

SUPREME COURT OF NIGERIA
25TH APRIL, 2008 SC. 130/2007
CORAM:- N. TOBI, G. A. OGUNTADE, F. F. TABAI,
I. T. MUHAMMAD, P. O. ADEREMI, JJSC

MR. MUFUTAU AKINPELU APPELLANT/
(Substituted by Court Order as the APPLICANT
Representative of Alhaji Akinola
Akinpelu)

AND

1. EBUNOLA ADEGBORE
2. DADA ADEGBORE RESPONDENTS
3. OLUSEGUN SOTOMI
4. MONINUOLA SOTOMI

RULES OF COURT - Motions - Refusal of by lower court - Supreme Court Rules, O. 2 r. 28 (3) - Provides that where Court of Appeal refuses an application - Similar one can be made to Supreme Court for consideration - It extends to all interlocutory matters (H1)

APPEALS - Interlocutory motions - Supreme Court - Interlocutory application refused by the High Court - Further refused by Court of Appeal - Cannot be heard by Supreme Court - Except by way of appeal - From the Court of Appeal decision (H2)

APPEALS - Time - Extension of time to appeal - Special circumstance - Application for extension of time - Needs to show special circumstance - Mistake of counsel as in this case - Qualifies as special circumstance (H3)

ORDERS OF COURT - Disobedience to - Liability for - A party cannot be held - Liable for disobedience to court order - If the disobeying conduct - Comes before the order of court - As there is nothing to disobey at the material time (H4)

FACTS

The Plaintiffs/Respondents had sued the Defendants/Applicants/

Appellants at the High Court of Lagos State claiming damages for destruction of Respondent's Church, perpetual injunction and a declaration that the purported sale of the property at No. 48B, Jebba Street, (East) Ebute Metta, Lagos by Mr. Gbeminiyi Sotomi (deceased) without the consent and authority of the Respondents is null and void. Appellants filed a counter-claim. After hearing, the learned trial judge granted the declaration and perpetual injunction but refused the claim for damages. The counter-claim was also dismissed.

Appellants promptly filed a Notice of Appeal. They also brought an application praying the trial court for an order restraining Respondents from taking action to eject them from the property. Learned trial judge refused the injunction sought. A similar application for injunction was made to the Court of Appeal. The Court heard and dismissed the application. Appellants have come to the Supreme Court by way of motion on notice praying for two sets of alternative reliefs. The first set is essentially for orders to enable Appellants appeal out of time to the Court of Appeal from the judgment of the trial court on the substance suit. The second set is essentially for orders to enable the Appellants appeal out of time to the Supreme Court from the interlocutory decision of the Court of Appeal on the motion for injunction.

ISSUES FOR DETERMINATION

"2.01. Whether this Honourable Supreme Court of Nigeria has jurisdiction to deal summarily with the application by granting all the reliefs sought in the application to the Court of Appeal of Nigeria without waiting for the record of appeal to be delivered to the Supreme Court?"

2.02. Whether the applicant has prayed for the three reliefs of an order for extension of time within which to apply for leave to appeal to the Supreme Court of Nigeria, an order for leave to appeal against the interlocutory decision of the Court of appeal of Nigeria in the Appeal No. CA/L/512/2004 and an order for extension of time within which to file Notice of Appeal against the said interlocutory decision?"

2.03. Whether the applicant has given good and substantial reasons for failure to appeal within the prescribed period?"

2.04. Whether it is obligatory to establish the mistake of the

counsel as a good and substantial reason for the lateness in bringing the application for leave after the applicant has included this ground of appeal a ground challenging the jurisdiction of the Court of Appeal of Nigeria to dismiss the motion in the appeal No. CA/L/512/04 on the 23rd day of January, 2006?

2.05. Whether the applicant is entitled to be granted an order of interlocutory injunction restraining the claimants/respondents from taking any action to eject the defendant/applicant and his agents and privies from the landed property in dispute pending the determination of the appeal in the appeal No CA/L/512/04?

2.06. Whether the applicant is entitled to be granted leave to appeal to the Supreme Court of Nigeria on all the four grounds of appeal which are set down in the Notice of Appeal dated 7th February, 2006, which said grounds of appeals are alleged to be grounds of mixed law and fact?"

HELD (Unanimously rejecting the first set of reliefs but granting the second set per **TOBI JSC**)

Motions - Refusal of by lower court

1. Learned counsel for the applicant relied heavily on Order 2 Rule 28(3) of the Supreme Court Rules. The sub-rule provides:-

"Where an application has been refused by the court below, an application for a similar purpose may be made to the court within fifteen days after the date of refusal."

The "court below" and the "court" in Order 2 Rule 28(3) mean the Court of Appeal and the Supreme Court, respectively. The rule therefore means that where the Court of Appeal refuses an application, a similar one can be made to the Supreme Court for consideration. It is not my understanding of the sub-rule that this court makes an order on behalf of the Court of Appeal or specifically ask the Court of Appeal to carry out an order it ought to have made in the first place. It is rather my understanding that this court, on its own, can make an order which the Court of Appeal refused to make; as in this case, extension of time to appeal from the decision of the High Court of Lagos State. The sub-rule extends to and involves all interlocutory matters such as stay of proceedings, stay of execution, injunction and bail pending appeal. (p. 1546 A)

APPEALS - Interlocutory motions

2. On 3rd August, 2004, applicant by an application asked the trial Judge for an order of injunction restraining the respondents, their agents and privies from taking any action to eject him, his agents and privies from the landed property at No. 49A, Jebba Street, Ebute-Metta, Lagos. The learned trial Judge refused the application. He made a similar application to the Court of Appeal which was also refused. This is therefore the third effort.

C In the hierarchy of the court system in the Constitution and in practice, this court has no jurisdiction to make an order that will ignore or by-pass the constitutional position of the Court of Appeal. This court has no direct link with the State High Courts in the judicial process and therefore has no jurisdiction to make orders that will D have such a situation or impact. The Court of Appeal plays an intermediary role as between this court and the High Court of Lagos State or any other State for that matter.

In another breadth, counsel has urged this court to take the motion as an appeal. Which of these should be obeyed? Prayer 6 asking for E leave to appeal or the submission that this court should take the motion as an appeal? Wherever or in whatever way the table turns, this court cannot convert a motion to an appeal. The two are quite distinct and different court processes. They do not coalesce in anyway. A motion F deals with interlocutory matters. Although there are certain appeals which deal with interlocutory matters, this court has not the jurisdiction to convert the motion before it as an appeal.

And If I may go further, that is the basis of the wrongness of the prayers I have examined. Counsel, on his own and wrongly for G that matter, thinks that there is an appeal from the decision of the Court of Appeal. Unfortunately, there is no such appeal. Prayers 6 and 8 are clear on that. In the light of the above, I refuse prayers 1 to 7 which are essentially an abuse of this court. (pp. 1546 F/1547 G)

H Extension of time to appeal

3. An application for extension of time within which to appeal must show that special circumstances exist to justify that the application should be granted. A special circumstance is of a particular kind, which

is unique, beyond ordinary, regular and or usual circumstance. A special circumstance stands out on its own, punctuated with some amount of specialism.

