

SUPREME COURT OF NIGERIA
19TH FEBRUARY, 2010. SC. 133/2009
CORAM:- D. MUSDAPHER, G. A. OGUNTADE, F. F. TABAI,
I. T. MUHAMMAD, O. O. ADEKEYE, JJSC

ALL NIGERIAN PEOPLES PARTY APPELLANT
AND
1. SENATOR USMAN ALBISHIR
2. INDEPENDENT NATIONAL RESPONDENTS
ELECTORAL COMMISSION

APPEALS - Extension of time to appeal - Application - Crucial questions - The crucial question for the court to consider - Is whether the reason for failure to appeal within time - Could have been true and reasonable - As it will not be accepted if otherwise (H1)

APPEALS - Time - Failure to appeal within time - Plaintiff's reasons - Veracity - Contrary to the assertions by 1st respondent - It is clear that he deliberately withdrew his initial appeal - In order to pursue his suit at Kaduna (H2)

APPEALS - Time to appeal - Power to extend - O. 7 r. 10 of Court of Appeal Rules - Limits - It only avails persons who through inadvertence - Are unable to promptly file appeal - It is not an alternative route to those - Who have tried and failed at other procedures (H3)

FACTS

The applicant/1st respondent had sued the 2nd respondent and the appellant, as 1st and 2nd defendants respectively, at the Federal High Court, Maiduguri, challenging the alleged wrongful substitution of his name with that of late Senator Mamman Bello Ali, as the appellant's gubernatorial candidate for Yobe State in the 2007 general elections. But on the 21st February 2007, the court, in a ruling delivered on the issue of jurisdiction, struck the matter out for want of jurisdiction. 1st respondent filed an appeal against the ruling to Court of Appeal Jos but subsequently withdrew the appeal through his counsel. Before the withdrawal however, he had filed an action similar to the one in the court in Maiduguri before the Federal High

Court, Kaduna. The matter in Kaduna was prosecuted up to Court of Appeal, Kaduna where it was struck out for lack of jurisdiction.

Eventually, 1st respondent returned to Court of Appeal, Jos with an application for extension of time to appeal against the ruling of the court in Maiduguri dated 21st February 2007. This was eighteen months after the ruling was delivered. The reason he gave as explanation for his failure to appeal within time centred on the absence of his lead counsel and wrong advise from counsel. That court was of the view that the reason was sufficient under O. 7 r. 10 of the Court of Appeal Rules. Accordingly, it granted the application. Aggrieved, Appellant has brought this appeal against that ruling by Court of Appeal granting 1st respondent's application. It is appellant's contention that having regards to the circumstances of this case, the reason given for failure to appeal within time was untrue and so insufficient.

ISSUE FOR DETERMINATION

“ Whether the court below was right having regard to facts and circumstances of this case and the extant law to have granted extension of time to the 1st respondent to appeal to the court below on the ruling of the Federal High Court, Maiduguri delivered on 21st February, 2007 in suit No. FHC/MG/CS/08/07 when he failed totally to meet the conjunctive requirements as set out in the Court of Appeal Rules. ”

HELD (Unanimously allowing the appeal per **OGUNTADE JSC**)
Extension of time to appeal - Application - Crucial questions

1. The crucial question which the court below ought to have taken into account is whether or not the reason for failure by the 1st respondent to appeal within the prescribed time could have been true. When it is demonstrably shown that the reason or excuse upon which an applicant for extension of time has premised his application is false or untrue or unreasonable, such reason or explanation could not be accepted under Order 7 rule 10(2) of the Court of Appeal Rules. (p.492 F)

APPEALS - Time - Failure to appeal within time

2. From what I have said above, it is manifestly clear that the 1st respondent in order to be able to initiate a new action at the Federal

High Court, Kaduna and in order to render nugatory the order of the Federal High Court, Maiduguri consciously and deliberately withdrew the appeal which he caused to be filed on 21/02/07. How else could he have proceeded with the suit at the Federal High Court, Kaduna if there remained pending at the Court of Appeal, Jos an appeal which he caused to be filed. The Court of Appeal, Kaduna saw through the manipulations of the judicial process which the 1st respondent indulged in. But regrettably the court below did not. Rather the court below at page 516 of the record reasoned thus:

“The applicant stated as part of his reason for failure to file the Notice of Appeal the various advices he received from his counsel resulting in his mistaken impression that he had a valid appeal.
(p. 495 H)

APPEALS - Time to appeal - Power to extend

3. The relief derivable under order 7 Rule 10 of the Court of Appeal Rules is only available to persons who through inadvertence or some importunity are unable to promptly file their appeals within the time frame set under the Court of Appeal Act. It is not created as an alternative route of appeal to persons who have tried and failed through other procedures. It is not for gamblers or speculators. Surely if the Court of Appeal, Kaduna had not in its prudence allowed the appeal against the order made by the Federal High Court Kaduna, the 1st respondent would not have come back to seek extension of time to appeal before the court below. In other words, 1st respondent was intent on using the court below as a back-up or last resort in the event he failed in his gamble. (p. 496 H)

REPRESENTATION

Mr. Yusuf Ali S.A.N. (Mr. A.O. Adelodun, Dr. W. Egbewole, Abu Adamu, K. K. Eleja, S. A. Oke, M. Abdullahi, Etukwu Onah, B. E. Offione, N. N. Adegboye, Murtar Abubakar, Alex Akoja with him) for the appellant.

Dr. Alex A. Izinyon, SAN (D. D. Dodo SAN, Dr. Akin Onigbinde, I. N. Ambule, Esq., S. A. Yelwa, Esq., M. S. Shuaibu, Esq., Haruna Albishir, Esq., B. K. Abu, Esq., P. M. Ayam, Esq., F. O. Izinyon, Esq., Festus Jumbo, Esq., Umar Bukar Gana, Esq., Ejoyi Oghojafor Esq., Alaci John, Esq., Tehemba Gbashima, Kauna Penzin with him) for the 1st

Respondent.

