

SUPREME COURT OF NIGERIA
6TH JUNE, 2008. SC. 4/2008
CORAM:- N. TOBI, G. A. OGUNTADE, F. F. TABAI,
I. T. MUHAMMAD, J. O. OGEBE, JJSC

NATIONAL INLAND WATERWAYS

AUTHORITY

..... APPLICANT

AND

THE SHELL PETROLEUM

DEVELOPMENT COMPANY

..... RESPONDENT

OF NIGERIA

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 - Unless there are compelling reasons to do otherwise (H1)

FACTS

The plaintiff/applicant commenced suit No. FHC/PH/322/03 at the Federal High Court Port-Harcourt against the Defendant/Respondent. After hearing, though the learned trial court gave judgment to the Applicant, it nevertheless appeared to have resolved some of the issues in the suit against the Applicant. Accordingly the Applicant being dissatisfied with part of the judgment which was not in its favour, filed a cross-appeal. The cross-appeal was initially filed without leave. Before it was ripe for hearing, it dawned on counsel that leave of the court was necessary for the cross-appeal. Whereupon, by a motion dated 28th March, 2006, the Applicant sought extension of time within which to seek leave and within which to cross-appeal before the Court of Appeal. The court refused the prayers. It held that the Applicant's Notice of Appeal was ab-initio void and could not be regularized retrospectively and that every process or proceedings founded on it was incurably bad.

On 30th January, 2007, the Applicant filed another motion before the Court of Appeal seeking substantially the same reliefs as in the earlier dismissed motion. But the motion was struck out as an abuse of the court's process. Applicant promptly applied to the Court

of Appeal for leave to appeal against both the ruling of the court dismissing its motion of 28th March, 2006, and the ruling of the court striking out its motion of 30th January, 2007. But the court allowed the application to lapse. Consequently, applicant has brought the instant motion before the Supreme Court seeking for an order for enlargement of time within which Applicant may apply for leave to appeal against the rulings, an order granting leave to appeal and an order for enlargement of time within which to appeal against the rulings.

ISSUE FOR DETERMINATION

“Whether in the circumstances of this case this Honourable Court ought to exercise its discretion in favour of the applicant by granting the order sought for enlargement of time.”

HELD (Unanimously granting the prayers per **OGEBE JSC**)

APPEALS - Enlargement of time

1. To succeed in an application of this nature, the applicant must establish good and substantial reasons for the failure to apply for leave to appeal within time and the grounds of appeal must prima facie show good cause why the appeal should be heard as provided for in Order 2 Rule 31 of the Supreme Court Rules. From the supporting affidavit it is clear that the applicant applied to the court below within time to appeal from its ruling of 7th November, 2007, but the court allowed the application to lapse. That is why the application came before this court. That shows a good and substantial reason for the delay.

I have examined the proposed grounds of appeal and I am of the view that they prima facie show good cause why the appeal should be heard. See the cases of Agu v. Ayalogu (1999) 6 NWLR (Pt.606) 205, Sale v. Yahaya (1995) 3 NWLR (Pt.382) 242 and Okere v. Nlem (1992) 4 NWLR (Pt.234) 132.

I do not agree with learned senior counsel for the respondent that the application is intended to overreach the respondent because he will have full opportunity to react to the applicant’s appeal if the application succeeds. A party who seriously seeks to exercise his right of appeal should not be shut out unless there are compelling reasons to do so and no such reasons have been shown in this case.

(p. 2590 F)

NOTABLE POINTS OF INTEREST **TOBI JSC**

1. Defect in brief may not be fatal to the brief

Although the Supreme Court held in Orji that failure to formulate issues in a Brief is sufficient by itself to render the Brief incompetent, there is no evidence that the Brief of the respondents was struck out. If anything, the court made use of it. In Echo, beyond the remark that none of the Briefs formulated issues for determination and the need to comply with rules of Brief writing, nothing else happened to the Brief. Again, the court made use of them. In Weide, the trend is similar. Although the court came to the conclusion that the respondent's Brief did not formulate issues, the court made use of it. The court sought refuge in the fact that the adverse party did not raise the issue. But more importantly the court relied on Obiora v. Osele (1989) 1 S.C. (Pt.II) 60; (1989) 1 NWLR (Pt.98) 279, which decided that a defective Brief is a Brief which can be used.