Mistake of counsel qualifies as a special circumstance. In other words, the court would readily exercise its discretion to extend the period prescribed for doing an act if it is shown to the satisfaction of the court that the failure by a party to do the act within the period prescribed was caused by the negligence or inadvertence of his counsel.

In the affidavit in support of the motion filed in this court, Chief Oriade, counsel for the applicant, deposed that the lateness in filing the Notice of Appeal was as a result of his mistake. Paragraph 23 deposed as follows:-

“That the lateness in filing the Notice of Appeal from the decision of the Honourable Court of Appeal of Nigeria dated 23rd January, 2006 and the motion for leave to appeal and an Order of interlocutory injunction was caused by my mistake that I thought that the Notice of Appeal could be filed after a period of (14) fourteen days had elapsed before I realized that the appeal was in respect of an interlocutory decision of the Court of Appeal of Nigeria.”

It is the law that mistakes of counsel cannot be visited on his client. The client is a novice in the law. Counsel is the expert and the only duty of the client is making available to counsel the evidence and the payment of the professional fees. Once he does that, he cannot be made responsible for any mistakes in law. I have cited some cases above. (pp. 1549 C/1550 F)

ORDERS OF COURT - Disobedience to - Liability for

4. The two lower courts, the High Court and the Court of Appeal, refused the motion for enlargement of time and interlocutory injunction on the ground that the applicant was in contempt of the orders of the High Court. The fulcrum of the submission of learned counsel for the respondents is also on a disobeying conduct resulting in contempt. I should therefore take it here.

Where is the evidence of disobedience of court order by the applicant? The 4th respondent, Moninuola Sotomi, in affidavit in this court, deposed in paragraph 2 as follows:-

“The case began on 9th December, 1991, when the respondent forcibly entered the premises and demolished some part. Necessary court processes and affidavit of urgency were filed on 11th December, 1991, 2nd day after filing the court processes, an order of an interim injunction was made against the respondent in the form contained in the order of court, a certified true copy of which is hereby produced and marked Exhibit MOA. Another order of interlocutory injunction against the respondent was further confirmed on 21st January, 1993.”

Both the learned trial Judge and the Court of Appeal were bound to consider paragraph 2 of the affidavit of Moninuola Sotomi, which is clearly an admission against interest. I am rather surprised that they did not consider the clear deposition.

A party can be held liable to disobedience of court order if the disobeying conduct comes after the order of court. A party cannot be held liable of disobedience of a court order if the conduct precedes the order of court. In the latter situation, there is no disobedience because there is in law and in fact nothing to disobey as there was no order to disobey. (pp. 1551 C/H/1552 F)

NOTABLE POINTS OF INTEREST

TABAI JSC

1. Pendency of an appeal at the Supreme Court is necessary for application of its O. 2 r. 28 (3)

Order 2 of the Supreme Court Rules pertains generally to the administration and general procedure of appeals pending therein. And Order 2 Rule 28(3) relates specifically to applications thereat in a pending appeal. Similarly Order 3 Rule 3(3) of the Court of Appeal Rules relates specifically to applications pending in that court. In other words, the Jurisdiction of the Court of Appeal can only be invoked to entertain an application of any kind under Order 3 Rule 3(3) where there is an appeal pending therein. At the Court of Appeal therefore, in view of the appeal pending therein via the Notice of Appeal dated 98/7/04, the defendants/appellants were, by virtue of the provisions of Order 3 Rule 3(3) of the Court of Appeal Rules, at liberty to make the application. The jurisdiction of that court was properly invoked to entertain the application on the 93/1/06.

This court is however not similarly placed. There is no appeal pending here and the jurisdiction of this court not having been invoked, no application can lie here. The pendency of an appeal before this court is a condition precedent to the invocation of Order 2 Rule 28(3) of the Supreme Court Rules to bring an application like the one before us. It is my respectful view therefore that Chief Oriade misconceived the purport of Order 2 Rule 28(3) of the Supreme Court Rules. (p. 1559 C)

ADEREMI JSC

2. Rules of court are meant to be obeyed

All I need say here if only for the purpose of expounding the principles of law guiding the grant or refusal of this type of application, is that, when a court is invited to make an order extending the time within which to do certain things such as extending the time prescribed by the Rules of Court for taking certain procedural steps, the court must always bear in mind that Rules of Court must, prima facie be obeyed. Thus, to justify the court exercising its discretion in extending the time which is prescribed by Rules of Court to do certain procedural acts, there ought to be materials, call same depositions, in the supporting affidavit explaining the delay in taking timeously, such procedural steps; as Edmund Davies, CJ., said in *Revici v. Prentice Hall Incorporated & Ors.* (1969) 1 AER. 772, quoted with approval by this court in the well-known case of *N.A. Williams Ors v. Hope Rising Voluntary Society* (1982) 1-2 S.C. (Reprint) 70; (1982) 1 ALL NLR (Pt. I) 1, our local classicus on this issue of 'procedural law thus and I quote him:-

"if no excuse is offered no indulgence shall be granted."
(p. 1562 C)

REPRESENTATION

Chief R. A. O. Oriade, (with him; M. A. Oriade), for Appellant.
F. Lawal, for Respondents.

CASES REFERRED TO

Odofin v. Chief Agu (1992) 3 NWLR (Pt. 229) 350
Lamai v. Chief Okoye (1983) 3 S.C. 65

- Chikwendu v. Mbamah (1989) 3-4 S.C. 31
 Ibodo v. Enarofia (1980) 5-7 S.C. 42. (1980) 5-7 S.C.
 Akinyede v. The Appraiser (1971) 1 All NLR 162
 Alagbe v. Abimbola (1978) 2 S.C. 39; (1978) 2 S.C.
 Obikoya v. Wema Bank Limited (1989) 1 S.C. (Pt. I) 132; (1989) 1
 B NWLR (Pt.96) 157
 Akibu v. Oduntan (1991) 2 S.C. 77; (1991) 2 NWLR (Pt. 171) 1
 Sotuminu v. Ocean Steamship (Nig.) Ltd. (1992) NWLR (Pt. 239)
 Ogbonnaya v. Adapalm (Nig.) Ltd. (1993) 5 NWLR (Pt. 292) 147
 C N.A. Williams Ors v. Hope Rising Voluntary Society (1982) 1-2 S.C.
 Ogbu v. Urum (1981) 4 S.C. 1; (1981) 4 S.C.
 Williams v. Hope Rising (1982) 1-2 S.C. 145; (1982) 1-2 S.C.
 Nwachukwu v. The State (1986) 2 NWLR (Pt. 25) 165
 Shittu v. Osibanjo (1988) 7 S.C. (Pt. III) 1; (1988) 3 NWLR (Pt. 83)
 D 483

STATUTES & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1999; s. 233(1) to
 (4)
 E Court of Appeal Act; s. 16
 Supreme Court Act, 1960; s. 22
 Supreme Court Act, 2004; s. 22
 Court of Appeal Rules; O. 3 r. 3(3)
 F Supreme Court Rules, 1999; O. 2 r. 28(3)

LEAD JUDGMENT BY TOBI JSC

The applicant in a motion filed on 4th June, 2007, asked for the following reliefs:-

- G *“1. An order for extension of time, pursuant to the provisions of Order 2 Rule 28(3) of the Supreme Court Rules, 1999, within which to apply directly to this Honourable Supreme Court of Nigeria, for all the reliefs which were refused by the Court of Appeal of Nigeria in the interlocutory decision dated the 23rd of January, 2006,*
 H *in the application No. CA/L/512/2004.*
2. An order for extension of time within which to seek leave to appeal to the Court of Appeal of Nigeria from the judgment or decision dated 9th July, 2004, as delivered by the Honourable Justice D.

