

SUPREME COURT OF NIGERIA

4TH JUNE, 2010. SC. 169/2003

**CORAM:- N. TOBI, W. S. N. ONNOGHEN, I. F. OGBUAGU,
F. F. TABAI, J. A. FABIYI, JJSC**

AULT & WIBORG (NIGERIA) LIMITED APPELLANT

AND

NIBEL INDUSTRIES LIMITED RESPONDENT

APPEALS - Time - Application for extension of time - Trinity prayers
- When needed - They become necessary where right of appeal is
only with leave - And applicant had failed to appeal within time (H1)

APPEALS - As of right - Application for extension of time - Appropri-
ate prayer - Where appeal is as of right - But applicant failed to
appeal within time - He need only pray for extension of time (H2)

JUDICIAL PRECEDENTS - Authority - Odofoin v. Agu - Application
for extension of time to appeal - The case is not an authority that
every such application - Must contain the trinity prayers (H3)

FACTS

The plaintiff/respondent sued defendant/appellant before the High Court of Ogun State holden at Ota claiming the sum of N1,320,013.83 (One million, three hundred and twenty thousand and thirteen naira, eighty-three Kobo) being a sum allegedly owed by appellant to respondent, as well as 21% interest per annum from 1997 till date of judgment and thereafter till the final liquidation of the debt. Subsequently, respondent moved the court and had the matter placed under the undefended list. Upon service of the originating processes, appellant caused an appearance to be entered for it but failed to file any notice of intention to defend. Eventually trial judge gave judgment to respondent as claimed but awarded post judgment interest at the rate of 10% per annum.

About seven months after the judgment was given, i.e., after the expiration of the constitutional period for appeal, appellant filed a motion on notice before the Court of Appeal for an order extending the time within which it may appeal against the judgment. In its

motion, appellant merely prayed for a single relief to wit: an extension of time within which it may file its notice of appeal. After hearing the motion, Court of Appeal struck it out for being incompetent in that appellant failed to ask for the trinity prayers of extension of time to seek leave to appeal, leave to appeal and extension of time within which to appeal. It was the view of Court of Appeal that in so far as appellant had failed to appeal within the constitutional period, it required leave to subsequently bring an appeal. Aggrieved, appellant has brought the instant appeal against that ruling of the Court of Appeal.

ISSUE FOR DETERMINATION

“Whether the Appellant required leave to appeal from the final decision of the High Court of Ogun State in this case to the Court of Appeal”.

HELD (Allowing the appeal by a majority decision per **TABAI JSC**, Onnoghen and Ogbuagu JJSC dissenting)

Trinity prayers - When needed

1. In my considered opinion where a party can only appeal to the Court of Appeal with the Leave of the Federal High Court or the High Court or the Court of Appeal as provided in section 242 (1) of the Constitution and he fails to so seek leave to appeal within the period prescribed by law then he has the duty to apply for extension of time within which to seek leave to appeal, leave to appeal and extension of time within which to appeal. It is then and only then that the party in default of appealing with leave of court is required to invoke the trinity prayers to appeal. (p.1861 G)

Appropriate prayer - Where appeal is as of right

2. Where however a party can appeal as of right as provided in section 241(1) (a) of the Constitution and he fails to utilise his right to appeal within the period prescribed by law he only needs to apply for extension of time within which to appeal. And since he was not required, in the first place, to seek leave to appeal he has no duty to apply for extension of time within which to seek leave to appeal.

I have earlier reproduced herein above the motion filed at the court below on the 10th January, 2003 by the Appellant. There were no prayers for extension of time within which to seek

leave to appeal and leave to appeal.

In its decision on the 4th of March, 2003 the Court of Appeal struck out the application for incompetence, the reason being that in addition to the prayer for enlargement of time, the Appellant ought to have applied for extension of time within which to seek leave to appeal and leave to appeal. With respect, the Court of Appeal was wrong. (p. 1862 A/C)

JUDICIAL PRECEDENTS - Authority - Odofin v. Agu

3. Before concluding this judgment it is necessary to comment briefly on the decision in PETER ADEBOYE ODOFIN & ANOR vs CHIEF AGU & ANOR (1992) 2 NWLR (Part 229) 350 relied upon and quoted extensively by learned counsel for the Respondent in support of his submission.

The case is clearly distinguishable from the instant case. The decision of the High Court on the 16th of May, 1985 against which the Respondents sought to appeal, was a decision in exercise of its appellate jurisdiction and not in exercise of its jurisdiction as a court sitting at first instance. Having regard to the fact that the Respondent's right to appeal was with the leave of court and it defaulted in appealing within the 3 months prescribed by law it had the obligation to apply for extension of time within which to seek leave for appeal, leave to appeal and extension of time to appeal. The case therefore is not authority for the submission that whenever a party wishing to appeal fails to do so within the time allowed by law, he had a duty to apply for the trinity prayers. (pp. 1862 G/ 1863 C)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC (DISSENTING)

1. Whether leave is required depends on nature of the grounds

The question whether an application for extension of time within which to appeal against the final decision of the High Court sitting at first instance needs the three prayers of:

- (a) extension of time within which to seek leave to appeal;
- (b) leave to appeal; and,
- (c) extension of time within which to file notice of appeal.