Although the Brief has not formally formulated issue or issues it has clearly addressed the issue or issues in the appeal. I will therefore not discountenance it. I will rather make use of it. (p. 2596 B)

2. Mistake of counsel is a special circumstance

An application for extension of time requires the exercise of the discretionary power of the court and like every other discretionary power, must be exercised judicially and judiciously, that is according to law and the exercise of sound judgment based on the intellectual prowess of the Judge. The applicant must show that special circumstances exist to justify the grant of his application. A special circumstance is not the ordinary, regular or usual circumstance. On the contrary, a special circumstance is a unique circumstance, which is particularly or unusually great. An application for extension of time must contain the relevant materials as set out in Order 2 Rule 31(2) of the Supreme Court Rules. Where the delay in filing the necessary process is as a result of the mistake, negligence or inadvertence of counsel, the court will favourably exercise its discretion in favour of the applicant. (p. 2597 B)

3. Mistake of counsel is a subjective issue

Although the respondent gave further particulars in denial of some of the paragraphs denied in paragraph 36 of the counter-affidavit, the affidavit is silent on paragraphs 5, 6 and 7. I do not think it is enough for the respondent to merely say “I deny paragraphs 5, 6 and 7 without more. The issue of mistake or inadvertence of counsel is subjective; not objective. If counsel deposes that he made a mistake as to the legal position in the matter, I do not think it is available to the adverse party to say that he did not make a mistake. The only avenue open to the adverse party, if it is so, is that the issue was not a mistake of law but a factual blunder which the party, as owner of the facts of the case, must accept full responsibility and not pass the buck to counsel. Unfortunately for the respondent, that is not the situation here. (p. 2598 E)

4. Decision on extension of time is not decision on merits

That takes me to the final issue and it is whether, the refusal of the application for enlargement of time and leave to appeal is a decision on the merit. Merit here means merit of the case. Merit of a case is the substantive consideration to be taken into account in making a decision in contrast to extraneous or technical points especially of procedure. See Garner, A Dictionary of Modern Legal Usage, 2nd edition, page 557. Merit, as a legal term, refers to the strict legal rights of the parties. It is the substance, element or ground of a cause of action or defence. See Black’s Law Dictionary, 6th Edition, pages 989 and 990. In other words, merit is the real or substantial ground of an action or defence in contradistinction to some technical or collateral matter raised in the course of the case. It is in practice a matter of substance as distinguished from a matter of form. A matter of adjectival or procedural nature is generally not on the merits.

With the greatest respect to Chief Akinjide, I do not agree with him that the refusal of the application for enlargement of time is a decision on the merit. It cannot be so. (p. 2600 B)

OGUNTADE JSC

5. Cost not denial is remedy for belated appeal

The learned senior counsel for the respondent in reacting to the application argued that a delay in the early disposal of the appeal would arise if I granted the application; and further, that the application would over-reach the respondents whose standpoint on the appeal the applicant had known. I think that it ought to be borne in mind that the right of appeal is given by the Constitution of Nigeria and that the exercise of such right ought not to be denied too readily to an applicant for leave to appeal. There is no doubt that the delayed exercise of a right of appeal may cause inconvenience and displeasure to the opponent of the applicant but these are matters to be addressed by an award of costs not a denial of the right of appeal. (p. 2602 G) B
C

REPRESENTATION

Etigwa Uwa, for the Applicant. D

Richard Akinjide, SAN., (with him; Kenneth Obisike), for the Respondent.

RULES REFERRED TO

Supreme Court Rules, 1999, O. 2. r. 31(2), O. 6. r. 2(1)(b), (2) & (3) E

BOOKS REFERRED TO:

Black's Law Dictionary, 6th Edition, pages 989 and 990

Garner, A Dictionary of Modern Legal Usage, 2nd Edition, page 557. F

LEAD JUDGMENT BY OGEBE JSC

The applicant brought the application before the court seeking the following reliefs:- G

"1. An order for enlargement of time within which the applicant may apply for leave to appeal against the rulings delivered by the Court of Appeal sitting in its Port Harcourt Division on the 10th day of July, 2006, and the 7th day of November, 2007, in appeal No. CA/PH/342/05. H

2. An order granting leave to the applicant to appeal to the Supreme Court against the said rulings delivered by the Court of Appeal on the 10th day of July, 2006, and the 7th day of Novem-

ber, 2007, in appeal No. CA/PH/342/05.

