

**SUPREME COURT OF NIGERIA**

4TH JUNE, 2010 S.C. 324/2002

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

CHIEF JOHN OYEGUN ..... APPELLANT  
AND

CHIEF FRANCIS ARTHUR NZERIBE ..... RESPONDENT

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APPEALS - Time - Application for enlargement of - Requirements - Applicant must show good reasons for failure to appeal in time - And good cause why the appeal should be heard (H1)

APPEALS - Leave - Court's discretion - Appeal against - Leave is required to bring such an appeal - Else it is incompetent and liable to be struck out - As it cannot be brought as of right (H2)

COURTS - Exercise of discretion - Attitude of appellate court - It will not interfere with it - Once it is exercised judicially and judiciously - As a previous decision cannot be an authority for another in such matter (H3)

**FACTS**

The plaintiff/respondent had sued defendant/appellant before the High Court of Imo State sitting at Oguta in Suit No. HOG/3/96 to recover the money he had loaned out to appellant but which appellant had failed to repay when it became due. Eventually judgment was given in favour of respondent on 23rd October 1996. Appellant failed to appeal against the judgment within the time prescribed by law. Indeed he did not appeal against the judgment until the 28th of June 2002 when he filed a motion before the Court of Appeal praying for enlargement of time within which to appeal against the judgment.

The court heard the motion and in its ruling thereon refuse the application as it held that appellant was not able to explain satisfactorily the reason for the delay of nearly six (6) years. Aggrieved, appellant has brought this appeal against the ruling of Court of Appeal.

**ISSUES FOR DETERMINATION**

**“ISSUE ONE**

*Whether by refusing to extend the time within which the Defendant/Applicant/Appellant can appeal against the judgment against (sic) and thereby shutting him out of judicial remedy eternally, did not amount to an infringement of his fundamental right to fair hearing as enshrined in Section 36 of the 1999 Constitution of the Federal Republic of Nigeria.*

**ISSUE TWO**

*Whether the Court of Appeal was right in rejecting flatly the reasons proffered by the Appellant for failing to file his appeal within time.*

**ISSUE THREE**

*Whether in the circumstances of this case, an order of striking out would not have been more appropriate and met the ends of Justice more than one of outright dismissal as was done by the court below in this case”.*

**HELD** (Unanimously dismissing the appeal per **OGBUAGU JSC**)  
**APPEALS - Out of time - Application for enlargement of time**

1. The said Order and Rule under which the application was brought, provide as follows:

*“Every application for an enlargement of time in which to bring 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”.*

In other words, the two conditions laid down above, must be present. It must be noted that the instant appeal, is against the exercise of discretion by the court below. The question of writing in the Notice of Appeal 18<sup>th</sup> December, instead of 23<sup>rd</sup> October, 1996 etc., with the greatest respect, is a non-issue. The issue as far as I am able to discern from the application, is that the court below, found as a fact that there was inordinate delay in bringing the motion/application and that the grounds of appeal are not substantial. Period.  
(p. 2104 C)

***Exercise of discretion - Appeals against - Need for prior leave***

2. It does not appear to me, that there is any application either in the court below or in this Court, for leave to appeal which I have noted, is an appeal against the exercise of discretion by the court below. In the case of *International Equitable Associations Ltd. V. Cyrial Okehie* (1999) 5 NWLR (pt.604) 620 @ 627 C.A. citing the case of *Harrison Welli & ors. V. Okechukwu & ors.* (1985) 2 NWLR (pt.5) 63, it was held that leave was required in such circumstances and that such an appeal, is not of right. On this ground, this appeal is incompetent and liable to be struck out. (p. 2104 H)

***Exercise of discretion - Attitude of appellate court***

3. It is also settled that the exercise of discretion, is a matter exclusively for the court to do after weighing all the circumstances of the case in the interest of justice. In other words, in matters of discretion, no one case, can be an authority for another and the court, cannot be bound by a previous decision to exercise of discretion in a particular way. In the instant appeal, the court below, found as a fact and held that the Appellant failed to satisfactorily satisfy the two requirements in the said Rules of the Court of Appeal. I agree. I am unable to interfere with that discretion which was judicially and judiciously exercised. (p. 2105 D)

