

**SUPREME COURT OF NIGERIA**  
9TH JULY, 2010 SC. 316/2006  
**CORAM:- D. MUSDAPHER, F. F. TABAI,**  
**I. T. MUHAMMAD, M. S. MUNTAKA-COOMASSIE,**  
**O. O. ADEKEYE, JJSC**

FIRST BANK OF NIGERIA PLC. .... APPELLANT  
AND  
T.S.A. INDUSTRIES LIMITED ..... RESPONDENT

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APPEALS - Notice - Filed prior to ruling but same date - Propriety - Appellate courts do not oppose such step - What they frown at - Is delay in filing of appeal (H1)

APPEALS - Notices of appeal - Multiple filing - Effect on competence - An appeal is not incompetent for being brought by more than one notice - It is open to appellant's counsel to adopt one of the notices filed (H2)

APPEALS - Grounds - Whether of law or facts - Basis - It is not based on the form of question it raises - But on the substance of the complaint against the lower court - And what appellate court is required to do (H3)

APPEALS - Court of Appeal Rules - Dismissal under O. 6 r. 10 - Effect on status of appeal - Such dismissal terminates the life of the appeal - Such that no court has jurisdiction to revive it (H4)

COURTS - Words & phrases - "Functus officio" - Meaning - A court becomes functus officio in a matter - When it fulfills its function in respect thereof - And so lacks the potency to revisit it (H5)

APPEALS - Court of Appeal Rules - Dismissal under O. 6 r. 10 - Requirements - It must be shown that record of appeal had been entered - And time for filing brief had expired - And there is no extension of time ordered (H6)

RULES OF COURT - Court of Appeal Rules - O. 7 rr. 2 and 5 -

Availability to parties - It is meant to aid the vigilant and not the sluggard - As such it must be invoked within reasonable time - To avail a party (H7)

COURT PROCESSES - Service - Improper service - Effect on proceedings - It nullifies any order made against the party improperly served - As it denies him the opportunity to be heard in the proceedings (H8)

FAIR HEARING - Breach - Effect on judgment - Such judgment will not be allowed to stand on appeal - As the right to fair hearing is constitutional (H9)

### ***FACTS***

The plaintiff/respondent sued defendant/appellant before the High Court of Lagos State holden at Ikeja claiming sundry reliefs translating into various sums of money. On 23rd January 2001, the learned trial judge gave judgment in favour of respondent. Dissatisfied with the judgments, appellant filed an appeal to Court of Appeal. By way of a departure from the Rules, appellant compiled the record of appeal while respondent compiled a supplementary record. Appellant also filed an application for stay of execution before the trial court which application was refused in April 2001. Appellant further made a similar application to Court of Appeal which application was partly granted on 25th June 2001 as the court ordered that the judgment debt be placed in an interest-yielding account with United Bank for Africa. Appellant further appealed to the Supreme Court which in SC/289/2001 varied the ruling of Court of Appeal by ordering that the sum be placed in the Union Bank. This was on 28th March 2006.

Meanwhile appellant had on 5th June 2003 filed an application before the Court of Appeal, in the main appeal, for extension of time within which to file his brief. This was about two years after filing the appeal. On 14th June 2005, the application was struck out and on 26th September 2005, acting on an application by respondent, Court of Appeal struck out the appeal under O. 6 r. 10 of its rules for failure of appellant to file its brief. Appellant subsequently filed an application before Court of Appeal praying for an order setting aside

the order striking out the appeal. The application was refused as the court held *inter alia* that it had become *functus officio*. The instant appeal is against that ruling of Court of Appeal. It is appellant's contention *inter alia* that in view of the provisions of O. 7 r. 5 of Court of Appeal Rules 2002 the court had jurisdiction to revisit an order made by it pursuant to O. 6 r. 10 thereof. Moreover it contends that the failure to serve it with the respondent's motion for striking out/dismissal which resulted in the said order vitiated the order. It was not in dispute that the motion was served on a counsel who had been debriefed by appellant to the knowledge of respondent.

### **ISSUES FOR DETERMINATION**

(i) Considering Order 7 Rule 5 of the Court of Appeal Rules 2002, whether or not the Court of Appeal is inexorably lacking in jurisdiction to revisit an order dismissing an appeal under Order 6 Rule 10 of the Court of Appeal Rules 2002.

(ii) Whether or not the learned justices of the Court of Appeal were right when in declining jurisdiction to revisit and set aside their previous order dismissing appellant's substantive appeal under Order 6 Rule 10 of the Court of Appeal Rules 2002, they held that as of the time of making the said dismissal on the 26<sup>th</sup> day of September 2005, they had the jurisdiction to do so.

(iii) Whether or not a party to a court case, in this case, the appellant can be deprived of its constitutionally guaranteed right to a hearing on the merit of its case by a combination of the procedural nonfeasance, or misfeasance of its own counsel and the professional malfeasance of the opposing counsel.

(iv) If the answers to issues 1, 2 and 3 are in the negative, then whether or not the court of appeal was right when it declined jurisdiction to revisit and set aside its order dismissing the appellant's substantive appeal.

### **HELD** (Unanimously allowing the appeal per **ADEKEYE JSC**) **APPEALS - Notice - Filed prior to ruling but same date**

1. The grouse of the respondent is that the Notice of appeal was filed the same day as the Ruling was delivered and by mathematical calculation of the date and time of filing in the Notice of appeal - it was filed even before the Ruling was read and delivered in the open court. The respondent considers this an abuse of court process and even

contempt. I do not see any procedural lapse in the filing of this Notice of appeal as the respondent is making this court to believe.

The appellant clearly read the hand writing on the wall and decided, though one may be tempted to use the word hastily, decided to file the Notice of appeal. In such notices the ground is mostly predicated on the omnibus ground. I will say that the appellate courts do not oppose such steps; what the courts frown at is delay in filing Notice of appeal. This being the reason why the Rules of court place a burden on an appellant to explain the reasons for the delay to the satisfaction of the court. (p. 2231 F)

### ***Notices of appeal - Multiple filing - Effect on competence***

2. The answer to this objection has been aptly answered in the case of Tukur v. Government of Gongola State (1988) NSCC Vol.19 pt.1 pg.30 quoting from the judgment of the Supreme Court from page 36 lines 6-12 that *"The answer to the question, can an appellant file two Notices of Appeal with emphasis on the word can is obviously yes he can."*

In the case of Iteshi v. The State 9-11 SC at pg.41 - the Supreme Court considered a similar situation where the appellant filed three Notices of appeal. The Apex court held that - it was open to counsel for the appellant to choose which of them he intends to adopt.

An appeal is not incompetent because it is brought by more than one notice of appeal. I adopt this sound reasoning in respect of this objection. (p. 2233 C)

### ***APPEALS - Grounds - Whether of law or facts - Basis***

3. The important yardstick for the classification of a ground of appeal is not in the form of the question it raises but for instance -

(a) Where the ground of appeal shows that the trial court or appellate court misunderstood the law or misapplied the law to the fact, it is certainly a ground of law.

(b) Where the ground suggests an invitation to the court where an appeal is lodged to investigate the existence or otherwise of certain facts made by the trial court or where the evaluation of the evidence tendered is exclusively challenged, it is a ground of fact or at best a ground of mixed law and fact.

(c) Where the questions which the court is bound to answer in

accordance with a rule of law arises out of statutory provisions and interpretation of documents, it is a ground of law.

(d) Where the question is one that will require questioning the evaluation of the facts by the trial court before application of the law, it is a ground of mixed law and fact.

(e) Where the ground of appeal questions the exercise of the discretion by a trial court, it is undoubtedly not a ground of law but at best a ground of mixed law and facts because the manner in which a court ought to exercise its discretion in a particular case is a question of fact depending on facts and circumstances of each case.

(f) Whether or not discretion is exercised judicially and judiciously or arbitrarily in any particular case is a question of mixed law and fact.

(g) A ground of appeal complaining of failure of the court to discharge its duty of considering and pronouncing on the issues raised before it is a question of law.

