

SUPREME COURT OF NIGERIA
22ND JANUARY, 2010. SC. 253/2002
CORAM:- G. A. OGUNTADE, F. F. TABAI,
I. T. MUHAMMAD, J. A. FABIYI, O. O. ADEKEYE, JJSC

CHIEF JOHN OYEGUN APPELLANT
AND
CHIEF FRANCIS A. NZERIBE RESPONDENT

RULES OF COURT - Noncompliance - Attitude of courts - It is strict compliance thereto - That makes for quicker administration of justice - Courts shall always refuse to exercise their discretion - When their rules are not obeyed (H1)

RULES OF COURT - Court of Appeal Rules - Dismissal under O. 3 r. 20(1) - Effect - Though the operative word in that provision is "dismissal"- It is without prejudice - To the right of a party to apply for re-listing under O. 3 r. 20(4) (H2)

STATUTES - Interpretation - Fundamental principle - Literal interpretation should always be employed - Except when it is impossible - As the intention of a statute must be gathered - From the plain expression used therein (H3)

WORD & PHRASES - Judgment on the merits - Meaning - It is one obtained where the case has been argued - And the court has decided - Which party is in the right (H4)

FACTS

The plaintiff/appellant sued defendant/respondent in suit No. HOG/42/95 before the High Court of Imo State sitting at Oguta Judicial Division. The court in its judgment directed appellant to pay the sum of N10,525,000.00 (ten million, five hundred and twenty five thousand) and 5% interest thereon per annum until the loan is liquidated. Aggrieved, appellant appealed to Court of Appeal against the judgment. The parties settled records in respect of the appeal on 23/3/97 and the appellant had a period of thirty (30) days as from 24/3/97 to fulfil the conditions of appeal. When as at 23/3/99 appel-

lant was yet to comply with the conditions of appeal, respondent caused the High Court's Registrar to file a motion for noncompliance. The motion was consequently served on the parties and subsequently argued before the Court of Appeal.

In its ruling, the court held that appellant has not shown any evidence of timely compliance or at all. Neither was there any evidence of an application for extension of time to comply though the time set for compliance had long expired. Accordingly the court dismissed the appeal under order 3 Rule 20 of Court of Appeal Rules. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal. It is his argument that the court ought not to have dismissed the appeal but should have struck it out at best.

ISSUES FOR DETERMINATION

(1) Whether the summary dismissal of appellant's appeal without considering the affidavit evidence in the matter did not amount to a breach of his fundamental rights as enshrined in the 1999 Constitution of the Federal Republic of Nigeria.

(2) Whether, in the circumstance of this case, an order of striking out would not have been more appropriate than one of dismissal as was done by the court on this case.

HELD (Unanimously dismissing the appeal per **ADEKEYE JSC**)

RULES OF COURT - Noncompliance - Attitude of courts

1. The proceedings of the courts are guided by the Rules of that court. They are regulations made by the courts to assist them in their efforts to determine issues or controversies before them. They provide the support in administration of justice. They regulate matters in court and help parties to present their cases within a procedure made for the purpose of a fair and quick trial. It is the strict compliance with the rules that makes for quicker administration of justice. Any party seeking the discretionary power of court must bring his case within the provisions of the Rules on which he purported to make his application. The court shall always refuse to exercise its discretionary power when the rules are not obeyed. (p. 428 A)

Court of Appeal Rules - Dismissal under O.3 r. 20(1) - Effect

2. Though the operative word in order 3 rule 20 (1) is "dismissal" - it is obviously a dismissal "without prejudice."

I arrived at this conclusion with community reading of Order 3 Rule 20 (1) and Order 3 Rule 20 (4) of the Court of Appeal Rules 1981.

The Order by virtue of Rule 20 (4) gives adequate opportunity to an appellant whose appeal has been dismissed for non-compliance under Rule 20 (1) to invoke the discretionary couple with the equitable jurisdiction of the lower court to relist the appeal, though such applicant has the burden of showing good and substantial grounds why the court must exercise its jurisdiction in his favour. (p. 429 A)

STATUTES - Interpretation - Fundamental principle

3. The fundamental principle in the interpretation of statutes is that except when it is impossible a literal interpretation should be employed. The real meaning and intention of a statute must be gathered from the plain and unambiguous expression used therein. (p. 429 C)

Judgments on the merits - Meaning

4. The appellant's counsel obviously misconceived the proceeding by jumping to conclusion that the matter was not heard on merit. The application to dismiss the appeal by the appellant was filed at the Registry and date of hearing of the application was served on the parties. Both counsel for the parties were in court on the 27/11/2000 when they made submission in support of the application. Contrary to the conclusion of counsel in his brief, the court heard the application for non-compliance on merit. A judgment or ruling on the merits is one obtained where the case has been argued and the court has decided which party is in the right. (p. 429 F/H)

