

SUPREME COURT OF NIGERIA
22ND MAY, 2009, SC. 29/2007
CORAM :- D. MUSDAPHER, F. F. TABAI,
I. T. MUHAMMAD, P. O. ADEREMI,
M. S. MUNTAKA-COOMASSIE, JJSC

JOE UWAGBA APPELLANT
V.
FEDERAL REPUBLIC OF NIGERIA RESPONDENT

JUDGMENTS - Res judicata - Applicability - It does not apply as the earlier judgment did not make a decisive pronouncement - On validity of order making the presence of appellant mandatory on hearing date (H1)

APPEALS - Right of - Applicability of Rules of Court - Decisions under Failed Banks Decree - Provisions of the Decree are special in nature - Therefore while exercising jurisdiction thereunder - Court of Appeal could not resort to rules of court (H2)

APPEALS - Right of appeal - Source & implication - It can only be conferred by statute - So where the Constitution has donated a right of appeal - Without any condition - Court of Appeal can not lay such a condition (H3)

ORDERS OF COURT - Without jurisdiction - Competency - Orders of court has to be lawfully & competently made - An order made without jurisdiction is a nullity ab initio (H4)

COURTS - Crime - Trials in absentia - Failed Banks Decree - Propriety - S. 27 of the Decree clearly permits such proceedings - To the extent of executing orders arising therefrom (H5)

FACTS

The appellant was arraigned and tried on a three-count charge before the Enugu zone of the Failed Banks Tribunal. The appellant was away abroad at the time he was charged and remained away throughout his trial. He was eventually convicted. He became aware

1440 *Uwagba v. FRN* (2009) 5 KLR (pt. 267) 1439; (2009) 15 NWLR of the judgment after the time reserved for appeal had passed. Without taking steps to comply with the terms of the judgment, appellant instructed his counsel to apply for extension of time within which to appeal, even while he was still abroad. A preliminary objection was raised against the application on the ground that the applicant was a contemnor who should not be heard. The objection was overruled and the application granted upon a condition that appellant be personally present on date of hearing the appeal.

Dissatisfied, appellant appealed against the attached condition but the Supreme Court held that it was misconception of the order by the Court of Appeal, for the appellant to tie his right of appeal to the said condition as he had already been afforded the right of appeal by the said order notwithstanding the condition. Consequently, the parties went back to the Court of Appeal to pursue the appeal thereat. But when the court refused to hear the appeal for failure of appellant to obey the attached condition, appellant brought the instant appeal against the refusal of the Court of Appeal to hear the appeal on that ground. To this appeal, the respondent has raised an objection that the Supreme Court was functus officio in respect of the question.

ISSUE FOR DETERMINATION

“Whether the lower court has jurisdiction to make the presence of the appellant in court a condition for the hearing of his appeal?”

HELD (Unanimously allowing the appeal per **MUHAMMAD JSC**)
JUDGMENTS - Res judicata - Applicability

1. I cannot see in that judgment where this court made a decisive pronouncement on the validity or otherwise of the order made by the court which made the presence of the appellant mandatory on the date his appeal would be heard. The right of appeal was something different and the condition that appellant be personally present on the date the appeal would be heard was another different thing entirely. The former was exercised by the appellant and his appeal was entered by the court below. The appellant, however, did not comply with the latter and he appealed against it which gave rise to the instant appeal. Thus, this appeal is to determine the validity of the latter order that appellant must be present personally in the court below before his appeal could be heard. Our earlier decision in appeal No. SC. 199/

2001, did not in anyway decide the validity of that order. Therefore, this court has not given any decision on that order. The appellant thus, has every right to approach this court for a decision on that order given by the court below. (p. 1447 G/1448 A)

APPEALS - Right of - Applicability of Rules of Court

2. The provisions of the Decrees (Acts) set out above are special in nature and they deal with special cases. It cannot therefore be said that the Court of Appeal, while exercising its jurisdiction, could resort to its ordinary Rules of Court. I therefore fail to see the relevance of section 28 of the Court of Appeal Act, nor Order 4 Rule 14(5) of the Court of Appeal Rules, which, according to learned counsel for the respondent, could be relied upon by the court below to compel the personal and physical presence of the appellant in the Court on the date fixed for hearing his appeal. It is also clear from the enabling laws that the court below was not conferred with jurisdiction to compel the personal appearance of the appellate when his appeal is to be heard. (p. 1450 E)

APPEALS - Right of appeal - Source & implication

3. The position of the law has been re-stated severally that jurisdiction is an all-important issue that the court cannot confer it upon itself when the enabling statute has not done so. The parties, even where they consent to do so, cannot confer jurisdiction on a court where the enabling statute has not done so. It can only be conferred by statute. As the Constitution and other enabling statutes have donated right of appeal on a party who is aggrieved by the decision of a court of trial or tribunal or other courts or tribunals (as the case may be) which entertain appeals, without laying any condition which may hinder or inhibit the hearing of the appeal, it will be stretching the law to an unimaginable distance for the court below to lay such a condition. (p. 1450 H)

ORDERS OF COURT - Without jurisdiction - Competency

4. It is not the aim of a court to punish a litigant before finding him liable or guilty to the claim or charge made against him. I know it may be touchy and sensational for a court to remain a toothless-bull-dog where a litigant disobeys a court order. But I must add that such court's

order has to be lawfully and competently made. Where an order is made by a court without jurisdiction that order is a nullity AB INITIO. (p. 1451 C)

Crime - Trials in *absentia* - Failed Banks Decree - Propriety

B 5. Section 27 of Decree 18 of 1994 made the following provision:

“27(1) The absence from Nigeria of a debtor or of a person who has committed an offence under this Decree shall not prevent his case being heard and determined or his being tried and convicted under this Decree.

