunate position of having to disagree."*

The plaintiff/respondent/appellant was dissatisfied with the majority judgment per Akintan and Adeniji, JJCA, as shown above and he appealed to this court on four grounds of appeal.

- E On the date of hearing this appeal, 20/11/07, each of the parties adopted its brief of argument as filed and exchanged. Learned senior counsel for the appellant, Chief Ahamba, SAN formulated two issues for determination by this court, they are as follows:

- F *"1. Whether the introduction by the court of appeal, suo motu, of a fact not contained in the affidavit of the parties before it, and applying same in the exercise of the court's discretion to grant leave, was proper. Ground 2*
- G *2. Whether granting of leave to the respondent to appeal out of time was in the circumstances of the facts before the court, proper in law. Ground(s) 1, 3 and 4."*

The respondent's brief of argument was settled by I. R. Minakiri (Mrs.), Director of Civil Litigation, Ministry of Justice, Rivers State.

- H *She identified the same issues:*

"1. Whether in the face of the affidavit evidence of the parties before the court of appeal the court suo motu introduced facts and applied same in granting leave to the respondent.

2. Whether granting of leave to the respondent to appeal out of time was in the circumstances of the facts before the court proper in law."

The consideration of the court below in granting the reliefs sought by the applicant is encapsulated in the following dictum of Akintan, JCA:

"One of the duties of every court is to protect, the exercise of the right of appeal of a litigant. See Vaswani Trading Co. v. Savalakh & Co. (1972) All NLR 922; and Central Bank of Nigeria v. Ahmed (2001) 11 NWLR (Pt. 724) 369. Although it is a requirement of the law that the two conditions to be met in an application for extension of time to appeal, as set out above, must be satisfied conjunctively, the position however is that if the grounds of appeal are substantial, the court may be inclined to look with more favour on the reason for the delay and that as much as possible an applicant with an arguable appeal ought not to be shut out from exercising his right of appeal. See in Re Adewunmi (1983) 3 NWLR (Pt.83) 483; Cooperative & Commerce Bank (Nig.) Ltd. v. Ogwuru (1993) 3 NWLR (Pt.284) 630; and Oloko v. Ube (2001) 13 NWLR (Pt. 729) 161.

Similarly, the duty of the court in the consideration of the grounds of appeal proposed by an applicant to support an application for leave to appeal is limited to whether the grounds of appeal are substantial and reveal arguable grounds. It is not the business of the court at that stage to decide upon the merits of such grounds as are filed in support of the application. See Ibodo v. Enarofia (1980) 5-7 SC 43; Holman v. Bros. (Nig.) Ltd. v. Kigo (Nig.) (1980) 8-11 SC 43; Obikoya v. Wema Bank Ltd. (1989) 1 NWLR (Pt.96) 157; and Central Bank of Nigeria v. Ahmed, supra. Also once an appellant satisfies the court that there are good and substantial reasons justifying the delay in appealing within time, the length of the delay is immaterial in the consideration of the application for extension of time within which to appeal. See Alagbe v Abimbola (1978) 2 SC 39; Kalu v Igwe (1991) 3 NWLR (Pt. 178) 168; and Oloko v. Ube supra."

The applicant in the instant case exhibited the notice of appeal he intends to file if his application is granted. The notice of appeal contains six grounds of special. The six grounds of appeal without their particulars are as follows:

"1. The learned trial judge erred in law in relying on the valuation report prepared by PW2 (Exhibit I) in determining that the appellant and the 1st Defendant/Respondent for the cost of the moulds ostensibly valued therein at N31,150,000.00 (thirty one million, one hundred and fifty thousand Naira) only.

B 2. The learned trial judge erred in law when he entered judgment in favour of the plaintiff/respondent against the appellant and the Defendant/Respondent jointly and severally in the sum of N42,100,000 (forty two million, one hundred thousand Naira) only.

C 3. The learned trial judge erred in law and on the facts when he held that PW2 "should be regarded as an expert."

4. The learned trial judge erred in law in awarding the additional sum of N5,843,813.00 (five million, eight hundred and forty three thousand, eight hundred and thirteen Naira) only as general D damages in respect of "loss of business earnings and costs of retaining professionals."

