

**SUPREME COURT OF NIGERIA**

6TH JUNE, 2008 SC. 28/2002

**CORAM:- G. A. OGUNTADE, F. F. TABAI, I. T. MUHAM-  
MAD, J. O. OGEBE, M. S. MUNTAKA-COOMASSIE, JJSC**

1. CHIDOZIE IFEKANDU ..... APPLICANTS  
2. DANIEL O. OKAFOR  
AND  
JULIUS UZOEGWU ..... RESPONDENT

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APPEALS - Enlargement of time - Considerations - Once good reasons are shown - For failure to appeal within time - Court should grant the prayer - If there is prima facie good grounds of appeal - As right of appeal is constitutional - It should not be readily denied (H1)

**FACTS**

The plaintiff/Respondent sued the Defendants/Applicants at the High Court of Anambra State Sitting at Onitsha, on 22nd February 1977. On 7th October 1994, the court, after hearing, dismissed the Respondent's suit with costs. On appeal by the Respondent, the Court of Appeal set aside the judgment of the trial court and in substitution awarded the Respondent the reliefs he sought. The judgment of the Court of Appeal was delivered on 2nd April, 2001. Dissatisfied, the Applicants filed a Notice of Appeal on 11th May, 2001, against the judgment, containing fourteen grounds of appeal. All the grounds, except the omnibus ground were said to be errors of law. Subsequently, Applicants changed their counsel, bringing in Anyamene, SAN as their new counsel. The learned SAN observed that though the grounds of appeal were tagged errors in law, many of them were in fact grounds of mixed law and fact for which leave must be obtained to appeal thereon .

Consequently, on 5th March 2007, Applicants brought the instant motion seeking sundry reliefs meant to avail them with (1) an extension of time within which to apply for leave to appeal on grounds of mixed law and facts; (2) Leave to appeal; (3) Extension of time within which to appeal; (4) Leave to file and argue three additional grounds of mixed law and facts, and (5) extension of time within

which to file to Appellants' Brief. Before the filing of the said motion however, unknown to applicants, the appeal previously filed by them had been struck out on 5th April, 2006.

**ISSUES FOR DETERMINATION**

*"1. Whether the applicants have given good and substantial reasons for the failure to appeal within time?"*

*2. Whether the applicants have shown prima facie good cause why the appeal should be heard?"*

**HELD** (Unanimously granting prayers (1), (2) and (3) per **OGUNTADE JSC**)

***APPEALS - Enlargement of time***

1. I have given consideration to the arguments of senior counsel who appeared for the parties. It is my view that the applicants have made enough case for the grant of the application. Order 2 Rule 31 of the Supreme Court Rules, provides:-

*"31. (1) The court may enlarge the time provided by these rules for the doing of anything to which these rules apply, or may direct a departure from these rules in any other way when this is required in the interest of Justice.*

*(2) Every application for an enlargement of time in which to appeal or in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period. There shall be exhibited or annexed to such affidavit -*

*'(a) a copy of the judgment from which it is intended to appeal;*

*(b) a copy of other proceedings necessary to support the complaints against the judgment; and*

*(c) grounds of appeal which prima facie show good cause why the appeal should be heard.*

There is no doubt that the applicants have manifested a measure of dilatoriness in the pursuit of this appeal. I bear in mind however, that the right of appeal is derived from the Constitution of Nigeria and ought not to be readily denied to an applicant. Chief Ume, SAN., for the respondent stressed that the applicants had filed a Notice of Appeal even before the judgment of the court below was filed

and that the Notice of Appeal exhibited in this application was not the Notice of Appeal previously filed. He argued further that a previous appeal filed by the applicants was struck out. I do not see these as sufficient reason to refuse the application since a party may file more than one Notice of Appeal provided they are filed within the period allowed by law. (pp. 2558 H/2559 G)

### **RULES REFERRED TO**

Supreme Court Rules, 1999; O. 2 r. 31.

### **REPRESENTATION**

A. N. Anyamene, SAN., (with him; A.C. Anaenugwu and F. N. Udemezue), for the Applicants.

Chief (Dr.) Ejike Ume, SAN., (with him; I. O. Udenko), for the Respondent.

### **LEAD JUDGMENT BY OGUNTADE JSC**

The applicants by their motion filed on 5-3-07, seek the following reliefs:-

*“1. Extending the time within which to apply for leave to appeal against the judgment of the Court of Appeal, Enugu Division delivered on 2nd April, 2001, on grounds of mixed law and facts and or facts;*

*2. Granting leave to appeal against the said decision on mixed law and facts and/or facts alone;*

*3. Extending the time to file notice of appeal against the said decision on mixed law and facts and/or facts alone;*

*4. Granting leave to file and argue three additional grounds of appeal on law and mixed law and facts;*

*5. Extending of the time within which to file the appellants’ Brief in the said appeal;*

*AND for such further and/or other orders as to the court may seem fit.”*

In paragraphs 3 to 9 of the affidavit in support of the motion, the 1st appellant/applicant deposed thus:-