C *(2) An order of the Tribunal made pursuant to a hearing or trial under subsection (1) of this section shall, where expedient, be executed in the absence of the debtor or person convicted, but the commencement of a sentence of imprisonment shall be deferred until*
D *his return to Nigeria.”*

Thus, the appeal could be pursued to its logical conclusion by the court below even in the absence of the appellant from this country and he can be convicted. All orders given by the court against the appellant could be executed in his absence except if it is a sentence of
E imprisonment which shall be deferred until his return to the country. That indeed is what the law prevailing provided. The provisions are clear enough requiring no importation of any rule or interpretation apart from the natural rule. (p. 1451 F)

F

NOTABLE POINTS OF INTEREST

TABAI JSC

1. Issue estoppel - The instant issue is distinguishable from the former

G It is clear from the above that the issue determined by this Court in the previous Suit No. SC. 119/2001 in its judgment on the 4th of July 2002 was whether the order of the Court of Appeal about the personal presence of the appellant at the hearing of the appeal constituted a clog or an impediment in the Appellant's right of
H appeal. That issue, in my humble view, is quite distinct from the present issue of whether the Court below had the jurisdiction to make the order. I hold therefore that the issue before this Court cannot be said to have been decided in the earlier suit. (p. 1455 E)

2. Courts declare the law not what the law should be

The court below apparently made the order because it thought it was necessary and/or reasonable so to do. It is however settled principle of law that in its interpretative function the court is bound to limit itself to what the law is and not what the law ought to be. Expounding on this principle of interpretation in *GARUBAABIOYE & ORS v SA'ADU YAKUBU & ORS* (1991) 5 NWLR (Part 190) 130 at 153 this Court per Olatawura JSC stated:-

"It is not a derogation of the powers of judges if they, and rightly too, limit themselves to the interpretation of the Act. What the law ought to be is outside the function of the Judges. What the law is found in their judgments...." (p. 1457 B)

ADEREMI JSC**3. A party cannot be held absent when his counsel is in court**

Generally, when a party to a proceeding engages the services of a counsel, he has the discretion to appear in person along with his chosen legal practitioner or he may be represented by the legal practitioner alone. Such a party cannot be held to be absent in Court if his counsel or other permitted representative is present in court. (p. 1460 D)

MUNTAKA-COOMASIE JSC**4. Court of Appeal cannot compel presence of appellant in court for hearing**

The authorities cited by my learned brother, with respect, are apt and un-assailable. The court below cannot in law have jurisdiction or power to make such order i.e. court below cannot compel the presence of the appellant in court on the hearing of his appeal. Let us stick to our power as donated to us by the relevant provisions of the constitution or statutes. (p. 1461 B)

REPREENATION

Chief A. Olujinmi, SAN for the appellant, with him; Kola Wole Esan, Esq., C. O. Ekwamaru, Esq., Segun Olujinmi Esq., Sewun Onolade (Mrs.), Olufemi Atetedeye, Esq.

Chief F. O. Orbih for the respondent with him; Abu Yunusa, Esq.

CASES REFERRED TO

- Adigun & Ors v. Governor Osun State (1995) 3 NWLR (Pt.385) 513
 The Federal Government of Nigeria & Anor v. Lord Chief Udensi Ifegwu (2003) 5 SCNJ 217
 B Lakanmi v. Adene and Others (2003) 4 SCNJ 348
 Kotoye v. Saraki (1994) 9 NWLR (Pt.357) 414 D - R
 IBWA v. Imano Nig. Ltd. (1988) 3 NWLR (Pt.85) 633 at 651
 ORUBU v N.E.C. (1988) 5 NWLR (Part 94) 323
 C AFRICAN NEWSPAPERS v NIGERIA (1985) 2 NWLR (Part 6) 137
 OJOKOLOBO v ALAMU (1987) 3 NWLR (Part 61) 377
 GARUBA ABIOYE & ORS v SA'ADU YAKUBU & ORS (1991) 5 NWLR (Part 190) 130 at 153
 ADEYEMI V. Y.R.S. IKE-OLUWA & SONS LTD. (1983) 8 NWLR D (pt.309) 27

STATUTES & RULES REFERRED TO

- Banks and other Financial Institutions Decree, No. 25 of 1999
 Constitution of the Federal Republic of Nigeria, 1999, ss. 235 & 243
 E Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, s. 27
 Tribunals (Certain Consequential Amendments, etc.) Decree No. 62 of 1999
 Court of Appeal Act, s. 28
 F Court of Appeal Rules, O. 4 r. 14 (5)

LEAD JUDGMENT BY MUHAMMAD JSC

- The appellant was the General Manager of Prime Merchant
 G Bank. He, along with two others, were charged before the Enugu Zone of the Failed Banks Tribunal, with the offences of conspiracy to steal and stealing various sums of money amounting to about N878,000,000.00 (Eight Hundred and Seventy Eight Million Naira).
 He was also charged with failure to take reasonable steps to secure
 H compliance by Prime Merchant Bank Ltd. with requirement of the Banks and other Financial Institutions Decree (Act) No. 25 of 1999.
 The appellant was away abroad at the time he was charged before the Tribunal and remained away throughout his trial and conviction. According to the learned counsel for the appellant, the ap-

pellant became aware of the judgment against him on 20/10/1999. He took no steps to comply with the terms of the judgment.