**REPRESENTATION**

Chief Osahen Uzamere for the Appellant with him, Chief O. O. Ihensekhien

E. I. Nwugha, Esq., for the Respondent.

**CASES REFERRED TO**

Kotoye v. Mrs. Saraki & anor. (1995) 5 SCNJ. 1@ 7

Agbomeji v. Bakare & 4 ors. (1998) 7 SCNJ. 33 @ 58

Moukamim v. Agbaje (1982) 11 S.C. 122 @ 123, 131

Federal Housing Authority v. Abosede (1998) 1 SCNJ. 133 @ 138

Alhaji Arowolo v. Akapo & 2 ors. (2003) 8 NWLR (pt.823) 451 @ 500

Eronini v. Iheuko (1989) 2 NSCC (Pt. 1) 503, 513, (1989) 3 SC (Pt. 1) 30

University of Lagos v. Olaniyan (No.1) (1985) 1 NWLR (pt.1) 136 @ 163

Ikenna & anor. V. Chief B. Boyah & 3 ors. (1997) 3 SCNJ. 135 @ 143

Joseph Afolabi & Ors. v. John Adekunle & Anor. (1983) 14 NSCC B 398, 405

Mosheshe General Merchants Ltd. V. Nigeria Steel Products Ltd. (1987) 4 S.C. 152 @ 153

C **RULES REFERRED TO**

Court of Appeal Rules, 1981, O. 3 r. 4(1)

**LEAD JUDGMENT BY OGBUAGU JSC**

D This is an appeal against the Ruling (decision) of the Court of Appeal, Port-Harcourt Division (hereinafter called “the court below”) delivered on 18<sup>th</sup> April, 2002 refusing and dismissing the application of the Appellant for an extension of time to appeal against the Judgment of the High Court of Imo State sitting at Oguta in Suit No. E HOG/3/96, delivered on 23<sup>rd</sup> October, 1996.

Dissatisfied with the said decision, the Appellant has appealed to this Court. He has formulated three (3) issues for determination, namely,

F “ISSUE ONE

*Whether by refusing to extend the time within which the Defendant/Applicant/Appellant can appeal against the judgment against (sic) and thereby shutting him out of judicial remedy eternally, did not amount to an infringement of his fundamental right to fair hearing as enshrined in Section 36 of the 1999 Constitution of the Federal Republic of Nigeria.*

ISSUE TWO

*Whether the Court of Appeal was right in rejecting flatly the reasons proffered by the Appellant for failing to file his appeal within* H *time.*

ISSUE THREE

*Whether in the circumstances of this case, an order of striking out would not have been more appropriate and met the ends of Justice more than one of outright dismissal as was done by the court*

*below in this case”.*

I note that the learned counsel for the Appellant did not and have not stated even at the hearing of this appeal on 9<sup>th</sup> March, 2010, under which ground of appeal, the above issues have been formulated or raised or distilled from. The consequence is now firmly settled. When any issue or issues is or are not distilled from ground or grounds of appeal, such an issue or issues, will be struck out. There are too many decided authorities in respect thereof. See the case of Ikegwuoha v. University of Jos (2005) All FWLR (pt.280) 1573. In other words, issue or issues formulated by an Appellant, must be based on and correlate with the ground or grounds of appeal. See the cases of Alhaji Arowolo v. Akapo & 2 ors. (2003) 8 NWLR (pt.823) 451 @ 500 C.A.; Archbishop Jatau V. Alhaji Ahmed & 4 ors. (2003) 1 SCNJ. 382@ 388. In fact, such an issue or issues, is incompetent and must also be discountenanced together with the argument advanced thereunder in the consideration of an appeal. See the cases of Adelusola & 4 ors. v. In the instant appeal, the court below, found as a fact and held that the Appellant failed to satisfactorily satisfy the two requirements in the said Rules of the Court of Appeal. I agree. I am unable to interfere with that discretion which was judicially and judiciously exercised.; (2004) 5 SCNJ. 235 @ 246; Amadi v. NNPC (2000) 10 NWLR (pt.674) 76; (2000) 6 SCNJ. 1 (2000) 6 S.C. (Pt. 1) 66; (2000) FWLR (pt.9) 1527.

Worse still, I note also that the learned counsel for the Respondent, did not formulated any issue at all for determination in their Brief. So all the arguments in the Brief, must be discountenanced by this Court. I note however, that the Appellant has harped at pages 8 and 9 of their Brief, of the present mood of the court and particularly, Appellate Courts of showing a radical shift from the stance of absolute rigidity and undue reliance on technicalities to one of liberality citing cases of U.T.C v. Chief Pamotei & ors. (1989) 2 NWLR (Pt. 103) 244 (it is also reported in (1989) 3 SCNJ 79; Bango v. Chado (1989) 9 NWLR (Pt. 564) 139, 140 C.A.; Adaka v. Amekwe (1997) 11 NWLR (pt.125) 417 C.A and Shuaibu v. Nigeria-Arab Bank Ltd. (1998) 5 NWLR (pt. 551) 582, 586 (it is also reported in (1998) 4 SCNJ. 109.

