

SUPREME COURT OF NIGERIA
30TH DAY OF APRIL, 2010, SC. 1/2003
CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN,
I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH, JJSC

1. THE MINISTER OF PETROLEUM
AND MINERAL RESOURCES

2. THE ATTORNEY-GENERAL APPELLANTS
OF THE FEDERATION

AND

EXPO-SHIPPING LINE (NIG.) LTD. RESPONDENT

APPEALS - Application for enlargement of time - Reason for delay - Sufficiency - Where reason is inability to obtain copy of judgment - Applicant must spell out when and how he applied for it - And what obstacles faced (H1)

APPEALS - Application for enlargement of time - Nonreceipt of copy of judgment - As reason for late appeal - Where judgment to be appealed against is that of trial court - Such reason is unacceptable - As applicant could have filed an omnibus ground in the meantime (H2)

APPEALS - Application for enlargement of time - Reason for delay - When it may be overlooked - Where proposed grounds of appeal is on strong points of law - Like want of jurisdiction - It may not be necessary to satisfactorily explain the delay (H3)

APPEALS - Application for enlargement of time - Reason for delay - When irrelevant - Where proposed grounds of appeal is on issue of jurisdiction - Arising prima facie from the judgment appealed against - It ceases to be relevant (H4)

FACTS

The plaintiff/respondent obtained judgment against defendants/appellants in Suit No. FHC/L/CS/510/96 at the Federal High Court holden at Lagos on 13th of December, 2001 for the sum of N1,070,000 (one million and seventy thousand naira). Appellants were aggrieved by the judgment but failed and or neglected to ap-

peal against it within the statutory ninety days. Subsequently, they brought an application before Court of Appeal praying for an order extending the time within which to seek leave to appeal, leave to appeal and extension of time within which to file notice of appeal. The application was brought under O. 3 rr. (2), (3) and (4) of Court of Appeal Rules which *inter alia* required applicants to show by their affidavit in support both a good ground of appeal and satisfactory reason for their inability to appeal within the statutory period.

It is not in dispute that appellants showed good ground of appeal in their application. However Court of Appeal held that they did not give satisfactory reason for their failure to appeal within time. The reason given by appellants was that a certified true copy of the judgment was not given to them by trial court within the constitutional period of seven days but was only given to them after the statutory period of appeal had elapsed; and that as at the time they eventually got it their counsel who would have filed the appeal was engaged in serious political matters. Respondent filed a counter-affidavit by which it deposed that it had sent certified true copies of the judgment to appellants within the statutory period of appeal. Though appellants never reacted to this deposition of respondent, they were nevertheless dissatisfied with the ruling of Court of Appeal. They have brought this appeal against the ruling.

ISSUE FOR DETERMINATION

“Whether the learned Justices of the Court of Appeal were right in law when they dismissed the appellants’ application for enlargement of time within which to seek leave to appeal.

HELD (Unanimously dismissing the appeal per **CHUKWUMA-ENEH JSC**)

Enlargement of time to appeal - Reason for delay - Sufficiency

1. The court below has reacted to this question in its judgment after reviewing the depositions in the affidavit in support and the counter-affidavit whereupon it has found thus:

“The reason for the failure to appeal within time given by the applicant is vague and difficult to accept. ...

However, the above dicta have been challenged by the appellants. I have to observe and say that I find it even more difficult to accept the deposition in paragraph 4(c) of the affidavit in support as

being sufficient in material particular as to when and how the appellants have applied or eventually procured a copy of the judgment including any obstacles if any, in their way to obtaining the same which should have been spelt out and explained with the relevant dates so as to lay to rest the charge of self induced violation of the provisions of section 294(1) (supra) as pronounced by this Court in Oruche's case (supra). With respect, otherwise, it is empty and lame to so contend with respect to the said paragraph 4(c) without more. (p. 1570 A/D)

Nonreceipt of copy of judgment - As reason for late appeal

2. Let me say here that the lower Court's evaluation of the appellants' affidavit in support against the respondent's uncontroverted depositions as per its Counter Affidavit and Exhibits AA1 and AA2 cannot be faulted bearing in mind that an application of this nature is not granted as a matter of course. Surely, an applicant desirous to appeal would have filed an omnibus ground pending the receipt of a copy of the judgment as this is against a trial court's decision. The appellants have defaulted in this regard. Even so this court in *Ikenna v. Bosah* (1997) 3 NWLR (Pt. 495) 503 at 513 paragraph D has settled the issue that failure to obtain a copy of the judgment or record of proceedings is not a good and substantial reason under Order 3 Rule 4(2) of the Court of Appeal Rules 2002 as would otherwise explain away the inordinate delay as in this case. (p. 1570 H)

Appeals - Reason for delay - When it may be overlooked

3. As rightly argued by the respondent the issue of want of jurisdiction is not apparent on the face of the record to bring the instant case within the principle that where the ground of appeal has challenged the jurisdiction of the court to entertain a suit the court has to adopt a permissive approach in considering the reason for the delay in order not to shut out an appellant with arguable appeal from appealing.

There is no doubt that there are sound judicial pronouncements of this court to the effect that where proposed grounds of appeal show good cause of appeal, for example, on issue of jurisdiction or strong points of law as in the case of statutory interpretation it may not be necessary to satisfy the first arm of Order 3 Rules 2, on

inordinate delay in an application to appeal out of time.
(p. 1572 G/ 1573 A)

Time to appeal - Reason for delay - When irrelevant

B 4. The question therefore is whether on the facts as per the appel-
lants' affidavit and in the circumstances of this case (where the appel-
lants have satisfied the second leg of this rule), the delay in appealing
against the instant judgment has ceased to be a relevant factor in the
consideration of this matter as has been vigorously urged by the ap-
C pellants. Without any hesitation I do not think so.