NOTABLE POINT OF INTEREST ***MUHAMMAD JSC***

Right to Fair hearing arises after procedures are satisfied

On the issue of violating appellant's fundamental Right to fair hearing as submitted by learned counsel for the appellant, right to fair hearing, I believe, sets in only when the constitutional and procedural provisions which guarantee it are complied with by the complainant. In this case, the appellant woefully failed to comply with the requirements of the law pertaining to conditions of appeal. Right to

appeal is constitutional. Compliance with conditions of appeal is a pre-qualification for the appeal to be entered and then be heard by the appeal court. (p. 435 B)

PRESENTATION

- B Mr. O. Uzamere for the Appellant.
Mr. F. V. Onuegbu for the Respondent.

CASES REFERRED TO

- C Olatubosun v. NISER 3 NWLR pt. 80 pg. 25
Saude v. Abdullahi (1989) 4 NWLR pt. 116 pg
Ezeanah v. Atta (2004) 7 NWLR (Pt. 873) 468
Chime v. Ude (1996) 7 NWLR pt. 461 page 379
Saude v. Abdullahi (1989) 4 NWLR pt. 116 pg. 387
D Ivbiyaro v. Francis (2002) 1 NWLR pt. 47 pg. 33 at 35
N.A.A. v. Ojiekor (1998) 6 NWLR pt. 553 265 at pg. 267
University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143
Saidu v. Mahmood (1998) 2 NWLR pt. 536 pg. 130 at pg. 133
University of Lagos v. Olaniyan (1985) 1 NWLR pt. 1 pg. 156
E Magit v. University of Agric. Makurdi (2005) 19 NWLR pt. 959 pg. 211
Joseph Afolabi John Adekunle & Ors. (1983) 4 NSCC 398 at page 405
F Fountrades Ltd. V. Universal Association Co. (2002) 8 NWLR pt. 770 pg. 699

STATUTE & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1999, ss. 36 and 227
G Federal Court of Appeal Rules, 1981, O. 3 rr. 10,11 and 20

LEAD JUDGMENT BY ADEKEYE JSC

- H The appellant in this appeal was plaintiff in the suit Hog/42/95 filed in the High Court of Imo State, Oguta Judicial Division. In the considered judgment of that court delivered on 18/12/96, the appellant was directed to pay the sum of N10,525,000.00 (ten million, five hundred and twenty-five thousand) and interest of 5% per annum until the loan is liquidated. Feeling aggrieved by the judgment, the appellant appealed to the Court of Appeal, Port Harcourt Divi-

sion. The parties in the appeal settled records on 23/3/97 and the appellant had a period of thirty days (30) as from 24/3/93 to fulfill the conditions of appeal. The appellant failed to comply with the conditions precedent to filing the appeal within the statutory period. This prompted the respondent to bring this to the attention of the Registry. The principal Registrar of the High Court Oguta notified the respondent through his counsel about the defendant/appellant's failure to comply with the conditions of appeal on 23/3/99. The appellant was given the materials required to compile his Records of Appeal by the High Court of Oguta Registrar since the 16th of February 1999. A notice of motion for non-compliance was served on the parties. The motion was argued by counsel to both parties on the 27th of November 2000 before the Court of Appeal, Port Harcourt Division. In its Ruling, the Court held that: -

"Having listened to the arguments of counsel for both sides and studied the affidavits, it is clear that the respondent did not comply with any of the conditions of appeal as required in Exhibit A. The respondent has not shown any evidence of compliance. Exh. A to the counter-affidavit dated 16th February 1999 shows no compliance at all. The respondent was required to comply with the conditions of appeal within 30 days of March 1999. There is no evidence of extension of time to comply or even an application for extension of time to comply. In the result, this application has merit and the appeal is dismissed under Order 3 Rule 20 of the Court of Appeal Rules. N2000 in favour of the applicant."

Being dissatisfied with the order of court in the above ruling, the defendant initiated a further appeal in this court by filing his Notice and Grounds of Appeal on 20/12/01. After due compliance with the conditions of appeal, both parties exchanged briefs. At the hearing of this appeal on the 27/10/00 the defendant/appellant through his counsel, Osahon Uzamere adopted and relied on the defendant/appellant's brief filed on 16/9/02 wherein two issues were identified for determination in the appeal as follows: -

(1) Whether the summary dismissal of appellant's appeal without considering the affidavit evidence in the matter did not amount to a breach of his fundamental rights as enshrined in the 1999 Constitution of the Federal Republic of Nigeria.