(h) A ground of appeal which is a complaint of the misapplication of correctly stated principles of law to the facts of a case is a ground of law alone. (p. 2234 D)

### ***Court of Appeal Rules - Dismissal under O. 6 r. 10 - Effect***

4. In effect when a court of appeal dismisses an appeal before it under order 6 Rule 10 of its Rules 2002, that decision is a final decision, the Court of Appeal thereafter becomes functus officio and the court of appeal cannot re-list or re-enter such an appeal on its cause list. In the case of Kraus Thompson Organisation v. NIPSS (2004) 17 NWLR pt.901 pg.44 at pg.59 the Supreme Court expatiated further on this by saying that-

*"When an appeal is dismissed under Order 6 Rule 10 of the Court of Appeal Rules, its life terminates and it is therefore removed from the cause list. No court has jurisdiction to revive or resuscitate it."* (p. 2238 H)

### ***"Functus officio" - Meaning***

5. The phrase functus officio means *"a task performed, fulfilling the function, discharging the office or accomplishing the purpose and thereby becoming of no further force or authority."*

A court is said to be functus officio in respect of a matter if the court

has fulfilled or accomplished its function in respect of that matter and it lacks potency to review, re-open or re-visit the matter. Once a court delivers its judgment on a matter, it cannot re-visit or review the said judgment except under certain conditions. More importantly, a court lacks jurisdiction to determine an issue when it is functus officio in respect of the issue or where the proceedings relating to the issue is an abuse of court process. (p. 2239 C)

***Dismissal under O. 6 r. 10 - Requirements***

6. The appellant has chosen this option of coming to the Supreme Court in order to examine the jurisdiction of the court below to dismiss an appeal under the said Order 6 rule 10 of its Rules 2002.

The applicant must satisfy the court that -

(a) There is a record of appeal already entered. A record is entered after it has been transmitted to and delivered to the Registry of the appellate court from the lower court.

(b) Time for filing the appellant's brief of argument 60 days as provided by Rule 2 has expired.

(c) There is no extension of time ordered by the court within which the appellant would file its brief of argument.

(d) There is an application by the respondent for the dismissal of the appeal. (p. 2240 A)

***O. 7 rr. 2 and 5 - Availability to parties***

7. The appellant is of the impression that Order 6 Rule 10 of the Court of Appeal now wears a bit of human face. It is not as ruthless as it was under the 1981 rules now repealed. The reason being that the Court of Appeal Rules 2002 now has a new provision in the form of Order 7 rule 2 and Order 7 Rule 5.

It is certainly obvious that this section of the Court of Appeal Rules which is a miscellaneous provision is meant to aid the vigilant and not a sluggard. The appeal in the instant case was struck out since the 26/9/05. I do not see from the records how the appellant has taken advantage of this section which according to Order 7 Rule 5 must be invoked within a reasonable time. (p. 2242 C/G)

***Improper service - Effect on proceedings***

8. The bottom line is that the appellant was not present where a

major decision was taken against him based on wrong information contained in his address for service. The appellant was not heard before his appeal was dismissed. I agree with the reasoning and view of the appellant that a citizen's right to an opportunity to be heard before a decision is made against him in a suit to which he is a party is of fundamental and constitutional nature that ought not to be taken from him simply because of the procedural error of his counsel, his opponent or the Court registry; particularly when it does not fundamentally affect the opposing side. B

In the instant appeal not properly serving the appellant with process, whereupon service was served on it through counsel already debriefed by him to the knowledge of the applicant in the motion renders any order made against it in the application null and void. (p. 2245 A/E) C

### ***FAIR HEARING - Breach - Effect on judgment*** D

9. It is apparent that a hearing cannot be said to be fair if any of the parties is refused hearing or denied the opportunity to be heard, or to present his case.

Any judgment or ruling based on breach of the constitutional provisions of fair hearing as provided in section 36 of the 1999 Constitution will not be allowed to stand on appeal. Furthermore, Order 6 rule 10 of the Rules of the Court of Appeal relied upon by the respondent to hold that neither the Court of Appeal and no other court can revive, or re-list or resuscitate an appeal dismissed "*relying on the decision in Kraus Thompson Organisation v. NIPSS (2004) 17 NWLR pt.901 pg.44 at pg.59 is only a rule of court, while section 36 of the 1999 Constitution is a constitutional provision. By virtue of the provision of section 1 (3) of the 1999 Constitution, the doctrine of supremacy of the Constitution demands that if any law is inconsistent with the provision of the 1999 Constitution, the constitution shall prevail and the other law shall to the extent of the inconsistency be void.*" (pp. 2246 C/2247 B) E F G

### ***NOTABLE POINT OF INTEREST*** H ***MUNTAKA-COOMASSIE JSC***

*1. Court has a duty to verify proof of service*

*With tremendous respect, it is the duty of a judge who is seised with the proceeding before him to ensure that there is proper service of*

*the process on the other party who may be affected by the outcome of the proceeding before it. Where as in this case a party was neither in court nor represented by a counsel, it is the duty of a judge, not only to rely on the evidence of its registrar that there was a service of its process, but to examine the proof of service, in order to determine on whom and when the service was effected.*  
(italics mine)

This is so because service of the court's process is fundamental to the jurisdiction of the court to determine the matter before it. Where a court proceeds to determine the matter before it without a proper service, the proceeding would amount to a nullity.  
(p. 2253 B)

### **REPRESENTATION**

Adeyinka Olumide-Fusika, Esq., with him, A. Adewunmi, O. Oyewole and Abidakun for the Appellant.  
Chief Ladi Rotimi William, SAN with him, Chief Sayo Odumosu, Rebecca Tanya (Miss), Joseph Agbo and T. Timoye (Miss) for the Respondent.

### **CASES REFERRED TO**

- Sken-Consult (Nig.) Ltd v. Ukey (1981)1 SC 6.  
Ezeobi v. Abang (2000) 9 NWLR pt.691 pg.516.  
CBN v. Okojie (2004) 10 NWLR pt. 882 pg. 488.  
Atologbe v. Anoumi (1997) 9 NWLR pt. 522 pg. 536.  
Nnaji & anor. (2004) 16 NWLR pt.900 pg. 473 at 482.  
Olanrewaju v. BON Ltd. (1994) 8 NWLR pt.364 pg.622  
Omoyinmi v. Ogunsiji (2001) 7 NWLR pt.711 at pg.155.  
University of Lagos v. Ayoro (1985) 1 NWLR pt.1 pg.143  
Asalu v. Dakan (2006) All FWLR pt. 325 pg. 90 at pg. 107  
Basayagi v. Bide (1998) 2 NWLR pt.538 pg. 367 at pg.376  
Akeredolu v. Akinremi & ors. (1986) 2 NWLR pt. 25 pg. 710  
Otapo & Ors V. Sunmonu & Ors (1989) 2 NWLR (Pt. 58) 587 at 605.  
Nwadike & ors v. Ibekwe & ors. (1987) NSCC Vol. 18 pt. 11 at pg.220  
Federal Mortgage Bank v. Nig. Ins. Deposit Corporation (1999) 2 NWLR pt. 591 pg. 333 at pg. 343



Patrick D. Magit v. University of Agric. Makurdi & 3 ors (2005) 19 NWLR pt. 959 pg. 211 at page 252.

***STATUTE & RULES REFERRED TO***

Constitution of the Federal Republic of Nigeria, 1999, ss. 36 & 232  
Supreme Court Rules 1999, O. 8 r. 4 B  
Court of Appeal Rules 2002, O. 6 r. 10 & O. 7 rr. 2 & 5  
Supreme Court Rules 1985, O. 2 r. 29  
Court of Appeal Rules 1981, O. 6 r. 10

***LEAD JUDGMENT BY ADEKEYE JSC*** C

The appellant in this appeal, the first Bank of Nigeria Plc, was the defendant in Suit No. ID/9/98 while the respondent, T.S.A. Industries Limited, was the plaintiff. On the 23<sup>rd</sup> day of January 2001, the High Court of Lagos State, Ikeja Division delivered judgment in D favour of the plaintiff/respondent as follows:-

- (1) Relief No. 1 which is a declaration for fraud is disallowed.
- (2) The refund of N422,372,367.00 to the plaintiff by the defendant is given.
- (3) On proper checking of the facts and plaintiff's counsel E admission during his address, the sum equivalent to 1% interest rate from 31/12/92 - December 1996 and 21% interest rate on the amount to be refunded is granted from January 1997- 5/1/98 and 6% interest rate from 23/1/2001 till the amount is liquidated.
- (4) The sum of N3320 million is given to the plaintiff being F claims for special damages for loss of profit.
- (5) Claiming for exemplary damages for torture, stress and so on is refused.
- (6) Loss claiming for loss of goodwill is refused. G
- (7) Order that judgment be paid within two weeks is refused.
- (8) Order that Defence Account with Central Bank be attached is refused.

Vide page 94 of the Vol. 1 Record of appeal.

Dissatisfied with the foregoing judgment, the defendant/appel- H lant filed a Notice of Appeal against the judgment. The appellant, by way of Departure from the Rules, applied to compile the Records of Appeal, while the respondent filed the supplementary record.