Depends on the nature of the grounds of appeal raised by the appellant/applicant. Where the grounds are of fact or mixed law and

fact, the applicant must seek the three prayers supra. Where, however, the grounds of appeal are of law alone, then only a prayer for extension of time within which to appeal is needed. (p. 1866 G)

B *2. This appeal requires leave as the grounds are of mixed law and facts*

C Looking closely at the grounds of appeal supra, it is very clear that they are, at best, of mixed law and fact for which appellant needed the three prayers earlier stated in this judgment irrespective of the fact that his appeal is against the final decision of a High Court sitting at first instance. If he had appealed against the decision in question within the three months allowed him by law, there would have been no need for the leave, as his appeal would have been as of right. (p. 1868 B)

D **UGBUAGU JSC** (DISSENTING)

3. Every appeal out of time requires the trinity prayers

E Yes, there is Section 241(1) of the 1999 constitution which is applicable where the/an appeal, is filed within time, but once a party is out of time, the trinity prayers must be present.

F It is from the foregoing based on the decided authorities of this Court that I respectfully, do not agree with the lead Judgment of my learned brother, Tabai JSC, just read. In my respectful view, this appeal lacks substance and I have no hesitation in dismissing it. I accordingly affirm the decision/Ruling of the court below. Cost follow the event. The Respondent is entitled to costs fixed at N50,000.00 (Fifty thousand Naira) payable to it by the Appellant. (p. 1872 H/1873 B)

G **REPRESENTATION**

O. T. Akinbiyi for the Appellant.

A. O. Fayemiwo for the Respondent

H **CASES REFERRED TO**

Odojin vs Agu (1992) 3 NWLR (pt. 229) 350

Atande v. Olarewaju (1988) 4 NWLR (Pt. 89) 394

FINNIH vs IMADE (1992) 1 NWLR (Part 219) 511

EHOLOR vs OSAYANDE (1992) 6 NWLR (Part 249) 524

Odutola v. Chief Oderinde & 3 ors. (2004) 5 SCNJ. 285 @ 289
GOVERNOR GONGOLA STATE vs TUKUR (1989) 4 NWLR (Part 117) 592

Adeyemi v. Y.R.S. Ike-Oluwa & Sons Ltd. (1993)8 NWLR (Pt. 309) 27 at page 43

COMMISSIONER FOR WORKS BENUE vs DEVCON LTD (1988) B 3 NWLR (Part 83) 407

Co-operative & Commerce Bank (Nig.) Ltd. v. Emeka Ogwuru (1993) 3 NWLR (Pt.284) 630 @ 640

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, ss. 241 (1) (a) & 242 (1)

Court of Appeal Act, s. 25 (2) (a)

Ogun State High Court (Civil Procedure) Rules 1987, O. 23 r. 4 & D O. 40 r. 7

Court of Appeal Rules 2002, O. 3 r. 4(1)

LEAD JUDGMENT BY TABAI JSC, CON

The record of this appeal is rather scanty and does not appear to contain all the details about the suit from its inception. However from the materials available in the record, it is clear that the suit was commenced at the Ota Judicial Division of the High Court of Ogun State. The Plaintiff company was the Respondent at the court below and also the Respondent here. The Defendant company was the Appellant at the Court below and also the Appellant before this Court. The claim of the respondent against the Appellant was for the sum of 1, 320, 013.83 (one million, three hundred and twenty thousand and thirteen naira, eighty-three kobo) only, representing debt with interest at the rate of 21 (twenty-one) percent per annum from November 2001 until the final liquidation of the debt. There was also a claim of 21 (twenty-one) percent post-judgment interest.

By an ex-parte motion dated 29th October, 2001 the Respondent sought an order that the suit be entered on the undefended list. The application was granted on the 30th of October, 2001 and the writ of summons marked "Undefended List". The writ of summons together with the affidavit in support of the claim and documents attached thereto were served on the Defendant/Appellant on

the 18th of December, 2001 which then filed a memorandum of appearance. It did not however file an intention to defend the suit.

After taking address of counsel the trial court by its judgment on the 17th of May, 2002 allowed the claim. On the consequences of a failure to give a notice of intention to defend the trial court at Page B 9 of the record said:

“Failure to deliver a notice of intention to defend a suit on the ‘Undefended List’ means only one thing that is that the defendant has no defence to the claim. It is therefore tantamount to an admission by the defendant of the Plaintiff’s claim ”

The trial court then entered judgment for the Respondent in the following terms:

“The result is that judgment should and Is hereby entered in favour of the Plaintiff for the sum of N1,320,013.83 (one million, D three hundred and twenty thousand and thirteen naira, eighty-three kobo) only being the cost of goods supplied by the Plaintiff to the Defendant in 1997 - vide Order 23 Rule 4 of the Ogun State High Court (Civil Procedure) Rules 1987.

The Defendant shall also pay 10 (ten) percent interest on the E stated sum from today 17/7/02 until the judgment debt is finally liquidated-vide Order 40 Rule 7 of the Rules of this Court.”

The Defendant/Appellant was not satisfied with the judgment, especially with the award of interests on the principal sum representing the debt it owed to the Plaintiff/Respondent. It was therefore F desirous of appealing against the judgment but did not appeal within the three months stipulated in section 24(2) (a) of the Court of Appeal Act to appeal.

By a motion wrongly dated the 8th of January, 2002 but filed G on the 10th of January, 2003 at the court below the Defendant/Applicant sought an order of the court below enlarging the time within which to file a Notice of Appeal against the decision of the High Court of Ogun State (as per the judgment of Hon. (Mr.) Justice Onamade given on the 17th of July, 2002). The grounds upon which the application was brought were stated therein as follows:

(i) The right of the Appellant to appeal from the decision complained about is guaranteed under section 241 (1) (a) of the Constitution of Nigeria 1999.