While still abroad, the appellant instructed his counsel to file an application for extension of time to file his appeal. A preliminary objection was raised against the application on the ground that the applicant was a contemnor who should not be heard. The preliminary objection was over ruled by the court below on 30/4/2000. Application for extension of time to appeal was subsequently heard and granted by the court below with a condition that the appellant should be in court on the date of hearing the appeal.

Dissatisfied with that aspect of the ruling (i.e. presence of the appellant in court on the date of hearing the appeal by the court below), the appellant appealed first to this court in SC. 199/2001. The appeal was dismissed by this court on the 4th day of July, 2002.

After the dismissal of Appeal No. SC. 199/2001, by this court, the parties (who were the same as in the present, appeal), went back to the court below to settle briefs of argument. On the day fixed by the court below for the hearing of the appeal, the appellant failed to appear in court. This prompted the respondent's counsel to remind the court below of its previous order to the effect that the appellant must appear personally before it at the hearing of his appeal. The court below insisted that its earlier order that the appellant be present in court on the hearing date be complied with. Being dissatisfied with that order the appellant appealed again to this court.

Briefs were filed and exchanged by the parties in this appeal with the appellant filing a reply brief. In his brief of argument the learned senior counsel for the appellant, Chief Olujinmi (SAN), asked the following sole question:

"Whether the lower court has jurisdiction to make the presence of the appellant in court a condition for the hearing of his appeal?"

Learned counsel for the respondent raised a Preliminary Objection. The grounds of the objection and arguments in respect of the objection were embedded in the respondent's brief of argument. (I shall come back to the Preliminary Objection in due course). Learned counsel for the respondent formulated an issue in the event he is overruled on his Preliminary Objection. The issue he formulated for the determination of the appeal reads as follows:

“Whether the court below had the Jurisdiction to impose a condition that the appellant should be present during the hearing of his appeal.”

The Notice of Preliminary Objection filed by the respondent on 2/10/08 reads as follows:

B *“TAKE NOTICE that the Respondent/Appellant shall at the hearing of this Appeal raise the following preliminary objection to wit:*

C *This Appeal is incompetent and ought to be struck out for want of jurisdiction on the part of this Honourable Court to entertain it.*

GROUNDS OF OBJECTION

D *(1) The issue for determination in this interlocutory appeal had earlier been fully and effectively dealt with by this Honourable Court in its judgment, in a previous interlocutory appeal No. SC/119/2001 between JOE UWAGBA V. FEDERAL REPUBLIC OF NIGERIA.*

(2) The parties in Appeal No. SC/119/2001 are the same with the parties in this suit,

(3) This Honourable Court lacks the jurisdiction to review its judgment in Appeal No. SC/119/2001.”

E While arguing the Preliminary Objection in his brief of argument, the learned counsel for the respondent, Chief Orbih, stated that the Parties in Appeal No. SC. 199/2001 and the present appeal are the same. In both appeals the appellant’s complaint was that the
F court below lacks the jurisdiction to order the appellant to be present in court at the hearing of his appeal as this court had fully and effectively determined the issue in the instant appeal in its judgment on the previous appeal No. SC. 199/2001. Learned counsel submitted further that having regard to the judgment in that appeal, there is
G nothing new in the instant appeal for this court to decide as the court had stated emphatically that the condition that the appellant appear at the court below during the hearing of his appeal neither constituted a clog in the wheel of his right of appeal nor was it made without jurisdiction. Learned counsel urged that this court should decline
H the invitation by the appellant to review its previous decision in appeal No. SC. 199/2001. He cited the case of Adigun v. Local Government & Anor (1999) 8 NWLR (Pt.613) 30 at 37 - 80. Adigun & Ors v. Governor Osun State (1995) 3 NWLR (Pt.385) 513 at 536. Learned counsel finally submitted that the finality of the judgment of

this court rests on the pillars of Section 235 of the 1999 Constitution and that we should strike out the instant appeal as being incompetent and a gross abuse of the processes of this court.