F. Akinsanya (Mrs.) in Suit No. LD/ 2953/91 in the High Court of Lagos State, Lagos Judicial Division.

3. An order for leave to appeal to the Honourable Court of Appeal of Nigeria, Lagos Judicial Division from the judgment or decision of the trial court dated 9th July, 2004, in Suit No. LD/2952/91 in the High Court of Lagos State, Lagos Judicial Division. B

4. An order for extension of time within which to file the Notice of Appeal and the grounds of appeal from the judgment or decision of the trial court dated 9th July, in Suit No. LD/ 2952/91 to the Court of Appeal of Nigeria, Lagos Judicial Division. C

5. An order to deem as being properly filed and served the Notice of Appeal filed on 3rd day of August, 2004, in the appeal No. CA/L/512/2004 after the correct filing fee had been paid at the High Court Registry, Lagos, Nigeria.

6. An order for leave to appeal to the Honourable Supreme Court of Nigeria on all the grounds of appeal as set out in the Notice of Appeal dated 7th day of February, 2006, on the ground that they contained mixed law and facts. D

7. An order of interlocutory injunction restraining the claimants/respondents and their agents and privies from committing act of trespass upon or ejecting the applicant and his agents or privies from the landed property in dispute at No. 49B, Jebba Street, Ebute Metta, Lagos, Nigeria pending the determination of the appeal by the Honourable Court of Appeal of Nigeria. E

THE APPELLANT/APPLICANT, IN THE ALTERNATIVE TO PRAYERS 1 TO 7 ABOVE, CLAIMS THE FOLLOWING RELIEFS:- F

8. An order for enlargement of time within which to apply for leave to appeal to the Supreme Court of Nigeria from the interlocutory decision of the Honourable Court of Appeal of Nigeria dated the 23rd day of January, 2006, in the appeal No. CA/L/512/04. G

9. An order for leave to appeal from the interlocutory decision of the Honourable Court of Appeal dated the 23rd day of January, 2006, in the appeal No. CA/L/512/04 to the Honourable Supreme Court of Nigeria. H

10. An order for enlargement of time within which ,to appeal to Honourable Supreme Court of Nigeria from the interlocutory decision of the Honourable Court of Appeal of Nigeria dated the 23rd

day of January, 2006, in the appeal No. CA/L/512/04.

11. *An order for leave to appeal to the Honourable Supreme Court of Nigeria on all the grounds of appeal as set out in the Notice of Appeal dated the 7th day of February, 2006, on the ground that they contained mixed law and facts.*

- B 12. *An order of interlocutory injunction restraining the claimants/respondents and their agents or privies from taking any action for ejecting the applicant and his agents and privies from the landed property in dispute at No. 49B, Jebba Street, Ebute Metta, Lagos, Nigeria pending the determination of the appeal by the Honourable Supreme Court of Nigeria, Abuja City, Nigeria.....”*

The motion is supported by an affidavit of 24 paragraphs and a Brief of Argument. There is also a counter-affidavit. The following six issues are formulated in the appellant’s Brief:-

- D “2.01. *Whether this Honourable Supreme Court of Nigeria has jurisdiction to deal summarily with the application by granting all the reliefs sought in the application to the Court of Appeal of Nigeria without waiting for the record of appeal to be delivered to the Supreme Court?*

- E 2.02. *Whether the applicant has prayed for the three reliefs of an order for extension of time within which to apply for leave to appeal to the Supreme Court of Nigeria, an order for leave to appeal against the interlocutory decision of the Court of appeal of Nigeria in the Appeal No. CA/L/512/2004 and an order for extension of time within which to file Notice of Appeal against the said interlocutory decision?*

2.03. *Whether the applicant has given good and substantial reasons for failure to appeal within the prescribed period?*

- G 2.04. *Whether it is obligatory to establish the mistake of the counsel as a good and substantial reason for the lateness in bringing the application for leave after the applicant has included this ground of appeal a ground challenging the jurisdiction of the Court of Appeal of Nigeria to dismiss the motion in the appeal No. CA/L/512/04*

H *on the 23rd day of January, 2006?*

2.05. *Whether the applicant is entitled to be granted an order of interlocutory injunction restraining the claimants/respondents from taking any action to eject the defendant/applicant and his agents and*

privies from the landed property in dispute pending the determination of the appeal in the appeal No CA/L/512/04?

2.06. Whether the applicant is entitled to be granted leave to appeal to the Supreme Court of Nigeria on all the four grounds of appeal which are set down in the Notice of Appeal dated 7th February, 2006, which said grounds of appeals are alleged to be grounds of mixed law and fact?" B

The respondents have also formulated six issues as follows:-

"2.1 Does the dismissal of the motion by the Court of Appeal affect the jurisdiction of the Court of Appeal?" C

2.2 Can a party in contempt of the order of a court of competent jurisdiction ask for favour of the court?"

2.3 Based on the concurrent ruling on matters of fact of the trial court dated 26th November, 2004 and the ruling of the Court of Appeal, Lagos, dated 23rd January, 2006, does the appellant have any special facts to disturb the rulings?" D

2.4 In what status quo should the res be preserved?"

2.5 Is the appellant asking for a stay in good faith? The appellant has not made any effort in pursuing the substantive appeal in view of the fact that the appellant gave an undertaking before the Court of Appeal in Lagos to make the records of appeal available within three months from the 23rd January, 2006. E

2.6 Are Section 22 of the Supreme Court Act, 1960 and Section 16 Court of Appeal Act, applicable in the present case?" F

Taking issue No.1, learned counsel for the applicant submitted that the court has jurisdiction to deal summarily with the matter by granting all the reliefs sought in the application made to the Court of Appeal in appeal No. CA/L/512/2004 without waiting for the record of appeal to be delivered to this court. He relied on Order 2 Rule 28(3) of the Supreme Court Rules, 1999 and Section 22 of the Supreme Court Act, 2004 and the cases of *Abina v. Tika Press Ltd.* (1968) 1 All NLR 210 and *In Re: Adewunmi* (1983) 3 NWLR (Pt. 83) 482.

On issue No. 2, learned counsel informed the court that the applicant has, in his motion dated 23rd May. 2007, prayed for the three reliefs that are required to be entitled to be granted leave to appeal to this court from an interlocutory decision of the Court of H

Appeal. Relying on the case of *Odofin v. Chief Agu* (1992) 3 NWLR (Pt. 229) 350, learned counsel urged the court to grant the relief.

On issue No. 3, learned counsel submitted that the applicant has given good and substantial reasons for failure to appeal within the prescribed period. Blaming counsel for the delay in appealing
B against the decision of the court, learned counsel relied on *Louvers Import and Export v. Jozebson Industries Ltd.* (1988) 3 NWLR (Pt. 83) 429.