The turning point in the cited decisions as can be seen is that
the issue of jurisdiction has been the gist of some of the cases and has
been legitimately raised as complaints by way of grounds of appeal
and their particulars as set out in that regard against the appealed
D judgment and so it must prima facie arise from the judgment which
must be exhibited to the affidavit in support as the claim of want of
jurisdiction as here cannot be at large. The plea of want of jurisdiction
should not be fanciful but has to be showed as stemming from the
appealed judgment and the record. The appellants have made heavy
E weather of this question, in my view in vacuo. (p. 1574 C)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

F 1. *Appellant has a duty to prove improper exercise of discretion*
It is settled law that an appellate court will not interfere with an exer-
cising of discretion by a lower court simply because if faced with a
similar application it would have exercised the discretion differently.
Therefore the duty of an appellant who appeals against the exercise
G of discretion by a lower court is to satisfy the appellate court that the
lower court did not exercise its discretion judicially and judiciously
not to try to represent the same argument before the appellate court
in the hope that it would exercise its discretion differently.
(p. 1577 E)

H

ADEKEYE JSC

2. *Grounds of appeal serve to notify of appellant's complaint*

The grounds of appeal are the reasons for considering a judgment or
decision of court wrong. The purpose of the grounds is to isolate and

accentuate, for attack, the basis of the reasoning of the decision being challenged. It is furthermore meant to give notice to the respondent of the errors complained of. The grounds of appeal filed and argued should address themselves to and consider the facts of each particular case. (p. 1580 F)

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REPRESENTATION

C. I. Okpoko Esq. for the Appellants.

B. Opaleye Esq. for the Respondent.

C

CASES REFERRED TO

Oloko v Ube (2001) 13 NWLR (Pt. 729) 161

Oruche v. C.O.P. (1997) 4 NWLR pt. 497 pg. 1

Ikenna v. Bosah (1997) 3 NWLR pt. 495 pg. 503

Saraki v. Kotoye (1992) 9 NWLR pt. 264 pg. 156

Nyambi v. Osadin (1997) 2 NWLR (Pt. 485) 1 at 8

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

F. G. N. v. A.I.C. Ltd. (2006) 4 NWLR pt. 470 pg. 337

Ukwu v. Bunge (1997) 8 NWLR (Pt. 518) 527 at 542-543

Adewumi v. Osibanjo (1988) 3 NWLR (Pt. 83) 483 at 497

University of Lagos v. Aigoro (1985) 1 NWLR pt. 1 pg. 143

Oyeyemi v. Irewole Local Govt. (1993) NWLR (Pt. 270) 402 at 475

Cooperative & Commerce Bank v. Oquiure (1993) 3 NWLR (Pt. 284) 630

Christray (Nig.) Ltd. V. Elson & Niel Ltd. (1990) 3 NWLR (Pt. 140) 630 at 636

Metal Construction (W.A.) Ltd. V. Migliore (1990) 1 NWLR (Pt. 126) 299 at 325

Amadi v. Okoli (1977) 7 SC. 57

Ukwu v. Bunge (1997) 8 NWLR (Pt. 518) 635

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STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999, ss. 233(3) & 294(1)

Constitution of the Federal Republic of Nigeria, 1979, s. 258(1)

Court of Appeal Rules 2002, O. 3 rr. (2), (3) & (4)

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LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

This is an appeal against the ruling of the Lagos Division of the Court of Appeal delivered on 9/12/2002 dismissing the applicants'/ appellants' application by notice of motion brought pursuant to Order 3 Rules (2), (3), and (4) of the Court of Appeal Rules Cap. 62 Laws of the Federation of Nigeria and Section 16 of the Court of Appeal Act seeking three reliefs to wit, firstly, for enlargement of time within which to seek leave to appeal against the judgment of the Federal High Court Lagos delivered on 13/12/2001 in the suit No. FHC/L/CS/510/96; secondly, leave to appeal against the said judgment and, thirdly, enlargement of time within which to appeal against the said judgment. The application is supported by an affidavit of four paragraphs. The respondent in opposing the application has filed a Counter-Affidavit of seven paragraphs. After hearing both parties through their respective counsel, the court below in a considered ruling in dismissing the application said at page 22 of the record thus:

"I am satisfied that the proposed grounds of appeal raise good grounds why the appeal should be heard. If the applicants had satisfied the first limb of Order 3 Rule 4, I would have granted this application since the decision of the lower court was final there would have been no need to seek the leave of this court."

The applicants (i.e. appellants in this court) being dissatisfied with the decision have appealed to this court on a Notice of Appeal filed on 13/12/2002 containing a sole ground of appeal. They have filed a joint brief of argument and therein have raised one issue for determination as follows:

"Whether the learned Justices of the Court of Appeal were right in law when they dismissed the appellants' application for enlargement of time within which to seek leave to appeal."

The respondent has also filed its brief of argument on 24/2/2003 and has raised one issue for determination though similar to the appellants' only issue for determination as aforesaid and it reads as follows:

"Whether the learned Justices of the Court of Appeal exercised their discretion judiciously and judicially when they dismissed the appellant's application for enlargement of time within which to

seek leave to Appeal?”

The appellants have also filed a reply brief of argument on 1/7/2003 in response to the preliminary objection taken by the respondent and as set out in its brief of argument. Both sides at the oral hearing of the appeal before us have adopted and relied on their respective briefs of argument in support of their respective cases in this appeal. B

The respondent has raised a notice of preliminary objection in its brief of argument against the sole ground of appeal filed by the appellant contending that, overall, it has raised a question of mixed law and fact in that the sole ground of appeal has pungently touched C on the issue of the exercise of discretion by the court below; furthermore, that the particulars of error No (a) to the sole ground of appeal has raised questions of fact for which leave of court is required in order to sustain the said sole ground of appeal as competently so filed within the provisions of Section 233(3) of the 1999 Constitution D and finally that the appellants having failed first to seek and obtain leave of court as prescribed under Section 233 (3) (supra), the said sole ground of appeal and the notice of appeal are incompetent. He has relied on the cases of Metal Construction (W.A.) Ltd. V. Migliore (1990) 1 NWLR (Pt. 126) 299 at 325, Nyambi v. Osadin (1997) 2 E NWLR (Pt. 485) 1 at 8. Paragraph (f), Complex Ltd. V. Nigeria Araba Bank Ltd. (1997) 3 NWLR (Pt. 496) 643 at 654 paragraphs C-H. to urge the court to strike out the appeal as incompetent ab initio.