*“3. The plaintiff instituted this suit against me alone on 22nd February, 1977, and on 7th October, 1994, the High Court of An-*

*ambra State sitting in the Onitsha Judicial Division, dismissed the plaintiff's suit with costs.*

B 4. *On appeal by the plaintiff, the Court of Appeal, Enugu Division, set aside the judgment of the High Court and in substitution therefore awarded the plaintiff the reliefs he sought in the suit on 2nd April, 2001.*

5. *The 2nd defendant and I filed Notice of Appeal dated 8th May, 2001, on 11th May, 2001, containing fourteen grounds of appeal, all except the omnibus ground said to be errors in law.*

C 6. *The legal practitioner who handled my defence in the High Court and who represented me in the Court of Appeal filed the said notice and grounds of appeal as well as a motion for stay of execution of the said judgment pending the determination of the appeal to this court.*

D 7. *I then briefed A. N. Anyamene, Esquire, Senior Advocate of Nigeria to handle the appeal. The Record of Proceedings for use in the appeal was forwarded to this court by the Deputy-Chief Registrar of the court below under cover of his letter dated 3rd January, 2002.*

E 8. *Mr. A. N. Anyamene, advises me that though the grounds of appeal were tagged errors in law, many of them are in fact grounds of mixed law and fact for which leave must be obtained to appeal on the said grounds.*

F 9. *No leave to appeal on grounds of mixed law and fact or fact alone was obtained."*

The judgment of the court below and the proposed Notice of Appeal were annexed as exhibits to the application.

The respondent filed a counter-affidavit. Paragraphs 10 to 37 of the counter-affidavit read thus:-

G "10. *That paragraphs 5, 7, 9, 10, 11, 12 and 13 are not correct and untrue, this I verily believe.*

11. *That the applicants have not manifested good faith in this matter, this I verily believe.*

H 12. *That the applicants filed the Notice of Appeal long before the Court of Appeal delivered its judgment in this case.*

13. *That I believe that the Registrar of the Court of Appeal doubted the honesty of the defendants that he wrote on the process 'Time 9.50a.m. on 2/4/2001.*

14. *That by that time, the Court of Appeal had not started sitting and had not delivered any judgment to be appealed against.*

15. *That I herewith exhibit a copy of the said Notice of Appeal, which speaks for itself.*

16. *That the Registrar assessment is shown to be 2-04-2001, the very day of the judgment but before the judgment was actually delivered.* B

17. *That the copy of the Notice of Appeal exhibited in this motion is not a copy of the Notice of Appeal filed in the Court of Appeal, Enugu before the judgment was given that morning.* C

18. *That the said copy of the Notice of Appeal is herewith exhibited and marked Exhibit 'A'. It contains the said endorsements by the Registrar to show it was filed before the judgment of the court was delivered that day.*

19. *That I believe that it was improper for the defendants/appellants to file Notice of Appeal to the Supreme Court in the Court of Appeal long before the Court of Appeal delivered its judgment.* D

20. *That I believe that the defendants/appellants have not manifested any good faith all along to deserve the discretion of this Honourable Supreme Court to be exercised in their favour for the reliefs sought in the motion.* E

21. *That the judgment of the Court of Appeal was delivered since 2nd day of April, 2001.*

22. *That the appellants on the date of the judgment also prepared motion for stay of execution.* F

23. *That a copy of the said motion is herewith exhibited and marked Exhibit 'B', the affidavit in support is also marked Exhibit 'B1'.*

24. *That the plaintiff/respondent's counter-affidavit is exhibited as Exhibit 'C'.* G

25. *That when we came for the motion, the appellants withdrew it and it was struck out.*

26. *The appellants alleged that the appeal had been entered at the Supreme Court when the Record of Appeal had not even been compiled.* H

27. *That I believe that no competent appeal to the Supreme Court had been filed as all the grounds were on facts and at best*

*mixed law and facts.*

28. *That when eventually the appellant filed motions in the Supreme Court, we came to the Supreme Court but when the motions were called up, the appellants again withdrew the motions and they were struck out by the Supreme Court.*

B 29. *That said motions is herewith exhibited as Exhibits ‘D’, ‘D1’.*

30. *That thereafter, the appellants filed yet another motion on the same issue but never took steps to move it.*

C 31. *The motions were abandoned and were struck out by the Supreme Court for want of diligent prosecution.*

32. *That the Order of the Supreme Court striking out the motions is herewith exhibited as Exhibit E.*

D 33. *That as the appellants did not appear to be serious with the appeal all along, the plaintiff/respondent who was being dribbled by the appellants who did not show any seriousness or diligence to prosecute the appeal had no other recourse than to file a motion in the Supreme Court praying the court to dismiss or strike out the appeal.*

E 34. *That this motion was duly served on the appellants.*

35. *That evidence of service of the said motion is herewith exhibited as ‘F’, ‘F1’.*

F 36. *That after due consideration of the motion, this Honourable Supreme Court on the 5th day of April, 2006, formally struck out the appeal.*

37. *That the Ruling of the Supreme Court is herewith exhibited and marked Exhibit ‘G’.*”

On 12th May, 2008, we heard arguments on the application.  
 G Chief A. N. Anyamene, SAN., for the applicants urged us to grant the application. The respondent’s counsel, Chief Ejike Ume, SAN., opposed the application. He stated that, the applicant had in fact filed an appeal before the judgment of the court below was delivered. He urged us to view this as an abuse of the process of the  
 H court. Counsel drew our attention to Exhibit ‘H’ annexed to the counter-affidavit which is photocopy of the order made by this court on 5-04-06, striking out the appeal for want of diligent prosecution.