Mr. Wole Adebayo (Messrs. Chuka Ugwu and Halifa Kafo with him)
for the 2nd Respondent.

CASES REFERRED TO

- B Ntukidem v. Oko [1986] 5 NWLR (Pt.45) 909
 Oloko v. Ube (2001) 13 NWLR pt. 729 pg. 161
 Kotoye v. Saraki (1995) 5 NWLR (Part 395)256
 UKU v BUNGE (1991) 3 NWLR (Part 182) 677
 C Balogun v. Afokilu (1994) 7 NWLR pt. 355 pg. 206
 F.H.A. v. Abosede (1998) 2 NWLR pt. 537 pg. 177
 IROEGBU V OKWORDU (1990) 6 NWLR (Part 159) 643
 Shanu v. Afribank Nig. Plc. (2000) 13 NWLR pt. 684 pg. 392
 Yonwuren v. Modern Signs Ltd. (1985)1 NWLR pt. 1 pg. 143
 D Oladele v. Aromolaran II (1991) 3 NWLR (Pt. 181) 564 at 569-570
 Mobil Oil (Nig.) Ltd. v. Agadaigho (1988) 2 NWLR pt. 77 pg. 385
 Ikenta Best (Nig.) Ltd v. A.G. Rivers State (2008) 6 NWLR (Pt. 1084)
 612 at 642
 Williams v. Hope Rising Voluntary Funds Society (1982) 1 ALL NLR
 E pt. 1 pg. 1
 Abubakar v. Bebneji Oil and Allied Products Ltd. & Ors. 9(2007) 2
 S.C.N.J. 170 at 202
 Nigerian Airports Authority V. Chief Dick Celestine Okoro (1995)6
 F NWLR (Pt.403) 510 at 523-523

STATUTES & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1999, ss. 34 & 36
 Court of Appeal Rules, O. 7 r. 10
 G Electoral Act, s. 34

LEAD JUDGMENT BY OGUNTADE JSC

- This appeal challenges the propriety of the order made by
 the Court of Appeal, Jos (hereinafter referred to as ‘the court
 H below’) on 8-04-09. The 1st respondent before this Court Senator
 Usman Albishir was the applicant before the court below where he
 sought three principal reliefs which read:

*“1. An order extending the time within which to seek leave
 to appeal against the ruling of Hon. Justice Adamu Hobon of the*

Federal High Court, Maiduguri in Suit No: FHC/MG/CS/08/07 between Senator Usman Albishir v. Independent National Electoral Commission (INEC) & Anor. which said Ruling was delivered on 21st February 2007.

2. *An order granting leave to the Appellant to appeal against the ruling of Hon. Justice Adamu Hobon of the Federal high Court, Maiduguri in Suit No: FHC/MG/CS/08/07 between Senator Usman Albishir V. Independent National Electoral Commission (INEC) & Anor. Which said Ruling was delivered on 21st February 2007.*

3. *An order extending the time within which to appeal against the ruling of Hon. Justice Adamu Hobon of the federal high Court, Maiduguri in Suit No: FHC/MG/CS/08/07 between Senator Usman Albishir v. Independent National Electoral Commission (INEC) & Anor which said Ruling was delivered on 21ST February, 2007.”*

In the concluding paragraph of the ruling granting the application, the court below at page 59 of the record said:

“This application having duly satisfied both conditions of order 7 rule 10(2) of the Rules of this court, I have no hesitation in granting it which in my opinion is meritorious. Time is hereby enlarged within which the applicants is to appeal against the Ruling of Federal High Court Maiduguri delivered on 27th February, 2007. Applicant has seven days (7) from today to file his Notice of Appeal.”

The appellant, All Nigerian People Party was dissatisfied with the ruling of the court below. It brought this appeal against it on three grounds of appeal. In the appellant’s brief filed, the issue for determination in the appeal was stated to be:

“Whether the court below was right having regard to facts and circumstances of this case and the extant law to have granted extension of time to the 1st respondent to appeal to the court below on the ruling of the Federal High Court, Maiduguri delivered on 21st February, 2007 in suit No. FHC/MG/CS/08/07 when he failed totally to meet the conjunctive requirements as set out in the Court of Appeal Rules.”

This appeal raises the necessary to consider the applicability and effect of Order 7 rule 10(2) of the Court of Appeal Rules which provides:

“Every application for an enlargement of time within which to appeal shall be supported by an affidavit setting forth good and sub-

stantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged, a copy of the order granting such enlargement shall be annexed to the Notice of Appeal.”

B The above provision of the court of Appeal Rules has come before this court for consideration in a multiplicity of cases such that its applicability or interpretation although being constantly done against the background of varying facts, should not be problematic. What then are the facts in this case?

C The 1st respondent as applicant, had on 25/08/2008 brought his application for extension of time to appeal. He deposed in paragraphs 3 to 26 and 31 of the affidavit in support of the application thus:

D *“3. That I filed this suit at the Federation High Court Maiduguri, challenging the Respondents’ move remove my name as the bonafide Gubernatorial candidate of 2nd Respondent herein in the April 14th 2007 Governorship Election in Yobe State having won the 2nd Respondent’s Gubernatorial Primaries in Yobe State. Attached hereto*
 E *as Exhibit A is a copy of the letter dated the 17th day of December 2006 by the second Respondent nominating me as its candidate for the said election.*

4. That pursuant to the submission of my name as aforesaid I was invited for screening by the First Respondent herein and after
 F *considering all complaints against my candidature the said Respondent cleared me to contest and said election. Attached hereto as Exhibit B is a copy of the First Respondent’s letter dated the 13th day of February 2007.*

G *5. That in a letter purportedly dated the 13th day of February 2007, the second respondent herein without giving a cogent and verifiable reason or any reason at all purported to substitute me as its candidate for the said election. Attached hereto as Exhibit C is a copy of the said letter.*

H *6. That on filing the said suit, I also filled an application for an interim order of injunction as well as a Motion on Notice for an order of interlocutory injunction to restrain the Respondents from removing my name as the bonafide Gubernatorial Candidate of the 2nd Respondent in Yobe State for the election aforesaid.*