The appellants submitting to the contrary have urged the court F to uphold the sole ground of appeal as competent being a ground of law which has dealt with questions of inference arising from admitted or proved and accepted facts thus making the instant ground of appeal a ground of law. They refer to and rely on the cases; Complex Ltd. V. Nigeria Arab Bank (supra) and Nwadike v. Ibekwe (1987) 4 G NWLR (Pt. 67) 718 at 744-745 per Nnaemeka-Agu JSC, for so submitting.

The said ground of appeal involved in this imbroglio as per page 27 paragraph 3.1 of the record reads as follows:

“The Court of Appeal erred in law when it held to wit :- I am H satisfied that the proposed grounds of appeal raise good grounds why the appeal should be hear (sic). If the applicants had satisfied the first limb of Order 3 Rule 4(2) I would have granted this application. Since the decision of the lower court was final there would have been

no need to seek the leave to this court. In the final result, this application fails. It is dismissed with N200 cost in favour of the respondent.

PARTICULARS ERRORS:

- a. *The appellant reasons for failure to appeal within time is not vague and satisfies the requirement of Order 3 Rule (4) (1) of the Court of Appeal Rules having due regard to the obvious provisions of Section 294(1) of the 1999 Constitution.*”

I think I should observe it is settled law that whether a ground of appeal is one of law or mixed law and facts or facts alone does not really depend on the label tagged to the said ground. In that regard a ground of appeal and the particulars have to be construed together to determine under which one of the above three slots it has fallen to be considered. Leave in regard to cases that fall within section 233(3) of the 1999 Constitution bestows on the Court the jurisdiction to deal with such matters. Leave must have been first sought and obtained, that is to say where a ground of appeal is one of mixed law and facts or facts alone.

Considering the sole ground of appeal and its particulars of error conjunctively in the context of the preliminary objection taken by the respondent here, it is clear that the complaint is hinged on the failure to read the non-satisfaction of the first arm of Order 3 Rule 4(2) of the Court of Appeal Rules against the backdrop that the appellants have not been furnished with an authenticated copy of the judgment of the trial court within 7 days of the delivery thereof as prescribed by section 294(1) of the constitution. Notwithstanding that the wedge between grounds of law and mixed law and facts is that thin, it cannot be disputed that on that basis alone the said sole ground of appeal in this case is a ground of law. The appellants have contended that under Section 294(1) of the 1999 Constitution in pari materia with Section 258(1) of the 1979, they have to be given an authentic copy of the appealed trial court’s judgment within 7 days of its delivery as their right under Section 294(1) (supra). They submit that it is a good enough reason to have excused them from the alleged inordinate delay particularly when even more so they have otherwise gotten copies of the judgment well outside the statutory period to appeal as deposed to in the supporting affidavit. Clearly, the sole ground of appeal raises questions of the provisions of Section 294(1) vis-a-vis the findings of proved and accepted facts by the

court below and it is clearly a ground of law. See Nwadike Ibekwe's case (supra).

In the result the preliminary objection lacks any basis nor merit and must fail and so is hereby overruled.

Taking the two issues raised in this appeal together, the instant substantive application has been brought under Order 3 Rule 4(2) of the Court of Appeal Rules 2002 and it provides as follows:

"(2) Every application for an enlargement of time in 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 case why the appeal should be heard....."

The foregoing provisions have clearly prescribed two pre-conditions to be met for the exercise of court's discretion in favour of an applicant in that regard and they are, firstly, an affidavit in support of the application which has to set out good and substantial reasons for failing to appeal within the prescribed period; in this case it is 3 months since in this instance the decision appealed from is final; and, secondly, the applicant has to file grounds of appeal which prima facie show good cause why the appeal should be heard. In this case, the latter requirement has been met.

One inevitable corollary of the said Rule is that such applications as the instant one cannot be granted as a matter of course; meaning that in any event it is required that the two pre-conditions as outlined above must co-exist before a court may exercise its discretion in such matters. Although, it must have to be emphasized that the discretion has to be exercised judicially and judiciously, and so, where the court below has defaulted in any of those respects, that is, by erring in applying the principles guiding granting applications of this nature as stated above, an appellate court as this court would rightly intervene to avert a miscarriage of justice notwithstanding that it is predicated upon exercise of Court's discretion. See: Cooperative & Commerce Bank v. Oguiure (1993) 3 NWLR (Pt. 284) 630, Ibodo v. Enarofia (1980) 5-7 SC 42, Metal Construction (W.A.) Ltd. V. Migliore. (1990) NWLR (Pt. 126) 299, Williams v. Hope Rising Voluntary Society (1982) ANLR 1, University of Lagos v. Olaniyan (1985) 1 NWLR (Pt. 1) 156, and in United Bank for Africa v. GMBH & Co. (1989) 3 NWLR (Pt. 110) 374 where Oputa JSC in that regard has

in dealing with the exercise of discretion said that;

“Discretion is thus not an indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by the law or the equitable decision.”

Also in *Oyeyemi v. Irewole Local Govt.* (1993) NWLR (Pt. 270) 402
 B at 475 per Nnaemeka-Agu, JSC, wherein at paragraphs F-H, has this to say on the exercise of discretion by a trial Court:

“But, like all appeals on exercise of its discretion by a lower court, we can review the exercise of it but should only interfere if the discretion was not exercised judicially and judiciously, that is, its exercise was mala fide, arbitrary, illegal, or either by considering extraneous matters or by not taking into consideration material issues. I must note that it be exercised in accordance with the relevant rules of law or practice and according to the rules of reason and justices and not in accordance with private or whimsical opinion, humour or sentiment.”
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The above quotes which I respectfully adopt, have in a way defined the wide discretion exercisable by court in dealing with such matters as here. The court in this respect draws from its wisdom and ordinary
 E common judgment. The cited cases have clearly showed that sound exercise of judicial discretion has always been to meet the ends of justice in our adjudicative system. The courts must therefore have that goal in mind in exercising their discretion.