On issue No. 4, learned counsel argued that the applicant is
C not obliged to give a good and substantial reason for the prescribed period of appeal had elapsed if he includes in the Notice of Appeal a ground of appeal which challenged the jurisdiction of the court to deliver such decision sought to be appealed from. He relied once again on *Louvers Import and Export v. Jozebson Industries.* (supra)
D and *Obikoya v. Wema Bank Ltd.* (1989) 1 S.C. (Pt. I) 132; (1989) 1 NWLR (Pt. 96) 167.

On issue No. 5, counsel submitted that the applicant is entitled to be granted an order of interlocutory injunction to restrain the respondents from taking any action to eject the applicant and his agent
E or privies from the landed property in dispute pending the determination of the appeal by this court or by the Court of Appeal as the case may be. If the respondents are not restrained, the applicant and members of his family will be thrown into the streets of Lagos State without a place of abode, learned counsel contended. He relied on
F *Onwuzulike v. Commissioner for Special Duties Anambra State* (1996) 7 NWLR (Pt. 161) 252. *Globe Fishing Industries Ltd, v. Chief Coker* (1990) 11-12 S.C. 80; (1990) 7 NWLR (Pt. 162) 265 and *Kotoye v. Central Bank of Nigeria* (1989) 2 S.C. (Pt. I) 1; (1989) 1 NWLR (Pt. G 98) 419.

On the last issue, that is issue No. 6, learned counsel submitted that the applicant is entitled to be granted leave to appeal on all the four grounds of appeal because they are grounds of mixed law and facts. He relied on *Irahabor v. Ogalamien* (1988) 8 NWLR (Pt. 616)
H 517. Counsel urged the court to treat the motion as an appeal and grant all the reliefs sought by the applicant.

Learned counsel for the respondents, Mr. F. Lawal. Submitted on issue No. 1 that the two courts below have the jurisdiction to give

judgment in favour of the respondents. He relied on *Alade v. Alemuleke* (1988) 2 S.C. 1 and *Awoyegbe v. Chief Ogbeide* (1988).

On issue No. 2, learned counsel submitted that the applicant who refused to obey the order of interim injunction made by Alabi, J., (as he then was) and therefore in contempt, cannot ask for a remedy by way of the motion. He relied on *Governor of Lagos State v. Ojukwu* (1986) 2 S.C. 277. B

Learned counsel submitted on issue No. 3, that based on the concurrent findings of the trial court and the Court of Appeal the motion must fail because there are no procedural or substantive errors of law that will result in miscarriage of justice. He relied on *Lamai v. Chief Okoye* (1983) 3 S.C. 65. *Chikwendu v. Mbamah* (1989) 3-4 S.C. 31 and *Ibodo v. Enarofia* (1980) 5-7 S.C. 42. (1980) 5-7 S.C. (Reprint) 29. C

Counsel submitted on issue No. 4, that there exists no special circumstances to grant the motion. He relied on *Vaswani Trading Co. v. Savalakh and Co.* (1972) 12 S.C. 77; (1972) 12 S.C. (Reprint) 50, *Utilgas Nigeria and Overseas Gas Co. Ltd. v. Pan African Bank Ltd.* (1974) 10 S.C. 195; (1974) 10 S.C. (Reprint) 79, *ACB Ltd v. Ehiemua* (1978) 2 S. C. 219; (1978) 2 S. C. (Reprint) 49 and *Governor of Lagos State v. Ojukwu*, supra. D

On issue No. 5, learned counsel traced the history of what he regarded as non-diligent prosecution of the case in paragraphs 7.1 to 7.5 of the Brief and submitted that as the applicant has not purged himself of the contempt, he cannot seek for the reliefs in the motion. F

On issue No. 6, learned counsel argued that as the applicant has the obligation of proving all the facts pleaded and he failed to do so, Section 22 of the Supreme Court Act, 1960, cannot avail him. He relied on *Nigeria Maritime Services Ltd, v. Alhaji Afolabi* (1978) 2 S.C. 79; (1978) 2 S.C. (Reprint) 53 and *Awoyegbe v. Chief Ogbeide*, (supra). Counsel did not ask for any relief in the respondents' Brief. He merely ended the Brief by stating his nine grounds of opposing the application and ended his not paged Brief with a question thus: *"Can a party who is in contempt of a court order ask for a favour from the court?"* G

The Brief, as it is, is not the best. It has no pagination. That apart, there is no relief sought. As indicated above, the Brief ended H

with a question. Although the Brief is defective, I shall make use of it. In the light of the content of the Brief, it is my feeling that counsel wants this court to dismiss the motion. It is sad that he did not state that in the Brief.

Learned counsel for the applicant relied heavily on Order 2 Rule 28(3) of the Supreme Court Rules. The sub-rule provides:-

“Where an application has been refused by the court below, an application for a similar purpose may be made to the court within fifteen days after the date of refusal.”

The “court below” and the “court” in Order 2 Rule 28(3) mean the Court of Appeal and the Supreme Court, respectively. The rule therefore means that where the Court of Appeal refuses an application, a similar one can be made to the Supreme Court for consideration. It is not my understanding of the sub-rule that this court makes an order on behalf of the Court of Appeal or specifically ask the Court of Appeal to carry out an order it ought to have made in the first place. It is rather my understanding that this court, on its own, can make an order which the Court of Appeal refused to make; as in this case, extension of time to appeal from the decision of the High Court of Lagos State. The sub-rule extends to and involves all interlocutory matters such as stay of proceedings, stay of execution, injunction and bail pending appeal.

I should perhaps pause here to give the genesis of this matter. That will throw better light on the point I am struggling to make. On 3rd August, 2004, applicant by an application asked the trial Judge for an order of injunction restraining the respondents, their agents and privies from taking any action to eject him, his agents and privies from the landed property at No. 49A, Jebba Street, Ebute-Metta, Lagos. The learned trial Judge refused the application. He made a similar application to the Court of Appeal which was also refused. This is therefore the third effort.

In the hierarchy of the court system in the Constitution and in practice, this court has no jurisdiction to make an order that will ignore or by-pass the constitutional position of

the Court of Appeal. This court has no direct link with the State High Courts in the judicial process and therefore has no jurisdiction to make orders that will have such a situation or impact. The Court of Appeal plays an intermediary role as between this court and the High Court of Lagos State or any other State for that matter. B

Let me examine some of the prayers or reliefs in the motion filed by the applicant. Prayer 1 is generic. It is for extension of time to apply directly to this court for all the reliefs which the Court of Appeal refused. As it is, the prayer can hardly be granted in isolation of some of the other prayers. I should therefore take the other prayers. C

In prayer 2, leave is sought to appeal to the Court of Appeal from the judgment of the High Court. How can this court grant leave for the applicant to appeal to the Court of Appeal? Where is the jurisdiction of this court to do so? When did it become the law of procedure for a superior court to grant leave to appeal to an inferior court? I thought it is the reverse position. I can make the same point in relation to prayers 3, 4 and 5. Has this court power to grant the applicant leave to appeal to the Court of Appeal as sought in Prayer 3? Has this court the power to extend time within which to file Notice of Appeal in the Court of Appeal in respect of the decision of the High Court as sought in Prayer 4? Has this court the power to deem the Notice of Appeal filed on 3rd August, 2004, in appeal No. CA/L/512/2004 in the Court of Appeal after the correct filing fee had been paid at the High Court Registry, Lagos, as sought in Prayer 5? The answer or answers to the above questions is a big, No. It is a direct insult on this court to drag it to exercise jurisdiction in such matters within the competence of the Court of Appeal and tantalize this court that it has jurisdiction under Order 2 Rule 28(3) of the Rules of this court. D E F G

In prayer 6, leave of this court is sought to appeal to it on all the grounds of appeal in the Notice of Appeal. ***In another breadth, counsel has urged this court to take the motion as an appeal. Which of these should be obeyed? Prayer 6 asking for leave to appeal or the submission that this court should take the motion as an appeal? Wherever or in whatever way the table turns, this court cannot convert a motion to an appeal. The two are*** H

quite distinct and different court processes. They do not coalesce in anyway. A motion deals with interlocutory matters. Although there are certain appeals which deal with interlocutory matters, this court has not the jurisdiction to convert the motion before it as an appeal.