(2) Whether, in the circumstance of this case, an order of strik-

ing out would not have been more appropriate than one of dismissal as was done by the court on this case.

The learned counsel for the respondent adopted and relied on the respondent's brief deemed properly filed on 27/10/2009. In the respondent's brief the two issues formulated for determination are:

"(1) Whether the Court of Appeal had powers to make the order of 27/11/2000.

(2) Whether a party who has failed, refused and neglected to use the Constitutional and procedural provisions for enforcing his right of fair hearing would turn round to say that his right of fair hearing has been denied him if the Court of Appeal dismissed his appeal for want of prosecution."

I intend to be guided by the issues raised for determination by the appellants in this appeal.

ISSUE ONE

Whether the summary dismissal of the appellant's appeal did not amount to a breach of his fundamental rights as enshrined in the 1999 Constitution of the Federal Republic of Nigeria.

The sum total of the grouse of the appellant under this issue is that it was preposterous for the court below to hold that the respondent has not shown any evidence of compliance whereupon the learned justice dismissed the appeal. The appellant submitted that this amounts to consequently shutting out the applicant for ever by way of dismissal from arguing his appeal. This gesture of the court had violated the fundamental rights of fair hearing of the appellant. The counsel went ahead to define section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria and held that Order 3 Rule 20 (1) of the Court of Appeal Rules is not only inconsistent with the constitutional provisions of fair hearing but also null and void to the extent of that inconsistency. The learned counsel supported this by citing section 1 (1) (3) of the 1999 Constitution of the Federal Republic of Nigeria which stipulates that: -

"If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void."

He illustrated the doctrine of fair hearing by citing cases like: Ekiyor v. Bener (1997) 9 NWLR pt. 579; Saidu v. Mahmood (1998) 2 NWLR

pt. 536 pg. 130 at pg. 133; N.A.A. v. Ojiekor (1998) 6 NWLR pt. 553 265 at pg. 267; Olatubosun v. NISER 3 NWLR pt. 80 pg. 25; Aiyetan v. NIFOR (1987) 3 NWLR pt. 59 pg. 48.

By way of reply, the Respondent submitted that the right to appeal is a right which is subjectively exercised and the duty is on the appellant to justify its objectivity. The respondent referred to Order 3 Rules 10, and 11 of the Court of Appeal Rules which gave the discretion to the Registrar of the court to fix the time for the appellant to meet the conditions of appeal and whether or not the appellant has satisfied the conditions of appeal. The respondent having been satisfied that the appellant failed to comply with the conditions brought an application to dismiss the appeal for non-compliance under Order 20 Rule (1) of the Court of Appeal Rules. B
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The fact that the Registrar failed to compile and forward the Record of Appeal to the Court of Appeal confirms failure by the appellant to fulfill the conditions of appeal. He did nothing to suspend the application of Order 3 Rule 20 (1). Since the Rules of court were made pursuant to section 227 of the Constitution -Order 3 Rule 20 (1) is not an inferior legislation while the steps taken under it is Constitutional. The application was heard on affidavit evident. The respondent cited the case of Ezeanah v. Atta (2004) 7 NWLR pt. 873 pg 468 on merit. The Respondent referred to Order 3 Rule 20 (4) and that though the appeal was dismissed, the appellant can invoke the discretion of court under this Rule 20 (4) after showing good and substantial reasons for failure to prosecute the appeal, to relist the appeal. The appellant failed to take advantage of Order 3 Rule 20 (4). He urged the court to dismiss this appeal. D
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ISSUE NO. 2

Whether, in the circumstance of this case an order of striking out would not have been more appropriate than one of dismissal as was done by the court below in this case. G

The crux of the argument of the appellant relating to this issue is that the dismissal of the appeal under Order 3 Rule 20 (1) not being on merit is unconstitutional. An action cannot be dismissed for want of prosecution - whereas the proper action to be made should have been that of striking out. The appellant cited the case of Ivbiyaro v. Francis (2002) 1 NWLR pt. 47 pg. 33 at 35. The appellant thereby urged the court to reverse the ruling of the lower court of the 22/11/ H

2000 and remit the case back to a different panel of justices of the Court of Appeal, Port Harcourt Division for a re-hearing of the appeal from Imo State High Court, Oguta Judicial Division.

In a brisk reply to this issue, the respondent submitted that the appellant having failed to meet the conditions of the appeal, the appellant has disqualified himself from being heard and cannot now complain of the lack of fair hearing. Chime v. Ude (1996) 7 NWLR pt. 461 page 379.