5. The learned trial judge erred in law when he held with regard to the plaintiff's/respondent's claim for interest as follows:

E "Plaintiff pleaded the rate of interest chargeable but the 1st Defendant although denied it in the state of defenses, refused or neglected to give any evidence in proof of it."

6. The judgment of the lower court is against the weight of the evidence.

F There is no doubt that most of the above grounds of appeal raise substantial issues and reveal arguable grounds. Similarly, the reason given for the delay as disclosed particularly in paragraphs 6 and 10 of the affidavit in support could be attributed to error of judgment on the part of the previous counsel assigned to handle the G matter, a situation for which the court is always reluctant at penalizing the litigant.

"In the result, I hold that the applicant has made out a good case to warrant granting the prayers sought in the motion. The motion is there fore granted as prayed."

H Now juxtaposed to the majority judgment is the dissenting judgment of Ikongbeh, JCA. He disagreed with the reasoning process in the lead judgment. I set out herein below excerpts from the dissenting judgment:

"The only question that arises is whether the applicant has met the conditions precedent set by Order 3 Rule 4(2) of the court of appeal Rules, 2002. As my learned brother rightly observed, the law is that the two conditions, namely that (1) there are good and substantial reasons for failure to appeal within time and (2) the proposed grounds of appeal prima facie show good cause why the appeal should be heard, must be met simultaneously. In other words, it is not enough to show that there are good grounds of appeal without at the time showing any or any good and substantial reasons for not appealing within time or for waiting for an unacceptable/long time before bringing an application for extension of time and vice versa.

*The applicant, having three months within which to appeal had up to 15/07/96 to appeal against the judgment of 16/04/96. The present application was, however, not filed until 19/05/03, a full seven years, four months and three days! Since the delivery of the judgment or seven years, one month and three days since his time within which to appeal expired. There can be no doubt, therefore, that there has been an inordinate delay, which the applicant must satisfactorily explain before he can hope to get the extension of time he seeks, unless, of course, there are circumstances that the law recognizes as excusing him from such explanation. In *Ojara v. Bakare* (1976) N. S. C. C. (Vol. 10) 15, the delay in bringing the application for extension of time was only over three years. Madahkan, J.S.C who delivered the judgment of the Supreme Court, described the application as a "tardy application." The period of delay in *R. Lauwers Import-Export v. Jozebson Industries Co. Ltd.* (1988) 3 NWLR (Pt.83) 427, in bringing the application, was even shorter. It was only two years, six months and three days. Yet in the view of Agbaje, JSC, who delivered the lead judgment, however, "the defendant was not a little but a very great deal out of time." See p. 447. In both cases the application for extension of time was refused because the tardiness had not been satisfactorily explained."*

The only reason given for failure to appeal within time is contained in paragraph 10 of the supporting affidavit, which reads:

"10. That no steps were taken to appeal against the judgment of 16th April, 1998 on the part of the Attorney-General because successive Attorneys-General felt that not being a party to the con-

tract between the plaintiff and West African- Glass industries Plc, the 1st defendant/respondent, the liability was exclusively that of me 1st defendant/respondent and the 1 defendant/respondent had indicated that the matter would be settled. Thereafter, when settlement negotiations broke down, the 1st defendant/respondent indicated that it had appealed against the judgment and had substantial grounds of appeal against the judgment." (Italics mine)

Now, is this a tenable reason for failing to appeal against the decision of a court of competent jurisdiction, which positively and expressly found a defendant liable to the plaintiff and which authoritatively orders him and his co-defendant "jointly and severally" to pay to the plaintiff specified sums of money?

From the analysis I have made, it must be apparent that the reason contained in paragraph 10 does not meet the requirements of or Order 3, Rule 4(2). What reason has been offered for the inordinate delay in bringing this application? They are contained in paragraphs 7 and 8 of the supporting affidavit, which read:

"7. That between April 1995 and the 2000 the 1st defendant/respondent entered into prolonged negotiations with the plaintiff/respondent towards the settlement of the judgment debt, which broke down.

8. That the 1st defendant thereafter filed an appeal against the judgment and filed several court processes including Motions for stay of Execution of the judgment, and Motions for installment payment of the judgment debt before this Honourable Court and the State High Court. That the 1st defendant's/respondent's appeal was eventually dismissed for want of prosecution on the 29th June, 2000."