In his reply brief filed in this court on 31/10/08, the learned SAN for the appellant, submitted that while it is conceded that in the notice of appeal at page 33 of the supplementary record the issue as to the jurisdiction of the lower court to attach a condition to the leave to appeal granted to the appellant, that he should be present in court on the date of hearing of his appeal was distinctly raised, that issue was never decided by this court. After quoting some excerpts from the leading and concurring judgments of the court in appeal No. SC. 199/2001 the learned SAN said that their Lordships held the view that the ruling of the lower court was misconceived as no condition was attached to the appellant's right to file his notice of appeal following the leave granted and that this court distinguished between the filing of the notice of appeal per se and the time for the hearing of the appeal. He argued further that based on that decision, when the appellant's appeal came up in the lower court on 31/1/07 and the lower court insisted that the appellant must comply with the order of the court to be present personally at the hearing of the appeal, the issue was brought up afresh by the lower court and the appellant was entitled to pursue this appeal to decide that issue. Since this court did not decide in the earlier appeal, one way or the other the issue of the jurisdiction of the lower court to order the appellant to be personally present at the hearing of his appeal, the appellant could challenge the order that he should be personally present at the hearing of his appeal as he was not estopped in any way by the earlier decision of this court. He urged this court to overrule the objection of the respondent.

I read the earlier judgment of this court in appeal No. SC. 199/2001 which was made available to us by learned counsel for the appellant. ***I cannot see in that judgment where this court made a decisive pronouncement on the validity or otherwise of the order made by the court which made the presence of the appellant mandatory on the date his appeal would be heard.*** My understanding of the orders made in that judgment was simply that the appellant could exercise his right of appeal and he in fact did appeal to the court below. It was a misconception by the appellant to

tie his right of appeal to the condition laid by the court below that he be personally present in court before his appeal could be heard. All the Justices that were on the panel that heard the appeal in this court expressed same view. Thus, ***the right of appeal was something different and the condition that appellant be personally present on the date the appeal would be heard was another different thing entirely. The former was exercised by the appellant and his appeal was entered by the court below. The appellant, however, did not comply with the latter and he appealed against it which gave rise to the instant appeal. Thus, this appeal is to determine the validity of the latter order that appellant must be present personally in the court below before his appeal could be heard. Our earlier decision in appeal No. SC. 199/2001, did not in anyway decide the validity of that order. Therefore, this court has not given any decision on that order. The appellant thus, has every right to approach this court for a decision on that order given by the court below.*** The preliminary objection of the respondent lacks merit and it is hereby overruled.

I shall now consider the lone issue upon which this appeal was predicated. I think a very convenient point in starting the consideration of this appeal is the judgment of the court below which was delivered on 25/4/2000, by Akpabio JCA (of blessed memory). The learned JCA held, inter alia:

“We have carefully considered all the arguments canvassed in this application, right from day one by teamed counsel on both sides, and find that in view of the Constitutional right of appeal given to every citizen of this country, including even murderers, the appellant cannot be denied his opportunity to prove his innocence. This application therefore succeeds, but will be given on condition in view of applicant’s foreign residence:-

1. Leave is hereby granted to the applicant to appeal against his conviction and sentence of 10 years imprisonment imposed on him by the Failed Banks etc. Tribunal in 1998.

2. Time is hereby extended by 30 days from the date hereof within which applicant should file and serve his Notice and grounds of appeal on the

CONDITION

That the appellant appears personally to be present in this court on the date of hearing of the appeal, so that whatever decision is arrived at will not be an exercise in futility - Equity does nothing in Vain."

Section 243 of the Constitution of the Federal Republic of Nigeria, 1999 confers, generally, right of appeal to the Court of Appeal from the decisions of the Federal High Court, a High Court of a State to be exercisable in the case of Civil Proceedings at the instance of a party thereto, or the High Court or the Court of Appeal at the instance of any other person having an interest in the matter, and in the case of criminal proceedings at the instance of an accused person or, subject to the provisions of the Constitution and any powers conferred upon the Attorney-General of the Federation or the Attorney-General of a state to take over and continue or to discontinue such proceedings, at the instance of such other authorities or persons as may be prescribed. There are other provisions in the Constitution which donate right to appeal on a party in a dispute, who has been aggrieved by the decision of the trial court or tribunal for further appeal from an appellate court or tribunal. The instant appeal stemmed from the decision of the Failed Banks (Recovery of Debts) and Financial Malpractice in Banks, Tribunal, Zone 1, Enugu, which sentenced the appellant in absentia to a term of imprisonment for ten years in 1998. Being aggrieved by that decision, the appellant sought to appeal to the court below. The court below granted the appellant the reliefs as contained in part of the relief which I set out earlier. It is also to be noted that the trial Tribunal was set up under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, now contained, as an Act in Cap F2, the Laws of the Federation of Nigeria, Vol. 6 of 2004. On matters relating to appeal by an aggrieved party, the Act, in section 21 states that a judgment of the court is subject to appeal as specified in section 5 of this Act. (NB! I cross checked section 5 of the Act and I find nothing relating to appeal process). In any event, the case was decided under Decree No. 18 of 1994 (The Decree for short). Section 5 of the Decree provided as follows:

"5(1) A person convicted or against whom a judgment is given under this Decree may, within 21 days of the conviction or judgment, appeal to the Special Appeal Tribunal established under the

Recovery of Public Property (Special Military Tribunal) Decree 1984, as amended, in accordance with the provisions of that Decree.”

In 1999, the then Federal Military Government enacted Decree No. 62, Tribunals (Certain Consequential Amendments, etc), certain amendments were made wherein the Federal High Court or
 B High Court of a state, as the case may be, was conferred with jurisdiction to try offences created under enactments specified in the schedule to the Decree. Subsection (2) of section 2 provided:-

"Accordingly, a tribunal established in any of the enactments
 C specified in the schedule to this Decree is hereby dissolved.”