I have painstakingly considered the submission of counsel on the issues for determination in accordance with the briefs of the parties. I make haste to point out that this court does not intend to belabour the subject-matter of this appeal which clearly falls into the realm of civil procedure as relates to appeals. The court proceedings in appeals are guided by the Civil Procedure Rules of every court of record under our legal system be it a State or Federal court. It is constitutional that the head of every cadre of superior court shall have the power to make the Rules of that court. The relevant Rules in Order 3 of the Federal Court of Appeal Rules 1981 made provision for the steps to be complied with in the filing of appeals from the High Court of the State to the Court of Appeal.

The relevant judgment on which the appeal to the Port Harcourt Division of the Court of Appeal was predicated was delivered by the Oguta High Court, Imo State on 18/12/96. Parties settled the Record of Appeal on 29/3/97. The appellant had the 30 days statutory period therefrom to comply with the conditions of appeal. The appellant failed to comply with the provisions of Order 3 Rule 20, until the respondent in the appeal filed a motion on notice praying for an order of the Court of Appeal to dismiss the appeal on the grounds of the appellant's non-compliance with the conditions of appeal in the suit.

I find it convenient to consider the Rules relevant to the process of filing an appeal from the High Court to the Court of Appeal. Besides the Constitutional provision which allows for an appeal as of right or with leave on grounds of mixed law and fact, Order 3 rule 20 (1) of the Court of Appeal Rules 1981 stipulates that: -

"If the appellant has complied with none of the requirements of Rules 10 and 11 of this Order, the Registrar of the court below shall certify such fact to the court, which shall thereupon order that

the appeal be dismissed either with or without costs, and shall cause the appellant and the respondent to be notified of the terms of its order.”

Order 3 Rule 10 stipulates that: -

“The appellant shall within such time as the Registrar of the court below directs deposit with him a sum fixed to cover the estimated expense of making up and forwarding the record of appeal calculated at the full cost of one copy for each of the seven copies for the use of the court or where twenty copies are sent, one twentieth.”

Order 3 Rule 11

“The appellant shall within such time as the Registrar of the court below directs deposit such sum as shall be determined by such Registrar or give security therefore by bond with one or more sureties to his satisfaction as such Registrar may direct for the due prosecution of the appeal and for the payment of any costs which may be ordered to be paid by the appellant.”

The appellant complied with the foregoing to the extent of settling the Record of Appeal and depositing money and the stationery items required to compile the Records of Appeal. As the appellant did not go beyond this stage and the respondent being aware that the statutory period for complying with the conditions of appeal had expired, the respondent invoked Order 3 Rule 20 (1) of the Court of Appeal Rules 1981.

The court below heard the motion for non-compliance filed by the respondent. The court listened to the submission of both counsel to the application and dismissed the appeal. At the time the application was heard, the appellant had no competent appeal before the lower court in that: -

(a) There was no Record of Appeal before the Appellate Court.
(b) The time to comply with the conditions of appeal starting from 24/3/97 had expired.

(c) The appellant did not show any evidence of compliance even in the counter-affidavit filed on 16/2/99 to oppose the application for non-compliance.

The appellant was aggrieved by the order of dismissal made by the lower court, as in his opinion, the proper order should have been that of striking out as the appeal was not heard on merit. The reaction of the appellant to the order of court makes it imperative

and I consider it of paramount importance at this stage to explain the essence of the Rules of Court in proceedings under our civil procedure. ***The proceedings of the courts are guided by the Rules of that court. They are regulations made by the courts to assist them in their efforts to determine issues or controversies before them. They provide the support in administration of justice. They regulate matters in court and help parties to present their cases within a procedure made for the purpose of a fair and quick trial. It is the strict compliance with the rules that makes for quicker administration of justice. Any party seeking the discretionary power of court must bring his case within the provisions of the Rules on which he purported to make his application. The court shall always refuse to exercise its discretionary power when the rules are not obeyed.*** The provisions of the Rules make it emphatic that prima facie they are meant to be obeyed and followed. Solanke v. Somefun (1974) 1 SC 141; Saude v. Abdullahi (1989) 4 NWLR pt. 116 pg. 387; Atanda v. Ajani (1989) 3 NWLR pt. 111 pg. 511; U.T.C. (Nig.) v. Pamotei (1989) 2 NWLR pt. 103 pg. 244.