7. *That the learned trial judge while delivering ruling on the said interim application for injunction suo motu raised the issue of jurisdiction and without calling on any party to address him on the jurisdictional issue so raised by him proceeded to hold that he lacked the jurisdiction to entertain the suit and consequently struck it out. The said ruling of the trial court attached hereto as Exhibit D.* B

8. *That at the time of the ruling my Solicitor, Dr. Izinyon was not readily available.*

9. *That in view of the time constraint given that the election was fast approaching I instructed one Haruna Mshelia Esq. a legal practitioner based in Maiduguri to file an appeal in the name of my said Solicitor Dr. Alex Izinyon, SAN. A copy of the said Notice of Appeal is attached hereto as Exhibit E.* C

10. *The Exhibit E was filed within time in February, 2007.*

11. *That due to communication breakdown as well as the D immense tension and political pressures I found myself in during that period I was not able to inform my solicitor about my instruction to Mr. Mshelia on time.*

12. *That on hearing about the Notice of Appeal filed in his name by Mr. Mshelia, Dr. Izinyon wrote the lower court denouncing the said Notice of Appeal.* E

13. *That in his bid to carry out the instruction I gave him, Mr. Mshelia signed the Notice of Appeal without putting his name on the Notice of Appeal.*

14. *That all along I had been advised by my Solicitors that I have a valid appeal.* F

15. *That also relying on the instructions of one of my Solicitors Musa Tende Esq. I came to believe that I could file another action at the Federal high Court since the Maiduguri case was struck out as opposed to being dismissed.* G

16. *That relying on the said advice I instructed Musa Tende Esq. to commence another action at the Federal High Court and he consequently filed suit No. FHC/KD/CS 42/2007.*

17. *That in the said Kaduna case the First Respondent in its defence also found and relied heavily on Exhibit C purportedly written by the Second Respondent allegedly substituting me. Attached hereto as Exhibit F is a certified (sic)* H

18.

19.

20.

25. *That I am very desirous of pursuing this appeal which was against the ruling of the Federal high Court, Maiduguri.*

B 26. *That I verily believe that it will take an inordinately long period of time to prepare the record of appeal at the trial court's registry."*

27.

28.

C 31. *That the failure to file the Notice of Appeal within time was not out of disrespect to this Honourable Court but rather due to the various advice aforesaid as a result of which I was under the mistaken impression that I had a valid Appeal."*

The appellant, who was the 2nd respondent before the court below deposed to a counter-affidavit. Paragraphs 3 to 15 of the said counter-affidavit read thus: :

E "3. That a copy of the applicant's motion dated 25th August, 2008 was passed on to me by the Secretary of the 2nd Respondent Senator Saidu Kumo, with a firm directive that I react and/or respond to same.

4. That I have gone through the said motion together with the affidavit in support of same and the attached exhibits and I perfectly understand the content thereof.

F 5. That I know as a fact that paragraphs 4, 5, 7, 8, 20, 24, 26, 28, 29, 30, 31, 32, 33 and 34 of the affidavit in support of the said motion are untrue.

6. That in reaction to paragraph 5 of the applicant's affidavit, I know as a fact:

G (i) That Senator Mamman B. Alli was the duly nominated Gubernatorial candidate of the 2nd Respondent for the election of 14th April, 2007 and he won the said election as the Governor of Yobe State.

H (ii) That the applicant commenced an action before the Federal high Court, Maiduguri which action was duly struck out for want of jurisdiction on 21st February, 2007.

(iii) That the applicant who initially appealed against the striking out of his case later withdrew the appeal vide his counsel's letter of 24th February, 2007, a copy of which is now shown to me and

attached here with and marked as Exhibit ANPPI.

(iv) That in further repudiation of the said appeal, the Applicant herein again wrote another letter through his lead counsel disclaiming the Notice of Appeal and asking that the court record be wiped clean of same. Now shown to me and attached here with and marked Exhibit ANPPII is a copy of the said letter. B

7. That I know as a fact that the withdrawal of the initial Notice of Appeal and/or disclaimer of same by the applicant was a deliberate choice and/or option, going by exhibits ANPPI and 11.

8. That I know as a fact that the applicant before with drawing the said appeal filed another action before the Federal High Court, Kaduna to press for the same reliefs which was the subject of case before the Federal high Court Maiduguri that became the subject of his appeal to the Court of Appeal, Jos Division. C

9. That I know as a fact that the applicant has been moving from one court to the other pressing for the same reliefs on the same subject matter. D

10. That I know as a fact that the applicant had equally lost his attempt to press his claim afresh before the federal High Court, Kaduna in preference for his appeal before this Honourable Court. E

11. That I know as a fact that this present application is a further forum shopping exercise by the applicant who has met a brick-wall in his preferred choice or option of relitigating the Federal high court's decision.

12. That I know as a fact that the applicant is now using the processes of the courts to annoy, irritate, distract and embarrass the 2nd Respondent. F

13. That I know as a fact that the present application is a gross abuse of the processes of this Honourable court. G

14. That I know as a fact that there is no urgency of any kind in this case which is an ordinary civil case that can wait its turn in the registry of the court.

15. That I know as a fact that any purported urgency in this case is self induced by the applicant who has been inconsistent in his choice of forum and has traversed all the superior courts of record including the Governorship Election Petition Tribunal of Yobe State" (Underling mine) H

Each of the 1st respondent and the appellant annexed docu-

mentary exhibits to their affidavit and counter-affidavits before the court below. I shall have cause to reproduce extracts from some of the said exhibits in the course of this judgment. The court below at page 517 of its ruling stated thus:

B *"In the present case, I am satisfied from the facts deposed to in the supporting affidavit that it discloses good and substantial reasons why the applicant failed to file his Notice of appeal within the time prescribed by law. Hence the applicant in my opinion has satisfied the first requirement of order 7 rule 10(2) of the Rules of this court."*

C In its ruling, before coming to the conclusion reproduced immediately above, the court below at pages 515-517 of the record had said:

D *"In the present case, the trial court gave its decision on 21st February, 2007 but Applicant filed his Notice of Appeal against the said decision on 25th August, 2008 after a period of eighteen months.*

The applicant stated reasons for the delay in bringing the application in paragraphs 18, 19, 20, 21, 22, 24, 25 and 31 of the affidavit in support. The said paragraphs are hereby adumbrated as follows:

E 18. That relying on advice of solicitors I all along verily believed that I had a valid appeal against the decision I am now appealing against.