In the instant matter the applicants/appellants have as found
 F by the court below met the second arm of the second arm of the requirement as prescribed under order 3 Rule 4(2) of the Court of Appeal Rules, that is to say, by raising a ground of appeal why the appeal should be heard, but has failed woefully in respect of the first
 G arm of explaining the basis of the inordinate delay of failing to appeal within 3 months statutory period allowed by law. And so, the application has been faulted as deficient since the two condition must co-exist for the application to be sustainable. The appellants in attacking this conclusion of the court below have submitted that the deposition
 H in paragraph 4 (c) in particular, of the affidavit in support has given sufficient and cogent reasons in law since section 294(1) of the 1999 constitution makes it mandatory for duly authenticated copies of judgment of the court to be issued to parties within 7 days of its delivery thereof and that in this instance the trial court has defaulted in that

regard. And so, that it wrong to rely on the case of *Christrays (Nig.) Ltd. v. Elson & Niel Ltd.* (1990) 3 NWLR (Pt. 140) 630 at 636 to dismiss the application; Whereas the appellants should have been excused from the apparent inordinate delay in seeking extension of time to appeal out of time as their sole ground of appeal raises a jurisdictional complaint. B

The respondent on the other hand reacting to the above submissions has relied on a number of cases including *Ibodo v. Enarofia* (supra), *Oruche v. C.O.P.* (1997) 4 NWLR (pt. 497) 1 at 56 paragraph F-A, *C.C.B. (Nig.) v. Ogwuru* (Supra), to submit that the two said conditions must be conjunctively satisfied before the court of Appeal in this instance can exercise its discretion in the applicants' favour for extension of time to appeal. But that the appellants have not deposed as to any good and substantial reasons for the inordinate delay to file their appeal within the statutory time allowed by law. And the reasons given by the appellants as per paragraphs 4 (b) and (c) of their affidavit in support of the application are so vague and nebulous and have not provided the answers why the applicants/appellants have not appealed within time and so has charged the applicants/appellants with such dilatoriness not deserving of the exercise of the court's discretion in their favour. It particularly has emphasized the principle that informed the decision in *Oruche's* case (supra). C D E

It is submitted in that regard that this court held interpreting Section 258(1) of the 1979 Constitution (as amended) in *pari materia* with Section 294(1) of the 1999 Constitution that where a party to a case was put on notice of the judgment date and failed to attend court to receive copies of the judgment of the court, such a party cannot hide under the provisions of Section 294(1) since it is a self induced violation of the said Section and consequently he is not entitled to any remedy by way of extending time to appeal. Furthermore, it is submitted that the issue of jurisdiction raised in the proposed notice of appeal is not apparent on the face of the record and besides, that the ground has been insufficiently particularized to bring out that complaint and its nature as well as the issue of the alleged jurisdiction based on the public officers protection law. See: *Amadi v. Okoli* (1977) 7 SC. 57. The point is made that an appellate court, as this court, will not interfere with the exercise of discretion of a lower F G H

court simply because faced with a similar application and circumstance it would have exercised the discretion differently. See: *University of Lagos v. Olaniyan* (supra) and *Worbi v. Asan Anyuah* 14 WACA 669 at 171. The court is urged to dismiss the appeal and to affirm the decision of the court below.

B I think I must early enough make one pertinent observation that a respondent is enjoined to defend his judgment, given as in this case by the court below, with all the resources at his disposal. See *Errington v. Errington* (1952) 1 KB. 290. That accords with the duty
C under the rules of this court as assigned to the respondent in an appeal.

The respondent is not allowed to appear on appeal to be remonstrating with any aspect or part of the decision except by way of respondent's notice or by way of direct appeal against any part of the
D judgment. In paragraph 4.02 of its brief of argument it has asserted that the appellants have not satisfied the two conditions prescribed by the Rules above. It is a common ground that the respondent here has not complained by any process known to law against any findings of the court below particularly as to whether the applicants have
E satisfied the 2nd arm of the requirements under Order 3 Rule 4(2) i.e. that the "*grounds of appeal have raised good grounds why the appeal should be heard.*" In the circumstances, there is no ground for the respondent bellyaching over a point it has not challenged in the
F proper manner as I have stated herein. In that regard, therefore, it is most improper to be seen to attack of that part of the judgment of the court below without more.

At this juncture as this is a case which has been fought on the facts, I set out the salient portions of the affidavit in support of the
G application upon which the appellants have particularly relied in this case. The appellants in the affidavit in support of their application have stated as follows:

"4. That I was informed by Chiesonu I. Okpoko Esquire of Counsel and I verily believe him that:

H (a) *The respondent obtained a judgment in its favour at the Federal High Court Lagos on 13th day of December, 2001 in suit No. FHC/LICS/510/96 against the Appellants/Applicants.*

(b) *The certified true copy of the said judgment of the Court below delivered on the 13th day of December, 2001 was issued to the*

appellant, after the time allowed to appeal in the matter by the Court.

(c) At the time the Certified True Copy of the said judgment was issued to the Appellants, and brought to the notice of Chiesonu I. Okpoko he was then engaged in sensitive and serious political matters, thus making it impossible for him to deal effectively with this case. B

(d) The Appellants/Applicants are now desirous to prosecute this appeal and have drafted a proposed Notice and Grounds of Appeal. A copy of the said Notice and Grounds of Appeal is hereby attached and marked exhibit F.G.N. 2. C

(e) It is only by the leave of this Honourable Court that the Appellants can file the said Notice and Grounds of Appeal out of time, as allowed by the Rules of this Honourable Court.

(f) The grounds of appeal raised arguable and substantial points of law.” D

The respondent has reacted to the above depositions as per paragraph 5 of its counter affidavit as follows:

“5. That I was informed by Bolade Opaleye of Counsel and I verily believe him that:

(a) The facts deposed to in paragraph 4(b), 4(c) and 4(f) are not true in there material particular. E

(b) The judgment of the Court below was available to all parties before the time allowed to appeal in the matter herein elapsed.