Sequel to that, section 5 of the erstwhile Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree, 1994 was deleted.

On matters of appeal now from the decisions of the Federal or
 D state High Court as the case may be, section 7 provided as follows:-

“7(1) A person convicted or against whom a judgment is given under this Decree may, within 30 days of the conviction or judgment, appeal to the Court of Appeal.

*(2) There shall be a right of appeal from a decision of the
 E Court of Appeal to the Supreme Court.”*

Thus, it can be seen that ***the provisions of the Decrees (Acts) set out above are special in nature and they deal with special cases. It cannot therefore be said that the Court of Appeal, while exercising its jurisdiction, could resort to its ordinary Rules of Court.*** See: M. U. Gombe v. P. W. (Nig.) Ltd. & Ors (1995) 7 SCNJ 19. ***I therefore fail to see the relevance of section 28 of the Court of Appeal Act, nor Order 4 Rule 14(5) of the Court of Appeal Rules, which, according to learned
 F counsel for the respondent, could be relied upon by the court below to compel the personal and physical presence of the appellant in the Court on the date fixed for hearing his appeal. It is also clear from the enabling laws that the court below was not conferred with jurisdiction to compel the personal appearance of the appellate when his appeal is to be heard. The position of the law has been re-stated severally that jurisdiction is an all-important issue that the court cannot confer it upon itself when the enabling statute has not done so. The parties, even where they consent to do so, cannot con-***
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fer jurisdiction on a court where the enabling statute has not done so. See: Okolo & Anor v. U. B. A. (2004), 1 SCNJ. 113. ***It can only be conferred by statute.*** See: Odua Investment Co. Ltd. v. Talabi (1997) 7 SCNJ, 600. ***As the Constitution and other enabling statutes have donated right of appeal on a party who is aggrieved by the decision of a court of trial or tribunal or other courts or tribunals (as the case may be) which entertain appeals, without laying any condition which may hinder or inhibit the hearing of the appeal, it will be stretching the law to an unimaginable distance for the court below to lay such a condition.*** A Court of law is created to settle disputes between parties who come to it for litigation whether in civil or criminal matters. ***It is not the aim of a court to punish a litigant before finding him liable or guilty to the claim or charge made against him. I know it may be touchy and sensational for a court to remain a toothless-bull-dog where a litigant disobeys a court order. But I must add that such court's order has to be lawfully and competently made. Where an order is made by a court without jurisdiction that order is a nullity AB INITIO*** see: The Federal Government of Nigeria & Anor v. Lord Chief Udensi Ifegwu (2003) 5 SCNJ 217; Lakanmi v. Adene and Others (2003) 4 SCNJ 348; National Bank of Nigeria Ltd. v. Weide & Co. Nig. Ltd. and Ors (1996) 9 - 10 SCNJ 147.

The condition imposed by the court below compelling the appellant to be present in court on the hearing date of his appeal, is not traceable to either the Constitution or any of the statutes referred to above.

Another vital issue is that ***section 27 of Decree 18 of 1994 made the following provision:***

"27(1) The absence from Nigeria of a debtor or of a person who has committed an offence under this Decree shall not prevent his case being heard and determined or his being tried and convicted under this Decree.

(2) An order of the Tribunal made pursuant to a hearing or trial under subsection (1) of this section shall, where expedient, be executed in the absence of the debtor or person convicted, but the commencement of a sentence of imprisonment shall be deferred until his return to Nigeria."

Thus, the appeal could be pursued to its logical conclusion by the court below even in the absence of the appellant from this country and he can be convicted. All orders given by the court against the appellant could be executed in his absence except if it is a sentence of imprisonment which shall be deferred until his return to the country. That indeed is what the law prevailing provided. The provisions are clear enough requiring no importation of any rule or interpretation apart from the natural rule. See also the case of Adeoye v. State (1999) 4 SCNJ 136; Kotoye v. Saraki (1994) 9 NWLR (Pt.357) 414 D - R; IBWA v. Imano Nig. Ltd. (1988) 3 NWLR (Pt.85) 633 at 651; Okunagba v. Egbe (1965) 1 All NLR 62 at 65.

Finally, I find this appeal meritorious. I accordingly allow the appeal. I set aside that part of the court below's Ruling which imposed a condition requiring the appellant to be present at the hearing of his appeal.

MUSDAPHER JSC

I have read before now the judgment of my Lord Muhammad, JSC just delivered with which I agree. I accordingly allow the appeal and set aside the order of the Court of Appeal by demanding the presence personally of the appellant in court at the hearing of the appeal. Having regard to the special nature of the procedure, the condition imposed by the Court of Appeal is without jurisdiction and is set aside.

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TABAI JSC

This is appeal against the decision of the Enugu Division of the Court of Appeal on the 31st day of January 2007. The facts as can be gleaned from the record of proceedings are briefly as follows: -

The Appellant who was a staff of Prime Merchant Bank Ltd. as its General Manager was tried and convicted in absentia on the 8th of July 1998 at the Enugu Zone of the Failed Bank's Tribunal. According to the Appellant, he became aware of the conviction on the

20th of October 1999. He applied for obtained the record of proceedings on the 28th of October 1999.