I take it that this is not a matter of technicality, but an established principle and firmly settled law. Where a counsel has been

briefed and he accepted the brief and has even appealed before the court and announced his appearance, obviously, he has full control of the case and he is expected to take full responsibility in respect thereof. See perhaps, the pronouncement of Bello, CJN in the case of Mosheshe General Merchants Ltd. V. Nigeria Steel Products Ltd. (1987) 4 S.C. 152 @ 153; (1987) 4 SCNJ. 11. I will, in the interest of justice, deal with the merits of the appeal in respect of the suit which judgment in favour of the Respondent, was delivered in the trial court, since 23<sup>rd</sup> October, 1996.

When this appeal came up for hearing on 9<sup>th</sup> March, 2010, the learned counsel for the Respondent moved their motion for extension of time to file the Respondent's Brief of Argument and a deeming order. This was granted and the said Brief, was deemed filed on 9<sup>th</sup> March, 2010. Thereafter, both learned counsel adopted their respective Briefs. While Chief Uzamere - learned counsel for the Appellant, urged the court to allow the appeal, Nwugha, Esq. - learned counsel for the Responded urged the court to dismiss the appeal. Judgment was thereafter reserved till to-day.

The motion is dated 26<sup>th</sup> June, 2000 and was filed on 28<sup>th</sup> June, 2002. It was brought under Order 3 Rule (1) of the Court of Appeal Rules 1981. It prayed for;

*"An Order extending the time for the defendant/Appellant/Applicant to appeal against the Judgment of the High Court of Imo State sitting at Oguta, in Suit No. HOG/3/96 delivered on 23/10/96".*

It is noted by me that the court below, heard arguments from the learned counsel for the parties. In the lead Ruling - per Ogebe JCA (as he then was) presiding, in refusing the application, it was held as follow:

*"This is an application for extension of time for the applicant to appeal from judgment of High Court, Oguta in Suit HOG/3/96 delivered on 23<sup>rd</sup> October, 1996. The appellant's counsel has not been able to explain satisfactorily the reason for the delay of nearly six years. In an application of this nature, the reason for the delay must be cogent and the proposed grounds of appeal must be substantial".* (the underlining mine)

It concluded that,

*"That is not case here. Accordingly* and has even appeared before the court and announced his appearance, obviously, he has

full control of the case and he is expected to take full responsibility in respect thereof. Sec perhaps, the pronouncement of Bello, CJN in the case of Mosheshe General Merchants Ltd. v. Nigeria Steel Products Ltd. (1987) 4 S.C. 152 @ 153; (1987) 4 SCNJ. 11. I will, in the interest of justice, deal with the merits of the appeal in respect of the suit which judgment in favour of the Respondent, was delivered in the trial court, since 23<sup>rd</sup> October, 1996. B

When this appeal came up for hearing on 9<sup>th</sup> March, 2010, the learned counsel for the Respondent, moved their motion for extension of time to file the Respondent's Brief of Argument and a deeming order. This was granted and the said Brief, was deemed filed on 9<sup>th</sup> March, 2010. Thereafter, both learned counsel adopted their respective Brief. While Chief Uzahare - learned counsel for the Appellant, urged the court to allow the appeal, Nwugha, Esq - learned counsel for the Respondent, urged the court to dismiss the appeal. D Judgment was thereafter reserved till to-day.