(c) The respondent solicitors sent a Certified True Copy of the judgment each to the Applicant herein and their Solicitor C. I. Okpoko Esquire. A copy of the letter and the receipt for the C.T.C. for the judgment are attached and marked Exhibit AA1 and AA2 respectively. F

(d) The time when the C.T.C. of the judgment was issued to the Applicants was not stated, neither was the time when C.T.C. was brought to the notice of the Counsel. G

(e) Counsel for the Applicant did not state the period, time and specific matters he was engaged in that culminated in the delay in filing the notice of Appeal. H

(f) The grounds of Appeal raises question of facts and law and or mixed law and fact.”

Adverting to the above depositions on the backdrop of a charge of inordinate delay to file the appeal, the question is whether the

applicants thereby have set out above good and substantial reasons for failing to appeal within the statutory period of time i.e. 3 months.

The applicants trump card in that regard is as deposed to in paragraph 4(c) of the affidavit in support of the application. **The court below has reacted to this question in its judgment after reviewing the depositions in the affidavit in support and the counter-affidavit whereupon it has found thus:**

“The reason for the failure to appeal within time given by the applicant is vague and difficult to accept. The reason is that the applicants were not given the judgment sought to be appealed against only after the time to appeal had expire. All that a party intending to appeal who has not got a copy of the judgment he wants to appeal against need do is to raise the omnibus ground of appeal and to file further grounds on receipt of the judgment. Delaying in receiving a copy of judgment is not a good and substantial reason within Order 3 Rule 4(1) of the Court of Appeal Rules. See: Chrstray (Nig.) Ltd. V. Elson & Niel Ltd. (1990) 3 NWLR (Pt. 140) 630 at 636.”

However, the above dicta have been challenged by the appellants. I have to observe and say that I find it even more difficult to accept the deposition in paragraph 4(c) of the affidavit in support as being deficient in material particular as to when and how the appellants have applied or eventually procured a copy of the judgment including any obstacles if any, in their way to obtaining the same should have been spelt out and explained with the relevant dates so as to lay to rest the charge of self induced violation of the provisions of section 294(1) (supra) as pronounced by this Court in Oruche’s case (supra). With respect, otherwise, it is empty and lame to so contend with respect to the said paragraph 4(c) without more.

The respondents’ depositions countering the facts relied upon by the appellants have not been challenged and the implication in law for not having done so is that the court is at liberty to act on the unchallenged depositions of the respondent. See: Oruche’s case (supra). ***Let me say here that the lower Court’s evaluation of the appellants’ affidavit in support against the respondent’s uncontroverted depositions as per its Counter Affidavit and Exhibits AA1 and AA2 cannot be faulted bearing in mind that an***

application of this nature is not granted as a matter of course. Surely, an applicant desirous to appeal would have filed an omnibus ground pending the receipt of a copy of the judgment as this is against a trial court's decision. The appellants have defaulted in this regard. Even so this court in Ikenna v. Bosah (1997) 3 NWLR (Pt. 495) 503 at 513 paragraph D has settled the issue that failure to obtain a copy of the judgment or record of proceedings is not a good and substantial reason under Order 3 Rule 4(2) of the Court of Appeal Rules 2002 as would otherwise explain away the inordinate delay as in this case. The appellants have not taken the decisive step to depose in the circumstances as to when and how they have applied for a copy of the judgment, any impediments if any in their unrelenting effort as it were, to secure a copy of the judgment and I refer with approval to *Oloko v Ube* (2001) 13 NWLR (Pt. 729) 161 per Edozie, JCA (as then was). Without any doubt the law on matters of this nature is quite clear and settled. The reasons given for not meeting conditions for the first arm of Order 3 Rule 4 (supra) as per paragraphs 4(b) and (c) of the supporting affidavit are shrouded in woolly arguments and so unacceptable.

In regard to paragraph 4(b) of the supporting affidavit there is the uncountered (*sic*) depositions of the respondent to the effect that certified true copies of the said judgment have been sent to the appellants and their Counsel within the appeal period. The failure to challenge paragraphs 4 (b) and (c) in particular of the respondent's counter affidavit leaves the Court no other choice but to accept the same as unchallenged evidence, i.e. to act on the respondent's version of the story. Paragraph 4(c) of the supporting affidavit in particular has been highlighted as an important reason for failing to appeal within the statutory period of 3 months in this case as Counsel has been engaged in sensitive and serious political matters that have made it impossible for him to deal with this matter. No court worth its salt would be taken in by such a bare deposition. By so deposing without expatiating on the said sensitive and serious political matters has depicted want of understanding that an application in the circumstances is not granted as a matter of course. Again, the said deposition in paragraph 4(c) of the supporting affidavit and I agree with the respondent in that regard that it is most nebulous as no effort has been

made to be exact and forthcoming as to the nature of the political activities . These excuses, if at all, respectfully, are vague and downright evasive and once again difficult to accept. The degree of dilatoriness reached in this matter in my view is compounded by the weightless deposition in paragraph 4(c), I need say no more in regard to
B paragraph 4(c), it is as non-starter as that.

And so, the appellants therefore have no ground to challenge the decision of the court below relying on the case of *Christray Nig. Ltd. v. Elson* which is a case rightly relied upon in this case by the
C court below for holding that the appellants should have filed as a last resort a notice of appeal raising a general ground of appeal pending the receipt of the copy of the judgment. The principle expounded in the cited case is informed by the degree of diligence an appellant particularly against the judgment of a trial court to the Court of Appeal has to attain in an application of this nature.
D

The appellants, if I may repeat, have not done so here.

The appellants have taken the point that on having raised a prima facie good ground of appeal as found by the court below, which borders on jurisdiction that it is wrong in law for the court
E below to have dismissed the application. They refer and rely on the cases of *Lauwers Import-Export v. Jozebson Industry Ltd.* (1988) 3 NWLR (Pt. 83) 429 at 450; (1988) 7 SC (Pt. 111) 20; *Adewumi v. Osibanjo* (1988) 3 NWLR (Pt. 83) 483 at 497 and 501 and *Ukwu v. Bunge* (1997) 8 NWLR (Pt. 518) 527 at 542-543. In this connection
F it should be recalled that the appellants have contended that their complaint has raised a jurisdictional issue.