(ii) Section 25 (2) (a) of the Court of Appeal Act limits the time

within which to file an appeal from the decision complained about to three months

(iii) As the decision was given on the 17th of July, 2002 normal time has expired since September 2002 to file the notice of Appeal.

(iv) Order 3 Rule 4 (1) of the Court of Appeal Rules 2002 permits this Court to enlarge the time within which appeal may be brought.

The motion was supported by an affidavit of 12 paragraphs to which was attached a copy of the Notice of Appeal as Exhibit AULT 1: A further affidavit was deposed to on the 28th of January, 2003 and to which was attached a copy of the judgment of the trial court as Exhibit AULT 2.

There is no indication as to when arguments for and against the application were taken as the proceedings in relation thereto do not form part of the record of appeal. Also not forming part of the record is the actual ruling of the court below on the 4th of March, 2003 the only relevant document is the drawn up Order of the court indicating that the application was struck out for incompetence. This Court is therefore bereft of the grounds on which the application was opposed and a fortiori the grounds on which the court below adjudged the application incompetent. It is my view therefore that this appeal ought to have been struck out for incomplete record of proceedings at the court below.

The point was however not raised by the Respondent and I do not feel comfortable to strike out and thus terminate an appeal upon a ground raised suo motu by the court and without affording the parties, especially the Appellant, the opportunity to be heard on the point. And I am inclined to adopt this approach of caution for fear of a possible denial of justice and also having regard to the guiding principles on the point in cases like COMMISSIONER FOR WORKS BENUE vs DEVCON LTD (1988) 3 NWLR (Part 83) 407; GOVERNOR GONGOLA STATE vs TUKUR (1989) 4 NWLR (Part 117) 592; EHOLOR vs OSAYANDE (1992) 6 NWLR (Part 249) 524; FINNIH vs IMADE (1992) 1 NWLR (Part 219) 511.

However the Notice of Appeal dated the 14th of March, 2003 and filed on or about the 17th of March, 2003 aptly captures the grounds upon which the Court of Appeal refused the application for

extension of time to appeal. Ground ONE of the Notice of Appeal states:-

“(1) *Error of Law in holding that application filed on the 10/1/2003 is incompetent as leave was not sought for Enlargement of Time. Their lordships of the Court of Appeal erred in law when they held that the application filed on the 10th January, 2003 before their Lordships court for enlargement of time to appeal from the judgment of the High Court of Ogun State in this case is incompetent because leave was not obtained for enlargement of time to appeal.*”

“Particulars of Error

The application before the Court of Appeal was for an order for enlargement of time within which to file an appeal from the decision of the High Court of Ogun State. The appeal contemplated being an appeal from a final decision of the High Court, it was not necessary to seek leave to appeal under section 241 (1) (a) of the constitution of the Federal Republic of Nigeria 1999 - the same being an appeal as of right.”

Before this Court briefs of arguments have been filed and exchanged on behalf of the parties. The Appellant’s Brief dated the 12th of January, 2005 and filed on the 14th of January, 2005 was prepared by O.T. Akinbiyi. The Respondent’s Brief dated the 1st of March, was filed on the 2nd of March, 2005. It was prepared by A.O. Fayemiwo.

In the Appellant’s Brief two issues for determination were formulated. However, on the 9th of March, 2010 when the appeal was heard learned counsel for the Appellant withdrew the second issue which was accordingly struck out with the arguments proffered on it. The single issue left in the Appellant’s brief is “*whether the Appellant required leave to appeal from the final decision of the High Court of Ogun State in this case to the Court of Appeal*”.

The substance of the arguments of O.T. Akinbiyi for the appellant is that by virtue of the provisions of section 241(1) (a) of the 1999 Constitution an appeal from the final decision of the Federal High Court or a High Court to the Court of Appeal is as of right and that where an Appellant fails to exercise the right within the prescribed period he only needs to apply for enlargement of time within which to appeal, and that no leave is required in such a case. A.O. Fayemiwo for the Respondent argued on the other hand that once a

party is out of time within which to appeal he is bound to ask for the trinity prayers of extension of time within which to seek leave to appeal, leave to appeal and extension of time within which to appeal. He relied mainly on ODOFIN vs AGU (1992) 3 NWLR (Part 229) 350; and CO-OPERATIVE AND COMMERCE BANK (NIGERIA) LTD vs EMEKA OGWURU (1993) 3 NWLR (Part 234) 630 at 640. B

In his arguments, learned counsel for the Appellant Chief O.T. Akinbiyi relied wholly on the provisions of section 241 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria and in my view this appeal turns squarely on the interpretation of that provision. And for a comprehensible resolution of the issue before us therefore it is also necessary to examine the provisions of section 242 (1) of the Constitution. C

The relevant part of section 241 (1) of the constitution provides:- D

“241 (1) An appeal shall lie from the decisions of the Federal High Court to the Court of Appeal as of right in the following cases:-

(a) Final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance (underlining mine). E

(b) Where the ground of appeal involves questions of law alone decisions any civil or criminal proceedings.”