On the 11<sup>th</sup> of April 2001, the appellant having been refused

an unconditional stay of the judgment of the High Court of Lagos State brought an application to the Court of Appeal by way of motion on Notice, praying the Court of Appeal for an unconditional stay of execution. The Court of Appeal refused the application on 25<sup>th</sup> June 2001. The plaintiff/respondent being dissatisfied with the Ruling of the Court of Appeal for unconditional stay of execution of the judgment of the trial court, appealed to this court on an interlocutory appeal. The court on the 3<sup>rd</sup> of May 2004, further varied the conditional stay in the interlocutory appeal, SC/289/2001 to the effect that the judgment sum and the deemed interests be placed in an interest-yielding Account with the Union Bank of Nigeria Plc as against United Bank for Africa Plc as ordered by the Court of Appeal. The interlocutory appeal was dismissed by this court on the 28<sup>th</sup> of March 2006. The defendant/appellant however filed an application for extension of time to file brief on the 5<sup>th</sup> of June 2003; the Court of Appeal struck out the application on the 14<sup>th</sup> of June 2005. The Court of Appeal however on the 26<sup>th</sup> of September 2005, acting on the application of the respondent, struck out the appeal for failure of the appellant to file its brief of argument under Order 6 Rule 10 of the Court of Appeal Rules 2002. The appellant filed an application on the 1<sup>st</sup> of June 2006 urging the Court of Appeal to set aside the order of dismissal made pursuant to Order 6 Rule 10 of the Court of Appeal Rules 2002. Vide pages 54-70 Vol. 1 of the Record of Appeal. It is the stand of the appellant that the Record compiled was for the purpose of the interlocutory appeal - the stay of execution with suit No. CA/L/250/2006. The argument of the appellant is that appeal No. CA/L/200/2001 is not the substantive appeal and the Record of proceedings filed by the appellant cannot be relied upon by the Court of Appeal to dismiss the appeal on 26/9/2005. The appellant filed an application against the Ruling of the 26/9/05. In the Considered Ruling delivered by the Court on the 11<sup>th</sup> of December 2006, the application of the appellant urging the court to set aside its Ruling of the 26/9/05 was refused. The court held that it had no appeal before it as between the parties numbered as CA/L/250/2006. It has become functus officio to re-list, re-enter or revive the appeal. The instant appeal is against the decision of the Court of Appeal delivered on the 11<sup>th</sup> of December 2006.

When the appeal was heard on 22<sup>nd</sup> of April 2010, the ap-

pellant relied on the appellant's brief filed 23/7/07 and the appellant's Response to preliminary objection and Reply to Respondent's Brief filed on 11/12/07. The learned counsel for the appellant submitted that this court granted some prayers in its application before it on the 10<sup>th</sup> of April 2007. The appellant raised fresh issues and proposed new grounds of appeal - these issues cover grounds 4, 5 and 6 of the grounds of appeal while other grounds raised in the appeal are grounds of law. I intend to come back to this when considering the preliminary objection raised by the respondent in its brief. Meanwhile, the appellant has abandoned ground 2 of the ground of appeal. This ground is automatically struck out. The appellant also referred to the application of the respondent filed on the 21<sup>st</sup> of December 2006 at the Supreme Court Registry seeking departure from the Rules of the Supreme Court to permit the respondent to personally undertake the compilation of the Record of Appeal for use at the hearing of this appeal. This application was taken in Chambers and granted on the 20<sup>th</sup> of June 2007. Meanwhile, the Registry of the lower court had on the 20<sup>th</sup> day of May 2007, transmitted to this Court and served on the parties the official compiled record of appeal in two volumes. The appellant presumes that the time for the filing of briefs will start to run as from the 20<sup>th</sup> of May 2007. All reference to record in the appeal shall be to these two Records.

The appellant settled four issues for determination as follows-

(i) Considering Order 7 Rule 5 of the Court of Appeal Rules 2002, whether or not the Court of Appeal is inexorably lacking in jurisdiction to revisit an order dismissing an appeal under Order 6 Rule 10 of the Court of Appeal Rules 2002.

(ii) Whether or not the learned justices of the Court of Appeal were right when in declining jurisdiction to revisit and set aside their previous order dismissing appellant's substantive appeal under Order 6 Rule 10 of the Court of Appeal Rules 2002, they held that as of the time of making the said dismissal on the 26<sup>th</sup> day of September 2005, they had the jurisdiction to do so.

(iii) Whether or not a party to a court case, in this case, the appellant can be deprived of its constitutionally guaranteed right to a hearing on the merit of its case by a combination of the procedural nonfeasance, or misfeasance of its own counsel and the professional malfeasance of the opposing counsel.

(iv) If the answers to issues 1, 2 and 3 are in the negative, then whether or not the court of appeal was right when it declined jurisdiction to revisit and set aside its order dismissing the appellant's substantive appeal.

The respondent filed its brief on the 15/11/07 and on the same day, filed Notice of preliminary objection praying that this court to hear the learned Senior Counsel, Chief Iadi Rotimi-Williams on behalf of the respondent/applicant, as follows -

(1) An order striking out the appeal, herein as this honourable court lacks jurisdiction to entertain same.

(2) An order dismissing or striking out the appeal herein as it is a gross-abuse of the process of the court.

(3) An order that the purported Record of Appeal No. CA/L/250/2006 is an abuse of the process of court.

The objection was predicated on the under mentioned grounds -

(i) Where an appeal has been dismissed by the Court of Appeal under Order 6 rule 10 of its Rules 2002, it cannot be relisted, or re-entered as that court has become functus officio since the dismissal is a final decision. Once an appeal is so dismissed, the court of appeal or any court has no jurisdiction to revive such an appeal by re-entering or relisting same and this honourable court has no jurisdiction to order the court of appeal to relist or re-enter the appeal which the court of appeal itself has no jurisdiction to do so as provided for in section 232 (1) and (2) of the Constitution of the Federal Republic of Nigeria 1999. [ ] (ii) Where there is no appeal against a decision of a court, the Supreme Court has no jurisdiction to entertain any ground of appeal not appealed against by the appellant. [ ] -

(iii) That this honourable court has no jurisdiction to entertain the following- [ ] (a) Notice of Appeal dated 11<sup>th</sup> December 2006, as same was filed before the Ruling in Appeal No. CA/L/200/2007 was delivered in the open court. [ ] (b) Notice of Appeal dated 25<sup>th</sup> January 2007, filed by way of letter to the Deputy Chief Registrar of the Court of Appeal - without leave of this honourable court as provided under Order - 8 Rule 4 of the Rules of this Honourable Court 1999. [ ] (c) That - the grounds of appeal contained in the said 2 (two) Notices of Appeal mentioned in (a) and (b) above, are not questions of law alone but also contain questions of fact and of mixed law and facts, and

since LEAVE of the court below or of this honourable court was not FIRST SOUGHT AND OBTAINED before filing same. The said (two) Notices of Appeal herein are incompetent as they are unconstitutional.

(d) Motion on Notice dated 10<sup>th</sup> April 2007 as same cannot cure a defective Notice of Appeal. B

(e) That the appellant's Motion on Notice dated the 14<sup>th</sup> day of June 2007 is incompetent and should be discountenanced as it is unconstitutional and a gross abuse of court process.

(iv) That this Honourable Court lacks jurisdiction to grant the reliefs sought in the appellant's 2 (two) Notices of Appeal herein. C

(v) There is no Notice of Appeal in the court below giving birth to appeal No. CA/L/250/2006 and

(vi) There is no appeal known as appeal No. CA/L/250/2006 between the parties herein in the court below. D

(vii) The said Record of Appeal No. CA/L/250/2006 is an abuse of the process of the court.

The respondent raised two issues for determination as follows- E

(i) Whether the dismissal of an appeal in the Court of Appeal under Order 6 Rule 10 of the Court of Appeal Rules 2002 can be set aside by any court or whether such an appeal can be revived or relisted under Order 7 Rule 5 of the Court of Appeal Rules 2002? F

(ii) Whether the appellant is not estopped from raising the defence of mistake of counsel in the circumstances of this case.

The respondent argued the preliminary objection and the main issues in the appeal in the respondent's brief filed on the 15/11/07. The respondent added the cases of Asalu v. Dakan (2006) All FWLR pt. 325 pg. 90 at pg. 107 and Federal Mortgage Bank v. Nig. Ins. Deposit Corporation (1999) 2 NWLR pt. 591 pg. 333 at pg. 343 to its list of authorities to urge this court to dismiss the appeal. G

It is noteworthy that the issues raised in the preliminary objection filed by the respondent and the issues for determination relatively overlap. In such cases - I shall dispose of the preliminary objection and the main appeal on the same reasoning and conclusion at a go for the avoidance of repetition and prudent management of judi- H

cial time. The respondent brought the preliminary objection; pursuant to Order 2 Rule 9 of the Supreme Court Rules 1985 to ask this court to strike out the appeal as this honourable court has no jurisdiction to entertain same. The grounds relied upon briefly are -

B (1) That the Court of Appeal had dismissed an appeal under Order 6 Rule 10 of the Court of Appeal Rules, the court has become functus officio and lacks the vires to re-list or re-enter the appeal.