B And If I may go further, that is the basis of the wrongness of the prayers I have examined. Counsel, on his own and wrongly for that matter, thinks that there is an appeal from the decision of the Court of Appeal. Unfortunately, there is no such appeal. Prayers 6 and 8 are clear on that. In the light of the above, I refuse prayers 1 to 7 which are essentially an abuse of this court. Counsel should not afford that.

D That takes me to the alternative prayers 8 to 12. I should be quick in saying that prayers 8 to 12 clearly come under Order 2 Rule 28(3). In other words, the prayers are clearly vindicated by the provisions of the sub-rule because they are praying this court to make orders which the Court of Appeal refused to make.

E I should take the prayers along with the submissions in the Briefs, particularly the submissions in the respondents' Brief. The granting of an application for enlargement or extension of time within which to appeal is at the discretion of the court, which must be exercised judicially and judiciously. See *Akinyede v. The Appraiser* (1971) 1 All NLR 162, *Alagbe v. Abimbola* (1978) 2 S.C. 39; (1978) 2 S.C. (Reprint) 28, *Obikoya v. Wema Bank Limited* (1989) 1 S.C. (Pt. I) 132; (1989) 1 NWLR (Pt.96) 157.

F The discretion cannot be exercised in vacuo but in relation to the facts and circumstances of the case before the court. The court will take into consideration the following factors:-

G *“(a) An applicant, in the matter, has a right of appeal as of right and therefore does not require leave of court.*

(b) The affidavit in support of the application must give satisfactory explanation for the delay. In other words, the affidavit must show good and substantial reasons for the failure to appeal within the period prescribed. In other words, the affidavit must present some materials before the court to enable it exercise its discretion.

H *(c) The grounds of appeal must show good cause why the appeal should be heard. Once the grounds of appeal prima facie*

show good cause why the appeal should be heard, an application will be granted. The court cannot at this stage consider whether the appeal will succeed. That has to come at the hearing of the appeal.

(d) The justice of the case demands that the appeal should be heard. See Ibodo v. Enarofia, (supra), Ogbu v. Urum (1981) 4 S.C. 1; (1981) 4 S.C. (Reprint) 1; Williams v. Hope Rising (1982) 1-2 S.C. 145; (1982) 1-2 S.C. (Reprint) 70, Nwachukwu v. The State (1986) 2 NWLR (Pt. 25) 165, Mobil Oil (Nig.) Limited v. Chief Agadaigho (1988) 2 NWLR (Pt. 77) 383 and Shittu v. Osibanjo (1988) 7 S.C. (Pt. III) 1; (1988) 3 NWLR (Pt. 83) 483.

An application for extension of time within which to appeal must show that special circumstances exist to justify that the application should be granted. See Osinupebi v. Saibu (1982) 7 S.C. 104; (1982) 7 S.C. (Reprint) 49. A special circumstance is of a particular kind, which is unique, beyond ordinary, regular and or usual circumstance. A special circumstance stands out on its own, punctuated with some amount of specialism.

Mistake of counsel qualifies as a special circumstance. In other words, the court would readily exercise its discretion to extend the period prescribed for doing an act if it is shown to the satisfaction of the court that the failure by a party to do the act within the period prescribed was caused by the negligence or inadvertence of his counsel. See Doherty v. Doherty (1964) 1 All NLR 299, Ahmadu v. Salawu (1974) 11 S.C. 43; (1974) 11 S.C. (Reprint) 33, Bowaje v. Adediwura (1976) 6 S.C. 143; (1976) 6 S.C. (Reprint) 95.

Prayers 7 and 12 are the same. They are for an order of interlocutory injunction. I did not take prayer 7 when I dealt with the first set of prayers. I stopped at prayer 6. I decided to take prayer 7 along with prayer 12. As the prayers are the same, I will drop prayer 7 and take prayer 12. And so prayer 7 goes with prayers 1 to 6.

Interlocutory injunction is procedurally between interim injunction and perpetual injunction. It is an injunction granted by the court pending the determination of the case. The locus classicus is Kotoye v. Central Bank of Nigeria (1989) 2 S.C. (Pt. I) 1; (1989) 1 NWLR (Pt. 98) 419, a decision of this court. In that case, this court held as follows:-

“(a) That the applicant must show that there is a serious ques-

tion to be tried, i.e. that the applicant has a real possibility, not a probability of success at the trial, not with standing the defendant's technical defence (if any). (Obeya Memorial Specialist Hospital v. A-G Federation (1987) 3 NWLR (Pt. 60) 325 followed);

B *(b) That the applicant must show that the balance of convenience is on his side; that is, that more justice will result in granting the application than in refusing it. (Missini v. Balogun (1968) 1 All NLR 318 referred to);*

C *(c) That the applicant must show that damages cannot be an adequate compensation for his damage or injury, if he succeeds at the end of the day;*

(d) That the applicant must show that his conduct is not reprehensible, for example that he is not guilty of any delay;

D *(e) No order for an interlocutory injunction should be made on notice unless the applicant gives a satisfactory undertaking as to damages save in recognized exceptions;*

(f) Where a court of first instance fails to extract an undertaking as to damages, an appellate court ought normally to discharge the order of injunction on appeal."

E See also *Globe Fishing Ind. Ltd, v. Coker* (1990) 11-12 S.C. 80; (1990) 7 NWLR (Pt. 162) 265, *Akibu v. Oduntan* (1991) 2 S.C. 77; (1991) 2 NWLR (Pt. 171) 1, *Sotuminu v. Ocean Steamship (Nig.) Ltd.* (1992) 5 NWLR (Pt. 239) 1, *Ogbonnaya v. Adapalm (Nig.) Ltd.* (1993) 5 NWLR (Pt. 292) 147 and *7-Up Bottling Co. Ltd, v. Abiola and Sons (Nig) Ltd.* (1995) 3 NWLR (Pt. 383) 257.

F ***In the affidavit in support of the motion filed in this court, Chief Oriade, counsel for the applicant, deposed that the lateness in filing the Notice of Appeal was as a result of his mistake. Paragraph 23 deposed as follows:-***

H ***"That the lateness in filing the Notice of Appeal from the decision of the Honourable Court of Appeal of Nigeria dated 23rd January, 2006 and the motion for leave to appeal and an Order of interlocutory injunction was caused by my mistake that I thought that the Notice of Appeal could be filed after a period of (14) fourteen days had elapsed before I realized that the appeal was in respect of an interlocutory decision of the Court of Appeal of Nigeria."***

It is the law that mistakes of counsel cannot be visited on his client. The client is a novice in the law. Counsel is the expert and the only duty of the client is making available to counsel the evidence and the payment of the professional fees. Once he does that, he cannot be made responsible for any mistakes in law. I have cited some cases above. As paragraph B 23 is not controverted by the respondents, I take it as a correct deposition.