The section goes on to provide for other the other situations where appeal shall lie as of right. F

Section 242 (1) provides:-

“242 (1) Subject to the provisions of section 241 of this Constitution, an appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal with the leave of the Federal High Court or that High Court or the Court of Appeal.” G

In my considered opinion where a party can only appeal to the Court of Appeal with the Leave of the Federal High Court or the High Court or the Court of Appeal as provided in section 242 (1) of the Constitution and he fails to so seek leave to appeal within the period prescribed by law then he has the duty to apply for extension of time within which to seek leave to appeal, leave to appeal and extension of time within which to appeal. It is then and only then that the party in default of appealing with leave of court is required to in H

voke the trinity prayers to appeal.

Where however a party can appeal as of right as provided in section 241(1) (a) of the Constitution and he fails to utilise his right to appeal within the period prescribed by law he only needs to apply for extension of time within which to appeal. And since he was not required, in the first place, to seek leave to appeal he has no duty to apply for extension of time within which to seek leave to appeal.

I have earlier reproduced herein above the motion filed at the court below on the 10th January, 2003 by the Appellant. It prayed simpliciter for “*an Order of this appellate court enlarging the time within which to file a Notice of Appeal from the decision of the High Court of Ogun State holding at Otta (as per the judgment of Hon. (Mr.) Justice, Onamade given on the 17th of July, 2002)*” **There were no prayers for extension of time within which to seek leave to appeal and leave to appeal.**

In its decision on the 4th of March, 2003 the Court of Appeal struck out the application for incompetence, the reason being that in addition to the prayer for enlargement of time, the Appellant ought to have applied for extension of time within which to seek leave to appeal and leave to appeal. With respect, the Court of Appeal was wrong. By its decision the Court of Appeal tried to impose on the Appellant a duty which section 241(1) (a) of the Constitution never imposed on it. The judgment of the Ogun State High Court on the 17th of July, 2002 was “*a final decision of the court sitting at first instance*” within the meaning of the provisions of section 241 (1) (a) of the Constitution.

Having regard to the fact that the Appellant’s right to appeal is as of right, all it needed to do was simply to apply for extension of time within which to appeal.

Before concluding this judgment it is necessary to comment briefly on the decision in *PETER ADEBOYE ODOFIN & ANOR vs CHIEF AGU & ANOR* (1992) 2 NWLR (Part 229) 350 relied upon and quoted extensively by learned counsel for the Respondent in support of his submission. The case was commenced at the Akoko Grade A Customary Court in Ondo State by the Appellants as Plaintiffs. At the end of the trial judgment was entered for the Plaintiffs/Appellants. The Respondents’ appeal to the

High Court was dismissed on the 16th of May, 1985. The Respondents failed to appeal within the 3 months allowed and so filed an application at the Court of Appeal praying for “(1) extension of time within which to ask for leave to appeal against the judgment delivered on the 16th of May, 1985 and (2) leave to appeal against the said judgment?” B

There was no prayer for extension of time within which to appeal. In its ruling on the 21/10/85 the Court of appeal granted the application and even granted extension of time to appeal which prayer was not sought. On appeal against that ruling this Court held that in the absence of a prayer for extension of time to complete the circle of trinity prayers the application was fundamentally defective. C

The case is clearly distinguishable from the instant case. The decision of the High Court on the 16th of May, 1985 against which the Respondents sought to appeal, was a decision in exercise of its appellate jurisdiction and not in exercise of its jurisdiction as a court sitting at first instance. Having regard to the fact that the Respondent’s right to appeal was with the leave of court and it defaulted in appealing within the 3 months prescribed by law it had the obligation to apply for extension of time within which to seek leave for appeal, leave to appeal and extension of time to appeal. The case therefore is not authority for the submission that whenever a party wishing to appeal fails to do so within the time allowed by law, he had a duty to apply for the trinity prayers. D E F

The instant case is one where the Appellant’s right of appeal is as of right under section 241 (1) (a) of the 1999 Constitution. In the circumstances it is inconceivable to require the Appellant to seek extension of time to seek leave to appeal and leave to appeal when by virtue of the clear constitutional provision he does not need leave to appeal. G

In view of the foregoing considerations I hold that the application filed on the 10 of January, 2003 for enlargement of time within which to appeal was properly before the Court. H

Further more the ground of appeal involves questions of law alone and which also entitles the Appellant to appeal as of right.

On the whole this appeal succeeds and is accordingly allowed. The motion filed on the 10th of January, 2003 for enlargement of

time within which to appeal is granted. Appellant/Applicant is granted 60 days from today within which to file the Notice of Appeal at the Ibadan Judicial Division of the Court of Appeal. I assess the costs of this appeal at N50, 000.00 in favour of the Appellant.

B

TOBI JSC

I have read in draft the lead judgment of my learned brother, Tabai, JSC and I agree with him that the appeal should be allowed. Accordingly, I allow the appeal and set aside the decision of the Court below. I also abide by all the consequential orders in the lead judgment including that relating to costs.

D

ONNOGHEN JSC (DISSENTING)

On the 17th day of July, 2002 judgment was entered by the High Court of Ogun State, Holden at Otta in suit No. HCT/330/2001 against the appellant for the sum of 1, 320,01 3.83 with 21% interest from 1997 to date of judgment and 10% interest thereon till final liquidation of the judgment debt.

Appellant desired to appeal against the said judgment but failed to do so within the three months allowed by law as a result of which appellant filed a Notice of Motion on the 10th day of January, 2003 praying the lower court for an order extending time to file his appeal against the said judgment.