The appellants have also contended that the sole ground of appeal has raised particularly issue of jurisdiction under the Public Officers
G Protection Act which and I agree with the respondent simply has provided for a period of time within which action can be brought against Public Officers. This allegation I must confess is not apparent from the particulars of error of the said ground of appeal nor otherwise from the record. ***And as rightly argued by the respondent***
H ***the issue of want of jurisdiction is not apparent on the face of the record to bring the instant case within the principle that where the ground of appeal has challenged the jurisdiction of the court to entertain a suit the court has to adopt a permissive approach in considering the reason for the delay in order***

not to shut out an appellant with arguable appeal from appealing. See Amadi v. Okoli (1977) 7 SC. 57 and Ukwu v. Bunge (1997) 8 NWLR (Pt. 518) 635 and in Re Adewunmi (supra).

There is no doubt that there are sound judicial pronouncements of this court to the effect that where proposed grounds of appeal show good cause of appeal, for example, on issue of jurisdiction or strong points of law as in the case of statutory interpretation it may not be necessary to satisfy the first arm of Order 3 Rules 2, on inordinate delay in an application to appeal out of time. Such exceptional circumstances are therefore a commonplace in our jurisprudence. Let me refer to some of them, in Onashile v. Idowu (1961) SCNLR 16 this court held:

“In the present case, there are one or more points of law and of statutory interpretation, the appeal does not look frivolous and to shut it out, without hearing on the merit, on the ground that the appellant was four days late in carrying out the conditions laid down by the Registrar..... would be too drastic a penalty”

In the case of Lauwers Import - Export v. Jozebson Industries Ltd. (supra) this court has followed the principle enunciated by Bairmain F.J. in the Onashile’s case (supra) and has also relied on the case of Hakido Kpema v. The State (1986) 1 NWLR (Pt. 17) 396 at 405 - 407 per Obaseki JSC to state that where a judgment or order is given without jurisdiction and so a void judgment or order it could never be too late to appeal against it. His Lordship in that matter has cited and followed an earlier opinion of the Privy Council in the case of Chief Kwame Asante v. Chief Kwame Tawia (1949) P. 432; 1949 WN. 40 where their Lordships have stated that:

“If it appeared to an appellate court that an order against which an appeal was brought had been without jurisdiction, it could not be too late to admit and give effect to the plea that the order was a nullity.”

The same reasoning and opinion have been expressed in Re: Adewunmi & Ors. (1988) 3 NWLR (Pt. 83) 483 where Nnamani JSC (of blessed memory,) unmistakably (*sic unmistakably*) has stated that:

“After all what is involved is the exercise of discretion of the Court. If the grounds of appeal are substantial, the court may be

inclined to look with more favour on the reasons for delay. To do otherwise would inevitably lead to injustice, for, in my view, as much as is possible an appellant with an arguable appeal ought not to be shut out from an appeal.”

B These are weighty judicial pronouncements. They seem to hold and emphasize the point that where the grounds of appeal are raised on jurisdiction that it is never too late to appeal to set aside a void judgment or order. The implication of these decisions in the words of Agbaje JSC in Lauwers case (supra) and I agree with the opinion as to effect that:

C *“It would appear that the reasons for the delay in appealing against the said judgment would cease to be a relevant factor to be taken into consideration in an application for extension of time within which to appeal against the said judgment.”*

D ***The question therefore is whether on the facts as per the appellants’ affidavit and in the circumstances of this case (where the appellants have satisfied the second leg of this rule), the delay in appealing against the instant judgment has ceased to be a relevant factor in the consideration of this matter as has***
E ***been vigorously urged by the appellants. Without any hesitation I do not think so.***

The turning point in the cited decisions as can be seen is that the issue of jurisdiction has been the gist of some of the cases and has been legitimately raised as complaints by way
F ***of grounds of appeal and their particulars as set out in that regard against the appealed judgment and so it must prima facie arise from the judgment which must be exhibited to the affidavit in support as the claim of want of jurisdiction as here***
G ***cannot be at large. The plea of want of jurisdiction should not be fanciful but has to be showed as stemming from the appealed judgment and the record. The appellants have made heavy weather of this question, in my view in vacuo.*** In the circumstances, the claim of want of jurisdiction being spurious takes
H their case no further.

I have as per the above given due consideration to the case of the appellants in challenging the exercise by the court below of its discretion in refusing their application in this matter for extension of time to appeal out of time as the application has not showed any

cogent materials nor as to coherent facts and circumstances upon which its discretion could have been exercised. I am satisfied on the principles grounding the decision in *Williams v. Hope Rising Society Fund* (supra) that they have not made out sufficient case to warrant this court's interference in the circumstances. The finding in this respect is neither perverse nor has it occasioned a miscarriage of justice. B In other words, the appellants have failed to show that the discretion has not been exercised judicially and judiciously. See *Williams' case* (supra).

In the event, their application must fail and it fails and so has been rightly dismissed by the court below. I, therefore, find no merit C in the appeal. In the circumstances, the claim of want of jurisdiction being spurious takes their case no further.

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In other words, the appellants have failed to show that the F discretion has not been exercised judicially and judiciously. See *Williams' case* (supra).

In the event, their application must fail and it fails and so has been rightly dismissed by the court below. I, therefore, find no merit G in the appeal, it should be dismissed and I so dismiss it and affirm the of the court below with N50,000.00 costs to the respondent decision.

MUSDAPHER JSC

I have read before now the judgment of my Lord Chukwuma- H Eneh, JSC just delivered with which I entirely agree. For the reasons so eloquently and comprehensively set out, I too, find no merit in this appeal. I dismiss it and affirm the decision of the court below in refusing the appellants' application for extension of time within which to

appeal. I abide by the order for costs proposed in the aforesaid judgment.

ONNOGHEN JSC

On the 13th day of December, 2001 the Federal High Court
 B Holden at Lagos delivered judgment in suit NO. FHC/L/CS/510/96
 against the appellants, then defendant, in the sum of N1,070,000.00
 (One Million and Seventy Thousand Naira) only by way of a refund
 of monies paid by the respondent on account of accreditation fee
 C for oil bunkering licence which never materialized. The appellants
 had ninety (90) days within which to appeal against the said judgment
 but failed and or neglected to do so. They later presented an application
 before the lower court for an order extending time within which to seek
 leave to appeal, leave to appeal and extension of time
 D within which to file notice of appeal, otherwise known as the trinity
 prayers.