3. *An order for enlargement of time within which the applicant may appeal to the Supreme Court against the said rulings delivered by the Court of Appeal on the 10th day of July, 2006, and 7th day of November, 2007, in appeal No. CA/PH/342/05, in terms of the proposed Notice of Appeal annexed to the affidavit in support of this application as Exhibit OE6.”*

It was supported by an affidavit that detailed the circumstances which led to the application. Attached to the application are numerous exhibits including the proposed Notice of Appeal and the rulings of the lower court sought to be appealed against. There is also a bulky counter-affidavit filed on behalf of the respondent in opposition to the motion.

The learned counsel for the applicant in his oral argument and Brief of Argument in support of the application submitted that the affidavit sufficiently explained the delay in bringing the application, and that the ground of appeal are substantial in nature. He relied heavily on the case of *Agu v. Ayalogun* (1999) 6 NWLR (Pt.606) 208, and urged the court to grant the application.

The learned senior counsel, Chief Akinjide for the respondent opposed the application in his Brief filed on behalf of the respondent and his oral argument. He argued that granting the application will not only delay the appeal in the Court of Appeal, it will also overreach the respondent’s Reply-Brief in that court.

The arguments in the Briefs of both parties attempt to drag me into delving into the merit of the appeal if and when it is ready for hearing. I shall not fall into that temptation.

To succeed in an application of this nature, the applicant must establish good and substantial reasons for the failure to apply for leave to appeal within time and the grounds of appeal must prima facie show good cause why the appeal should be heard as provided for in Order 2 Rule 31 of the Supreme Court Rules. From the supporting affidavit it is clear that the applicant applied to the court below within time to appeal from its ruling of 7th November, 2007, but the court allowed the application to lapse. That is why the application came before this court. That shows a good and substantial

reason for the delay.

I have examined the proposed grounds of appeal and I am of the view that they prima facie show good cause why the appeal should be heard. See the cases of Agu v. Ayalogu (1999) 6 NWLR (Pt.606) 205, Sale v. Yahaya (1995) 3 NWLR (Pt.382) 242 and Okere v. Nlem (1992) 4 NWLR (Pt.234) 132. B

I do not agree with learned senior counsel for the respondent that the application is intended to overreach the respondent because he will have full opportunity to react to the applicant's appeal if the application succeeds. A party who seriously seeks to exercise his right of appeal should not be shut out unless there are compelling reasons to do so and no such reasons have been shown in this case. C

For all I have said in this ruling, I have no hesitation in granting the application. Accordingly, time is extended till today within which the applicant may apply for leave to appeal against the rulings of the Court of Appeal, Port-Harcourt delivered on the 10th day of July, 2006 and 7th day of November, 2007, in appeal No. AC/PH/342/05. Leave is also granted to the applicant to appeal to the Supreme Court against the said rulings and time is extended by 60 days from today for the applicant to file its' notice and grounds of appeal as proposed in Exhibit OE6. D E

The applicant shall pay costs of N30,000.00 (Thirty Thousand Naira) to the respondent for this application. F

TOBI JSC

In a motion filed on 15th January, 2008, the applicant asked for the following reliefs:- G

"1. An order for enlargement of time within which the applicant may apply for leave to appeal against the rulings delivered by the Court of Appeal sitting in its Port-Harcourt Division on the 10th day of July, 2006 and the 7th day of November, 2007 in appeal No. CA/PH/342/05. H

2. An order granting leave to the applicant to appeal to the Supreme Court against the said rulings delivered by the Court of Appeal on the 10th day of July, 2006 and the 7th day of November,

2007, in appeal No. CA/PH/342/05.

3. An order for enlargement of time within which the applicant may appeal to the Supreme Court against the said rulings delivered by the Court of Appeal on the 10th day of July, 2006 and 7th day of November, 2007, in appeal No. CA/PH/342/05, in terms of the proposed Notice of Appeal annexed to the affidavit in support of this application as Exhibit OE6.”

The motion is supported by an affidavit of 22 paragraphs. The respondent has opposed the motion. It filed a counter-affidavit of 48 paragraphs.

What are the facts leading to this motion? The applicant commenced Suit No. FHC/PH/322/03, at the Federal High Court, Port-Harcourt by way of Originating Summons dated 12th May, 2004. The court gave judgment to the applicant. The applicant, being dissatisfied with part of the judgment which was not in its favour, filed a cross-appeal. The cross-appeal was initially filed without leave. It later dawned on counsel that leave of the court was necessary.

In a motion dated 28th March, 2006, the applicant sought leave and extension of time to cross-appeal. The Court of Appeal refused the motion. Delivering the leading ruling of the court, M.D. Muhammad, (JCA.), said at page 33 of the record: -

“As held in *Macfoy v. UAC supra*, because applicant’s Notice of Appeal is *ab initio void* and cannot be regularized retrospectively every process or proceedings founded on such a nullity is incurably bad. We cannot add to a Notice of Appeal that does not exist all the orders we are asked to make by the applicant and expect same to stay. For all these reasons, I find no merit in the application and dismiss same.”