A Notice of Appeal was prepared and same was to be filed on the 19th November 1999 but was not so filed. On the 24th of January 2000 a motion for extension of time to file the Notice of Appeal was filed. By a motion dated and filed on the 28th of February 2000 the Respondent sought by a preliminary objection to strike out the application for extension of time to appeal. The said preliminary objection was refused on the 30th of May 2000. The motion for extension of time was argued. By its ruling on the 25th of April 2001, the Court of Appeal granted the application with the condition;

“That the Appellant appears personally to be present in this Court on the date of hearing of the appeal so that whatever decision is arrived at will not be an exercise in futility - Equity does nothing in vain.”

There was an appeal against this order of the Appellant’s personal presence at the hearing of the appeal to this Court. By its judgment on the 4th of July 2002 the appeal was dismissed. This Court reasoned that the order of the Court about the personal presence of the Appellant does not fetter his constitutional right of appeal and that it was up to the Court of Appeal to decide on what orders it may deem fit to make at the hearing of the appeal.

At the Court of Appeal briefs of argument were duly filed and exchanged and the matter was apparently set down for hearing on the 31st of January 2007. On the said 31st of January 2007 Mr. Lana of counsel for the Appellant drew the attention of the Court to the fact that the matter was ripe for hearing, briefs of argument having been filed and exchanged and expressed his preparedness for arguments in the appeal. Chief Orbih of counsel for the Respondent then reminded the Court of its order of the 25th of April 2001 about the Appellant’s physical presence in Court at the hearing of the appeal. In its reaction the Court of Appeal per Ogebe JCA (as he then was) had this to say:

“The Appellant must comply with the order of this Court to be present at the hearing of the appeal. The appeal is adjourned 19/4/07 for hearing.”

The Appellant was still aggrieved with the above order and has therefore come on appeal to this Court. Briefs of argument have

been filed and exchanged. The Appellant's Brief was settled by Chief Akin Olujinmi SAN. He also prepared the Appellant's Reply Brief. The Respondent's Brief was prepared by Chief Ferdinand Orbih. .

Chief Ferdinand Orbih also raised a preliminary objection that this appeal is incompetent and therefore that this Court lacks the jurisdiction to entertain same. The ground for the objection is that the issue for determination in this appeal has been fully and effectively determined by this Court in its previous judgment in Appeal No. SC. 119/2001 on the 4th of July 2002 and therefore that this Court is *functus officio*. In the Appellant's Reply Brief Chief Olujinmi SAN conceded that the issue of whether the Court of Appeal had the jurisdiction to order the personal presence of the Appellant at the hearing of the appeal was distinctly raised. But contended that this Court did not decide the issue in its judgment of the 4th of July 2002 and therefore that the Appellant was right to raise it again.

Before going to the merit of the appeal let me, first of all, dispose of the preliminary objection. The issue in my considered view is very narrow. The question is whether in its judgment in Appeal No. SC. 119/2001 on the 4th of July 2002 this Court determined the issue of whether or not the Court of Appeal had the jurisdiction to order the personal presence of the Appellant at the hearing of the appeal. For the purpose appreciating the real issue that was submitted to and determined by this Court in the said previous judgment on the 4th of July 2002 in SC. 119/2001, let me examine what the court said. In his judgment Ogwuegbu JSC said:

"The Court below granted the appellant herein extension of time to appeal against the decision and allowed him 30 days from the date of the Order within which to file and serve his Notice and Grounds of Appeal. The said court concluded its order as follows;

"That the appellant appears personally to be present in this Court on the date of hearing of the appeal so that whatever decision is arrived at will not be an exercise in futility - Equity does nothing in vain."

The Appellant has appealed against this condition and has argued under issue (I) in his brief that the court has no jurisdiction to clog the appellant's right of appeal with a condition precedent that he should be present in Court at the hearing of his appeal.

In my view, this is a misconception of the ruling of the Court

below. The Court below granted extension of time to appeal and the appellant has exercised that right by appealing to the said Court. The condition is not that he must be present himself before he can file his appeal.

I therefore see no merit in the appeal. It is frivolous and I hereby dismiss it.” B

In his own contribution Uwaifo, JSC had this to say:

“The Appellant was granted leave to appeal. No condition was attached to that leave which would have deprived him of the right to appeal. The Court below further said that at the hearing of the appeal the appellant should be present. To appeal on that ground and raise the issue” C

“whether the lower court has jurisdiction to clog the appellant’s right of appeal with the condition precedent that he should be present at the hearing of his appeal” D

“is, in my view, a misconception of the order of the Court below. That order that he should appear at the hearing cannot be seen to clog the appellant’s right of appeal. He has certainly exercised his right of appeal by filing his notice and grounds of appeal”

Other Justices in the appeal spoke in the same vein. E

It is clear from the above that the issue determined by this Court in the previous Suit No. SC. 119/2001 in its judgment on the 4th of July 2002 was whether the order of the Court of Appeal about the personal presence of the appellant at the hearing of the appeal constituted a clog or an impediment in the Appellant’s right of appeal. That issue, in my humble view, is quite distinct from the present issue of whether the Court below had the jurisdiction to make the order. I hold therefore that the issue before this Court cannot be said to have been decided in the earlier suit. F G

For the foregoing reasons, I hold that the preliminary objection is misconceived and same is accordingly struck out.