The grounds on which the application is based are stated on the motion papers to be:

“(i) *The right of the Appellant to appeal from the decision complained about is guaranteed under section 241(1) (a) of the Constitution of Nigeria, 1999.*

“(ii) *section 25(2) (3) of the Court of Appeal Act limits the time within which to file an Appeal from the decision complained about to three months.*

“(iii) *as the decision was given on the 17th of July, 2002, normal time has expired since September, 2002 to file the Notice of Appeal.*

“(iv) *Order 3 Rule 4(1) of the court of Appeal Rules 2002*

permits this Court to enlarge the time within which Appeal may be brought."

In a ruling delivered by the lower court, on the said motion on the 4th day of March, 2003, the Court struck out the application for being incompetent in that the tripod prayers were not present in the application, resulting in the instant appeal. B

Learned counsel for the appellant, O.T. AKINBIYI Esq., in the appellant's brief of argument filed on the 14th day of January, 2005 formulated the following issue for the determination of the appeal:-

"Whether the Appellant required leave to appeal from the final decision of the High Court of Ogun State in this case (Given on the 17th of July, 2002) to the Court of Appeal." C

In arguing the appeal, learned Counsel submitted that the provisions of section 241(1) (a) of the 1999 Constitution is very clear to the effect that an appeal against the final decision of the High Court of a State or the Federal High Court is as of right; that where the appeal is as of right but the appellant fails to appeal within time he only needs extension of time to appeal and not the tripod prayers which are needed in an application involving appeal by leave of court. Learned Counsel cited and relied on the following decided authorities: Igunbor vs Afolabi (2001) MJSC 205-206; Western Steel works Ltd vs Iron and Steel workers union (1986) 2 NSCC 786; Omonuwa vs Ostodin (1985) 1 NSCC 147; Ojora vs Odunsi (1964) NMLR 12; Ude vs Agu (1961) NSCC 45 at 47 - 48, in urging the court to resolve the issue in favour of the appellant and allow the appeal. D E F

On his part, learned Counsel for the respondent, A.O. FAYEMIWO ESQ, in the respondent's brief filed on 2nd March, 2005 submitted that the tripod prayers are necessary in all applications where the applicant is out of time in appealing and applies for enlargement of time to appeal, including where the appeal is against the final decision of the High Court as in the instant case, relying on Odofin vs Agu (1992) 3 NWLR (pt. 229) 350; that since the application of the appellant did not satisfy the above requirements, the lower court was right in striking same out and urged the court to resolve the issue against the appellant and dismiss the appeal, relying further on Co-operative and Commerce Bank (Nigeria) Ltd vs Emeka Ogwuru (1993) 3 NWLR (part 284) 630 at 640. G H

Section 241(1) (a) of the 1999 Constitution provides as follows:

*“(1) An appeal shall be from decisions of the Federal High court to the Court of Appeal as of right in the following cases -
(i) final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance,”*

There is no doubt that an appellant has a Constitutional right of appeal in the circumstances stated under section 241(1) (a) supra. It should, however, be noted that an appellant desiring to appeal against the final decision of a High Court rendered in the first instance proceedings has three months within which to appeal. The issue in this appeal is whether an applicant for extension of time to appeal against a final judgment entered by a High court sitting at first instance needs to seek from the court extension of time within which to seek leave to appeal, leave to appeal, in addition to a prayer for extension of time within which to appeal or file notice of appeal. While learned Counsel for the appellant contends that such an applicant needs only a prayer for extension of time to appeal, learned Counsel for the respondent, as well as the lower court, are of the view that such an applicant needs the three prayers earlier mentioned in this Judgment.

In the case of *Adeyemi vs Y.R.S. Ike-Oluwa & Sons Ltd* (1993) 8 NWLR (pt. 309) 27 at 43 this court held that where the proposed grounds of appeal in an application for extension of time to appeal are grounds of appeal which raise questions of fact only or of mixed law and fact, the applicant must ask for extension of time and any other prayer to be added to a prayer for leave to appeal otherwise the application is incompetent. See also the case of *Co-operative and Commerce Bank (Nig) Ltd vs Ogwuru* (1993) 3 NWLR (pt. 284) 630.

On the other hand, where the grounds of appeal raise questions of law alone, no prayer for leave to appeal would be needed since the appeal will be as of right.

In other words, the question whether an application for extension of time within which to appeal against the final decision of the High Court sitting at first instance needs the three prayers of:

- (a) extension of time within which to seek leave to appeal;
- (b) leave to appeal; and,
- (c) extension of time within which to file notice of appeal

Depends on the nature of the grounds of appeal raised by the

appellant/applicant. Where the grounds are of fact or mixed law and fact, the applicant must seek the three prayers supra. Where, however, the grounds of appeal are of law alone, then only a prayer for extension of time within which to appeal is needed.

The grounds of appeal in this case are as follows:-

“3. GROUNDS OF APPEAL

B

(i) The Learned Trial Judge erred in law by merging the principal sum complained about as owed in this case with interest claimed and then again awarding interest on the total sum.

PARTICULARS OF ERROR IN LAW

(a) As shown in the Writ of Summons and statement of claim the principal sum claimed to be owed is N582,750.00 (Five hundred and Eighty - two thousand, Seven hundred and fifty naira) inclusive of value Added Tax (VAT)

C

(b) Although the Plaintiff/Respondent calculated interest up to October, 2001 and lumped the same with the principal sum the Court had the duty to separate the two elements of principal and interest.