The applicant filed another motion on 30th January, 2007, for generally the same reliefs. The Court of Appeal struck out the motion “for being an abuse of the court process.” Dissatisfied with the ruling of 20th July, 2006 and 7th November, 2007. The applicant filed a Notice of Appeal. The motion before us is to seek leave to appeal against the two rulings of the Court of Appeal.

Briefs were filed and exchanged. Applicant formulated the following issue for determination:-

“Whether in the circumstances of this case this Honourable

Court ought to exercise its discretion in favour of the applicant by granting the order sought for enlargement of time.”

I do not see any issue or issues formulated in the respondent’s Brief. It is not even stated or indicated in the Brief that the respondent adopts the issues formulated in the applicant’s Brief. And so, this court is asked to make use of a Brief without an issue. I will return to this later. B

Learned counsel for the applicant, Mr. Etigwe Uwa, called the attention of the court to Order 2 Rule 31(2) of the Supreme Court Rules; *Agu v. Ayalogu* (1999) 6 NWLR (Pt.606) 205, *Sale v. Yahaya*(1995) 5 NWLR (Pt.382) 242 and *Okere v. Nlem* (1992) 4 NWLR (Pt.234) 132 and urged the court to grant the motion. Relying on *NDLEA v. Okorodudu* (1997) 3 NWLR (Pt.492) 221 and *Okumagba v. Esisi* (2005) 4 NWLR (Pt.916) 501, counsel submitted that as the failure to appeal within time was the error of counsel, this court should not visit the mistake on the applicant. Counsel argued that the grounds of appeal are substantial and arguable. He relied on *Williams v. Mokwe* (2005) 7 S.C. (Pt.II) 153; (2005) 14 NWLR (Pt.954) 249, *Erisi v. Idika* (1987) 4 NWLR (Pt.66) 503, *Oniwaya v. Ikuomola* CA/L/323N/2006 delivered on 1/4/07 (unreported), *Eyo v. Inyang* (2001) 8 NWLR (Pt.715) 304, *Bedding Holdings Ltd. v. NEC* (1992) 8 NWLR (Pt.260) 428, *Thor Ltd. v. FCMB* (2005) 6 S.C. (Pt.I) 9; (2005) 14 NWLR (Pt. 946) 696 and *Barclays Bank DCO v. Hassan* (1961) 1 All NLR 836. D

Learned counsel submitted that a refusal of an application for extension of time to appeal is not a decision on the merits of the case. He relied on *Mohammed v. Olawunmi* (1993) 4 NWLR (Pt.287) 384 and *Ugwajiofor v. Onyekagbu* (1964) 1 All NLR 124. Learned counsel relied heavily on the case of *Mercantile Group v. Aiyela* (1998) 4 NWLR (Pt.414) 450. He urged the court to grant the motion. E

Chief Richard Akinjide, SAN., submitted that as the applicant’s arguments in support of his application deal substantially with the merits of the appeal, the application has failed to comply with Order 6 Rule 2(l)(b), (2) and (3); which failure is a good ground for the refusal of the application. Rules of practice and procedure do not permit courts to venture into the merit of an appeal when deciding an interlocutory application, learned Senior Advocate argued. F

Learned Senior Advocate submitted that the respondent will be greatly overreached and prejudiced if the application is granted. He claimed that the applicant did not appeal against the argument that the submissions of the applicant in the main appeal are incompetent and should be discountenanced. Counsel pointed out that it was after the applicant read the respondent's Reply Brief that the applicant decided to repair its badly damaged case by filing a second motion at the Court of Appeal seeking leave to appeal against the findings which were not appealed against when the applicant filed its Brief on 24th July, 2006. He said that if the application is granted, factual basis on which the respondent's Reply Brief rested would be destroyed and the goal post shifted to the detriment of the respondent.

On the issue of mistake of counsel, learned Senior Advocate submitted that a litigant takes his counsel, like a Christian marriage, for better and for worse. Where a litigant retains an incompetent and or tardy counsel, the incompetence and or tardiness of such counsel does not, alone, warrant the discretionary indulgence of the court in his favour; more so where a litigant repeatedly retains the same negligent counsel for the same matter as in this case, learned Senior Advocate contended. He relied on Iroegbu v. Okwordu (1990) 9-10 S.C. 199; (1990) 21 NSCC (Pt.111) 377, Geosource (Nig.) Ltd. v. Biragbara (2000) 13 NWLR (Pt.684) 355.