As can be seen, the two reasons are, firstly, that the 1st defendant/judgment debtor and the plaintiff/judgment creditor embarked on prolonged negotiations and, secondly, that the 1st defendant/judgment debtor was pursuing an appeal.

With all due respect, I fail to see what any of this had to do with the applicant.

I have pondered all the questions I have posed and the facts before the Court and have come to the conclusion that it will not be in the interest of justice that the execution of this overdue judgment debt be further delayed by allowing any of the judgment debtors to

engage in what the plaintiff/judgment creditor has in its counter-affidavit aptly described as "legal gymnastics in court."

It is for all the reasons that I have given, especially the fact that no good reason has been given for failure to appeal within time and for delaying in bringing this application that I have decided to refuse the application. B

Although the judgment of Ikongbeh was a dissenting one, the appellant seemed to have accepted it in preference to the majority judgment.

I agree with them. But permit me my Lords, to justify why I C have to agree with the reasoning given in the dissenting judgment and the submissions of learned SAN for the appellant.

The law relating to grant of leave to an applicant for extension of time within which to file his appeal is no more in doubt. In the Court of Appeal, Rules 2000 Order 3, Rule 4(1) 4(2) provides as follows: D

"4(1) The court may enlarge the time provided by these rules for the doing of anything to which these rules apply;

(2) Every application for an enlargement of time in which to appeal SHALL be supported by an affidavit setting forth GOOD and SUBSTANTIAL reasons for failure to appeal within the prescribed E period, and by GROUNDS OF APPEAL which PRIMA FACIE show GOOD CAUSE why the appeal should be heard. "

(Italics and underlining supplied by me for emphasis)

Thus, the grant or refusal, by sub-rule (1) of rule 4 of the F order, is entirely left at the discretion of the Judge(s) before whom the application is laid. That is the essence of the word "may" there. However, the exercise of judicial discretion has not been left unfettered. There are authorities which require that it has to be exercised judicially and judiciously. That of course will naturally and inevitably G entail the weighing of the evidence at the court's disposal, the surrounding circumstances thereof and addresses delivered where necessary, all in the interest of justice. If that happens, then an appeal court will have no right to interfere with such exercise of discretion. See the cases of: Jones v. Curling 13 Q. R. D. 26; Kudoro v. Alaka H (1956) 1 FSC 82 - 83; Solanke v Ajibola (1938) 1 All NLR 46; General Oil Ltd, v. Odutan (1990) 7 NWLR (Pt.163) 423 at 441; Anya v. A. N. N. Ltd. (1992) 6 NWLR (Pt.247) 318 at 323 - 324; Saraki v.

Kutoye (1990) 4 NWLR (Pt.143) 144 at 151; Royal Exchange Assurance (Nig.) Ltd, v. Aswani Textiles Ltd. (1992) 3 NWLR (Pt.227) 1 at page 5; The Resident Ibadan Province & Anor v. Mamudu Lagunju (1954) WACA 14 549 at page 552.

But, where judicial discretion is wrongly or improperly applied, it is the duty of the appeal court to interfere. See: *Efetiroroje v. Okpalefe II* (1991) 5 NWLR (Pt.193) 517; *Royal Exchange Assurance (Nig.) Ltd, v. Aswani Textiles Ltd*, (supra). *Anya v. Africa Newspapers of Nigeria Ltd.* (1992) 6 NWLR (Pt.247) 319; *University of Lagos v. Aigoro* (1965) 1 NWLR (Pt.1) 143 or (1985) 1 SC 265; *Bank of Borodo v. Merchantile Bank* (1987) 3 NWLR (Pt.110) 417; *Jamal Eng. Co. v. MISR (Nig.) Ltd.* (1972) 1 All NLR 417.

Sub-rule (2) of rule 4 of the said order makes the grant of enlargement/extension of time within which to appeal or seek leave to appeal as the case may be, necessarily dependent upon satisfaction of two conditions, i.e.:

(a) There must be good and substantial reasons for not filing the Notice of Appeal within the prescribed time, and ;

(b) There must exist Prima Facie grounds of appeal raising substantial questions for resolution in the appeal, that is the essence of the word shall, there.