In the circumstance of this case, the rules of court Order 3 Rule 20 (1) directs that an appeal shall be dismissed in the event of non-compliance with the conditions of appeal. The reason cannot be far fetched as non-compliance renders the appeal incompetent. A court is competent only when: -

(a) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another

(b) The subject-matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and

(c) The case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

The appeal under consideration is incompetent as the appellant has failed to fulfill the conditions precedent to enable the court below to exercise its jurisdiction to hear the appeal. Any defect in competence is fatal as the proceedings are a nullity however well conducted and decided, the defect is extrinsic to adjudication.

Madukolu v. Nkemdilim (1962) 2 SCNLR 341. ***Though the operative word in order 3 rule 20 (1) is “dismissal” - it is obviously a dismissal “without prejudice.”***

I arrived at this conclusion with community reading of Order 3 Rule 20 (1) and Order 3 Rule 20 (4) of the Court of Appeal Rules 1981. B

Order 3 Rule 20 (4) reads: -

“An appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored. Any such application may be made to the court and the court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit.” C

The fundamental principle in the interpretation of statutes is that except when it is impossible a literal interpretation should be employed. The real meaning and intention of a statute must be gathered from the plain and unambiguous expression used therein. Toriola v. Williams (1982) 7 S.C. 27. ***The Order by virtue of Rule 20 (4) gives adequate opportunity to an appellant whose appeal has been dismissed for non-compliance under Rule 20 (1) to invoke the discretionary couple with the equitable jurisdiction of the lower court to relist the appeal, though such applicant has the burden of showing good and substantial grounds why the court must exercise its jurisdiction in his favour.*** D
The appellant turned round to make heavy weather of the order of dismissal made by the lower court and that the order was made without hearing the appeal on merit. ***The appellant’s counsel obviously misconceived the proceeding by jumping to conclusion that the matter was not heard on merit. The application to dismiss the appeal by the appellant was filed at the Registry and date of hearing of the application was served on the parties. Both counsel for the parties were in court on the 27/11/2000 when they made submission in support of the application.*** E
The court held in its ruling that:- F

“Having listened to the arguments of counsel for both sides and studied the affidavits, it is clear that the respondent did not comply with any of the conditions of appeal as required in Exh. A” G

Contrary to the conclusion of counsel in his brief, the court heard the application for non-compliance on merit. A H

judgment or ruling on the merits is one obtained where the case has been argued and the court has decided which party is in the right. Fountrades Ltd. V. Universal Association Co. (2002)

8 NWLR pt. 770 pg. 699. The grouse of the appellant that court deviated from the tenets of fair hearing before the appeal was dismissed is practically unfounded. The doctrine of fair hearing can only be invoked by court after it has assumed jurisdiction - that is, it is competent to hear the matter. Moreover fair hearing is not a cut-and-dried principle which parties can, in the abstract always apply at their comfort and convenience. Orugbo v. Una (2002) NWLR pt. 292 pg. 175; Magit v. University of Agric. Makurdi (2005) 19 NWLR pt. 959 pg. 211.

A curious aspect of this appeal is that regardless of the provisions of Order 3 Rule 20 (4), the appellant's counsel decided to come to this court on appeal. I regard this reaction of the appellant's counsel to the order of the lower court as an abuse of legal process. In the first place, when the Registry of the lower court issued the application for non-compliance and served it on the parties, the appellant's counsel did not give the matter a prompt attention - either by asking for an extension of time to comply with the condition of appeal or take any other steps whatever to suspend the application of Order 3 Rule 20 (1) of the Court of Appeal Rules 1981. The appeal filed by the appellant rather than invoking the provisions of Order 3 Rule 20 (4) is in my opinion, frivolous, aggressive, waste of litigation time, waste of money and an improper use of legal process. As I have mentioned earlier in this judgment, rules of court are meant to be followed and obeyed. This is an unfortunate situation as the suit was filed in Ogun High Court between 1995 - 1996. The court must jealously guard against our legal process from being grossly abused. The order of the lower court made in its ruling delivered on 27/11/2000 was an exercise of discretion by the justices of the lower court. Where discretion is sound and guided by law, exercised judicially and judiciously, the court will not interfere with such proper use of judicial discretion. Haruna v. Ladeinde (1987) pt. 67 pg. 941; Ugboma v. Olise (1971) 1 All NLR pg. 8; University of Lagos v. Olaniyan (1985) 1 NWLR pt. 1 pg. 156; University of Lagos v. Aigoro (1985) 1 NWLR pt. 1. Unfortunately the blunder committed here was mistake of counsel. It is trite that courts would not visit the blunders, mistake and inadvert-

ence of counsel on the litigant or penalize a litigant for the mistake of the Registry.