(c) The rate at which interest was calculated up till October, 2001 by the Plaintiff/Respondent was never stated and proved.

E

(d) The Defendant/Appellant's Counsel urged the Court to consider seriously the issue of interest in the case.

(e) The Plaintiff/Respondent was compensated twice in the judgment by way of interest

(ii) The Learned Trial Judge erred in law not only by lumping interest in the aggregate, but by awarding the sum claimed as interest as due when no rate of interest was stated and established to be due.

F

PARTICULARS OF ERROR IN LAW

(a) There was no pleading and, or evidence (say Affidavit evidence) as to the rate of interest at which the sum lumped together with the principal (as interest accrual) was calculated.

(b) It was not established what rate of interest, if any, was due.

(iii) The Learned Trial Judge erred in law by awarding Interest upon what was pronounced as judgment debt at 10%

H

PARTICULARS OF ERROR IN LAW

(a) There were no facts established or facts of which judicial notice may be taken upon which interest of 10% upon the judgment

debt, may be based.

(b) *By awarding interest at 10% upon what was pronounced as the judgment debt, his Lordship (the trial judge) gave the Plaintiff/Respondent double compensation as interest element was already contained in the sum of N1,320,13.83 (One Million Three hundred and twenty thousand, thirteen naira and eighty three kobo)."*

Looking closely at the grounds of appeal supra, it is very clear that they are, at best, of mixed law and fact for which appellant needed the three prayers earlier stated in this judgment irrespective of the fact that his appeal is against the final decision of a High Court sitting at first instance. If he had appealed against the decision in question within the three months allowed him by law, there would have been no need for the leave, as his appeal would have been as of right.

It should be noted that the decision of this Court in the Adeyemi's case, supra, involves an application for extension of time to appeal against a final decision of a High Court sitting at first instance, which application was found incompetent as the same did not contain the required three prayers.

It is for the above reasons that I find myself unable to agree with the lead judgment of my learned brother, TABAI, JSC, just delivered.

In the circumstance, I resolve the sole issue in the appeal against the appellant and consequently dismiss the appeal as lacking in merit with N50,000.00 costs to the respondent.

Appeal dismissed.

G **OGBUAGU JSC (DISSENTING)**

This is another Interlocutory appeal against the Ruling of the Court Appeal, Ibadan Division (hereinafter called "the court below") delivered on 4th March, 2003, striking out the Appellant's for an enlargement of time within which to file its Notice of appeal against the decision of the High Court of Ogun State, sitting at Otta per Onamade, J. delivered/given on 17th July, 2002.

Dissatisfied with the said Ruling, the appellant, has appealed to this Court on two (2) grounds of appeal. Without their particulars, they read as follows:

“(1) Error of Law in holding that Application filed on 10/1/2003 is Incompetent. As leave was Not Sought For Enlargement of time.

Their Lordships of the Court of Appeal erred in Law when they held that the Application filed on 10th January, 2003 before their Lordship’s Court for enlargement of time to appeal from the judgment or the High Court of Ogun State in case, is incompetent because leave was not obtained for enlargement of time to appeal.

(2) Error of Law in Striking Out of the Application for Enlargement of Time Filed on 10/1/2003.

Their Lordships of the Court of Appeal erred in Law by striking out the Application filed before their Lordships Court on 10th January, 2003 when the same should have been granted”.

The Appellant initially, formulated two (2) issues for determination. But when this appeal came up for hearing on 9th March, 2010, the learned counsel for the Appellant - Akinbiyi, Esq. applied to withdraw and did withdraw their issue (ii) together with all the arguments in respect thereof. His reason was that there was no Preliminary Objection in respect of their Grounds of Appeal. In the circumstance, (he said issue (ii) is accordingly, struck out together with the arguments in respect thereof. His reason was that there was no Preliminary Objection in respect of their Grounds of Appeal. In the circumstance, the said issue (ii) is accordingly, struck out together with the arguments in respect thereof. So, as it stands, there is only a sole issue for determination which reads as follows:

“(i) Whether the Appellant required leave to appeal from the final decision of the High court of Ogun State in this case (given on the 17th of July, 2002) to the Court of Appeal”.

On its part, the Respondent has formulated two (2) issues for determination, namely,

“(1) Whether or not the Court of Appeal was right to strike out the Appellant’s application for enlargement of time within which to file its Notice of Appeal for being incompetent.

(2) Whether or not the grounds of Appeal as formulated in the Appellant’s Notice of Appeal raises issues of mixed law and facts, in which case the Appellant needs the leave of either the court below (Court of Appeal) or the Supreme Court in order to maintain their Notice of Appeal’.

At the said hearing of this appeal, the Appellant's said learned counsel, adopted their Brief of Argument and he urged the Court to allow the appeal Fayemiwo, Esq. the learned counsel for the Respondent, also adopted their Brief of Argument. He urged the Court to dismiss the appeal which he stated is incompetent on the ground
B that leave, was required. He urged the Court to affirm the decision of the court below. Thereafter, Judgment was reserved till to-day.

In my respectful view, the issue for determination is whether or not leave was required in the circumstances of the case. I note that
C in the Records, the said Ruling of the court below, is not exhibited. What appears at page 12 of the Records, is only the drawn Order of the court below. I note also that the Notice of Appeal to this court at page 13 of the Records, is dated 14th March, 2003. It has a stamp of the court below as received on 17th March, 2003, but paid on 2nd
D April, 2003. The Notice of Appeal to the court below is dated 8th January, 2003 and was paid for on 20th March, 2003.