***I have given consideration to the arguments of senior***

**counsel who appeared for the parties. It is my view that the applicants have made enough case for the grant of the application. Order 2 Rule 31 of the Supreme Court Rules, provides:-**

***“31. (1) The court may enlarge the time provided by these rules for the doing of anything to which these rules apply, or may direct a departure from these rules in any other way when this is required in the interest of Justice.***

***(2) Every application for an enlargement of time in which to appeal or in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period. There shall be exhibited or annexed to such affidavit -***

***‘(a) a copy of the judgment from which it is intended to appeal;***

***(b) a copy of other proceedings necessary to support the complaints against the judgment; and***

***(c) grounds of appeal which prima facie show good cause why the appeal should be heard.***

***(3) When time is so enlarged a copy of the order granting such enlargement of time shall be annexed to the Notice of Appeal.”***

Under the above Rules, I ought to bear in mind two essential matters, namely: -

***“1. Whether the applicants have given good and substantial reasons for the failure to appeal within time?***

***2. Whether the applicants have shown prima facie good cause why the appeal should be heard?”***

**There is no doubt that the applicants have manifested a measure of dilatoriness in the pursuit of this appeal. I bear in mind however, that the right of appeal is derived from the Constitution of Nigeria and ought not to be readily denied to an applicant. Chief Ume, SAN., for the respondent stressed that the applicants had filed a Notice of Appeal even before the judgment of the court below was filed and that the Notice of Appeal exhibited in this application was not the Notice of Appeal previously filed. He argued further that a previous**

***appeal filed by the applicants was struck out. I do not see these as sufficient reason to refuse the application since a party may file more than one Notice of Appeal provided they are filed within the period allowed by law.***

In conclusion, I make the following orders:-

B *“1. Time within which to seek leave to appeal against the judgment of the Court of Appeal, Enugu delivered on 2-04-01, is extended till today.*

*2. Leave to appeal against the said judgment on grounds other than law is granted.*

C *3. Time to appeal against the said judgment is extended by 30 days from today.”*

On 5-4-06, the appeal previously filed by the applicants was struck out. As there is no existing appeal before this court, the 4th D prayer by applicants to file three additional grounds of appeal is inappropriate. It is struck out. In the same manner, the prayer for extension of time to file appellants’ Brief is premature since there is as yet no appeal before this court. Prayer 5 is accordingly struck out.

I award N30,000.00 costs in favour of the respondent.

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### **TABAI JSC**

F I read, before now, the draft of the leading Ruling of my learned brother, Oguntade, JSC., and I agree that the application was premature and liable to be struck out and is accordingly struck out by me also. I also abide by the order on costs in the leading ruling.

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### **MUHAMMAD JSC**

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I have read in advance the ruling just delivered by my learned brother, Oguntade, JSC. I am in agreement with his reasoning and conclusion. The application has merit and it should be granted. I grant the application. I abide by all orders made by my learned H brother, Oguntade, JSC., including order as to costs.

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### **OGEBE JSC**

I read in advance the leading Ruling of my learned brother, Oguntade, JSC., and I agree with it generally.

The applicants showed a lot of laxity in pursuing their appeal which was earlier struck out for want to diligent prosecution by this court. The present application is misleading by seeking reliefs which assume that the earlier appeal is subsisting. Parties seeking the discretion of this court or any court for that matter must come with clean hands. B

In the overall interest of justice I grant the application in terms of the leading Ruling with 30,000.00 (Thirty Thousand Naira) costs in favour of the respondent. C

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### **MUNTAKA-COOMASSIE JSC**

I have read in draft before now the leading Ruling rendered by my learned brother, Oguntade, JSC. No court shall be seen as depriving the litigants the right to appeal a fortiori this court. The law is behind the applicant in this application. Time is extended till today for, the applicant to seek leave to appeal against the judgment of the Court of Appeal. The 4th prayer is turned down in the absence of the appeal before us. I agree also with my Lord Oguntade, that prayer for extension of time to file appellants' Brief is quite premature for the reason that there is no existing appeal before this court same is hereby struck out. D E

I admire the way and manner my Lord resolved the issue of unbridled insinuation that the applicants had filed a Notice of Appeal even before the judgment of the court below was delivered. I agree entirely with conclusions of my Lord on that issue. Let us not hear more of such comments. F G

Application is therefore granted in part. I endorse the orders as to costs as contained in the leading Ruling.

H