I hereby dismiss this appeal for lacking in merit. The litigant however has an option to invoke Order 3 Rule 20 (4) of the Court of Appeal Rules 1981 to relist the appeal if he is still interested in pursuing same and more important - if the subject-matter of the appeal is not statute barred. N50,000.00 costs of this appeal is assessed in favour of the respondent.

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OGUNTADE JSC

I have had the privilege of reading in draft a copy of the lead judgment delivered by my learned brother Adekeye JSC. I entirely agree with him that this appeal has no merit. I would also dismiss it. It was a case of much ado about nothing as it was possible for the appellant to have taken advantage of the applicable Court of Appeal Rules, that is Order 3 rule 20(4). Rather the appellant took the arduous course which in the end has turned unhelpful to his case. I subscribe to the order made on costs.

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TABAI JSC

I read, in advance, the lead judgment prepared by my learned brother ADEKEYE JSC and I also agree that the appeal lacks merit. I therefore also dismiss it with costs which I also assessed at N50,000.00 in favour of the Respondent.

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MUHAMMAD JSC.

This appeal is on the fulfillment of conditions of appeal as provided by Rules of court. At the initial stage, it appeared that the appellant failed to comply with the requirements as contained in Exhibit 'A' which required the appellant:

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[1] to deposit the sum of N10.000.00 towards the costs of stationery and Record of Appeal,

[2] to pay the sum of N20,000.00 and N6.00 for filing of security bond and Registrar's certificate respectively.

[3] Appellant to enter into a bond in the sum of N25,000.00 with one surety for due prosecution of the appeal and

[4] conditions to be fulfilled within 30 days from today.

B The above conditions were signed by Assistant Chief Registrar of High Court of Imo State, Oguta Judicial Division, on the 24th day of March, 1997.

C For the non-compliance as indicated above, the respondent and applicant at the Court of Appeal Port-Harcourt, Division [court below] filed a motion on Notice praying that court for an order dismissing the appeal. The court below, on the 27th of November, 2000, after listening to arguments of counsel for both sides and having considered the affidavit evidence in support and in opposing the motion, D found that the appellant/respondent did not comply with any of the conditions of appeal as required in Exhibit 'A'. The court below found merit in the application and granted same. It accordingly dismissed the appeal under Order 3 Rule 20 of the Court of Appeal Rules.

E The appellant was not happy with the court below's ruling. He appealed to this court to set aside the decision of the court below and order a relisting of the appeal.

F After settling briefs of arguments, both parties through their respective counsel adopted and relied on briefs of arguments filed by them. The appellant's learned counsel urged us on the hearing date to allow his appeal by reversing the ruling of the court below and remit the case to the court below for a re-hearing by a panel of Justices of that court differently constituted. Learned counsel for the respondent urged this court to dismiss the appeal and affirm the decision of the court below. G

Two issues were formulated by the learned counsel for the appellant. They are as follows:

"ISSUE ONE:

H *Whether the summary dismissal of Appellant's appeal without considering the affidavit evidence in the matter did not amount to a breach of his fundamental rights as enshrined in the 1999 Constitution of the Federal Republic of Nigeria.*

ISSUE TWO:

Whether, in the circumstance of this case, an order of striking

out would not have been more appropriate than one of dismissal as was done by the court below in this case.”

Learned counsel for the respondent formulated two issues:

[i] *Whether the Court of Appeal had powers to make the order of 27/11/2000*

[ii] *Whether a party who has failed, refused and neglected to use the constitutional and procedural provisions for enforcing his right of fair hearing could turn round to say that his right of fair hearing has being [sic] denied him if the Court of Appeal dismissed his appeal for want of prosecution.”*

In considering this appeal, I think I need to, from the outset, set out the provisions of Order 3 Rules 10, 11 and 12 of the Court of Appeal Rules 1981, as amended:

“[10] *The appellant shall within such time as the Registrar of the court below directs deposit with him a sum fixed to cover the estimated expenses of making up and forwarding the record of appeal calculated at the full cost of one copy for the appellant and one-seventh cost for each of the seven copies for the use of the court, or where twenty copies are sent, one-twentieth.*

[11] *The applicant shall within such time as the registrar of the court below directs deposit such sum as shall be determined by such Registrar or give security therefore, by bond with one or more sureties to his satisfaction as such Registrar may direct for the due prosecution of the appeal and for the payment of any costs which may be ordered to be paid by the appellant;*

Provided that no deposit or security shall be required where the deposit would be payable by the Government of the Federal Republic of Nigeria or of state, or by any Government department.