See: *Ibodo & Ors. v. Enarofia & Ors.* (1980) 5-7 SC. 42 at page 51; *Mobil Oil Ltd. v. Agadaigho* (1938) 2 NWLR (Pt.77) 355; *Doherty v. Doherty* (1964) 1 All NLR 299.

I think the judgment sought to be appealed against is a final judgment. The period allowed by the court of appeal Rules within which to file an appeal against such a final judgment is stipulated by section 25 of the Court of Appeal Act, 1976 now contained in Cap. G 27, LFN, 1990 which provides as follows:

"25(2) the periods for the giving of notice of appeal or notice of application for leave to appeal are:

(a) in an appeal in a civil cause or matter fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against final judgment."
(Underlining supplied for emphasis).

Looking at the facts of the application at the court below, judgment (final) was delivered on the 16th of April, 1996. Thus, the

applicant had up to 15th of July, 1996 within which to file its Notice and Grounds of Appeal. A day after the 15th of July, 1996 would render any notice of appeal filed null and void as it was filed out of time except where there was an application for extension of time within which to file same and is granted by the Court of Appeal where than court found merit in the application. The applicant in this matter sought to have time extended to ask for leave to appeal, leave to appeal and extension of time within which to appeal, seven (7) years after delivery of judgment by the trial court. In its affidavit in support of the motion on notice before the court below, the applicant averred as follows:

"4. That on or about April 20th, 1996, I was informed by counsel to the 2nd Defendant/Applicant that judgment was entered jointly and severally against the 1st and 2nd Defendants on the 16th April, 1996.

5. The time for the 2nd Defendant/Applicant to appeal expired on July 15th, 1993. Consequently, the order of this Honourable Court is needed to extend the time within which the applicant can apply for leave to appeal, leave to appeal and extending the time within which to appeal against the judgment of 16th April, 1996."

Although length of time (longevity) taken before filing an appeal is not usually material or relied upon by the courts to shut the doors of appeal against a perspective appellant, as that may amount to denial of justice, yet the law places a heavy burden upon such applicant to scale the two hurdles mentioned above i.e. explaining away by cogent and convincing affidavit evidence, the delay and good or arguable grounds of appeal why the appeal should be heard. *Alagbe v. Abimbola* (1978) 2 SC; *Kalu v. Igwe* (1991) 3 NWLR (Pt.178) 168; *Oloko v. Ube* (2001) 13 NWLR (Pt.729) 161. And, the requirement of the case law is that these two conditions must be satisfied simultaneously. Where only one condition is satisfied and the other is not, the application is lacking in merit and cannot be granted. See: *Okere v. Nkem* (1992) 4 NWLR (Pt.234) 132; *Okwelume v. Anokefo* (1996) 1 NWLR (Pt.425) 468; *Balogun v. Afolalu* (1994) 7 NWLR (Pt.355) 206; *FHA v. Abosede* (1998) 2 NWLR (Pt.537) 177 at p. 187.

Permit me my Lords, to reproduce the paragraphs relied upon

by the applicant/respondent i.e. paragraphs 5, 6, 7, 8, 10, 11 and 12:

B *"5. The time for the 2nd Defendant/Applicant to appeal expired on July 15th, 1996. Consequently, the order of this Honorable Court is needed to extend the time within 'which the applicant can apply for leave to appeal, leave to appeal and extending the time within which to appeal against the judgment of 16th April, 1996.*

C *6. That the court processes in suit No. PHC/1097/94, comprising the Writ of Summons, Statement of Claim, Order for Joinder of the 2nd defendant etc. were served on the 2nd defendant but were misplaced in the Attorney-General's Chambers, hence no appearance was entered or defence filed in the said suit, until judgment was entered against the 1st Defendant/Respondent and 2nd Defendant/Appellant jointly and severally and steps taken to execute the judgment with the Attorney-General's approval. A copy of the said judgment of 16th April, 1996 is hereby attached as "Exhibit A"*

E *7. That between April 1995 and the 2000, the 1st Defendant/Respondent entered into prolonged negotiations with the Plaintiff/Respondent towards the settlement of the judgment debt which broke down.*

F *8. That the 1st Defendant thereafter filed an appeal against the judgment and filed several court processes including motions for stay of execution of the judgment, and motions for installment payment of the judgment debt before this Honorable Court and the State High court.*