(2) That this court lacks the jurisdiction to grant the reliefs sought in the appellant's two notices of appeal.

C (3) No notice of appeal gave birth to Appeal No. CA/L/250/2006, hence there is no such appeal between the parties.

D (4) The grounds of appeal in the two notices of appeal mentioned, that filed on 11/12/06 and the other filed on 25/1/07 are not questions of law alone but also contain questions of fact and mixed law and facts.

The leave of the lower court or this court was not first sought and obtained before filing them, they are incompetent and unconstitutional. It is a constitutional requirement that where grounds of appeal raise question of mixed law and fact, leave of court is required by virtue of section 233 (3) of the 1999 Constitution to appeal from the decision of the Court of Appeal to the Supreme Court.

A court is only competent to adjudicate in a matter when among other conditions, the subject matter of the suit is competently before the court, and when the action is initiated by due process of law which in the foregoing is permission to obtain leave to file grounds of appeal. When it is settled that the question raised in the grounds of or appeal is of mixed law and fact, leave of the trial court or appellate court is required before the appeal can be competently filed. An incompetent action cannot be heard by any court of law. Failure of an appellant to seek and obtain the mandatory statutorily or constitutionally required leave to appeal rendered the notice of appeal incompetent and nugatory.

H Madukolu v. Nkemdilim (1962) 2 SCNLR pg. 341.

Atologbe v. Anoumi (1997) 9 NWLR pt. 522 pg. 536.

First Fuels Ltd. v. N.N.P.C. (2003) pt. 1018 pg. 276.

N.E.P.A. v. Eze (2001) 3 NWLR pt. 701 p. 606.

Abbey v. Alex (1991) 6 NWLR pt. 198 pg. 459.

Usually where a court's jurisdiction is challenged by the de-

fence, it is better to settle the issue one way or the other before proceeding to hearing of the case on the merits. Any failure by the court to determine any preliminary objection or any form of challenge to its jurisdiction is a fundamental breach which renders any further step taken in the proceedings a nullity.

A-G Lagos State v. Dosunmu (1989) 3 NWLR pt. 111 pg. 552. B

Madukolu v. Nkemdilim (1981) 1 NCLR 135.

Sofekun v. Akinyemi (1981) 1 NCLR 135.

An appellate court should first consider a preliminary objection raised during an appeal and express its opinion on whether it agrees or not because a successful preliminary objection may have the effect of disposing of the appeal. It does not matter if the objection is frivolous or not, it should not be ignored. This is because it is a cardinal principle of administration of justice to let a party know the fate of his application whether properly or improperly brought. D

Nwanta v. Esumei (1993) 8 NWLR pt. 563 pg. 650.

Tambio Leather Works Ltd. v. Abbey (1998) 12 NWLR pt. 579 pg. 548.

I shall proceed to consider the grounds of the preliminary objection. The court is urged to strike out this appeal for the dual reasons that this court lacks the jurisdiction to entertain same and that it is an abuse of court process. E

(a) The respondent argued that the appellant filed its notice of appeal against the Ruling of the Court of Appeal on 11/12/06 the same day as the Ruling and before the ruling was read. This appeal is not against the decision of the court dismissing its substantive appeal on 26/9/06, but against the ruling of the Court of Appeal declining to set aside its decision dismissing the appeal on lack of jurisdiction to do so. The Notice of Appeal filed on 11/12/06 because of its mode of filing is incompetent and amounts to an abuse of process of court for anticipating that a decision yet to be delivered was going to be against it. Furthermore, the respondent submitted since the notice of appeal was filed at 1.26pm on 11/12/06 when the ruling of the Court of Appeal was yet to be delivered is not only an abuse of court process but also a nullity. The reason being that at the time the notice of appeal was filed; there was no decision or order of court to be appealed against. The respondent cited cases: F G H

Patrick D. Magit v. University of Agric. Makurdi & 3 ors (2005)  
19 NWLR pt. 959 pg. 211 at page 252.

Chief Kaunsu Ajayi Ambo v. Fatai Ayinla Ayelum & 5 ors  
(1993) 3 NWLR pt. 280 pg. 126 and pg. 146.

The notice of appeal filed on 25<sup>th</sup> of January 2007 is also a  
B nullity as it was filed without obtaining leave, contrary to Order 8  
Rule 4 of the Rules of Court 1985. Where the appellant is filing a  
new process and abandoning the one already filed - it has to be done  
through the proper application and putting the parties on notice.  
C The appellant cannot file a new notice of appeal and abandon a  
former notice through a letter to the Deputy Chief Registrar of the  
Court of Appeal. The Notice of Appeal filed on 25/1/07 ought to be  
dismissed as it was not properly filed. The respondent further argued  
that even where it is deemed to be a valid notice of appeal, the grounds  
D contained therein are not grounds of law alone, but also contain  
grounds of fact, mixed law and fact and leave of the Court of Appeal  
or this Court has to be obtained before filing same. The respondent  
made reference to grounds one to eleven of the grounds of appeal.  
Since the appellant failed to comply with the provisions of section  
E 233 (3) of the 1999 Constitution, it cannot exercise its right of appeal  
to the Supreme Court in respect of questions of mixed law and facts.  
The Supreme Court is consequently precluded from exercising its  
appellate jurisdiction in respect of the grounds of appeal. The Motion  
on Notice dated 14/6/07 predicated upon the validating of the No-  
F tice of Appeal dated 25/1/07 is equally incompetent and ought not  
to be entertained. The appellant has not challenged the decision of  
the Court of Appeal dismissing appeal No. CA/L/200/2007 - rather  
all it had been doing was to raise fresh issues. The appellant filed two  
G motions on notice on the 10<sup>th</sup> of April 2007 and 14<sup>th</sup> of June 2007.  
The respondent contended that the appellant is still supposed to ask  
for leave from the Court of Appeal or the Supreme Court to file the  
two motions. The application for amendment made by the appellant  
cannot be granted - as such an amendment is to a notice of appeal  
H where the grounds of appeal contains questions of fact, mixed law  
and facts and leave to appeal must comply with the provisions of  
section 233 (3) of the 1999 Constitution, such leave must first be  
sought and obtained. Such an amendment cannot be made here as  
there is no valid appeal before the court. The 2<sup>nd</sup> Motion on Notice



dated the 14<sup>th</sup> of June 2006 in which the appellant is seeking leave of this court to file additional grounds of appeal on questions of mixed law and fact is also incompetent as there is no competent appeal before the court. The respondent submitted also that the appellant must not be allowed to benefit from the order of this honourable court made in chambers on the 20<sup>th</sup> day of June 2007 as it had abandoned the said Motion on Notice dated 10<sup>th</sup> of April 2007 upon which the said order was made. Finally, that the purported Record of Appeal No.CA/L/250/2006 on which the appellant predicated this appeal was rejected by the Court of Appeal; and this court is urged to accept it as an abuse of court process. This court must hold that it lacks the jurisdiction to entertain this appeal based on all the arguments canvassed in this objection, which include abuse of court process.

The appellant replied to the issue of filing of the Notice of appeal on 11/12/07 before the Ruling was completed. On the issue of filing two notices of appeal and the irregular withdrawal/abandonment of the first in favour of the second Notice of Appeal filed, the appellant submitted that this ground of objection is belated by virtue of Order 2 Rule 29 (1) of the Supreme Court Rules 1985 as amended. An application such as this preliminary objection seeking to strike out or set aside any process or proceedings for procedural non-compliance can only be entertained by this court if it is made within a reasonable time. The respondent failed to address this procedural defect promptly. The respondent is supposed to react, immediately it becomes aware of it and not from the time the amendment was sought. The ground of objection is lacking in merit in view of the decision of the Supreme Court in cases like -

*Akeredolu v. Akinremi & ors.* (1986) 2 NWLR pt. 25 pg. 710.

*Harriman v. Harriman* (1987) 3 NWLR pt. 60 pg. 244.