[12] *The court may, where necessary, require security for costs or for performance of the order to be made on appeal, in addition to the sum determined under rules 10 and 11 of this Order.”*

These were conditions set out by the Assistant Chief of the trial court which, according to him, were not complied with by the appellant which necessitated the motion on Notice filed by the respondent. Order 3 of the Rules made further provisions for non-compliance with conditions of appeal. These are contained in Order 3 Rules:

“20[1] *If the appellant has not complied with any of the requirements of rules 10 and of this Order, the Registrar of the court*

below shall certify such fact to the Court, which shall thereupon order that the appeal be dismissed either with or without costs, and shall cause the appellant and the respondent to be notified of the terms of its order.

B [2] *If the respondent alleges that the appellant has failed to comply with a part of the requirements of rules 2, 10 or 11 of this order, the court, if satisfied that the appellant has failed, may dismiss the appeal for want of due prosecution or make such other order as the justice of the case may require."*

C From the records of appeal before this court, it appears that there was an inquiry to the Registrar of the trial court by one Prince N.I.A. Ohanyere, learned counsel for the defendant/appellant at the trial court and the court below on whether the appellant complied with the conditions of appeal. The Registrar of the trial court on the D 23rd of March, 1999, replied him that the conditions of appeal were not complied with by the defendant/appellant since 24th day of March, 1997 till that date of reply. Sequel to that, the respondent at the court below, filed a motion on Notice for the dismissal of the appeal. In his counter affidavit at the court below, the appellant/respondent E denied almost all the material facts averred to by the applicant in his affidavit in support. He filed a counter affidavit to that effect in which one Mr. Ohjina deposed to the following facts:

F *"4. That the appellant/respondent has since fulfilled all the conditions of appeal given to him. Attached herewith as Exhibit 'A' is a document by which the conditions were fulfilled.*

G *5. That at the beginning of the appeal, appellant fulfilled all the conditions imposed and work indeed start [sic] in the compilation of the records. But suddenly the officer said to be in charge of the appeal papers was said to have been transferred and was alleged to have locked up the document somewhere nobody appeared to know.*

6. The appellant had to begin all over again hence Exhibit 'A'.

7. Our latest inquiries, we were informed at the Oguta High Court that the records would soon be ready.

H *8. That appellant is very serious about his appeal and has gone a whole length to ensure he is diligent in its prosecution as for example, on 19/1/2000 this Honourable Court granted the appellant leave to file and argue further grounds of appeal.*

9. That the appellant should not be shut out of the gates of

justice which the grant of this application would entail.”

Having myself, meticulously had a look at the affidavit evidence of the appellant/respondent, I cannot but agree with the court below that there was no evidence of compliance with the conditions of appeal as set out in Exhibit ‘A’.

On the issue of violating appellant’s fundamental Right to fair hearing as submitted by learned counsel for the appellant, right to fair hearing, I believe, sets in only when the constitutional and procedural provisions which guarantee it are complied with by the complainant. In this case, the appellant woefully failed to comply with the requirements of the law pertaining to conditions of appeal. Right to appeal is constitutional. Compliance with conditions of appeal is a pre-qualification for the appeal to be entered and then be heard by the appeal court. It is true that:

[i] there was no record of appeal before the court below

[ii] the time given to the appellant within which to comply with conditions of appeal had expired without the appellant complying with same. There was no evidence that time was extended to so comply.

Such non-compliance, in my view, is potent enough to render any appeal, if there was one, incompetent. This, coupled with the trite principle of the law that court Rules are not made for mere decoration but to be obeyed made it easy for the court below to dismiss the appeal under Order 3 Rule 20 of the Court of Appeal Rules.

Although the appellant was under the illusion that he had complied with the conditions of appeal as given to him by the Registrar of the trial court, It still remained his responsibility to follow progress of his case with keen interest so as to fill any gap that might jeopardize his appeal. Even after the court below had given its ruling, there were still further openings for the appellant to reactivate his appeal. Order 3 Rule 20[4] provides:

“[4] *An appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored and any such application may be to the court which may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit.*”

There is nothing to show that the appellant resorted to this rule. Then, who is to blame?

In conclusion, I agree with my brother, Adekeye, JSC, that the appeal lacks merit. I too dismiss the appeal. I abide by all other orders made by my brother, Adekeye in her leading judgment.

B

FABIYI JSC

I have read before now the judgment just delivered by my learned brother, Adekeye, JSC. I agree with the reasons advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed.