G *10. That no steps were taken to appeal against the judgment of 16th April, 1996 on the part of the Attorney-General because successive Attorneys General felt that not being a party to the contract between the plaintiff and West African Glass Industries Plc, the 1st Defendant/Respondent, the liability was exclusively that of the 1st Defendant/Respondent and the 1st Defendant/Respondent had indicated that the matter would, be settled. Thereafter, when settlement negotiations broke down, the 1st Defendant/Respondent indicated that it had appealed against the judgment and had substantial grounds of appeal against the judgment.*

H *11. The 1st Defendant/Respondent's appeal was however dismissed on June 29th, 2000 for want of prosecution.*

12. That on the assumption of duty of the new Attorney-General, H. Odein Ajumogobia, Esq., on or about July 18th, 2003, he reviewed that facts and circumstances of the case after discussion with counsel in the Ministry of Justice and 1st Defendant's/Respondent's counsel and concluded that there are substantial grounds for an appeal against the judgment of the lower court on behalf of the Appellant. The said grounds of appeal are hereby attached as "Exhibit B." B
The averments as above but especially as contained in paragraphs 6, 7, 8, 10, and 12 gave the following reasons which accounted for the delay in filing the appeal within time:

(a) Court processes served on 2nd defendant, etc. were misplaced in the Attorney-General's chambers hence no appearance was entered or defences filed in the said suit until judgment was entered against the 1st and 2nd defendants jointly and severally and steps taken to execute the judgment with the Attorney-General's approval. C D

(b) Prolonged negotiations were entered by the 1st defendant/respondent with the plaintiff/respondent towards settlement of judgment debt which broke down.

(c) That the 1st defendant filed an appeal and other processes. The appeal was dismissed for want of prosecution on 29/6/2000 E

(d) No steps were taken to appeal against the trial courts judgment by the 2nd defendant/respondent because successive Attorneys-General felt that they were not a party to the contract entered by the plaintiff and 1st defendant and that the 1st defendant indicated that the matter would be settled. F

(e) That it is only when the new Attorney-General H. Odein Ajumogobia Esq., assumed office on or about 18th July, 2003, he reviewed the facts and circumstances of the case and concluded that there were substantial grounds of appeal against the said judgment. G

Now, I curiously observed that of all the facts deposed to in the above paragraphs of the affidavit in support of the motion, none has made any reference to positive actions/steps taken by the 2nd defendant/respondent in explaining away the delay of over 7 years from the date of the said judgment. They were facts relating to efforts made by the 1st defendant/respondent. The deposition in paragraph 10, which showed the effort made by the then new Attorney-General, Mr. Ajumogobia, although it was not his fault, can at best be de- H

scribed as an after thought. It came about too belatedly. Other reasons advanced such as contemplation of settling the matter by the parties could not have been a barrier to filing an appeal at the appropriate time. Equally, where the appeal had been properly filed, that in itself cannot be a barrier to filing terms of settlement and then seek
B leave of court to withdraw the appeal. Nothing of that nature happened. The respondents especially the 2nd respondent went into deep slumber from 16th April, 1996 to the 13th of November, 2003. "Delay", they say, "defeats equity." The law aids those who are vigilant not those who sleep upon their rights. *Vigilantibus et non*
C *dormientibus jura subvertuntur*. It might not be wrong to conclude that although the judgment was entered against the defendants and they were liable jointly and severally, yet the 2nd respondent decided to stand by and watch the 1st respondent fight its own cause.
D Further, what was averred to in paragraphs 6 and 10 of the affidavit in support cannot in my humble view amount to inadvertence of counsel. The name of Attorney General of Rivers has featured throughout the proceedings of the two courts below as a party in the suit/appeal. Thus, it is not a case where one counsel, who,
E under a fiduciary relationship with his client, refuses to act in order to cause loss or injury to his client. In this appeal, it is the client himself who caused injury to himself by refusing to act timeously. If the effort of Mr. Ajumogobia was attempted early enough by the said successive Attorneys-General, perhaps, it would have fetched some positive result. Alas! It is too late. Not only that, the case is worse as there
F were no cogent, concrete and convincing reasons to explain away the tardiness. It is really a pity!

For these and the more detailed reasons contained In the judgment of my learned brother, Tabai, JSC, I too find merit in this appeal and abide by all orders made in the lead judgment including order as to costs.

H