In the application for extension of time to the court below simpliciter, the grounds for the application are stated as follows:

“(i) *The right of the Appellant to appeal from the decision*
E *complained about is guaranteed under Section 241(1) (i) of the Constitution of Nigeria.*

(ii) *section 25 (2) (a) of the Court of Appeal Act limits the time within which to file an Appeal from the decision*
F *complained about to three months.*

(iii) *As the decision was given on the 17th of July, 2002, normal time has expired since Sept, 2002 to file Notice of Appeal.*

(iv) *Order 3 Rule 4(1) of the Court of Appeal Rules 2002 permits this Court to enlarge the time within which Appeal may be*
G *brought”.*

The application was supported by an affidavit and the main Reasons or the delay or failure to file the Notice of Appeal within time, appears to me to be the change of counsel and the inability to obtain the ratified true copy of the judgment of the said High court in
H time. While the appellant insists and contends that by virtue of the provisions of Section 241 (1) (a) of the 1999 Constitution, an appeal lies or shall lie from the decision of the Federal High Court or a High Court to the Court of Appeal as of right in the case of where the decision is final in any civil or criminal proceedings before the Federal

High Court or High Court sitting at first instance. Therefore, that the court below was openly wrong to strike out their application on the ground that no leave had been obtained and that the application, was incompetent. The Appellant further contends that the judgment of the High Court, is/was final having finally decided the rights of the parties in respect of the suit (which was brought under the Unde- B
fended List and no Notice of Intention to Defend was filed by the (Appellant). Learned counsel for the Appellant finally submitted that when an appeal is from a final decision in a case or from a decision which has finally decided the rights of the parties in the proceedings C
in issue, the appeal is brought as of right. He cites and relies on the cases of Udo & ors. v. Agu & ors. (1961) NSCC 45,47-48; Ojara v. Odunsi (1964) NMLR 12; Omonuwa v. Oshodin & anor (1985) 1 NSCC 147; West (sic) meaning Western Steel work Ltd v. Iron Steel Workers Union Ltd. (1986) NSCC 786 and Igunbor v. Afolabi (Mrs.) D
& anor. (2001) MJSC 205 - 206 (it is also reported in (2001) 5 SCNJ. 124). Some of these cases were referred to in the case of Odutola v. Chief Oderinde & 3 ors. (2004) 5 SCNJ. 285 @ 289.

The Respondent on its part contends that their issues deal with the competency or otherwise of the Appellant's said application. E
That the Appellant was out of time within which to file its Notice of Appeal. I note that in its ground (iii) for bringing the said application, it concedes or admits that the time to file the Notice of Appeal, had expired. Surely, that was the reason it applied to the court below for F
extension of time to so file. It admits that the Judgment of the High Court was given on 17th July, 2002 and that their three months expired in September, 2002. I note that there is only one prayer - i.e. for an order within which to file their appeal i.e. prayer in a trinity G
prayer which was not there. There is no prayer for extension of time within which to seek leave to appeal and there is no prayer for leave to appeal. Surely, without a competent Notice of Appeal, there is no appeal.

In the case of Odofin A anor. v. Chief Agu & anor. (1992) 3 NWLR (Pt. 229) 350 @ 371- per Karibi - Whyte, JSC, @ 376 - per H
Babalakin, JSC and @ 371. per Nnaemeka-Agu, JSC also cited and relied on by the Respondent (it is also reported in (1992) 3 SCNJ. 161), Karibi-Whyte, JSC. stated inter alia, as follows:

"Now, where as in this case, the application to appeal was

made out of time, a Notice of appeal made out for time will require a prayer for enlargement of time within which to file such Notice of Appeal. In the absence of a Notice of Appeal, namely, the foundation of the appeal, there is no appeal before the Court.”

(the underlining)

B Babalakin, JSC, stated inter alia, thus:

“But a person whose time to appeal under Section 25 of the Court of Appeal Act 1976 has expired and wishes to appeal out of time requires the following prayers viz:

- C
- 1. Extension of time to seek leave*
 - 2. Leave to appeal and*
 - 3. Extension of time within which to appeal.*

The last prayer includes filing of Notice of Appeal. For any or all of these prayers to be granted the Applicant must give cogent
D *reason for delay in appealing within time.*

If an applicant fails to satisfy the court about reasons for delay or any or all of these prayers the Court of Appeal will lack jurisdiction to entertain such appeal.....”.

Nnaemeka-Agu, JSC stated inter alia,

E *“That any such application must contain these three prayers is not a matter of mere cosmetic importance which could be waived off with levity or waived. Rather, it is a matter which goes to the serious issue of the jurisdiction of court .The periods within which a*
F *party can appeal in our courts are prescriptions of statutes and leave to appeal where necessary, is a requirement of our Constitution”.*

See also the cases of Co-operative & Commerce Bank (Nig.) Ltd. v. Emeka Ogwuru (1993) 3 NWLR (Pt.284) 630 @ 640 cited and relied in the Respondent’s Brief; (it is also reported in (1993) 3
G SCNJ. 54); Chief Nwosu anor. v. Ofor (1997) 2 NWLR (Pt. 487) 274; (1997) 1 SCNJ. 193 & 195.