In the case of *Tukur v. Government of Gongola State* (1988) NSCC Vol. 19 pt. 1 pg.30, the court gave an answer to whether an appellant can file two notices of appeal; the answer was in the positive. In the case of *Iteshi v. The State* (1975) 9-11 SC pg. 41, the court pronounced that three notices of appeal can be filed by an appellant, and it was open for the appellant to choose which of them he intends to adopt. In effect, the appellant replied that the filling of more than

one notice of appeal does not affect the validity of an appeal if all the notices are filed within the statutory period for appealing. An appeal is not incompetent because it is brought by more than one notice of appeal. The appellant contended that all the grounds of appeal in the notice of appeal dated 25<sup>th</sup> January 2007 before the amendment  
 B effected thereto in the amended notice of appeal dated 17<sup>th</sup> of July 2007 - pursuant to the court order of 20<sup>th</sup> of June 2007 are of mixed law and fact for which leave has not been sought. All the grounds in the appellant's notice of appeal are of law and not of mixed law and  
 C fact. The appellant went further to identify the criteria for grouping or classification into grounds of law or mixed law and fact by saying that -

(1) It is only where the question raised in a ground of appeal is one of law as applied to disputed facts that the ground is said to be  
 D of mixed law and fact.

(2) Where the ground of appeal deals merely with a matter of inference from undisputed fact, then it is one of law.

(3) A ground of appeal complaining of its judicial duty of considering and pronouncing on the issues raised before it, is a ques-  
 E tion of law.

The appellant relied on the case of Nwadike & ors. V. Ibekwe & ors. (1987) NSCC Vol. 18 pt. 11 at pg. 1220. The appellant came to the conclusion that in the Notice of appeal dated the 25<sup>th</sup> of Janu-  
 F ary 2007, that grounds 1,4,5,6,7,8,10 and 11 challenged the inferences drawn by the Court of Appeal from the facts before the court, while grounds 2,3 and 9 challenged the failure of the court to dis-  
 G charge its judicial duty of considering and pronouncing on the issues raised before it. In the last three grounds v-vii, the appellant held that there is no appeal no. CA/L/250/2006 between the parties at the  
 H Court of Appeal and therefore the record is an abuse of the process of the court. The Registrar of the Court of Appeal has compiled and transmitted a Record dated 10/5/07 to this Court. The Record indicates that it is in respect of the case with the Court of Appeal numbers  
 CA/L/200/01 and CA/L/250/06. The respondent declared that it would be using its self compiled record of appeal as against the record compiled at the registry. The respondent is also preventing this court from using this Record. Section 233 (1) of the 1999 Constitution confers on the Supreme Court jurisdiction to hear and determine

appeals from the Court of Appeal. There is no dispute about the contents of a Record - Order 7 Rule 2 has laid down. What should constitute the Record of appeal to be compiled and transmitted by the Registrar of the Court of Appeal to this Court. Order 3 Rule 3 permits some of these documents to be excluded from the Record but this can only be at the mutual consent of both the appellant and the respondent. The Record of Appeal CA/L/250/06 featured prominently in this appeal. The respondent's objection on this record of proceedings therefore lacks substance and same should be dismissed. B

In the grounds upon which the application for preliminary objection are based - the respondent raised as its ground (1) as follows- C

*"Where an appeal has been dismissed by the Court of Appeal under Order 6 Rule 10 of the Rules 2002, it cannot be relisted, or registered as that court has become functus officio since the dismissal is a final decision and once an appeal is so dismissed, the Court of Appeal or any court has no jurisdiction to revive such an appeal by re-entering or re-listing same and this honourable court has no jurisdiction to do so as provided for in section 232(1) of the Constitution of the Federal Republic of Nigeria 1999."* E

The respondent supported the foregoing with copious argument and submissions as can be seen on pages 9-13 of the respondent's brief under the caption - Notice of Preliminary Objection. Under the issues raised for determination in this appeal at page 40 of the respondent's brief-the respondent's issue one reads as follows:- F

*"Whether the dismissal of an appeal in the court of appeal under Order 6 Rule 10 of the Court of Appeal Rules 2002, can be set aside by any court or whether such an appeal can be revived or re-listed under Order 7 Rule 5 of the Court of Appeal Rules."* G

Both the preliminary objection and this issue for determination raise the same question which to my mind is the core issue for determination in this appeal. In other words, where an appeal has been dismissed under the provisions of Order 6 Rule 10 of the Court of Appeal Rules 2002, can such an appeal be revived or re-listed under Order 7 Rule 5 of the Court of Appeal rules 2002. H

The respondent argued and submitted that where the Court of Appeal dismisses an appeal before it under Order 6 Rule 10 of its

rules 2002, that decision is a final decision that the Court of Appeal becomes functus officio and the Court of Appeal cannot re-list or re-enter such an appeal on its list, and that any appeal dismissed under Order 6 Rule 10 of the Court of Appeal rules cannot be revived and no court including the Supreme Court has jurisdiction to revive such an appeal by re-entering or re-listing same. The respondent cited cases to buttress the foregoing submission like *Olowu v. Abolore* (1993) 5 NWLR pt. 293 pg 255 at pg.270.

*Basayagi v. Bide* (1998) 2 NWLR pt.538 pg. 367 at pg.376.  
*Kraus Thompson Organisation v. NIPSS* (2004) 17 NWLR pt.901 pg.44 at pg.59.

*Asalu v. Dakan* (2006) All FWLR pt.325 pg.90.  
The respondent emphasised that section 232 (1) and (2) of the Constitution does not clothe the Supreme Court with jurisdiction to order the Court of Appeal to re-list or re-enter an appeal it dismissed under Order 6 Rule 10 of the Rules 2002. The only recognised step against any order setting aside the dismissal can only be entertained by way of appeal to the Supreme Court as provided under Section 233 (1) of the 1999 Constitution. The respondent cited these cases -

*United Bank for Africa Plc v. Michael Ajileye* (1999) 2 NWLR pt. 663 pg. 116 at pg. 123.

*Omoyinmi v. Ogunsiji* (2001) 7 NWLR pt.711 at pg.155.

The respondent drew attention to the fact that the appellant have failed to appeal against the decision of the Court of Appeal dismissing the appeal on 26<sup>th</sup> September 2005. The respondent explained that Order 6 Rules 2 and 10 of the Court of Appeal Rules 2002 have the force of law as the Constitution itself, while Order 6 Rule 10 is a specific provision on failure of an appellant to file its brief of argument. The respondent made it clear that at the time the court invoked Order 6 rule 10 to dismiss the appellant's appeal -

(1) The appellant failed to file its written brief in disobedience of the Rules of the lower court and time had not been extended for it to file same.

(2) The court invoked the provision of Order 6 Rule 10 in the Circumstance.

The respondent concluded that the understanding of the appellant that when a case has been dismissed under Order 6 Rule 10

of the Court of Appeal Rules 2002, such an appellant can by virtue of Order 7 Rule 5 of the same Rules re-invoke the jurisdiction of the lower court and the court to set aside the dismissal and re-list the appeal in the Courts Cause List, is a misconception. As Order 7 Rule 5 which is a general provision cannot override Order 6 rule 10 which is a specific provision the respondent concluded that it will be wrong to apply the provisions of Order 7 Rule 5 to this appeal and set aside the Ruling of the Court of Appeal on 11/12/06 to re-list or re-enter the appeal in the Cause List. The Supreme Court lacks the jurisdiction to order the court below to do what is inconsistent with the Constitution. Furthermore, the term “within a reasonable” provided in Order 7 Rule 5 has since lapsed.

#### Issue Two

Whether the appellant is not estopped from raising the defence of mistake of counsel in the circumstance of this case.

Four counsel appeared for the appellant at different times and they all filed different processes in the appeal. Chief Akinjide, SAN was under a mistaken impression as to the existence of any prior record of appeal.

The respondent submitted that as on the 26<sup>th</sup> of September 2005 - there was a record of appeal duly filed by the appellant following the Motion on Notice for departure from the Rules and granted by the court below. On the 26<sup>th</sup> of September 2005, the only application before the court was that of the respondent filed on the 23<sup>rd</sup> of June praying for an order dismissing the appeal for want of diligent prosecution. The respondent observed that the court had jurisdiction to make the dismissal order. It was observed that appeal does not operate as a stay of execution or proceedings.

Nine months after the appeal was dismissed, the appellant's counsel, by a letter dated 27/4/06 informed the respondent's counsel that a new Record of appeal has been complied as appeal no. CA/L/250/06 and forwarded by the Registrar of the lower court to the Court of Appeal. This court is urged to hold that the respondent's Motion dated 23<sup>rd</sup> June 2005 for the dismissal of the appeal at the court below was rightly and properly moved under Order 6 Rule 10 of the Court of Appeal Rules.

The respondent finally contended that the issue of professional malfeasance is not applicable to the learned senior counsel in

this case. It was the appellant who initiated this appeal and filed a Record of appeal and motion for extension of time to file his brief. The appellant never followed up its motion for extension of time and the same was struck out. The appellant left the motion for extension of time to file brief unattended to from 10<sup>th</sup> June 2005 to 14<sup>th</sup> of June 2005 when it was struck out. One of the counsel engaged by the appellant did not file the appellant's brief and neglected to comply with rules as to filing notification of change of address for service. The court is urged to dismiss the appeal for lacking in merit.