Learned Senior Advocate submitted that Williams v. Mokwem, supra; Mercantile Group v. Aiyela, supra. Ugwajiofor v. Onyekagbu, supra, Mohammed v. Olawunmi, supra, cited by counsel for the applicant are inapplicable. He argued that application for extension of time and leave to appeal was heard on the merits. He relied on Ogolo v. Ogolo (2006) 2 S.C. (Pt.I) 61; (2006) 5 NWLR (Pt.972) 163, IGOP v. Marke (1957) NRNL 89.

Learned Senior Advocate called the attention of the court to the counter-affidavit of the respondent and submitted orally that most of the paragraphs were not denied. He urged the court to admit them. He relied on Attorney-General of Ondo State v. Attorney-General of Ekiti State (2001) 9-10 S.C. 116; (2001) 17 NWLR (Pt.743) 749-750. Counsel finally urged the court to dismiss the motion.

Let me start with the respondents Brief without any issue for-

mulated. In *Orji v. Zara Industries Ltd.* (1992) 1 NWLR (Pt.216) 124, the Supreme Court said at page 146:-

"It is noted that in the respondent's Brief issues for determination were not formulated. Neither were the issues proffered by the appellant adopted..... Failure to formulate issues in a Brief is sufficient by itself to render the Brief incompetent, and arguments canvassed therein would therefore be of no consequence. The Brief becomes irredeemably bad if, as in this case, arguments are not based on any issue or semblance of them."

In *Echo Enterprises Limited v. Standard Bank of Nigeria Limited and Anor.* (1989) 4 NWLR (Pt. 116) 509, the Court of Appeal said at page 512:-

"I wish to remark that in none of the Briefs of Argument filed were any issues for determination raised. There is need to always comply with the rules of Brief writing in order that relevant issues may be considered as a guide."

In *Weide and Co. (Nig.) Ltd. v. Weide and Co. Hamburg* (1992) 6 NWLR (Pt.249) 627, the Court of Appeal said at page 637:-

"But here is a case where for the respondent, without formulating issue or issues in the respondent's Brief, has attacked those in the appellant's Brief. This is the basis of my dilemma. I am in some trouble but I must resolve the issue. And how do I resolve it? That is the question. Order 6 Rule 3 of the Court of Appeal Rules, 1981, as amended by the Court of Appeal, (Amendment) Rules, 1984, provides for the form and contents of a Brief. One essential content is the issue or issues for determination in either the appellant's Brief or in the respondent's brief... In the instant case, the respondent's attitude is tantamount to blowing hot and cold with the same breath. But it is clear to one that the respondent's Brief is defective. What is the effect of that on the entire Brief? Should this court throw the Brief into the dust bin like an unwanted meal? A respondent's Brief is expected in law to perform two main functions... It will not be justice to throw out a Brief merely because it is defective. It is not justice to throw out a Brief merely because it is faulty. It is not justice to throw out a Brief merely because it is inelegantly written. A defective, faulty and inelegant Brief will certainly attract the attention and comment of an appellate court, but beyond that, nothing should happen, un-

less the defect, fault or inelegance of the Brief affects the merits of the appeal. In Obiora v. Osele (1989) 1 S.C. (Pt.II) 60; (1989) 1 NWLR (Pt.97) 279, it was held that the Court of Appeal cannot dismiss an appeal of an appellant on the ground that his Brief of Argument is defective.”

- B Although the Supreme Court held in Orji that failure to formulate issues in a Brief is sufficient by itself to render the Brief incompetent, there is no evidence that the Brief of the respondents was struck out. If anything, the court made use of it. In Echo, beyond the
 C remark that none of the Briefs formulated issues for determination and the need to comply with rules of Brief writing, nothing else happened to the Brief. Again, the court made use of them. In Weide, the trend is similar. Although the court came to the conclusion that the respondent’s Brief did not formulate issues, the court made use of it.
 D The court sought refuge in the fact that the adverse party did not raise the issue. But more importantly the court relied on Obiora v. Osele (1989) 1 S.C. (Pt.II) 60; (1989) 1 NWLR (Pt.98) 279, which decided that a defective Brief is a Brief which can be used.

- Although the Brief has not formally formulated issue or issues
 E it has clearly addressed the issue or issues in the appeal. I will therefore not discountenance it. I will rather make use of it.