Since the courts are not allowed to comment in such interlocutory applications, I say no more in this case leading to this appeal. See the cases of Oduba v. C.V. Scheepy etc. & anor. (1997) 5
H SCNJ, 216 & Chief Falomo v. Oba Bamigbe & 3 ors. (1998) 6 SCNJ. 42; (1998) 6 S.C. 141.

Even my reading of the affidavit in support, shows that there is no acceptable reason or reasons in law or fact for the Appellant being out of time. Yes, there is Section 241(1) of the 1999 constitution

which is applicable where the/an appeal, is filed within time, but once a party is out of time, the trinity prayers must be present. It is now settled that failure of a party to obtain in time the Records, is acceptable reason for the failure to file an appeal in time. See the cases of Yiborku v. The Republic (1968) 1 ANLR 343 @ 640; Ojora v. Bakare (1976) 1 ANLR 22; Chrisray (Nig.) Ltd. v. Elson & Neil Ltd (1990) 3 NWLR (Pt. 140) 630 C.A. and Chief I. B. Ikenna & anor. v. Chief B. Bosah & 3 Ors. (1997) 3 SCNJ. 135, just to mention but a few.

It is from the foregoing based on the decided authorities of this Court that I respectfully, do not agree with the lead Judgment of my learned brother, Tabai JSC, just read. In my respectful view, this appeal lacks substance and I have no hesitation in dismissing it. I accordingly affirm the decision/Ruling of the court below. Cost follow the event. The Respondent is entitled to costs fixed at N50,000.00 (Fifty thousand Naira) payable to it by the Appellant.

FABIYI JSC

As extant in the transcript Record of Appeal, a final judgment was entered by Onamade, J. at the High Court of Justice, Ota in Ogun State on 17th July, 2002. The appellant felt unhappy with the judgment and desired to appeal out of time. On its behalf, an application was filed on 10th January, 2008 at the Court of Appeal (court below) in which it prayed for an order ‘enlarge the time within which to file a Notice of Appeal’. Ground 1 upon which the application was brought reads as follows:-

“The right of the Appellant to appeal from the decision complained about is guaranteed under Section 241 (1) (a) of the Constitution of Nigeria (sic) (Constitution of the Federal Republic of Nigeria) 1999.”

On 4th March, 2003, the court below heard the application and struck it out for the ostensible Reason that it was incompetent. The appellant felt irked with the stance of the court below and appealed to this court. Briefs of Argument were filed and exchanged by the parties.

The live issue in this appeal is the appellant’s issue (i) which reads as follows:-

“Whether the Appellant required leave to appeal from the

final decision of the High Court of Ogun State in this case (given on 17th of July, 2002) to the court of Appeal.”

It is clear that the parties are at one that the judgment of the trial court, for which the appellant desired to appeal, was a final decision. The provision of section 241 (1) (a) of the stated 1999 Constitution is applicable to this matter. It provides as follows:-

“241 (1) An appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases:-

(a) final decisions in any civil or criminal proceedings before the Federal High Court or High court sitting at first instance.”

Learned counsel for the appellant submitted with force that when an appeal is from a final decision in a case or from a decision which has finally decided the rights of the parties in the proceedings in issue, the appeal is brought as of right.

I agree with him. That is the correct statement of the law.

See:

Omonuwa v. Oshodin & Anor. (1985) 1 NSCC 147. It is more so, since the proposed grounds of appeal involve questions of law alone touching on the legality of interests awarded by the trial court. Refer to Section 241 (1) (b) of the 1999 Constitution. See. Adeyemi v. Y.R.S. Ike-Oluwa & Sons Ltd. (1993)8 NWLR (Pt. 309) 27 at page 43 D-E.

In a final decision where the rights of the parties have been finally determined, appeal is brought as of right. And where there is a right of appeal, no leave of court is needed or desirable in my considered view. It seems this goes without saying.

The above is often confused with interlocutory appeals wherein the rights of the parties in a case have not been decided upon. A proceeding in an action is said to be interlocutory when it is incidental to the principal object of the action, namely the judgment. An application to appeal after 14 days of such a ruling is guided by section 25(2) of the Court of Appeal Act (No. 43) 1976. This requires the three usual prayers, often referred to as the ‘trinity’. See also Section 31 of the Supreme Court Act (No. 12) of 1960.

The three substantive prayers required are:-

- (i) Extension of time within which to seek leave of appeal,
- (ii) Leave to appeal; and

(iii) Extension of time within which to appeal.

When leave to appeal is necessary, it must be applied for and duly obtained. See: *Amudipe v. Arijodi* (1978) 2 LRN 28; *Atande v. Olarewaju* (1988) 4 NWLR (Pt. 89) 394; *Odojin & Anr. v. Agu & Anr.* (1992) 3 NWLR (Pt. 229) 350; 368, 376; *Nigeria Air Force v. Shekete* (2002) 18 NWLR (Pt. 798) 129 at 158. B

It is my considered view, based on decided authorities, no leave was required by the appellant to file the appeal in question as desired. This is because it is an appeal from the final judgment of the trial High Court which finally determined the right of the parties. C With due respect to the court below, the applicant's application ought not to have been struck out. Enlargement of time to appeal ought to have been granted without much ado in the prevailing circumstances.

For the above reasons and those contained in the lead judgment of my learned brother, Tabai, JSC. I allow the appeal and hereby set aside the decision of the court below. I abide by all consequential orders contained in the leading judgment; inclusive of that relating to costs. D

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