The appellant in the first issue raised the question that considering Order 7 Rule 5 of the Court of Appeal Rules 2002, whether or not the Court of Appeal is inexorably lacking in jurisdiction to revisit an order dismissing an appeal under Order 6 Rule 10 of the Court of Appeal Rules 2002. The issue is similar to issue one raised by the respondent. The appellant argued and submitted on this issue that the impression of the learned Justices of the Court of Appeal that they are functus officio after the appeal was dismissed under Order 6 Rule 10 of the Court of Appeal Rules 2002, therefore, no court can revisit or have jurisdiction over it, and the only remedy open to an affected party was to appeal to the Supreme Court. Hence the court dismissed the application to re-visit or revive the application for hearing on its merit, and set aside the dismissal order. The learned Justices of the Court of Appeal supported their reasoning and conclusion with many decided cases particularly quoting from the case *Kraus Thompson Organisation v. National Institute of Policy and Strategic Studies (NIPSS) (2004) 17 NWLR pt.901 pg. 44* which said that once an appeal which has been dismissed by the Court of Appeal under Order 6 Rule 10 of the Court of Appeal Rules, it cannot be re-listed. The appellant however drew attention to the fact that in arriving at that decision, the justices of appeal relied on the pre - 2002 Court of Appeal Rules. Most of the cases cited by the lower court relied on by the court were decided before the year 2002 except the case *Kraus Thompson Organisation* cited and *Asalu v. Dakan (2006) All FWLR pt. 325 pg. 90* which were decided in the year 2004 and 2006. Both cases restate the position of the law as stipulated in the Court of Appeal rules 1981. That law was however revoked by Order 1 Rule 1 (2) of the Court of Appeal Rules 2002. The provision of Order 6 Rule 10 of the Court of Appeal Rules 2002

is no longer subject to automatic applicability and can now be interpreted liberally as against the strict prism of the 1981 Rules. The only exception to the rule that an appeal that has been dismissed without a hearing on the merit cannot be revisited or reinstated by the Court of Appeal is in Order 3 Rule 20 (4) which specifically conferred jurisdiction on the Court of Appeal to vacate such a dismissal order and power to restore the appeal on the cause list where the dismissal order was made pursuant to Order 3 Rule 20 (1) of the 1981 Rules in relation to a dismissal under Order 6 rule 10. The courts have repeatedly declined jurisdiction to reinstate to re-list any appeal dismissed under Order 6 Rule 10 in the absence of constitutional provision or in the Rules of the Court. The appellant pointed at the 1981 and 2002 version of the Court of Appeal Rules - as a new Order 7 Rule 5 is newly introduced into the 2002 version of the Court of Appeal Rules. Order 7 Rule 5 (2) grants the appellant the option to make its application by way of motion on Notice to the Court of Appeal to set aside the order. Ordinarily the appellant was entitled to challenge the dismissal order of the Court of Appeal at the Supreme Court. Order 7 Rule 5 requires that the appellant in exercising that option, to make its application within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity and to state the grounds of the objection. It is pertinent to note that this issue was not canvassed for the appellant at the Court of Appeal, but now the appellant with the indulgence of this court pursuant to the leave granted on the 20<sup>th</sup> of June 2007 permitting the appellant to argue same as a fresh issue. The court is to hold that Order 6 Rule 10 of the Court of Appeal Rules 2002 can be challenged by the affected party for good cause and revisited and/or set aside by the Court of Appeal Under the newly introduced Order 7 Rule 5.

#### Issue Two

Whether or not the learned justices of the Court of Appeal were right when in declining jurisdiction to revisit and set aside their previous order dismissing appellant's substantive appeal under Order 6 Rule 10 of the Court of Appeal Rule 2002, they held that as of the time of making the said dismissal order on the 26<sup>th</sup> day of September 2005 they had jurisdiction to do so.

Under this issue, the appellant examine the appellant's ground

of objection under Order 7 Rule 5 (2) to the order of the court of appeal dismissing the appellant's substantive appeal under Order 6 Rule 10 are such as should entitle the appellant to the setting aside of the dismissal order. Those that are relevant to the second issue give grounds 3(k)(i)(m), 5,6,7,8,9,10,11,12,13,14,15,16 and 17 as produced particularly at pages 260-262 of volume 1 of the Record of Appeal and grounds 20,21,22,23 and 26 contained in the additional grounds reproduced particularly at pages 410-413 of 1611 of the Record of Appeal. There were two fold complaints before the court when the order under Order 6 Rule 10 was made as follows -

(a) There was an interlocutory appeal arising from the one dismissed by the Court of Appeal.

(b) The second complaint emanated from the grounds disclosed in the appellant's motion at the court below when the Court of Appeal made the dismissal order in issue, there was no Record of Appeal before that court to warrant the dismissal order under Order 6 Rule 10 of the Court of Appeal Rules. This raises the question whether the Court of Appeal has jurisdiction to dismiss an appeal - when there is an interlocutory appeal emanating from that appeal pending before the Supreme Court. Secondly, does the Court of Appeal have the jurisdiction to dismiss an appeal under Order 6 Rule 10 of the Court of Appeal Rules when there was no valid Record of Appeal before the court.

The appellant was permitted to come to the Court of Appeal with a complaint of such irregularities with a view to obtaining redress- by way of motion on notice.

The learned Justices of the Court of Appeal would not have made the order dismissing the appellant's substantive appeal without insisting that the pending appeal at the Supreme Court be dealt with and resolved. The appellant stressed that the jurisdiction of the Court of Appeal to dismiss an appeal is derived from the combined reading of Order 6 Rule 10.

The salient features of Order 6 Rule 10 pertaining to the present situation presupposes that there must be -

(a) An existing record of appeal.

(b) Time for filing of the appellant's brief i.e. 60 days as provided by rule 2 has expired.

(c) The appellant must have therefore defaulted in filing his



brief.

(d) There ought to be an application by the respondent for the appeal to be dismissed.

The foregoing elements were present according to the Court of Appeal when they invoked Order 6 rule 10 on the 26<sup>th</sup> of September 2005. The application before the court on 26/9/10 was under Order 3 Rule 23 (1) of Court of Appeal Rules 2002 and Section 15 of the Court of Appeal Act. The appellant pointed out that on the 26<sup>th</sup> of September 2005, there was no record of appeal before the Court of Appeal. The record of appeal got to the Court of Appeal on or about the 20<sup>th</sup> day of April 2006 and it was this that was erroneously assigned the number CA/L/250/2006 rather the existing appeal no. CA/L/200/2001 which was already assigned to the interlocutory proceedings that have taken place in the matter before the Court of Appeal. This error in numbering of the Record of Appeal was that of the registry. In the appeal before the lower court, the court held that there was indeed a record of appeal. The record comprised of document titled "Record of proceedings in CA/L/200/2001. Exh. TSA 3A is the bundle of document title "Supplementary Record of proceedings in CA/L/200/2001". The court held that there was only one appeal before the court and that dismissed under order 6 Rule 10. The only relevant Record of Appeal was transmitted from the Registry of the lower court on the 20<sup>th</sup> day of April 2006. Appeal could not have been dismissed under Order 6 Rule 10 as there was no valid record of appeal before the court. The documents before the court were mere appropriate to support an application under Order 3 rule 10 of the Court of Appeal Rules since only notice of appeal was filed. The court did not inquire into whether there was proper record before the court and whether the appellant's stipulated 60 days had expired.

The application itself took away the appellant's right of hearing of the appeal on merit. The respondent on the 26/9/05 moved an application under Order 6 Rule 10 which was quite different from what it brought to court under Order 3 Rules 23. The appellant concluded that if Order 6 Rule 10 of the Court of Appeal Rules stipulates that an appeal can only be dismissed under its provision if the appellant has defaulted in filing its brief of argument within the time permitted under Rule 6 Rule 2, then there would be a deficiency in the

competence of the court to dismiss the appeal under Order 6 rule 10 when the time stipulated under Order 6 Rule 2 had not commenced. Wrongful assumption and exercise of jurisdiction qualifies as non-compliance which should come within the purview of Order 7 Rule 5 of the Court of Appeal Rules 2002. This court must allow Order 7 Rule 5 to be argued as a fresh issue and at the same time resolve this issue in the appellant's favour and set aside the order dismissing the appeal.

### Issue Three

Whether or not a party to a court case in this case the appellant can be deprived of its constitutionally guaranteed right to a hearing on the merit of its case by a combination of the procedural non-feasance or misfeasance of his own counsel and the professional malfeasance of the opposing counsel.