Order 2 Rule 31 (2) of the Supreme Court Rules, 1999 (as amended) provides as follows:-

- F “(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 -
 G ‘(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
 H the appeal should be heard.”

Good reason is a satisfactory reason which is in favour or favourable to the case made by the applicant. It is a useful and suitable reason. A substantial reason is an important and material rea-

son. Good and substantial reasons are reasons which will aid the application to success, as the court, as a matter of adjectival law, will grant it.

Grounds of appeal on their mere sight, appearance and face should show good cause why the appeal should be heard. At this stage, the court is restricted to the good cause of the grounds and not whether they have the capacity to propel the appeal to success. That will be tantamount to the court jumping the gun and the court will not do such a thing. That will be decided when the appeal is heard.

An application for extension of time requires the exercise of the discretionary power of the court and like every other discretionary power, must be exercised judicially and judiciously, that is according to law and the exercise of sound judgment based on the intellectual prowess of the Judge. See generally, *Akinyede v. The Appraiser* (1971) 1 AII NLR 162. The applicant must show that special circumstances exist to justify the grant of his application. See *Osinpebi v. Saibu* (1982) 7 S.C. 104; (1982) 7 S.C. (Reprint) 49. A special circumstance is not the ordinary, regular or usual circumstance. On the contrary, a special circumstance is a unique circumstance, which is particularly or unusually great. An application for extension of time must contain the relevant materials as set out in Order 2 Rule 31(2) of the Supreme Court Rules. See *Williams v. Hope Rising* (1982) 1-2 S.C. 145; (1982) 1-2 S.C. (Reprint) 70, *Ogbu v. Urums* (1981) 4 S.C. 1; (1981) 4 S.C. (Reprint) 1. Where the delay in filing the necessary process is as a result of the mistake, negligence or inadvertence of counsel, the court will favourably exercise its discretion in favour of the applicant. See *Alagbe v. Abimbola* (1978) 2 S.C. 39; (1978) 2 S.C. (Reprint) 28; *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.

In paragraphs 5, 6 and 7, Ohirieme Eborieme, the deponent, deposed in the affidavit in support:-

"5. At the time of filing the notice of cross-appeal, counsel had the mistaken belief that the judgment being a final decision, could be appealed against within 3 months as a result of which the said notice of cross-appeal was filed shortly after a month of the delivery of the said judgment."

6. *In the process of writing the Brief of Argument, it became apparent that there was the need to seek for leave to cross-appeal, as at least two of the grounds of appeal appeared to be interlocutory though the said decisions which were subject of the two grounds are comprised in what is titled Judgment of the Federal High Court.*

B 7. *The applicant therefore filed before the Court of Appeal a motion dated 28th March, 2006, for leave and extension of time to cross-appeal together with a deeming order to regularize already filed notice of cross-appeal. The appellant also sought for extension of*
 C *time to file its respondent cross-appellant's Brief of Argument. The reason advanced for the lateness was mistaken view of counsel as to the nature of the decisions appealed against as well as ill health and pressure of work of counsel. Now produced and marked Exhibit OE1 is a copy of the said application dated 28th March, 2006...*

D What was the reaction of the respondent to the above paragraphs? They were amongst the paragraphs denied in paragraph 36 of the counter-affidavit in the following terms:-

"The defendant/applicant (SPDC) denies paragraphs... 5, 6, 7... of the plaintiff's affidavit in support of the application."

E Although the respondent gave further particulars in denial of some of the paragraphs denied in paragraph 36 of the counter-affidavit, the affidavit is silent on paragraphs 5, 6 and 7. I do not think it is enough for the respondent to merely say "I deny paragraphs 5, 6
 F and 7 without more. The issue of mistake or inadvertence of counsel is subjective; not objective. If counsel deposes that he made a mistake as to the legal position in the matter, I do not think it is available to the adverse party to say that he did not make a mistake. The only
 G avenue open to the adverse party, if it is so, is that the issue was not a mistake of law but a factual blunder which the party, as owner of the facts of the case, must accept full responsibility and not pass the buck to counsel. Unfortunately for the respondent, that is not the situation here.

H Learned Senior Advocate cited two cases on the mistake of counsel in his Brief. One is Iroegbu v. Okwordu (supra). The other is Geosource (Nig.) Ltd. v. Biragbara (supra). In Iroegbu, learned Senior Advocate quoted the following passage by Agbaje, JSC:-

"What respondent opposing an application for extension of

time to appeal must show? It appears to me that where there are catalogue of mistakes on the part of the legal practitioner acting for a litigant, as it is now being alleged, the correct approach to the mistake vis-a-vis an application for an extension of time to appeal, is to find out whether having regard to those mistakes, there is a probability of miscarriage of justice accruing if the indulgence sought by the litigant is granted."