The reasons for the delay in appealing are said to be that a
 certified true copy of the judgment was not given to the appellants
 until the time for filing the appeal had lapsed and that during the
 E relevant period, learned counsel for the appellants who would have
 processed and filed the appeal was engaged in sensitive and serious
 political matters.

In considering the appeal, the lower court held, inter alia, as
 F follows:-

*"The reason for the failure to appeal within time given by the
 application is vague and difficult to accept. The reason is that the
 applicants were given the judgment sought to be appealed against
 only after the time to appeal had expired. All that a party intending
 G to appeal who has not got a copy of the judgment he want to appeal
 against need do is to raise the omnibus ground of appeal and to file
 further grounds on receipt of the judgment. Delay in receiving a
 copy of the judgment is not a good and substantial reason within
 Order 3 Rule 4(1) of the Court of Appeal Rules*

H *I am satisfied that the proposed grounds of appeal raise good grounds
 why the appeal should be heard. If the applicants had satisfied the
 first limb of Order 3 rule 4(2) 1 would have granted this applica-
 tion...."* And proceeded to dismiss the application. See pages 22 and
 33 of the record.

It is against the above decision that the appellants have appealed to this court. The issue for determination, as formulated by learned counsel for the appellants, C. I OKPOKO ESQ is as follows:-

“Whether the learned Justices of the Court of Appeal were right in law when they dismissed the appellants application for enlargement of time within which to seek leave to Appeal”. B

It is settled law that for an applicant to succeed in an application under Order 3 Rule 4(2) of the Court of Appeal Rules, he must show the following:-

(a) Good and substantial reasons for the failure to appeal within the prescribed time and C

(b) Grounds of appeal which show good grounds why the appeal should or ought to be heard.

It is also settled that both conditions must co-exist as it is not sufficient to satisfy either of them. D

As stated earlier in this judgment, the lower court exercised its discretion in the matter by dismissing the application. In a situation such as the instant appeal on the exercising of the discretion of a lower court, the duty of the appellate court is simply to look at the record, review same to determine whether the lower court exercised its discretion judicially and judiciously having regards to the facts and circumstance of the case. It is settled law that an appellate court will not interfere with an exercising of discretion by a lower court simply because if faced with a similar application it would have exercised the discretion differently. Therefore the duty of an appellant who appeals against the exercise of discretion by a lower court is to satisfy the appellate court that the lower court did not exercise its discretion judicially and judiciously not to try to represent the same argument before the appellate court in the hope that it would exercise its discretion differently. E F G

I have carefully gone through the record and it is very clear that the appellants failed to satisfy the requirements of Order 3 Rule 4(2) of the Court of Appeal Rules as found and held by the lower court. It is not enough that the appellants might have, in the opinion of the lower court, good grounds of appeal but since they failed to satisfactorily explain their reason for the delay their application must fail as both condition must co-exist to warrant the court exercising its discretion in matters of that nature. H

There is the argument that one of the grounds of appeal raised the issue of jurisdiction to wit, Public Officers Protection Act. However, it is settled law that for an issue of jurisdiction to be competently raised to weight on the mind of the court, it must be apparent on the face of the record which is not the case in the instant, as the appellants in the instant case, which is not the case of jurisdiction or facts from which it could, on the face of the record, be seen to exist. It is not the law that public officers are immune from suits under the public officer protection Act but that suits against them must be instituted within a stated period otherwise they become stale. In the circumstance it is necessary for the facts relevant to the invocation of that Act to be provided in the particular of the appeal to make same apparent.

It is for the above reason and the more detailed reasons contained in the lead judgment of my learned brother CHUKWUMA – ENEH, JSC that I too find no merit in the appeal and accordingly dismiss same. I abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal dismissed.

MUHAMMAD JSC

I read in advance the judgment just delivered by my learned brother Chukwuma-Eneh, JSC. I am in agreement with his reasoning and conclusion that Preliminary Objection lacks merit. I dismiss it. The appeal also lacks merit and I dismiss it. I abide by all orders made in the leading judgment including order as to costs.

ADEKEYE JSC

I read in draft the judgment just delivered by my learned brother, C.M. Chukwuma-Eneh, JSC. I agree with his reasoning and conclusion. An appeal is substantially a complaint against the decision of a trial court. The 1999 Constitution guarantees every citizen of this country an access to court to air his grief and a right of appeal thereafter where necessary. The right of appeal must be exercised within the precept of the law.

Oredoyin v. Arowolo (1989) 4 NWLR pt. 114 pg. 172.

Ngige v. Obi (2006) 14 NWLR pt. 999 pg. 1.

The filing of a notice of appeal is a necessary prerequisite for

the hearing of an appeal.

Okpala v. Ibeme (1989) 2 NWLR pt. 102 pg. 208.

In a situation where the filing of a notice of appeal has been affected by effluxion of time, an appellant may file an application praying for an extension of time to appeal - that is to file the Notice of appeal which must reflect his grounds of appeal. In this appeal, the appellants/applicants filed a motion on Notice at the Court of Appeal, Lagos Division brought pursuant to Order 3 Rules (2), (3) and (4) of the Court of Appeal Rules Cap 62 Laws of the Federation of Nigeria 1990 and Section 16 of the Court of Appeal Act seeking reliefs as follows -

(1) Enlargement of time within which to seek leave to appeal against the judgment of the Federal High Court, Lagos delivered on 13/12/2001 in Suit No. FHC/L/CS/510/96.

(2) Leave to appeal against the said judgment.

(3) Enlargement of time within which to file notice and grounds of appeal.

This application was supported by a four paragraphs affidavit. The respondent in opposing the application filed a seven paragraphs counter-affidavit.

The lower court after hearing both parties on their affidavit evidence dismissed the application and said on page 22 of the record that-

"I am satisfied that the proposed grounds of appeal raise good grounds why the appeal should be heard. If the applicants had satisfied the first limb of Order 3 Rule 4 (2) I would have granted this application since the decision of the lower court was final there would have no need to seek leave of this court."