The appellant argued that one of the grounds for seeking to set aside the order dismissing its substantive appeal is that it had no notice of the respondent's application and of the proceedings of the Court of Appeal of the 26<sup>th</sup> day of September 2005. The appellant maintains the stand that it was entitled to be notified and heard on the application for dismissal and that failure to notify it of the said application and be heard on it was a breach of the constitutional right to fair hearing. The entire hearing of the 26<sup>th</sup> September 2005 by so doing becomes a nullity. The lower court considered the issue of service of process on the appellant but failed to consider Exhs. FBN2, FBN3, FBN4, FBN5, FBN6, FBN7 FBN8, FBN9, FBN18 and FBN19 which could have exposed that the information given to court during the proceedings of 26<sup>th</sup> September 2005 was incorrect. Consequently, the information to the court by the Registrar turned out to be incorrect, as there was no proper service on the appellant. The service of hearing of the application seeking the dismissal of the appellant's substantive suit was served on the firm of Afe Babalola, SAN. The court regarded same as good and effective notification to the appellant notwithstanding the fact that the appellant had long before then dispensed with the services of the said firm and engaged the services of Chief Richard Akinjide, SAN in his stead. The office of Afe Babalola, SAN failed to perform the obligation imposed on them under Order 1 Rule 3 (5) of the Court of Appeal Rules to notify the Registrar that they no longer had the authority to receive courts process on

appellant's behalf is in the nature of a mere error of counsel which ought not to be used against the appellant.

Secondly, Chief Akinjide SAN, who took over the conduct of the appellant's case from Chief Babalola SAN, simply wrote to the respondent's counsel and the Assistant Director of Litigation of the Court of Appeal that they were the new counsel representing the appellant in the matter through Exhibits FBN2, Exh. FBN4, FBN18 and FBN19. Notices of change of counsel from the firm of Richard Akinjide SAN to the respondent and the Court's Registry were not filed. The appellant submitted that this should not be more than a procedural misfeasance on the part of the firm of Chief Akinjide SAN. The omission on the part of the firm of Afe Babalola, SAN and Chief Akinjide, SAN ought not to operate to deprive the appellant of its constitutional right. The respondent put the address of the appellant in the motion dated the 23<sup>rd</sup> June 2005 seeking to dismiss the appellant's substantive appeal for want of diligent prosecution, put the Chambers of Afe Babalola, SAN as the appellant's address for service almost a year after the respondent's counsel had in FBN5 admitted that they were no longer counsel for the appellant in the matter. The appellant's new counsel Chief Akinjide, SAN had accepted service processes meant for it to the knowledge of the respondent's counsel, Bailiff of the Court of Appeal served process on the address endorsed to it. The proof of service of the motion purportedly served on the firm of Chief Afe Babalola SAN did not show the date, the exact time it was served, the name or designation and signature of the officer of that firm that received the service. Yet the Registrar of the court reported to the court that the appellant was served. The above information was not at the disposal of the court at the hearing of the 26<sup>th</sup> of September when the appellant's appeal was dismissed. The appellant submitted that since a citizen's right to an opportunity to be heard before a decision is made against him in a suit to which he is a party is of such fundamental and constitutional nature, it must not be taken away from him due to any procedural error made by his counsel. The court is to resolve this issue in favour of the appellant.

#### Issue No. 4

If the answers to 1,2, 3 are in the negative, then whether or not the Court of Appeal was right when it declined jurisdiction to

revisit and set aside its order dismissing the appellant's substantive appeal.

The appellant contended that the application seeking the dismissal of the appellant's appeal was not originated by due process. The conclusion of the appellant that there was no Record before the court on the 26<sup>th</sup> day of September 2005 meant that the 60 days allowed under Order 6 rule 2 of the Court of Appeal Rules 2002 had to begin to count. The court was not competent to sit and dismiss the appeal when it did. The proceedings leading to the dismissal of the appellant's substantive appeal was taken without genuine notification to him and behind his back. The proceedings will therefore amount to a nullity in law. The appellant had the option of either appealing against the decision or to apply to the Court of Appeal to set it aside. The appellant concluded that apart from the inherent jurisdiction of the Court of Appeal to set aside its null order, if this court resolve issue one in favour of the appellant, then it becomes clear that the Court of Appeal has the express power under its own rules to revisit and set aside its null order of 26<sup>th</sup> September 2005. The court is urged to resolve the fourth issue in favour of the appellant and grant all the four reliefs sought by the appellant.

I have painstakingly considered the copious argument and submission of learned counsel for the appellant and leaned senior counsel for the respondent in support of the questions raised in the preliminary objection filed by the respondent, and in respect of the issues for determination in the substantive appeal. The bulk of the grounds of the objection relate to the Notices of appeal filed by the appellant. A notice of appeal in the process of appeal is a very important document, as it forms the foundation of the appeal. If it is defective, the appellate court must strike it out on the ground that it is incompetent. The question of whether or not a proper notice of appeal has been filed in the lower court is a question which touches on the jurisdiction of the appellate court. If no proper notice has been filed, then there is no appeal for the court to entertain.

Anadi v. Okoli (1977) 7SC pg. 57.

CBN v. Okojie (2004) 10 NWLR pt. 882 pg. 488.

Olanrewaju v. BON Ltd. (1994) 8 NWLR pt.364 pg.622.

I shall consider some of the grounds particularly from - ground II which reads that-

*“Where there is no appeal against a decision of a court, the Supreme Court has no jurisdiction to entertain any ground of appeal not appealed against by the appellant.”*

I agree with the observation of the appellant that this ground of the objection is awkward and not self explicit. The ground does not point at or highlight any ground of appeal not appealed against. Section 233 of the 1999 Constitution confers the jurisdiction to hear and determine appeals on the Supreme Court. An appeal is not a new action, but a continuation of the matter which is subject of the appeal. It is a complaint against the decision of the lower court. An appellant enjoys the right of appeal and in so doing must file Notice embodying the grounds and particulars of his appeal. The complaint must be relevant to the decision appealed against and not to any matter which is not subject of the appeal. Issues raised by an appellant must be related to and confined to the decision complained against - the grounds of appeal filed. The grounds become incompetent and abandoned when the requirement is not met. The Supreme Court shall not consider an abandoned ground of appeal. After all the exercise of a right to argue, a ground or grounds of appeal is subject to the rules of evidence - and the discretion of the appellate court.

Ground II (a). The court has no jurisdiction to take

(a) Notice of appeal dated 11<sup>th</sup> December 2006, as same was filed before the Ruling in appeal No.CA/L/200/2001 was delivered in the open court. The ruling of the Court of Appeal delivered on the 11<sup>th</sup> of December 2006 is based on the appellant's motion on notice dated 21<sup>st</sup> June 2006, at the Court of Appeal praying the court to set aside its decision dismissing the appellant's substantive appeal No.CA/L/200/2001 on 26<sup>th</sup> September 2005. ***The grouse of the respondent is that the Notice of appeal was filed the same day as the Ruling was delivered and by mathematical calculation of the date and time of filing in the Notice of appeal - it was filed even before the Ruling was read and delivered in the open court. The respondent considers this an abuse of court process and even contempt. I do not see any procedural lapse in the filing of this Notice of appeal as the respondent is making this court to believe.***

***The appellant clearly read the hand writing on the wall and decided, though one may be tempted to use the word hast-***

**ily, decided to file the Notice of appeal. In such notices the ground is mostly predicated on the omnibus ground. I will say that the appellate courts do not oppose such steps; what the courts frown at is delay in filing Notice of appeal. This being the reason why the Rules of court place a burden on an appellant to explain the reasons for the delay to the satisfaction of the court.**

Grounds III (b) (d) (e) filing Notice of appeal without compliance to the Rules of this court particularly Order 8 Rule 4 of the Court of Appeal Rules 1999.

It must be borne in mind that Rules of court are to regulate matters in court and help parties in the presentation of their case within a procedure made for the purpose of a fair and quick dispensation of justice in the trial. Strict compliance with the rules makes for quicker administration of justice. They are made to attain justice with ease and certainty - and as such, they are made with that fundamental principle. The courts now lean heavily on the side of doing justice. The Rules of court are designed for ensuring that justice is obtained by parties in the citadel of justice. Rules of court must be complied with, observed and obeyed; non-compliance often attract the sanction of incompetency and ultimately striking out or dismissal as the case may be.