One factor for granting interlocutory injunction is the preservation of the res. It is the province of the law that the res should not be destroyed or annihilated before the judgment of the court. The C res in this matter is No. 49B, Jebba Street, Ebute Metta, Lagos.

The two lower courts, the High Court and the Court of Appeal, refused the motion for enlargement of time and interlocutory injunction on the ground that the applicant was in D contempt of the orders of the High Court. The fulcrum of the submission of learned counsel for the respondents is also on a disobeying conduct resulting in contempt. I should therefore take it here. Ruling on the motion on 26th November, 2004, the learned trial Judge, citing Governor of Lagos State v. Ojukwu E (1986) 1 NWLR (Pt. 18) 621, said:-

“In this case, the defendant disobeyed the Court Order and destroyed the res. There is no way of going back to status quo. But the disobedience of the defendant should not be turned into a blessing F since it will tantamount to stealing a match on the claimants who won the case and therefore an attempt to deny them the fruits of their victory.”

The Court of Appeal cited the above and dismissed the motion. The court said:- G

“A party cannot disobey a court order and turn round to seek the court’s equity. That will be taunting the court. The conduct of a party will be taken into account in the exercise of the discretion to grant the injunction. The applicants have not come with clean hands and so are not entitled to be given equity. The application is refused H and it is accordingly dismissed.....”

Where is the evidence of disobedience of court order by the applicant? The 4th respondent, Moninuola Sotomi, in affi-

davit in this court, deposed in paragraph 2 as follows:-

“The case began on 9th December, 1991, when the respondent forcibly entered the premises and demolished some part. Necessary court processes and affidavit of urgency were filed on 11th December, 1991, 2nd day after filing the court processes, an order of an interim injunction was made against the respondent in the form contained in the order of court, a certified true copy of which is hereby produced and marked Exhibit MOA. Another order of interlocutory injunction against the respondent was further confirmed on 21st January, 1993.”

It is clear from the above deposition that the applicant entered the premises and demolished some part of it two days before the court gave order of an interim injunction. This is clear by the two dates of 9th December and 11th December. A subtraction of 9 from 11 gives the answer 2. The deponent, Moninuola Sotomi even clearly deposed to the two days when she said “2nd day after filing the court processes”.

Chief Oriade made the point at the Court of Appeal in his Reply to the motion before that court. He said:-
“I submit that the demolition took place before the order was made,”

The Court of Appeal ignored his submission and dismissed the motion. Courts of law are bound by their records. Courts of law cannot go outside their records which provide the proceedings before them. ***Both the learned trial Judge and the Court of Appeal were bound to consider paragraph 2 of the affidavit of Moninuola Sotomi, which is clearly an admission against interest. I am rather surprised that they did not consider the clear deposition.***

A party can be held liable to disobedience of court order if the disobeying conduct comes after the order of court. A party cannot be held liable of disobedience of a court order if the conduct precedes the order of court. In the latter situation, there is no disobedience because there is in law and in fact nothing to disobey as there was no order to disobey.

Perhaps the point I am making will become clear or clearer if I reproduce the order of the learned trial Judge, which Moninuola

Sotomi, referred to as Exhibit MOA in her affidavit. It reads:-

“UPON THIS MOTION EX-PARTE coming before the Honourable Court:

AND UPON READING the affidavit of Miss Moninuola Sotomi, Female, Nigerian, Citizen of 49B, Jebba Street, East Ebute-Metta, Lagos, sworn to and filed at the High Court Registry. Lagos, on the 9th day of December, 1991. Together with the exhibits attached; AND AFTER HEARING Mr. Lawal of counsel for the plaintiffs/applicants;

AND UPON THE UNDERTAKING given by the plaintiffs/applicants;

AN ORDER OF INTERIM INJUNCTION is hereby made restraining the defendants from further committing acts of trespass on 49B, Jebba Street, East Ebute-Metta, Lagos State and from further demolishing the property pending the hearing and final determination of the Motion on Notice for an Order of Interlocutory Injunction which Motion on Notice shall be filed and served within three days from this date;

The Motion on Notice for an Order of Interlocutory Injunction is hereby fixed for hearing on Wednesday, 18th December, 1991;

IT IS FURTHER ORDERED that leave be and is hereby granted to the plaintiffs to serve the said Motion on Notice together with the Writ of Summons and the Statement of Claim in this suit. DATED at Lagos, this 11th day of December, 1991.

SGD

HON. JUSTICE A. ADE ALABI

JUDGE.”

Learned counsel for the respondents relied on the above order of Alabi, J (as he then was). As it is. Exhibit MOA agrees entirely with paragraph 2 of the affidavit of Moninuola Sotomi on the 11th December, 1991, date as the date when the court made the order of interim injunction. How can an order made on 11th December, 1991, affect a demolition carried out on 9th December, 1991, two days after. The applicant is not God. Only God can know and see what happens after this moment. And the Almighty God has refused to share that element of omniscience with mankind. And so it will remain with God forever.

Learned counsel for the respondents urged this court not to interfere with the concurrent findings of the two courts below. I will not obey counsel. I will interfere with the findings because they are perverse. The two courts wrongly came to the conclusion that the applicant disobeyed the order of the learned trial Judge. That is wrong.

B From whatever angle one looks at this motion, it is clear to me that it has merit. I accordingly grant prayers 8, 9, 10, and 11. Prayer 12 on interlocutory injunction is refused because there is no appeal before us. I also refuse prayers 1, 2, 3, 4, 5, 6 and 7. I award C N50,000.00 costs to the respondents.

OGUNTADE JSC

I have had the advantage of reading a draft copy of the leading ruling by my learned brother, Tobi, JSC. I agree entirely with him. It is necessary for me however to react briefly to the argument of Chief R.A.O. Oriade for the appellant/ applicant as to the import of Order 2 Rule 28(3) of the Supreme Court Rules. The appellant/ applicant had sought for extension of time within which to seek leave to appeal, and extension of time to appeal against the judgment of the High Court.

On 22/1/06, the Court of Appeal, Lagos in its ruling refused the said application. The appellant/applicant in his present application before this court has sought substantially the same reliefs. Chief F R.A.O. Oriade argued before us that the Rule of this court permits an applicant to bring an application directly before this court for leave to appeal against the decision of High court where such an application has been refused by the Court of Appeal. Chief Oriade displayed a G measure of bravado and a self-assurance that he was right in his stand point on the time effect of Order 2 Rule 28(3) of the Supreme Court Rules.

The said Rule provides:-

H *“28(3) where an application has been refused by the court below, an application for a similar purpose may be made to the court within fifteen days after the date of the refusal.”*

Let me start by stressing that in Nigeria, the jurisdiction of courts is derived from the Constitution of Nigeria, 1999 and some specific

laws. The jurisdiction of a court is given in a clear and express language and never to be looked for with a search light. Section 233 (1) to (4) of the 1999 Constitution provides:-

"233 (1) The Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.