The appellants aggrieved by the foregoing decision of the lower court appealed to this court. In order to appreciate the first limb of Order 3 Rule 4 of the Court of Appeal Rules 2002 - I have to reproduce the relevant Rule - Order 3 Rule 4 (1) stipulates that-

"The court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply."

Order 3 Rule 4 (2)

"Every application for an enlargement of time in 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.”

B Most basic is that the grant of leave to appeal involves the exercise of the discretionary power of the court. The power must be exercised judiciously and judicially based on the affidavit evidence before the court.

C Alamieyeseigha v. C.J.N. (2005) 1 NWLR pt. 906 pg. 60. A party seeking an enlargement of time within which to appeal to the Court of Appeal is expected going by Order 3 Rule 4 (2) to satisfy through affidavit evidence the two conditions laid down as follows –

(a) Good and substantial reasons for the failure to appeal within the period prescribed by section 25 (2) (a) of the Court of Appeal Act and

(b) That there are good grounds of appeal which prima facie show good cause why the appeal should be heard.

E The court will be prompted to exercise its discretion to grant the extension of time within which to appeal when the two conditions mentioned above are satisfied conjunctively and not disjunctively. The affidavit evidence before the court from the applicant must reflect the two conditions. The applicant must show to the court that the delay in bringing the application is neither willful nor inordinate. Good and substantial reasons have been interpreted by courts in numerous decided cases as acceptable, satisfactory and essential reasons useful to the application. The grounds of appeal are the reasons for considering a judgment or decision of court wrong. The purpose of the grounds is to isolate and accentuate, for attack, the basis of the reasoning of the decision being challenged. It is furthermore meant to give notice to the respondent of the errors complained of. The grounds of appeal filed and argued should address themselves to and consider the facts of each particular case.

H Saraki v. Kotoye (1992) 9 NWLR pt. 264 pg. 156.

Peters v. State (1992) 9 NWLR pt. 265 pg. 323.

Kalu v. Uzor (2006) 8 NWLR pt. 981 pg. 66.

The lower court agreed that the grounds of appeal show good cause why the appeal should be heard. The issue raised in the grounds is not such that would cause the lower court to overlook that sub-

stantial element in granting an enlargement of time to appeal which is that the two factors enumerated in Order 3 Rule 4 (2) must co-exist in the affidavit evidence in support of the application filed by an applicant intending to appeal out of time. The undermentioned cases are emphatic on this requirement specified in Order 3 Rule 4 (2)-

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

S.B.N. Plc. v. Abdulkadir (1996) 4 NWLR pt. 443 pg. 460.

F. G. N. v. A.I.C. Ltd. (2006) 4 NWLR pt. 470 pg. 337.

Yenwuren v. Modern Signs Ltd. (1985) 1 NWLR pt. 2 pg. 244. C

University of Lagos v. Aigoro (1985) 1 NWLR pt. 1 pg. 143.

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

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

Alagbe v. Abimbola (1978) 2 SC pg. 39.

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

Since it is imperative that in determining application for extension of time within which to appeal, each case has to be decided on its own peculiar facts and circumstances, the facts to be taken into consideration are however inexhaustive.

Holman Bros (Nig.) Ltd. v. Kigo (Nig.) Ltd. (1980) 8- 11 SC E pg. 43.

University of Lagos v. Olaniyan (1985) 1 NWLR pt. 1 pg. 156.

Ojora v. Bakare (1976) 1 SC pg. 47.

Re Adewunmi (1981) 3 NWLR pt. 83 pg. 483.

In paragraphs 4 (b) and (c) of the affidavit in support of the application, the applicant stated as follows - F

Paragraph 4 (b)

"The certified copy of the said judgment of the court below delivered on the 13th day of December 2007 was issued to the appellant, after the time allowed to appeal in the matter by the court." G

Paragraph 4 (c)

"At the time the Certified True Copy of the said judgment was issued to the appellants and brought to the notice of Chiesonu I. Okpoko he was then engaged in sensitive and serious political matters, thus making it impossible for him to deal effectively with the case." H

The contention of the appellants is that the foregoing creditably explains the reason for the delay for failing to appeal within the

three months statutory period. They were not served with copies of the judgment of the trial court within the time stipulated by law to enable them prepare and file their Notice and grounds of appeal.

Section 294 (1) of the 1999 Constitution makes it mandatory for duly authenticated copies of judgment of the court to be issued to parties within 7 days of its delivery, which the trial court failed to comply with. The respondent and the lower court vehemently opposed the viability of the reason given by the appellants for the delay as they had the opportunity to file an omnibus ground of appeal pending the time the judgment of court would be secured.

It is trite that inability to secure a copy of a judgment or ruling generally is not a reason for failure to file an appeal within the time presented by law.

Idris v. Audu (2005) 1 NWLR pt. 908 pg. 612.

Moreover in an application for extension of time to appeal, it is not enough for the applicant to merely state that he did not receive a certified copy of the judgment appealed against on time. The applicant must further state the date when he made an application for the certified copy of the judgment and a copy of the letter for such application must be attached to the affidavit in support of the extension of time to appeal.

Ikenna v. Bosah (1997) 3 NWLR pt. 495 pg. 503.

Oruche v. C.O.P. (1997) 4 NWLR pt. 497 pg. 1

In the peculiar circumstances of this case, it is definitely not gainsaying that the reason given by the appellants/applicants for the delay in filing notice and grounds of appeal is weak and porous particularly as expressed in paragraph 4 (c) of the affidavit in support; as a counsel must be committed to the briefs of a litigant, his client. He must return the brief where he is otherwise engaged to do so. This reason cannot be categorized as inadvertence or mistake of counsel on which a court can exercise its discretion in favour of granting an application for extension based on the case of *Ikenta Best (Nigeria) Ltd. v. A-G Rivers State* (2008) 6 NWLR pt. 1084 pg. 612

With fuller reasons given by my brother in the leading judgment, I also hold that there is no merit in the appeal. It is hereby dismissed. The decision of the lower court is affirmed with N50,000.00 costs to the respondent.