Put briefly, judgment was entered against the appellant at the trial High Court, Oguta, Imo State in the sum of N10,525,000:00 plus 5% per annum interest. He felt aggrieved and appealed to the Court of Appeal, Port Harcourt Division (court below). It is apparent from the record that he failed to comply with the conditions of appeal as stipulated by the Court of Appeal Rules 1981. An application filed by the respondent to dismiss the appeal under Order 3 Rule 20 (1) of the Court of Appeal Rules, 1981 was taken and granted by the court below on 27th November, 2000. In its ruling, the court below found as follows:-

“Having listened to the argument of counsel for both sides and studied the affidavits, it is clear that the respondent did not comply with any of the conditions of appeal as required in Exhibit A. The respondent has not shown any evidence of compliance. Exhibit A to the counter affidavit dated 16th February, 1999 shows no compliance-at all. The respondent was required to comply with if the conditions of appeal within 30 days of March, 1999. There is no evidence of extension of time to comply. In the result, this application has merit and the appeal is dismissed under Order 3 Rule 20 of the Court of Appeal Rules. N2,000.00, in favour of the appellant.”

Instead of applying for the appeal to be restored under Order 3 Rule 20 (4) of the Court of Appeal Rules, he decided to appeal to this court. In his brief of argument filed on 16th September, 2002, the two issues formulated for determination read as follows:-

“(1) Whether the summary dismissal of appellant’s appeal without considering the affidavit evidence in the matter did not amount to a breach of his fundamental rights as enshrined in the 1999 Con-

stitution of the Federal Republic of Nigeria.

(2) Whether, in the circumstance of this case, an order of striking out would not have been more appropriate than one of dismissal as was done by the court on this case.”

In the respondent’s brief deemed filed on 27-10-09, the two issues distilled for determination of this appeal read as follows:- B

“(1) Whether the Court of Appeal had powers to make the order of 27/11/2000.

(2) Whether a party who has failed, refused and neglected to use the constitutional and procedural provisions for enforcing his rights of fair hearing would turn round to say that his right of fair hearing has been denied him if the Court of Appeal dismissed his appeal for want of prosecution.” C

It is glaring that the appellant failed to comply with the conditions of appeal as dictated by Order 3 Rule 20 (1) which provides as follows: D

“20 (1) If the appellant has not complied with any of the requirements of rules 10 and of this Order, the Registrar of the court below shall certify such fact to the court, which shall thereupon order that the appeal be dismissed either with or without costs, and shall cause the appellant and the respondent to be notified of the terms of its order.” E

The appellant must appreciate that rules of court are meant to be obeyed. And failure to obey court rules must be met by an appropriate sanction as provided by the rule. See Joseph Afolabi F John Adekunle & Ors. (1983) 4 NSCC 398 at page 405; University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143.

The appellant does not deserve to be noticed for attempting to raise a finger of complaint for his own inaction. This is because the court below complied with the dictate of the rule of court as provided by Order 3 Rule 20 (3) which provides as follows:- G

“20 (3) If the respondent alleges that the appellant has failed to comply with a part of the requirements of rules 2, 10 or 11 of this order, the court, if satisfied that the appellant has so failed, may dismiss the appeal for want of due prosecution or make such order as the justice of the case may require.” H

Upon the filing of the application to dismiss the appeal, the appellant should have filed his own application for extension of time

to comply with the conditions of appeal. By so doing, he would have taken step to suspend the application of Order 3 rule 20 (3). He failed to act in the right direction to his own chagrin. See *Ezeanah v. Atta* (2004) 7 NWLR (Pt. 873) 468.

B The appellant should be told in clear terms that having failed to meet the conditions of appeal and also refused to take necessary steps to suspended the application of Order 3 rule 20 (3), he disqualified himself from being heard and cannot be noticed to attempt to hide under the canopy of fair hearing. See *Chime v. Ude* (1996) 7 NWLR (Pt. 461)379. I

C I shall be done after making a very vital point. The appellant who should have acted under Order 3 Rule 20 (4) decided to appeal to this court. Order 3 rule 20 (4) provides as follows:-

D *“20 (4) An appellant whose appeal has been dismissed under this rule may apply by notice of motion that the appeal be restored. Any such application may be made to the court and the court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit.”*

E From the above, it is clear to me that the right and sensible thing to do in the prevailing circumstance was for the appellant to apply by motion on notice that the appeal be restored by the court below. This could have been achieved within a period of about six months; all things being equal. But the appellant unwittingly filed his notice of appeal to this court on 20-12-2000. The judgment is handed F out today 21st January, 2010. This is a period of nine years and one month to be precise. The venture, no doubt, was most unrewarding and counter-productive. Such a goof is not pardonable. I say no more.

G For the above reasons and those set out in the lead judgment, I too feel that the appeal deserves to be dismissed. I order accordingly and abide by all consequential orders; that relating to costs inclusive.

H