(2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases-

'(a) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal;

(b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;

(c) decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be, contravened in relation to any person;

(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentenced of death imposed by any other court;

(e) decisions on any question-

'(i) whether any person has been validly elected to the office of President or Vice-president under this Constitution,

(ii) whether the term of office of President or Vice-President has become vacant and

(f) such other cases as may be prescribed by an Act of the National Assembly.'

(3) Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.

(4) The Supreme Court may dispose of any application for leave to appeal from respect of the Court of Appeal in respect of any civil or criminal proceedings in which leave to appeal is necessary after consideration of the record of the proceedings if the Supreme Court is of opinion that interests of justice do not require an oral

hearing of the application.”

It is patent that the jurisdiction conferred on this court under subsection 3 of Section 233 above is to grant the leave to appeal from the decisions of the Court of Appeal. This court has the jurisdiction to grant leave to appeal from the decision of the Court of Appeal by which that court has refused to grant the leave to appeal from the decision of the High Court. The appellant/applicant in the first leg of his application is praying this court to grant him the leave to appeal not against the judgment of the Court of Appeal but against the judgment of the trial court. This request is premised on the fact that the court below had refused him that request. The plain and direct answer is that this court has no such jurisdiction.

I would therefore agree with the leading ruling of my learned brother, Niki Tobi, JSC., and make the same orders he has made in the said ruling.

TABAI JSC

This Ruling is sequel to a motion which prays for the following reliefs:-

"1. *An order of extension of time pursuant to the provisions of Order 2 Rule 28(3) of the Supreme Court Rules, 1999, within which to apply directly to this Honourable Supreme Court of Nigeria for all the reliefs which were refused by the Court of Appeal of Nigeria in the interlocutory decision dated the 22nd January, 2006, in the application No. CA/L/ 512/2004.*

2. *An order for extension of time within which to seek leave to appeal to the Court of Appeal of Nigeria from the judgment or decision dated 9th of July, 2004, as delivered by the Honourable Justice D.P. Akinsanya (Mrs) in Suit No. LD/2953/91 in the High Court of Lagos State, Lagos Judicial Division.*

3. *An order for leave to appeal to the Honourable Court of Appeal of Nigeria, Lagos Judicial Division from the judgment or decision of the trial court dated 9th of July, 2004, in Suit No. LD/2952/91 in the High Court of Lagos State, Lagos Judicial Division.*

4. *An order for extension of time within which to file the Notice of Appeal and grounds of appeal from the judgment or decision*

of the trial court dated 9th July, in Suit No. LD/2952/91 to the Court of Appeal of Nigeria, Lagos Judicial Division.

5. *An Order to deem as being properly filed and served the Notice of Appeal filed on the 3rd day of August, 2004, in the appeal No. CA/L/ 25 512/2004 after the correct filing fee had been paid at the High Court Registry Lagos. Nigeria.* B

6. *An order for leave to appeal to the Honourable Supreme Court of Nigeria on all the grounds of appeal as set out in the Notice of Appeal dated 7th day of February, 2006, on the ground that they contain mixed law and facts.* C

7. *An order of interlocutory injunction restraining the claimants/respondents and their agents and privies from committing acts of trespass upon or ejecting the applicant and his agents or privies from the landed property in dispute at No. 49B, Jebba Street, Ebute Metta, Lagos, Nigeria pending the determination of the appeal by the Honourable Court of Appeal of Nigeria.* D

THE APPELLANT IN THE ALTERNATIVE TO PRAYERS 1 - 7 ABOVE CLAIMS THE FOLLOWING RELIEFS:-

8. *An order for enlargement of time within which to apply for leave to appeal to the Supreme Court of Nigeria from the interlocutory decision of the Honourable Court of Appeal of Nigeria dated 23rd day of January, 2006, to the Honourable Supreme Court of Nigeria.* E

9. *An order for leave to appeal from the Court of Appeal dated 23rd day of January, 2006, in the appeal No. CA/L/512/04 to the Honourable Supreme Court of Nigeria.* F

10. *An order for enlargement of time within which to appeal to the Honourable Supreme Court of Nigeria from the interlocutory decision of the Honourable Court of Appeal of Nigeria dated the 23rd day of January, 2006, in the appeal No. CA/L/512/04.* G

11. *An order for leave to appeal to the Honourable Supreme Court of Nigeria on all the grounds of appeal as set out in the Notice of Appeal dated 7th day of February, 2006, on the ground that they contain mixed law and facts.* H

12. *An order of interlocutory injunction restraining the claimants/respondents and their agents or privies from taking any action for ejecting the applicant and his agents and privies from the landed property in dispute at No. 49B, Jebba Street, Ebute-Metta, Lagos,*

Nigeria pending the determination of the appeal by the Honourable Supreme Court of Nigeria, Abuja City, Nigeria.”

The application was supported by an affidavit of 24 paragraphs. The respondents also filed a counter-affidavit of 10 paragraphs. For this application the parties through their counsel filed and exchanged
B Briefs of Argument. On the 1/4/2008 in court, Chief R.A.O. Oriade for the appellant/applicant adopted his Brief of Argument and urged that the application be granted. Mr. F. Lawal also adopted the plaintiffs/respondents’ Brief of Argument and urged a dismissal of the application.
C

Let me start with a synopsis of the facts leading to this application. At the Lagos Judicial Division of the High Court of Lagos State, the plaintiffs who are the respondents herein claimed against the defendants who are the appellants/applicants herein three reliefs,
D namely:-

“(1) N500,000.00 being damages for alleged destruction of their church by the defendant;

(2) Perpetual injunction; and

(3) A declaration that the purported sale of the property at No. 48B, Jebba Street, (East) Ebute Metta, Lagos by Mr. Gbeminiyi Sotomi (deceased) without the consent and authority of the plaintiffs is null and void.”
E

The defendants/appellants/applicants also counter-claimed. By the judgment of the court on the 9/7/04 the learned trial Judge D.F. Akinsanya, J., granted the declaration and perpetual injunction but refused the claim for damages. The counter-claim was dismissed.
F

The applicants promptly filed a Notice of Appeal. It was dated 28/7/04. This was followed by a motion dated 3/8/04 by the defendants/appellants/applicants for an interlocutory injunction dispute. By her considered ruling on the 26/11/04 the learned trial Judge refused the injunction sought. Another application for injunction was made at the court below. This application was taken and dismissed on the 23/1/06.
G

Prior to this application which is being considered there is no appeal pending before this court from the ruling of the Court of Appeal. The applicants have now brought this application, submitting forcefully that Order 2 Rule 28(3) of the Supreme Court Rules is
H

their authority for so doing. Can Chief Oriade be right in his submission? Order 2 Rule 28(3) of the Supreme Court Rules provides:-

“28(3) “Where an application has been refused by the court below, an application for a similar purpose may be made to the court within fifteen days after the date of the refusal.”

It is to be noted that an identical provision is made under the Court of Appeal Rules. It is Order 3 Rule 3(3) which also provides:-

“3(3) “Where an application has been refused by the court below, an application for a similar purpose may be made to the court within fifteen days after the date of the refusal.”