The motion is dated 26<sup>th</sup> June, 2000 and was filed on 28<sup>th</sup> June, 2002. It was brought under Order 3 Rule 4(1) of the Court of Appeal Rules 1981. It prayed for;

*"An Order extending the time for the defendant/Appellant/Applicant to appeal against the Judgment of the High Court of Imo State sitting at Oguta, in Suit No. HOG/3/96 delivered on 23/10/96".* E

It is noted by me that the court below, heard arguments from the learned counsel for the parties. In the lead Ruling - per Ogebe, JCA (as he then was) presiding, in refusing the application, it was held as follows: F

*"This is an application for extension of time for the applicant to appeal from Judgment of High Court, Oguta in Suit HOG/3/96 delivered on 23<sup>d</sup> October, 1996. The appellant's counsel has not been able to explain satisfactorily the reason for the delay of nearly six years. In an application of this nature, the reason for the delay must be cogent and the proposed grounds of appeal must be substantial",* G

*(the underlining mine)* H

It concluded that,

*"That is not the case here. Accordingly motion is dismissed as totally lacking in merit".*

In the first place, what the court below stated as underlined by

me, is the law which is firmly settled in a line of decided authorities by the two Appellate Courts; See the cases of *University of Lagos v. Olaniyan (No.1)* (1985) 1 NWLR (pt.1) 136 @ 163; *Kotoye v. Mrs. Saraki & anor.* (1995) 5 SCNJ. 1@ 7 – per Uwais, JSC (as he then was later CJN) citing some other cases therein. It is noted in the latter case, that any act of “gambling’ involves risk-taking; Chief Samuel Ikenna & anor. V. Chief B. Boyah & 3 ors. (1997) 3 SCNJ. 135 @ 143; Chief Victor Uhuru & 3 ors. V. Chief Mark Bunge (1997) 7 SCNJ. 262; (1997) 8 NWLR (pt. 518) 527 @ 541 542 and *Federal Housing Authority v. Abosede* (1998) 1 SCNJ. 133 @ 138 and many others.

Now, ***the said Order and Rule under which the application was brought, provide as follows:***

***“Every application for an enlargement of time in which to bring 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”.***

***In other words, the two conditions laid down above, must be present. It must be noted that the instant appeal, is against the exercise of discretion by the court below. The question of writing in the Notice of Appeal 18<sup>th</sup> December, instead of 23<sup>rd</sup> October, 1996 etc., with the greatest respect, is a non-issue. The issue as far as I am able to discern from the application, is that the court below, found as a fact that there was inordinate delay in bringing the motion/application and that the grounds of appeal are not substantial. Period.***

It is not in dispute that the judgment of the trial court, was given on 23<sup>rd</sup> October, 1999 and the application for extension of time, was filed in the court below, on 28<sup>th</sup> June, 2000 – i.e. Five (5) years after the Judgment was given. More importantly, the debt has remained unpaid up till now and the reason for non-payment, is not disclosed by the Appellant, who is still keeping the money of the Respondent that was loaned to him free of interest and ought to attract interest.

I note that at page 2 paragraph 6 of the Appellant’s Brief, it is stated that on 9<sup>th</sup> April, 2008, this court granted the Appellant’s application to file and argue Additional Grounds of Appeal. ***It does***



**not appear to me, that there is any application either in the court below or in this Court, for leave to appeal which I have noted, is an appeal against the exercise of discretion by the court below. In the case of International Equitable Associations Ltd. V. Cyrial Okehie (1999) 5 NWLR (pt. 604) 620 @ 627 C.A. citing the case of Harrison Welli & ors. V. Okechukwu & ors. (1985) 2 NWLR (pt. 5) 63, it was held that leave was required in such circumstances and that such an appeal, is not of right. On this ground, this appeal is incompetent and liable to be struck out.**

It is settled that an Appellate Court, can interfere with the exercise of discretion when such discretion, was not exercised judiciously and judicially. See the case of Agbomeji v. Bakare & 4 ors. (1998) 7 SCNJ. 33 @ 58. But when once it is exercised judicially and judiciously, this court cannot interfere. See the case of University of Lagos v. Olaniyan (supra) (pt. 175). **It is also settled that the exercised of discretion, is a matter exclusively for the court to do after weighing all the circumstances of the case in the interest of justice. In other words, in matters of discretion, no one case, can be an authority for another and the court, cannot be bound by a previous decision to exercise of discretion in a particular way.** See the case of Odusote v. Odusote (1971) 1 All NLR 219.

**In the instant appeal, the court below, found as a fact and held that the Appellant failed to satisfactorily satisfy the two requirements in the said Rules of the Court of Appeal. I agree. I am unable to interfere with that discretion which was judicially and judiciously exercised.** See the cases of this Court Holman Brothers (Nig.) Ltd. V. Kigo Nig. Ltd. & anor. (1980) 8 11 S.C. 43; Ibodo v. Enarofia (1980) 5, 7 S.C. 42; Moukamim v. Agbaje (1982) 11 S.C. 122 @ 123, 131; University of Lagos v. Olaniyan (supra); Niger Construction Ltd. V. Chief Okugbemi (1987) 4 NWLR (pt.67) 87; (1987) 11 12 SCNJ. 133 and Obikoya v. Wema Bank Ltd. (1989) 1 NWLR (pt.96) 157.