Now on the main issue of whether the Court of Appeal had the jurisdiction to order the personal presence of the appellant at the hearing of the appeal. Chief Olujinmi SAN referred to Section 5(1) and 27(1) and (2) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 and submitted that the right donated by the said Section 5(1) of the Act does not make any distinction between the person who attended the trial and H

the person tried in absentia. He submitted further that the right of appeal is not subject to the appellant's personal presence at the hearing of the appeal.

Chief Ferdinand Orbih for the Respondent argued on the other hand that the Court of Appeal had the jurisdiction to impose the condition about the Appellant's personal presence at the hearing of the appeal, contending that even the decision of this Court in SC. 119/2001 supports the contention. The order, he argued, comes within the inherent jurisdiction of the Court of Appeal to control its own proceedings. Section 27(1) and (2) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 provides:

"27(1) The absence from Nigeria of a debtor or of a person who has committed an offence under this Decree shall not prevent his case being heard and determined or his being tried and convicted under this Decree,

(2) An order of the Tribunal made pursuant to a hearing or trial under subsection (1) of this section shall, where expedient, be executed in the absence of the debtor or person convicted, but the commencement of a sentence of imprisonment shall be deferred until his return to Nigeria."

The above provisions clearly enabled the trial and conviction of the Appellant in absentia. There is also no dispute about the appellant's right to appeal against his conviction while he remains outside the territorial boundaries of Nigeria. The question in issue is whether the appeal could be heard and determined in his absence from Nigeria? Put in another way, whether it is obligatory for the appellant to return to Nigeria and be present in Court for his appeal to be heard and determined?

The right of appeal by a person convicted under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 is provided for in Section 5(1) thereof. It says:-

"A person convicted or against whom a judgment is given under this Decree may, within 21 days of the conviction or judgment appeal to the Special Appeal Tribunal established under the Recovery of Property (Special Military Tribunal) Decree 1984 as amended in accordance with the provision of that Decree."

A fundamental canon of interpretation is that clear and unam-

biguous provisions of a statute should be given their literal grammatical meaning. See *ORUBU v N.E.C.* (1988) 5 NWLR (Part 94) 323; *AFRICAN NEWSPAPERS v NIGERIA* (1985) 2 NWLR (Part 6) 137; *OJOKOLOBO v ALAMU* (1987) 3 NWLR (Part 61) 377. Section 5(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 is quite clear and unambiguous and should be accorded its ordinary grammatical meaning. The right of appeal circumscribed thereat is not subject to any condition. The court below apparently made the order because it thought it was necessary and/or reasonable so to do. It is however settled principle of law that in its interpretative function the court is bound to limit itself to what the law is and not what the law ought to be. Expounding on this principle of interpretation in *GARUBA ABIOYE & ORS v SA'ADU YAKUBU & ORS* (1991) 5 NWLR (Part 190) 130 at 153 this Court per Olatawura JSC stated:-

"It is not a derogation of the powers of judges if they, and rightly too, limit themselves to the interpretation of the Act. What the law ought to be is outside the function of the Judges. What the law is found in their judgments...."

The personal presence of the Appellant at the hearing of his Appeal is no doubt desirable. But it is not a mandatory requirement of Section 5(1) of the Act. The Court of Appeal was with respect, therefore in error to make the order complained of.

For the foregoing reasons and the fuller reasons comprehensively set out in the judgment of my learned brother, I. T Muhammad JSC, I also hold that there is merit in appeal which is accordingly allowed

ADEREMI JSC

This is an appeal against the judgment of the Court of Appeal, Enugu Division (hereinafter referred to as the court below) dated 31st January, 2007 in which the court below held that the appellant must comply with the order of the court to be physically present at the hearing of his appeal.

Briefly, the facts of the case are as follows: the appellant, a staff of Prime Merchant Bank Limited, Lagos, while abroad on leave, was

charged to the Failed Bank's Tribunal, Enugu Zone. He was tried in absentia and convicted of the offence of conspiracy to steal, stealing and failing to take reasonable steps to secure compliance by Prime Merchant Bank Limited with the requirement of BOFID No, 25 of 1991. He was sentenced to a term of 10 years imprisonment. On becoming aware of his conviction and sentence, he instructed his counsel to appeal against the said judgment. Suffice it to say that he gave the instruction to appeal while still abroad. As time within which to appeal had run out, an application for an order extending the time to so do was made to the court below on his behalf. A preliminary objection was taken against the hearing of the application on the ground that the applicant was a contemnor who ought not to be heard. That preliminary objection was thrown out while the application for an order extending the time to appeal was later heard and granted by the court below on the condition that the appellant/applicant should be physically present on the date the appeal would be heard.

Being dissatisfied with the aspect of the ruling compelling his physical appearance in court at the hearing of the appeal, an appeal was lodged to this court in 2001 in which after hearing the arguments of counsel, in a reserved judgment delivered on the 4th July, 2001 held that the order granting the appellant leave to appeal was not conditional. Although, this court in the said ruling was not unmindful of the fact that the court below had said that the physical appearance of the appellant in the court was a condition precedent to the hearing of the appeal until the court below actually refused to hear the appeal on the ground that the appellant was not in court physically, appeal on that point would not arise. The appeal at that point was consequently dismissed.