F 19. That it was only recently that this Honourable Court held in Motion No. CA/J/157M/2008 that the said appeal filed on my behalf by Mr. Mshella was invalid. Attached hereto is a certified true copy of the said decision of this Honourable court marked as EXHIBIT G.

G 20. *That I could not file another appeal immediately after delivery of the decision in EXHIBIT G because my Solicitor Dr. Alex Izinyon was out of the county and I was afraid to repeat the mistakes that led to the invalidation of the previous appeal.*

21. *That I also had to travel abroad on an extended trip for medical check up and I just came back into the country.*

H 22. *That my failure to file another appeal immediately after the decision in EXHIBIT G is not out of disrespect to this Honourable Court but rather due to the reasons deposed to in the preceding paragraphs.*

24. *That when on 22nd August, 2008 when Dr. Alex Izinyon*

SAN returned to the country, he informed me in his chambers at Wluze Zone 6, and I verily believed him that a fresh application should be brought to this Honourable court rather than an appeal hence this application.

25. That I am desirous of pursuing this appeal which was against the ruling of the Federal High Court, Maiduguri. B

31. That the failure to file the Notice of Appeal within time was not out of disrespect to this Honourable Court but rather due to the various advice aforesaid as a result of which I was under mistaken impression that I had a valid Appeal.' C

The applicant stated as part of his reason for failure to file the Notice of Appeal the various advices he received from his counsel resulting in his mistaken impression that he had a valid appeal.

It has been argued by counsel to the Respondents that the blunders, ill advise, misadventure or short coming of counsel resulting in wrong and/or defective professional decision of counsel should not be a reason to be considered in granting an application for enlargement of time to file an appeal. Learned senior counsel for the 2nd Respondent said that it is a clear exception to the general principle that inadvertence or sin of counsel will not be visited on the litigant. E

Put simply, the court below in its ruling accepted as a good and sufficient reason for extensions of time to appeal the explanation given by the 1st respondent that he believed he had a valid appeal in court until the Court of Appeal, Jos in appeal No. CA/J/157M/2008 on 17/07/08 vide exhibit 'G' ruled that he had no appeal and that he was then prompted to bring his present application. F

I am, speaking frankly, very much disturbed by the approach of the court below to this application. The court below has by its reasoning trivialised the importance and necessity to comply with time-frame for bringing an appeal. The Court of Appeal, a creation of the 1999 Constitution of Nigeria must not inhibit a citizen's right of appeal as conferred by the 1999 Constitution. On the other hand, the court must not convey to a litigant the impression that the Court of Appeal Act which creates a time-frame for bringing an appeal is irrelevant and inapplicable as to the time frame for the exercise of a right of appeal. The Court of Appeal has a duty to ensure that a would-be appellant who has ground of appeal which prima facie show good G H

cause why the appeal should be heard is not denied his right under the 1999 Constitution. Indeed, the court must encourage such litigant where it is satisfied that the right of appeal is being pursued in good faith.

Having said the above it is equally important that an applicant who has not shown by affidavit “good and substantial reason for failure to appeal within the prescribed period” and good grounds of appeal must not be granted such favour or the leave of the Court of Appeal to appeal out of time.

In *Nigerian Airports Authority V. Chief Dick Celestine Okoro* (1995)6 NWLR (Pt.403) 510 at 523-524, this court considering an appeal on the grant of extension of time to appeal observed:

“An appeal court will not interfere with the exercise of discretion by a lower court when such a discretion has been exercised judicially. It is only when the lower court exercised the discretion upon a wrong principle or mistake of law or under misapprehension of the facts or has taken into account irrelevant matters or on the ground that injustice could arise or has arisen that the appeal court will interfere - Kudoro v. Alaka (1956) 1 SCNLR 225; Enekebe v. Enekebe (1964) 1 ALL NLR 102, Saffiedine v. C.O.P [1965] 1 ALL NLR 54; Odusote v. Odusote [1971] 1 All NLR 229; State v. Gali [1974] 5 SC. 67; Awani v. Erejuwa II [1976] 11 SC. 307; Omadide v. Adajero [1976] 12 SC. 87; Demuren v. Asuni [1967] 1 All NLR 101 (Re-print); Ntukidem v. Oko [1986] 5 NWLR (Pt.45) 909.”

The crucial question which the court below ought to have taken into account is whether or not the reason for failure by the 1st respondent to appeal within the prescribed time could have been true. When it is demonstrably shown that the reason or excuse upon which an applicant for extension of time has premised his application is false or untrue or unreasonable, such reason or explanation could not be accepted under Order 7 rule 10(2) of the Court of Appeal Rules.

In paragraph 8 of the counter-affidavit before the court below, the appellant (who was the 1st respondent) deposed thus:

“That I know as a fact that the applicant before withdrawing the said appeal filed another action before the Federal High Court, Kaduna to press for the same reliefs which was the subject of the case before the Federal High Court Maiduguri that became the subject of

his appeal to the Court of Appeal, Jos Division.”

The question that must follow is this. Was it true that the 1st respondent had brought a suit before the Federal High Court Kaduna which was the same or similar to the suit struck out by the Federal High Court Maiduguri in respect of which the 1st respondent brought his present application for extension of time? B

The court below had before it the judgment of the Court of Appeal, Kaduna delivered on 13-7-2007. The said judgment set out the questions which the 1st respondent wanted the Federal High Court Kaduna to determine and the reliefs which the 1st respondent was seeking thus: C

"1. Whether having regard to the combined effect of the provisions of Sections 36, 177 and 182 of the Constitution of the Federal Republic of Nigeria, 1999 and section 34 of the Electoral Act, 2006 (as amended) the 2nd defendant can without giving any reason whatsoever change the candidature-ship of the plaintiffs as earlier submitted as the gubernatorial flag bearer/running mate for Yobe State in the April, 2007 general elections.