There are no catalogue of mistakes in the case. It is only one mistake and it is the one deposed to in paragraph 5 of the affidavit in support. That apart, Agbaje, JSC., held that where there is the probability of miscarriage of justice, an application for extension of time should be granted. I am of the view that there will be a miscarriage of justice if the application is not granted in the light of the deposition in paragraphs 5, 6 and 7 of the affidavit in support.

And that takes me to the next case - Geosource (Nig.) Ltd. v. Biragbara. In that case what Pats-Acholonu and Ogebe, JJCA., (as they were then) said are not helpful to the respondent because they are *obiter dicta*. Pats-Acholonu said that he "*would have most certainly dismissed the application for lacking merit, if the facts have shown demonstrable laxity bothering on crass irresponsibility or carelessness of any eventual consequences.*" He did grant the application. And so, I ask: why Geosource (Nig.) Ltd.? Even if Geosource (Nig.) Ltd. decided to the contrary, I should have not accepted the decision, being a Court of Appeal decision, in the light of the plethora of decisions of the Supreme Court on the issue. I must however say that there are exceptions to the principle of law that mistakes of counsel should not be visited on his client. This case however, does not come within the exceptions.

Let me take the submission of learned Senior Advocate on the issue of the applicant trying to overreach the respondent. Overreach means to circumvent, outwit or get the better of something by cunning or artifice. It also means to defeat one's object by going too far. It connotes smartness on the part of a party in the litigation to defeat his opponent by a thoroughly organized plan to frustrate the intention and intendment of the adverse party. An overreaching conduct is an inequitable conduct because it is not fair and just.

What is the overreaching conduct of the applicant that the re-

spondent is complaining of? It is the submission of learned Senior Advocate that the second motion of the applicant was designed to cure the incompetence of the Brief of the applicant arising from the badly damaged case. The applicant does not seem to agree with that. And so there is a dispute which should be determined by the court.

B And the only way to determine that is to grant the application for extension of time to appeal against the two rulings of the Court of Appeal.

C And that takes me to the final issue and it is whether, the refusal of the application for enlargement of time and leave to appeal is a decision on the merit. Merit here means merit of the case. Merit of a case is the substantive consideration to be taken into account in making a decision in contrast to extraneous or technical points especially of procedure. See Garner, A Dictionary of Modern Legal Usage, 2nd edition, page 557. Merit, as a legal term, refers to the strict legal rights of the parties. It is the substance, element or ground of a cause of action or defence. See Black's Law Dictionary, 6th Edition, pages 989 and 990. In other words, merit is the real or substantial ground of an action or defence in contradistinction to some technical or collateral matter raised in the course of the case. It is in practice a matter of substance as distinguished from a matter of form. A matter of adjectival or procedural nature is generally not on the merits.

F With the greatest respect to Chief Akinjide, I do not agree with him that the refusal of the application for enlargement of time is a decision on the merit. It cannot be so. He cited Akinyede v. The Appraiser, supra; and Ogolo v. Ogolo, supra and IGP v. Marke, supra. None of the cases decided that a refusal of an application for enlargement of time is a decision on the merit.

G Counsel cited the conclusions of M. D. Muhammad and Thomas, JJCA., in the ruling of 10th July, 2006. In paragraph 33 of the record, Muhammad, JCA., said:-

"I find no merit in the application and dismiss same....."

Thomas, JCA., said at page 34 of the record:-

H *"I entirely agree that the appeal is unmeritorious and it deserves dismissal and is so dismissed."*

While Muhammad, JCA., dismissed the application for lacking merit, Thomas, JCA., dismissed "*the appeal*". As there was no appeal

before the court, Thomas, JCA., was wrong in dismissing “*the appeal*.” He said that he agreed with Muhammad, JCA., and if he agreed with him, he ought to have dismissed the application, not “*the appeal*”. Having said that, since it was the application that was dismissed by Muhammad, JCA., such a dismissal is not on the merit of the case. The dismissal was purely procedural and has nothing to do with the substantive matter. B

Learned counsel for the applicant heavily relied on The Mercantile Group AG v. Aiyela. I will not take it at this interlocutory stage because it has so much to do with the merits of the second ruling of the Court of Appeal. This is more so when the case has nothing to do with merits of this application for extension of time. C