The parties, upon the dismissal of that appeal, went back to the court below, filed their respective briefs of argument and after the adoption of the said briefs, in a reserved judgment delivered, the court below granted leave to the applicant to appeal against his conviction and sentence of 10 years imprisonment imposed on him by the Failed Banks Tribunal in 1998; time to file the Notice of Appeal was consequently extended by 30 days from the date thereof. However, the hearing of the appeal was by the order of the court below, predicated on the physical appearance of the appellant in court. It is

this aspect of the condition precedent to the hearing of the appeal that has informed the present appeal.

The crucial issue for determination in this appeal is whether the physical presence of the appellant in the court is a SINE QUA NON to the hearing of the appeal. I hasten to say that I have read the respective briefs of the parties and the oral arguments canvassed by Chief Olujinmi, Senior Counsel for the appellant and Chief Orbih for the respondent. Perhaps, I should here point out that the appellant was tried and convicted by the Tribunal pursuant to the provisions of Section 27 (1) & (2) of the Failed Banks Act which provide for trial in absentia of a person accused of an offence under the Act. The two sub-sections provide:

“(1) The absence from Nigeria of a debtor or of a person who has committed an offence under this Decree shall not prevent his case being heard and determined or his being tried and convicted under this Decree.

(2) An order of the Tribunal made pursuant to a hearing or trial under sub-section (1) of this Section shall, where expedient, be extended in the absence of the debtor or person convicted, but the commencement of a sentence of imprisonment shall be deferred until his return to Nigeria.” (underlining mine for emphasis]

By the above provisions, a person charged under the Act can be tried and charged in absentia before the Tribunal and under sub-section (1) supra, the order of the Tribunal can, where expedient, be executed notwithstanding the absence of the debtor or person so convicted, but the commencement of his term of sentence of imprisonment shall be deferred until he returns to Nigeria. In short, the physical presence of the person is not a desideratum for the trial to commence. By virtue of Section 5 (1) of the Failed Banks (Recovery of Debts and Financial Malpractices in Banks) Decree No. 18 of 1994 (now Act) provides for a right of appeal for a convicted person - it provides: -

“A person convicted or against whom a judgment is given under this Decree may, within 21 days of the conviction of judgment appeal to the Special Appeal Tribunal established under the Recovery of Public Property (Special Military Tribunal) Decree 1984, as amended”.

The above provision does not make any distinction between a

person who attended the trial and a person tried in absentia. The true interpretation of the above provision is that the right of appeal is available to any person convicted or against whom a judgment is given. It should also be noted that here, both the appellant and the respondent filed their briefs of argument at the Registry of the court below before the judgment was delivered. This court, following the provisions of Order 6, Rule 8 (6) of the Supreme Court Rules, 1985 which states: -

“When an appeal is called and no party or legal practitioner appearing for him appears to present oral arguments, but briefs have been filed by all the parties concerned in the appeal, the appeal will be treated as having been argued and will be considered as such.”

reasoned in ADEYEMI V. Y.R.S. IKE-OLUWA & SONS LTD. (1983) 8 NWLR (pt.309) 27 per Uwais JSC (as he then was) at page 39 thus: -

“Since briefs of argument were filed by both the appellant and the respondents, we followed the provisions of Order 6 Rule 8 (6) of the Supreme Court Rules, 1985.”

Generally, when a party to a proceeding engages the services of a counsel, he has the discretion to appear in person along with his chosen legal practitioner or he may be represented by the legal practitioner alone. Such a party cannot be held to be absent in Court if his counsel or other permitted representative is present in court. See KEHINDE V. OGUNBUNMI & ORS (1968) NMLR 37. I must not fail to observe that in criminal matters or appeals where the order of the court is to be enforced and the accused/convict is outside jurisdiction there are provisions in the corpus of our laws to enable the arms of the law reach out to him wherever he may be for purposes of bringing to justice. The condition which imposed physical appearance of the appellant in the court during the hearing of the appeal, is, in my respectful view, too harsh and does not receive any support from the authorities referred to.

It is for the little I have said above, but most especially for the detailed reasoning and conclusion reached in the lead judgment of my learned brother, Muhammad JSC, with which I am in full agreement, that I also adjudge this appeal to be meritorious. It is accordingly allowed, while I set aside that part of the judgment of the court below which foisted a condition on the appellant requiring his physi-

cal appearance in court at the hearing of the appeal.

MUNTAKA-COOMASSIE JSC

I have had a preview of judgment of my learned Lord, Tanko Muhammad, JSC just delivered. I entirely agree with him that this appeal is meritorious. For the reasons he adduced and the conclusions he arrived at I too hold that there is a lot of merits in this appeal same is therefore allowed by me. The authorities cited by my learned brother, with respect, are apt and un-assailable. The court below cannot in law have jurisdiction or power to make such order i.e. court below cannot compel the presence of the appellant in court on the hearing of his appeal. Let us stick to our power as donated to us by the relevant provisions of the constitution or statutes. The law, they say, should be applied as it is and not as it ought to be. I abide by the consequential order made by my learned brother Tanko Muhammad JSC in the lead judgment.

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