2. Whether having regard to section 36 of the Constitution of the Federal Republic of Nigeria 1999 and Section 34(2) of the Electoral Act 2006 (as amended) whether without giving any reason at all the 1st defendant can accept any change or substitution with any other person whatsoever." E

They also sought the following reliefs from the court upon the determination of the above questions: F

1. A declaration that the plaintiffs having been lawfully nominated and their candidature accepted by the 1st defendant, they are entitled to fair hearing as to any reason given by the 2nd defendant for their replacement or substitution by any other person. G

2. A declaration that the 1st defendant cannot change the plaintiffs as its gubernatorial candidate/running mate for the April, 2007 gubernatorial election in Yobe State without giving any cogent reason.

3. A declaration that the 1st defendant cannot accept any replacement or substitution of the plaintiffs by any person whatsoever without the second defendant giving any cogent reason. H

4. A declaration that the failure of the 1st and 2nd defendants give the plaintiffs an opportunity to defend themselves for by (sic)

reason given amounts to denial of fair hearing.

5. An order setting aside any substitution whatsoever made by the 2nd defendant to the 1st defendant as the gubernatorial candidate/running mate in Yobe State.

6. An order of injunction restraining the defendant, their agents or servants from tampering with or doing anything whatsoever to the names or otherwise of the plaintiffs as already verified and cleared as the gubernatorial candidate/running mate for Yobe State in the April, 2007 general election."

In paragraphs 3 to 7 of the affidavit filed by the 1st respondent which I reproduced earlier in this judgment, the 1st respondent deposed to the nature of his claim before the Federal High Court Maiduguri and how it was struck out. At the Court of Appeal, Kaduna, the appellant in contending that 1st respondent's suit was an abuse of the process of court raised objection to the assumption of jurisdiction of the Federal High Court, Kaduna over the suit. The Court of Appeal, Kaduna in its judgment on 13-07-2007 concluded thus:

"Now in Maiduguri case, the learned trial judge held that he had no jurisdiction to hear and determine the action. It is a court of concurrent jurisdiction with the Federal High Court, Kaduna, which heard the case on its merits. Once the court had held that it had no jurisdiction to hear the case, a court to concurrent jurisdiction could not then entertain it. The only option open to the aggrieved party was to appeal against the decision. See: Abubakar v. Bebneji Oil and Allied Products Ltd. & Ors. 9(2007) 2 S.C.N.J. 170 at 202; N.D.E.C. v. S.B.N, Plc. (2003) 1 NWLR (801) 311.

Indeed the 1st respondent promptly filed a notice of appeal against the decision. To have subsequently instituted another action before the same Federal High Court sitting in another division for the same reliefs while the appeal was still pending, in my humble view, was an attempt to interfere with the due administration of justice by overreaching the Court of Appeal sitting in Jos. I am also of the view that the institution of the suit before the Federal High Court, Kaduna was done male fide. I therefore hold that the institution of the proceedings before the Federal High Court Kaduna amounted to an abuse of process and the said court ought not to have entertained it. The second issue for determination is accordingly resolved in favour of the appellant.

The effect of my findings in respect of issues 1 and 2 is that the learned trial judge lacked jurisdiction to entertain the suit before him. In the circumstance I am of the view that a consideration of the third issue for determination would amount to an academic exercise.

In conclusion therefore the appeal succeeds and is hereby allowed. The judgment of the Federal High Court in Suit No. FHC/K/CS/42/2007 per Liman, J. delivered on 19/3/07 is hereby set aside. The suit is accordingly struck out for lack of jurisdiction. Costs of N10,000.00 are awarded in favour of the appellant against the 1st and 2nd respondents. I make no order for costs against the 3rd and 4th respondents."

(Underlining mine)

The position we now have may be summarized thus:

1. The 1st respondent filed a suit at the Federal High Court, Maiduguri on 21/02/07 contending that he was improperly substituted as the Appellant's Governorship candidate for the 2007, Governorship election in Yobe State.

2. On 21st February, 2007, the said suit was struck out by the Federal High Court, Maiduguri.

3. On 22nd February 2007, the 1st respondent filed a Notice of Appeal against the order striking out his suit by the Federal High Court Maiduguri.

4. On 24-02-07, the chambers of Haruna Mshelia & Co. wrote to the Registrar of the Federal High Court, Maiduguri withdrawing the Notice of appeal filed on behalf of the 1st respondent on 22/02/2007.

5. On 23/02/07, the 1st respondent filed an originating summons before the Federal High Court Kaduna claiming similar reliefs as he claimed at the Maiduguri Federal High Court which said reliefs were struck out on 21-02-07.

6. On 19-03-07, the Federal High Court granted all the reliefs claimed by 1st respondent on his originating summons.

7. Dissatisfied, the then Governor of Yobe State, Senator Mamman Ali (now deceased) brought an appeal before the Court of Appeal, Kaduna.

I reproduced earlier the excerpts of the judgment of court of Appeal, Kaduna wherein the judgment of the Federal High Court, Kaduna was set aside as an abuse of court process. ***From what I***

have said above, it is manifestly clear that the 1st respondent in order to be able to initiate a new action at the Federal High Court, Kaduna and in order to render nugatory the order of the Federal High Court, Maiduguri consciously and deliberately withdrew the appeal which he caused to be filed on 21/02/07. How else could he have proceeded with the suit at the Federal High Court, Kaduna if there remained pending at the Court of Appeal, Jos an appeal which he caused to be filed. The Court of Appeal, Kaduna saw through the manipulations of the judicial process which the 1st respondent indulged in. But regrettably the court below did not. Rather the court below at page 516 of the record reasoned thus:

“The applicant stated as part of his reason for failure to file the Notice of Appeal the various advices he received from his counsel resulting in his mistaken impression that he had a valid appeal.