Order 2 of the Supreme Court Rules pertains generally to the administration and general procedure of appeals pending therein. And Order 2 Rule 28(3) relates specifically to applications thereat in a pending appeal. Similarly Order 3 Rule 3(3) of the Court of Appeal Rules relates specifically to applications pending in that court. In other words, the Jurisdiction of the Court of Appeal can only be invoked to entertain an application of any kind under Order 3 Rule 3(3) where there is an appeal pending therein. At the Court of Appeal therefore, in view of the appeal pending therein via the Notice of Appeal dated 98/7/04, the defendants/appellants were, by virtue of the provisions of Order 3 Rule 3(3) of the Court of Appeal Rules, at liberty to make the application. The jurisdiction of that court was properly invoked to entertain the application on the 93/1/06.

This court is however not similarly placed. There is no appeal pending here and the jurisdiction of this court not having been invoked, no application can lie here. The pendency of an appeal before this court is a condition precedent to the invocation of Order 2 Rule 28(3) of the Supreme Court Rules to bring an application like the one before us. It is my respectful view therefore that Chief Oriade misconceived the purport of Order 2 Rule 28(3) of the Supreme Court Rules. The result is that the application with respect to relief 1 and the other reliefs flowing there from, that is, reliefs 2, 3, 4, 5, 6 and 7 is incompetent and same is accordingly struck out.

The alternative reliefs sought in prayers 8, 9, 10 and 11 are, in my view, properly before this court and are accordingly granted. Relief 12 is however refused since there is no appeal before this court. For the foregoing and the better reasons comprehensibly set out in the

leading ruling of my learned brother, Tobi, JSC.. I also refuse prayers 1, 2, 3, 4, 5, 6, 7 and 12 which are accordingly struck out. Prayers 8, 9, 10, 11 and 12 are however granted.

I abide by the costs as ordered in the leading ruling.

B

MUHAMMAD JSC

I have read the ruling of my brother, Tobi, JSC. I agree with him that there is some merit in the application. I am in agreement with my brother on his final order which granted some of the reliefs sought by the applicant before the trial court. I too, grant same. I abide by all orders made in the leading ruling.

D

ADEREMI JSC

By his application filed on 4th June, 2007, the appellant/applicant prayed for the following orders set out hereunder;

E “1. *An order for extension of time, pursuant to the provisions of Order 2 Rule 28(3) of the Supreme Court Rules, 1999, within which to apply directly to this Honourable Supreme Court of Nigeria, for all the reliefs which were refused by the Court of Appeal of Nigeria in the interlocutory decision dated the 23rd of January, 2006, in the application No. CA/L/12/2004.*

F 2. *An order for extension of time within which to seek leave to appeal to the Court of Appeal of Nigeria from the judgment or decision dated 9th July, 2004, as delivered by the Honourable Justice D.F. Akinsanya (Mrs.) in Suit No. LD/2953/91 in the High Court of Lagos State, Lagos Judicial Division.*

G 3. *An order for leave to appeal to the Honourable Court of Appeal of Nigeria, Lagos Judicial Division from the judgment or decision of the trial court dated 9th July, 2004, in Suit No. LD/2952/91 in the High Court of Lagos State, Lagos Judicial Division.*

H 4. *An order for extension of time within which to file the Notice of Appeal and the grounds of appeal from the judgment or decision of the trial court dated 9th July, in Suit No. LD/2952/91 to the Court of Appeal of Nigeria, Lagos Judicial Division.*

5. *An order to deem as being properly filed and served the*

Notice of Appeal filed on 3rd day of August, 2004, in the appeal No. CA/L/512/2004 after the correct filing fee had been paid at the High Court Registry, Lagos, Nigeria.

6. *An order for leave to appeal to the Honourable Supreme Court of Nigeria on all the grounds of appeal as set out in the Notice of Appeal dated 7th day of February, 2006, on the ground that they contained mixed law and facts.* B

7. *An order of interlocutory injunction restraining the claimants/respondents and their agents and privies from committing act of trespass upon or ejecting the applicant and his agents or privies from the landed property in dispute at No. 49B, Jebba Street, Ebute Metta, Lagos, Nigeria pending the determination of the appeal by the Honourable Court of Appeal of Nigeria.* C

In the alternative, the appellant/applicant prays for the under-stated five orders: - D

8. *An order for enlargement of time within which to apply for leave to appeal to the Supreme Court of Nigeria from the interlocutory decision of the Honourable Court of Appeal of Nigeria dated the 23rd day of January, 2006, in the appeal No. CA/L512/04.*

9. *An order for leave to appeal from the interlocutory decision of the Honourable Court of Appeal dated the 23rd day of January, 2006, in the appeal No. CA/L/512/04 to the Honourable Supreme Court of Nigeria.* E

10. *An order for enlargement of time within which to appeal to Honourable Supreme Court of Nigeria from the interlocutory decision of the Honourable Court of Appeal of Nigeria dated the 23rd day of January, 2006, in the appeal No. CA/L/512/04.* F

11. *An order for leave to appeal to the Honourable Supreme Court of Nigeria on all the grounds of appeal as set out in the Notice of Appeal dated the 7th day of February, 2006, on the ground that they contained mixed law and facts.* G

12. *An order of interlocutory injunction restraining the claimants/respondents and their agents or privies from taking any action for ejecting the applicant and his agents and privies from the landed property in dispute at No. 49B, Jebba Street, Ebute Metta, Lagos, Nigeria pending the determination of the appeal by the Honourable Supreme Court of Nigeria, Abuja City, Nigeria...* H

I have had a close reading of the first seven orders prayed for and the alternative orders prayed for. In my humble view, the alternative orders prayed for made it very clear the nature of the reliefs the appellant/applicant has approached the citadel of justice for. In essence, it is to exercise his constitutional right of appeal, praying for extension of time to so do. I have looked at the supporting affidavit, the depositions therein make prayers 8,9,10 and 11 eminently meritorious. My learned brother, Tobi, JSC, has exhaustively and admirably set same out in his leading ruling. I cannot improve upon same.

All I need say here if only for the purpose of expounding the principles of law guiding the grant or refusal of this type of application, is that, when a court is invited to make an order extending the time within which to do certain things such as extending the time prescribed by the Rules of Court for taking certain procedural steps, the court must always bear in mind that Rules of Court must, prima facie be obeyed. Thus, to justify the court exercising its discretion in extending the time which is prescribed by Rules of Court to do certain procedural acts, there ought to be materials, call same depositions, in the supporting affidavit explaining the delay in taking timeously, such procedural steps; as Edmund Davies, CJ., said in *Revici v. Prentice Hall Incorporated & Ors.* (1969) 1 AER. 772, quoted with approval by this court in the well-known case of *N.A. Williams Ors v. Hope Rising Voluntary Society* (1982) 1-2 S.C. (Reprint) 70; (1982) 1 ALL NLR (Pt. I) 1, our local classicus on this issue of ‘procedural law thus and I quote him:-

“if no excuse is offered no indulgence shall be granted.”

As I have said, sufficient explanations are contained in the supporting affidavit. And I agree with the decision of my learned brother, Tobi, JSC., that prayers 8, 9, 10 and 11 should be granted. Consequently, I also grant them. However, I shall refuse to grant prayer 12 as there is no appeal yet on board. That prayer is premature. I abide by all other orders contained in the leading ruling including the order as to costs.