Learned Senior Advocate submitted orally that as the counter-affidavit was not contested, this court must take the depositions as true. He cited Attorney-General of Ondo State v. Attorney-General of Ekiti State, supra. When asked by the court to refer the court to the appropriate paragraph of the respondent’s Brief, he asked the court to put it in a new paragraph 7.5. As the issue was not argued in the Brief, the case cannot go to any paragraph. It is good law that parties are bound by their Briefs and parties can only add to their Briefs with leave of the court. As learned Senior Advocate did not seek leave to add a paragraph 7.5, this court did not grant it. D E

It is for the above reasons and the fuller reasons given by my learned brother, Ogebe, JSC., in his ruling that I too grant the motion dated 11th January, 2008 and filed on 15th January, 2008, for enlargement of time to appeal against the two rulings of the Court of Appeal. I abide by his order on the motion filed on 15th January, 2008. I also abide by his order as to costs. F

G

OGUNTADE JSC

This is an application for the following :-

“(1) *An order for enlargement of time within which the applicant may apply for leave to appeal against the rulings delivered by the Court of Appeal sitting in its Port Harcourt Division on the 10th day of July, 2006 and the 7th day of November, 2007, in appeal No. CA/PH/342/05.* H

(2) An order granting leave to the applicant to appeal to the Supreme Court against the said rulings delivered by the Court of Appeal on the 10 day of July, 2006 and the 7th day of November, 2007, in appeal No. CA/PH/342/05. ”

B In this court, I should, in considering the application be guided by Order 2 Rule 31 of the Supreme Court Rules, which 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.

C *(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

E *(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. ”

F The pertinent questions I should ask myself are:-

“1. Has the applicant shown good reasons for the failure to appeal within time?

2. Do the grounds of appeal raised in the proposed Notice of Appeal show good cause why the appeal should be heard?”

G The learned senior counsel for the respondent in reacting to the application argued that a delay in the early disposal of the appeal would arise if I granted the application; and further, that the application would over-reach the respondents whose standpoint on the appeal the applicant had known. I think that it ought to be borne in H mind that the right of appeal is given by the Constitution of Nigeria and that the exercise of such right ought not to be denied too readily to an applicant for leave to appeal. There is no doubt that the delayed exercise of a right of appeal may cause inconvenience and

displeasure to the opponent of the applicant but these are matters to be addressed by an award of costs not a denial of the right of appeal.

I would therefore grant the application as in the leading ruling of my learned brother, Ogebe, JSC. I subscribe to the order made on costs in the leading ruling.

B

TABAI JSC

I read, in advance, the draft of the leading ruling prepared by my learned brother, Ogebe, JSC., and I agree entirely with the reasoning and conclusion. An application for enlargement of time within which to apply for leave to appeal is one which calls for the court's exercise of discretion and which exercise depends on the peculiar facts and circumstances of the case.

C

The relevant provision for applications of this nature is Order 2 Rule 31 of the Supreme Court Rules, which provides:-

D

"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.

E

(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:-

F

'(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."

G

For the court to exercise its discretion to enlarge time within which to appeal or in which to apply for leave to appeal, the supporting affidavit must show good and substantial reasons for the failure to appeal within the period stipulated by the rules.

H

In this case paragraphs 5, 6 and 7 of the affidavit in support of the application constitute the reason for the appellant's failure to appeal within time. Mistake of counsel is the reason for the delay. Does

- this projected mistake of counsel qualify as a good and substantial reason to justify the court's exercise of its discretion in favour of granting the enlargement sought? I am inclined to answer this question in the affirmative. The determination as to whether a ground of appeal is one of law or facts or of mixed law and facts is a highly technical one beyond the comprehension of the non-lawyer litigant. It is a difficult and complex problem for legal practitioners and Judges alike. The respondents in their counter-affidavit merely denied these paragraphs without giving details why the court ought not to be persuaded by the assertions. In my view the mistake or inadvertence of counsel as the reason for the delay has not been successfully impeached by the respondents. In such circumstances I would like to exercise the discretion in favour of granting the extension sought. In my view granting the application best serves the ends of justice in this case.
- For these and the fuller reasons contained in the leading ruling of Ogebe, JSC., I also grant the application.

MUHAMMAD JSC

- My learned brother, Ogebe, JSC., has afforded me the opportunity to read before now, the ruling just delivered. I am in agreement with him that the application has merit and should be granted. I too grant the application. I abide by all orders made by his Lordship in the ruling including order as to costs.

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