It has been argued by counsel that the blunders, ill advise, misadventure or short-coming of counsel resulting in wrong and/or defective professional decision of counsel should not be a reason to be considered in granting our application for enlargement of time to file an appeal. Learned Senior Counsel for the 2nd respondent that it is a clear exception to the general principle that inadvertence or sin of counsel will not be visited on the litigant.”

I think otherwise. The truth of this matter is that the 1st respondent and his counsel chose to abuse the administration of justice. Why would the 1st respondent whose case was struck out at the Federal High Court, Maiduguri go to the Federal High Court, Kaduna to seek reliefs which he did not get in the Maiduguri Federal High Court? As it turned out, he got a favourable judgment at the Federal High Court, Kaduna. If the court of Appeal, Kaduna and this court which affirmed the judgment of the Court of Appeal, Kaduna had not seen through the games which the 1st respondent played with the administration of justice, he would have got his way. The same 1st respondent now says he wants to appeal out of time and ascribes as his excuse the explanation that he received conflicting advice from counsel.

The relief derivable under order 7 Rule 10 of the court of Appeal Rules is only available to persons who through inad-

vertence or some importunity are unable to promptly file their appeals within the time frame set under the Court of Appeal Act. It is not created as an alternative route of appeal to persons who have tried and failed through other procedures. It is not for gamblers or speculators. Surely if the court of Appeal, Kaduna had not in its prudence allowed the appeal against the order made by the Federal High Court Kaduna, the 1st respondent would not have come back to seek extension of time to appeal before the court below. In other words, 1st respondent was intent on using the court below as a back-up or last resort in the event he failed in his gamble. See Kotoye v. Saraki (1995) 5 NWLR (Part 395)256. The reasoning of the court below that the 1st respondent was unable to appeal within time because of the ill advise or blunders of counsel is grossly untenable. Rather, the 1st respondent had consciously and deliberately adopted a course of action which turned out in the end to be wrong or unrewarding.

In Ikenta Best (Nig.) Ltd v. A.G. Rivers State (2008) 6 NWLR (Pt. 1084) 612 at 642; this Court per Tobi JSC said:

“As it is, rule 4(2) provides for two conjunctive conditions for enlargement of time to appeal, They are good and substantial reasons and the grounds of appeal *prima facie* showing good cause, I want to say again that the two conditions are conjunctive not disjunctive. This means that the two conditions must be present in the affidavit or proved by the applicant.

The reasons must be good. In other words, the reasons must possess the quality that is satisfactory, favourable, useful or suitable to the application. The reasons must not be bad in the sense that they are unacceptable. Substantial reasons are essential, material and important reasons. Reasons which are peripheral or dance around the periphery strangely cannot suffice. The pendulum should weigh in favour of granting the application and not just enough to balance the weight or on an even keel.

Grounds of appeal.... The mirror through which the court takes a peep at the appeal. Although grounds of appeal are not barometers for the initial determination of the strength of the appeal, they provide some useful information, even if speculatively on the likely trend or outcome of the appeal. As the first point of contact

with the appeal, the grounds of appeal should, at the first sight of the appellate Judge or on their face, show good cause why the appeal should be heard. And here good cause means good reason. It should be emphasized that the good reason is for the hearing of the appeal and not that the appeal will succeed. No. That will be jumping the gun. At the stage of considering an application for extension of time to appeal, the court is concerned with the strength of the grounds of appeal and not with the success of the appeal.

What was the reason given for the inability or failure to appeal within time? The reason is deposed to in paragraph 10 of the affidavit in support and it is 'because successive Attorneys-General felt that not being the party to a contract between the plaintiff and West African Glass Industries Plc, the 1st defendant/respondent, that liability was exclusively that of the 1st defendant/respondent....'

Is that a good reason? The answer is 'No'. How can Attorneys-General, first law officers of the State and leaders of the States Bar and expert of the law, not able to take a decision on the law of contract? Attorneys-General know better than that or should know better than that. I entirely agree with the minority ruling of Ikongbeh, JCA" See also *Oladele v. Aromolaran II* (1991) 3 NWLR (Pt. 181) 564 at 569-570.

It is a correct statement that in the exercise of the power to grant extension of time to appeal, the court is called upon to exercise discretion. The grant of extension of time ought not be done if the excuse offered is patently untrue or crafted to gain an undue advantage as in this case. In this appeal the 1st respondent has made appearances in virtually all the courts including the election tribunals, Federal High Courts - Kaduna and Maiduguri, Courts of Appeal, Jos and Kaduna and finally this court. He now seeks to be allowed to re-route and go back to the Court of Appeal, Jos.

It is with respect that I think that the court below ought not have granted the 1st respondent leave sought to bring an appeal out of time. To do so was to have allowed the 1st respondent the satisfaction that he succeeded in fooling everybody. This appeal has immense merit. The application by 1st respondent for extension of time to appeal ought to have been dismissed. It is accordingly dismissed. The appeal is allowed with N50,000.00 costs in favour of the appellant against the 1st respondent.

MUSDAPHER JSC

I concur.

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B

TABAI JSC

I read, in advance, the lead judgment of my learned brother Oguntade JSC and I agree with his reasoning and conclusion that the appeal be allowed.

The appeal turns on the application of Order 7 Rule 10(2) of the Court of Appeal Rules 2007. In the relevant portion of the ruling which has given rise to this appeal, the Court below stated:

“The application having duly satisfied both conditions of Order 7 Rule 10(2) of the Rules of this Court, I have no hesitation in granting it which in my opinion is meritorious. Time is hereby enlarged within which the applicant is to appeal against the ruling of the Federal High Court Maiduguri delivered on 27th February 2007. The Applicant has seven days (7) from today to file his Notice of Appeal.”