Before concluding this judgment, I note that the Appellant asserts that his fundamental right to fair hearing was breached. I have shown that the court below, heard the arguments of the parties before its said Ruling. So, the argument in respect thereof, is with the

greatest respect, completely misconceived in the extreme. It is now settled that where the chances of an appeal succeeding, are extremely remote (as in the instant appeal), it behoves counsel in the case, to advise his client of the uselessness of pursuing such an appeal which patently lacks merits. See the case of *K.R. Textile Allied Products Ltd. v. Henry Stephens Shipping Co. Ltd.* & 2 ors. (1989) 1 NWLR (pt. 95) 115 C.A. It is now about thirteen (13) years, since Judgment was given in favour of the Respondent against the Appellant who has not shown any reason whatsoever, why he is unwilling to pay a debt/loan he never denied owing.

In conclusion, if there is any appeal that is unmeritorious, this is one of them. I accordingly dismiss it with costs of N50,000.00 (Fifty thousand naira) payable to the Respondent, by the Appellant.

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***TOBI JSC***

I have read in draft the lead judgment of my learned brother Ogbuagu, JSC, and I agree with him that this appeal be dismissed. I accordingly dismiss the appeal and abide by all the consequential orders including N50,000.00 costs payable to the Respondent by the Appellant.

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***ONNOGHEN JSC***

F I have had the benefit of reading in draft, the lead judgment of my learned brother, OGBUAGU, JSC just delivered.

I agree with his reasoning and conclusion that the appeal is without merit and ought to be dismissed. I order accordingly.

G I abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal dismissed.

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***FABIYI JSC***

I have had a preview of the judgment just delivered by my learned brother, Ogbuagu, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed.

I wish to chip in a few words of my own. It is extant in the record of appeal that the judgment of the trial High Court, Oguta in suit No. HOG/3/96 was delivered on 23<sup>rd</sup> October, 1996. The appellant who desired to appeal against the decision of the trial court filed his motion dated 26<sup>th</sup> June, 2000 on 28<sup>th</sup> June, 2000 at the Court of Appeal (court below). The application was filed under order 3 Rule 4 (3) of the Court of Appeal Rules, 1981 which provides as follows:-

*“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 granted such enlargement shall be annexed to the Notice of Appeal.”*

The application was heard on 18<sup>th</sup> April, 2002 by the court below. Brevi Manu, it dismissed the application on the grounds that no satisfactory reason for the delay was depicted and in essence, there are no substantial grounds of appeal.

The two requirements, as dictated by the stated Rule of court, must co-exist. It is the responsibility of the appellant who was the applicant at the court below to ensure that the same was obeyed. See: Joseph Afolabi & Ors. v. John Adekunle & Anor. (1983) 14 NSCC 398, 405; University of Lagos v. Aigoro (1985) 1 NWLR (Pt.1) 143. To the appellant’s chagrin, he failed to give satisfactory reason(s) for the delay; as found by the court below. As well, there are no substantial grounds of appeal which prima facie show good cause why the appeal should be heard. See: Ibodo v. Enarofia (1980) 5-7 SC 42.

The court below exercised its discretion in this matter judicially and judiciously as well. This court is often hesitant to interfere with such exercise of discretion where same has been properly carried out by the court below as done in this matter. I shall not interfere. See: University of Lagos & Ors. v. Olaniyan & Ors. (1985) 16 NSCC (pt.1) 98, 113; Eronini v. Iheuko (1989) 2 NSCC (Pt. 1) 503, 513, (1989) 3 SC (Pt. 1) 30; Moukam v. Agbaje (1982) 11 SC 122.

The appellant harped on the point that he was not afforded fair hearing. Since his counsel moved his motion on 18<sup>th</sup> April, 2002

before the court below handed out its Ruling, there is no big deal in the complaint. A party who failed to comply with the dictates of the applicable rule of court, as herein, should not create a straw upon which to cling. Such was not good enough. It was to no avail; after all.

B For the above reasons and the fuller ones set out in the judgment of my learned brother, I too, feel that the appeal lacks merit and should be dismissed. I order accordingly. I endorse all the consequently orders contained in the lead judgment; that relating to costs inclusive.

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