The sole issue for determination as proposed by the Appellant is:-

“Whether the Court below was right having regard to the facts and circumstances of this case and the extant law to have granted extension of time to the 1st Respondent to appeal to the Court below on the ruling of the Federal High Court Maiduguri delivered on the 21st February 2007 in Suit No. FHC/MG/CS/08/07 when he failed totally to meet the conjunctive requirements as set out in the Court of Appeal Rules”

As I stated earlier, this appeal turns on the effect of Order 7 Rule 10(2) of the Court of Appeal Rules which provides:-

“Every application for an enlargement of time within which to appeal shall be supported by affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged, a copy of the order granting such enlargement shall be annexed to the Notice of Appeal.”

Thus order 7 Rule 10(2) lays down two conditions for the ex-

exercise of a discretion to grant enlargement of time within which to appeal. The first is that there must be good and substantial reasons for failure to appeal within time; and the second is that there must be grounds of a appeal which prima facie show good cause why the appeal should be heard. And these two conditions must co-exist to warrant a grant of the application. See *UKU v BUNGE* (1991) 3 NWLR (Part 182) 677; *IROEGBU V OKWORDU* (1990) 6 NWLR (Part 159) 643; *DOHERTY v DOHERTY* (1964) 1 ALL NLR 299, *OJORA v BAKARE* (1976) 1 SC 47; *ALAGBE v ABIMBOLA* (1978) 2 SC 39.

The sole question for determination is whether the Court of Appeal was right in holding that the application satisfied both conditions. The affidavit opposing it are reproduced in the lead judgment and I need not reproduce same.

The ruling sought to be appealed against was delivered on the 27/2/2007. The application for extension of time within which to seek leave to appeal was dated 25/8/08 and filed on the 29/8/08. Thus the application for extension of time to seek leave to appeal was filed about 18 months after the ruling. The question is whether the application has disclosed good and substantial reasons for this delay of 18th months in bringing the application.

The application is supported by a 34 paragraph affidavit. The said affidavit contains a number of reasons for the delay. He alleged that his solicitor Dr. Izinyon was not readily available and that he had to instruct Haruna Mshelia to file a Notice of Appeal which was in time. That he failed to inform his solicitor about it. On a preliminary objection the notice of appeal was held to be incompetent and same was struck out. He alleged again that he could not file another application immediately because his solicitor Dr. Alex Izinyon was out of the country. Yet another reason for the delay in filing this application until the 29/8/08 was that he too travelled abroad on an extended trip for medical check up.

The 2nd Respondent in reaction filed a 28 paragraph counter-affidavit wherein many paragraphs of the supporting affidavit were denied. It was alleged in the said counter affidavit that the applicant had been moving from one court to another and that the application was a further forum shopping exercise.

In my consideration the affidavit in support of the applica-

tion did not sufficiently explain the delay of 18 months. That his lead counsel was abroad for sometime is no excuse since in his absence he rightly engaged he services of other counsel. Also not sufficiently explained is his alleged extended trip abroad. No particulars or details of the alleged extended trip was contained the affidavit. It is my view therefore that the application was devoid of good and substantial reasons for the delay and in the circumstances it is my view and I hold that there were no sufficient materials to warrant the court's exercise of its discretion in favour of the Applicant/Respondent. B

For the foregoing and the fuller reasons contained in the lead judgment of my learned brother Oguntade JSC I also allow the appeal. I adopt the issue of costs contained in the said lead judgment. C

MUHAMMAD JSC

My learned brother, Oguntade, JSC, afforded me the opportunity to read in draft his leading judgment just delivered. I agree with his conclusion. I abide by orders made in the leading judgment including order as to costs. D E

ADEKEYE JSC

I was privileged to read in draft the judgment just delivered by my learned brother, G. A. Oguntade, JSC. This is an appeal against the ruling of the Court of Appeal, Jos Division delivered on the 8th day of April 2008. The facts relevant to this appeal are as narrated by my brother in his leading judgment. The prayers before the Court of Appeal, Jos by the 1st respondent in this appeal as appellant/applicant was for tripod prayers to appeal against the Ruling of Hon. Justice Adam Holbon of the Federal High Court, Maiduguri in Suit No. FHC/MG/CS/08/07 between Senator Usman Aibishir v. Independent National Electoral Commission [INEC] & Anor. which said ruling was delivered on 21st February, 2007. F G H

The Court of Appeal in the penultimate paragraph of the Ruling had this to say-

“This application having duly satisfied both the conditions of

Order 7 Rule 10 (2) of the Rules of this Court, I have no hesitation in granting it which in my opinion is meritorious. Time is hereby enlarged within which the applicant is to appeal against the ruling of the Federal High Court Maiduguri delivered on 27th February 2007. Applicant has seven days (7) from today to file his Notice of Appeal.”

B The respondents in the appeal before the lower court, All Nigerian Peoples Party and Independent National Electoral Commission expressed their dissatisfaction with the ruling by their appeal to this court.

C The sole issue raised for determination challenged the decision of the lower court in granting extension of time to the 1st respondent to appeal to the court below in respect of the ruling of the Federal High Court, Maiduguri delivered on the 21st of February 2007 in suit No. FHC/MG/CS/08/07 when he failed totally to meet the conjunctive requirements as set out in the Court of Appeal Rules.

D The appellants in their briefs canvassed strongly against the lower court exercising its discretion in favour of granting the application to the 1st respondent. The 1st respondent was equally up to the task in giving a reply to facts raised, coupled with reasons why the application should be in his favour.

E By virtue of the 1999 Constitution, every citizen has a right of appeal to the Court of Appeal from the decisions of the Federal High Court or High Court in the civil or criminal proceedings as of right Section 241 (1) or with leave of the Federal High Court or High Court or the Court of Appeal under Section 242 (1). Section 243 (b) of the 1999 Constitution stipulates that the right shall be exercised in accordance with any Act of the National Assembly and the Rules of Court for the time being in force in regulating the powers, practice and procedure of the Court of Appeal. Section 25 (2) (a) of the Court of Appeal limits the time to appeal to the court from the decision of the Federal High Court or the High Court against a final decision to three months, and an interlocutory decision to fourteen days. Any Notice or grounds of appeal filed outside this period are null and void.

H The only saving grace for exercising the grace to appeal granted by the Constitution is for the litigant to file an application for an extension of time within which to file the Notice and grounds of appeal at the Court of Appeal. The Court of Appeal shall only exercise its discretion in favour of granting the application by meeting the condi-

tions stipulated in the Rules of Court.

Order 7 Rule 10 (2) of the Rules of the Court of Appeal 2007 is the enabling law - particularly applicable in the instance of the appeal under consideration.

Order 7 Rule 10 (2) stipulates that-

“Every Application for an enlargement of time within which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged, a copy of the order granting such enlargement shall be annexed to the Notice of Appeal.”

Numerous decided authorities of the appellate Courts on the application for extension of time to appeal show that it is not granted as a matter of course. An applicant who seeks this equitable relief from the Court of Appeal must meet the two requirements in Order 7 Rule 10 (2) of the Court of Appeal Rules 2007. Such application shall be supported by an affidavit evidence which must show (1) good and substantial reason for failure to appeal within the prescribed period. (2) Grounds of appeal which prima facie show good cause why the appeal should be heard. In order to exercise its discretion to grant any application for extension of time within which to appeal, the court has never compromised on the issue that the two conditions stated above must be satisfied conjunctively. The two conditions must be established in the affidavit evidence in support of the application. When only one out of the two conditions is satisfied, the application cannot be granted.

Alagbe v. Abimbola (1978) 2 SC pg. 89.

Ibodo v. Enarofia (1980) 5-7 SC pg. 43.

Williams v. Hope Rising Voluntary Funds Society (1982) 1 ALL NLR pt. 1 pg. 1.

Doherty v. Doherty (1964) 1 ALL NLR pg. 299.

Yonwuren v. Modern Signs Ltd. (1985) 1 NWLR pt. 1 pg. 143.

Mobil Oil (Nig.) Ltd. v. Agadaigho (1988) 2 NWLR pt. 77 pg. 385.

Okere v. Nkem (1992) 4 NWLR pt. 234 pg. 132.

Kotoye v. Saraki (1995) 5 NWLR pt. 395 pg. 256.

Balogun v. Afokilu (1994) 7 NWLR pt. 355 pg. 206.

F.H.A. v. Abosede (1998) 2 NWLR pt. 537 pg. 177.

Shanu v. Afribank Nig. Plc. (2000) 13 NWLR pt. 684 pg. 392.

Oloko v. Ube (2001) 13 NWLR pt. 729 pg. 161.

It is noteworthy that the grant or refusal of an application to enlarge time to appeal by the very nature of Order 7 Rule 10 (2) of the Court of Appeal Rules 2007 is left at the discretion of the court, and like any exercise of discretion, the court has a duty to exercise same judicially and judiciously, not arbitrarily or improperly before it can withstand the interference of an appellate court. All applicants including the respondent in this appeal, while giving good and substantial reasons for failure to appeal within the prescribed period, must exhibit reasons which are abundant, ample or concrete to the satisfaction of the court. The court in similar applications has used the length of time of the delay between the date of judgment and the equitable application as a yardstick to grant or refuse the application. Genuine mistake or error of judgment of counsel has been considered in some cases to grant the application. The courts had refused to grant an application where parties spent a length of time after the judgment engaged in negotiations. The reasons adduced for failure to appeal 18 months after the judgment of the Federal High Court was delivered in this case in hand is somewhat peculiar and unique. The judgment of court was handed down on the 21st of February 2007. I owe it a duty to disclose at this juncture that the subject-matter of the appeal - or the very essence of the relief sought are unique. The judgment of court was handed down on the 21st of February 2007. I owe it a duty to disclose at this juncture that the subject-matter of the appeal - or the very essence of the relief sought by the respondent in this appeal relates to retrieving his stolen mandate to contest the Gubernatorial election for Yobe State. His grouse was that as the gubernatorial candidate for Yobe State, his name was wrongfully substituted with that of late Senator Mamman Bello Ali. His cause of action to my mind appears justiciable but he engaged his time in random sampling of the venue to air his grievance. His opponent's dubbed his activities as shopping round for justice - in that he hopped from jurisdiction to jurisdiction in search for that venue where he can hatch his dream of becoming a governor on a platter of gold. His first port of call was the Federal High Court Maiduguri, where the court dismissed the application for lack of juris-

diction. He filed an appeal to the Court of Appeal - but same appeal was withdrawn through his counsel. Before then - he filed an action similar to the one before the court in Maiduguri before the Federal High Court, Kaduna. The matter in Kaduna went up to court of Appeal, Kaduna where the matter was struck out for lack of jurisdiction. The appeal was allowed in favour of late Senator Mamman Ali, who was the appellant and the respondent in this appeal was the 1st respondent. Before the outcome of the appeal to the Court of Appeal, Kaduna, the respondent filed a petition before the Governorship and Legislative House Election Petition Tribunal sitting in Damaturu - Yobe State, where the ground for the petition was his alleged wrongful substitution at the Governorship election of the 14th of April 2007. This was the position when the respondent found his way back to the Court of Appeal Jos. Of course the ground of his appeal is his alleged wrongful substitution. That is based purely on the interpretation of Section 34 of the Electoral Act which is an arguable issue. In determining an application for extension of time within which to appeal, each case has to be decided on its peculiar facts and circumstances.

The facts to be taken into consideration are inexhaustive. The peculiar facts and circumstances of this application is that the Res of the action is a governorship seat which is not in perpetuity but for a limited time. Time is of the very essence of the application, while the appeal relates to a pre-election matter - as the election itself took place on the 14th of April 2007. No court can exercise its discretion in favour of granting an application to appeal out of time where the reason for the delay to appeal from the affidavit evidence before this court is self induced and self-serving which turned out to be a clog in the wheel of timeous litigation. The act of the respondent is a new feature and an addition to the catalogue of abuse of legal process under our legal jurisprudence, namely litigation prostitution. This can never satisfy any court as good and substantial reason for failure to appeal within the prescribed period.

With fuller reasons given by my brother in the leading judgment, I also allow the appeal. I adopt the consequential orders in the leading judgment as mine.