Solanke v. Somefun (1974) All NLR pt.1 pg.141.  
University of Lagos v. Ayoro (1985) 1 NWLR pt.1 pg.143  
By virtue of Order 2 Rule 29 (1) of the Supreme Court rules 1985 as now amended - states that -

*“An application to strike out or set aside for non-compliance with these Rules of practice and procedure in this court, any proceedings or any step taken in any proceedings or any document, judgment or order therein shall only be entertained by the court if it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”*

This is not a remedy to wake up one morning and invoke at leisure, steps under this rule must be taken timeously else the privilege is lost.

III (e) That the appellant’s motion on Notice dated the 14<sup>th</sup> day of June 2007 is incompetent and should be discountenanced as it is unconstitutional and a gross abuse of court process.

The appellant explained that when the last application was filed, the relief meant to cover those in the application filed on the 14<sup>th</sup> of June 2007 - the respondent failed to raise the application within reasonable time.

Akeredolu & ors. v. Akinremi & ors. (1986) 2 NWLR pt. 25 pg.710. B

Harriman v. Harriman (1987) 3 NWLR pt. 60 pg.244.

Tukur v. Government of Gongola State (1988) NSCC (Vol. 19) pt.1 pg.30.

III (iv) That the honourable court lacks jurisdiction to grant C the reliefs sought in the appellant's 2 (two) Notices of Appeal herein.

***The answer to this objection has been aptly answered in the case of Tukur v. Government of Gongola State (1988) NSCC Vol.19 pt.1 pg.30 quoting from the judgment of the Supreme Court from page 36 lines 6-12 that "The answer to the question, can an appellant file two Notices of Appeal with emphasis on the word can is obviously yes he can."*** D

***In the case of Iteshi v. The State 9-11 SC at pg.41 - the Supreme Court considered a similar situation where the appellant filed three Notices of appeal. The Apex court held that - it was open to counsel for the appellant to choose which of them he intends to adopt.*** In the case of Harriman (supra), the court has decided that filing of more than one notice does not affect the validity of an appeal if all the notices are filed within the statutory period F for appealing. ***An appeal is not incompetent because it is brought by more than one notice of appeal. I adopt this sound reasoning in respect of this objection.***

III(c) That the grounds of appeal contained in the said two (2) notices of appeal mentioned in (a) and (b) above are not ques- G tions of law alone but also contain questions of fact and of mixed law and facts and since leave of the court below or of this honourable court was not first sought and obtained before filing same, the said (two) Notices of Appeal herein are incompetent as they are unconsti- H tutional.

The appellant explained that a Notice of Appeal was filed on 25/1/07 - but another Notice meant to amend this former notice was filed on 17/7/07. It was made pursuant to the order of this court of the 20<sup>th</sup> of June 2007. The appellant followed the case of Nwadike &

ors v. Ibekwe & ors. (1987) NSCC Vol. 18 pt. 11 at pg.220 to determine whether the grounds in the Notice of Appeal filed on 25<sup>th</sup> January are of law, or of mixed law and fact. The appellant held that grounds 1,4,5,6,7,8,10 and 11 challenged the inferences drawn by the Court of Appeal from facts before the court, while grounds 2,3  
B and 9 challenged the failure of the Court of Appeal to discharge its judicial duty of considering and pronouncing on the issues raised before it.

The respondent contend that all the grounds of appeal of the 25<sup>th</sup> of January before the amendment are of mixed law and fact for which no leave has been obtained. When a party objects to a ground of appeal on the ground that it raises a question of fact or of mixed law and fact, and that the requisite leave has not been obtained, the court will determine the question on a reasonable understanding of the nature of the ground of appeal and not what the party raising the objection may have misconceived to be the question involved in the ground of appeal filed by the appellant.  
D

***The important yardstick for the classification of a ground of appeal is not in the form of the question it raises but for instance -***  
E

***(a) Where the ground of appeal shows that the trial court or appellate court misunderstood the law or misapplied the law to the fact, it is certainly a ground of law.***

***(b) Where the ground suggests an invitation to the court where an appeal is lodged to investigate the existence or otherwise of certain facts made by the trial court or where the evaluation of the evidence tendered is exclusively challenged, it is a ground of fact or at best a ground of mixed law and fact.***  
F

***(c) Where the questions which the court is bound to answer in accordance with a rule of law arises out of statutory provisions and interpretation of documents, it is a ground of law.***  
G

***(d) Where the question is one that will require questioning the evaluation of the facts by the trial court before application of the law, it is a ground of mixed law and fact.***  
H

***(e) Where the ground of appeal questions the exercise of the discretion by a trial court, it is undoubtedly not a ground of law but at best a ground of mixed law and facts because the***



***manner in which a court ought to exercise its discretion in a particular case is a question of fact depending on facts and circumstances of each case.***

***(f) Whether or not discretion is exercised judicially and judiciously or arbitrarily in any particular case is a question of mixed law and fact.*** B

***(g) A ground of appeal complaining of failure of the court to discharge its duty considering and pronouncing on the issues raised before it is a question of law.***

***(h) A ground of appeal which is a complaint of the misapplication of correctly stated principles of law to the facts of a case is a ground of law alone.*** C

Nwadike & ors. v. Ibekwe & ors. (1987) NSCC Vol.18 pt.11 pg.1220

Abidoye v. Alawode (2001) 6 NWLR pt. 709 pg. 463. D

Ezeobi v. Abang (2000) 9 NWLR pt.691 pg.516.

Agbamu v. Ofili (2004) 5 NWLR pt.863 pg.540.

Metal Construction (WA) Ltd. v. Migliore (1990) 13 NWLR pt.635 pg.472.

Comex Ltd. v. Nigeria Arab Bank Ltd. (1997) 3 NWLR pt.496 E pg.643.

Coker v. U.B.A. Plc (1997) 2 NWLR pt.490 pg.641.

In the case of Thor Ltd. v. First City Merchant Bank Ltd. (2002) 4 NJSC pg.1 pg.179 at pg. 188 - the Supreme Court held that - F

*“Where however the ground or grounds of appeal are not of law alone but of mixed law and fact or fact simpliciter, the right of appeal from the court of appeal to the supreme court can only be exercised where the aggrieved party has first sought and obtained the leave of either the court of appeal or the supreme court.”* G

Akwiwu Motors Ltd. & anor. V. Dr. Babatunde Sangonnuga (1984) All NLR 309 at 311.

Section 213 (3) of the Constitution 1979 is in pari materia with Section 233 (3) of the 1999 Constitution. Gleaning through the grounds raised in the notice of appeal, the appellant must obtain leave of this court in order to rely on the grounds in the notice of appeal based on mixed law and facts. Such leave can be obtained to act on the side of caution where it is not apparent on record whether a ground of appeal can be classified as ground of law or ground of H

mixed law and fact.

The germane issue in the preliminary objection is the ground raising the question that where an appeal has been dismissed by the court of appeal under Order 6 Rule 10 of its rules 2002, it cannot be re-listed or re-entered as that court has become functus officio since the dismissal is a final decision. Once an appeal is so dismissed, the court of Appeal or any court has no jurisdiction to revive such an appeal by re-entering or re-listing same and this honourable court has no jurisdiction to order the court of appeal to re-list or re-enter the appeal which the court of appeal itself has no jurisdiction to do so as provided for in section 232 (1) and (2) of the Constitution of the Federal Republic of Nigeria.

In the respondent's brief, issue No. 1 reads –

*“Whether the dismissal of an appeal in the Court of Appeal under Order 6 Rule 10 of the Court of Appeal Rules 2002 - can be set aside by any court or whether such an appeal can be revived or re-listed under Order 7 rule 5 of the court of Appeal Rules 2000.”*

In the appellant's brief issue No. 1 reads -

*“Considering Order 7 Rule 5 of the Court of Appeal Rules 2002, whether or not the Court of Appeal is inexorably lacking in jurisdiction to re-visit an order dismissing an appeal under Order 6 Rule 10 of the Court of Appeal Rules.”*

I find it therefore convenient at this stage to consider the effect of Order 6 Rule 10 of the Court of Appeal Rules 2002 on any appeal dismissed pursuant to this Rule. The instant appeal challenges the decision of the Court of Appeal, Lagos delivered on the 11<sup>th</sup> of December 2006, declining to entertain and refusing the appellant's application to set aside the earlier decision of the same court dismissing the appellant's substantive appeal in the appeal CA/L/200/2001 under Order 6 rule 10 of the court of Appeal Rules. When the judgment of the court in the suit No. ID/9/98 was delivered on the 23<sup>rd</sup> of January 2001 in favour of the respondent as plaintiff. By Notice of Appeal dated 1<sup>st</sup> February 2001, the defendant/appellant filed an appeal to the Court of Appeal, Lagos. On the 11<sup>th</sup> of April 2001, the appellant brought an application to the Court of Appeal by way of motion praying the court for an unconditional stay of execution of the judgment of the trial court, which the Court of Appeal refused. The appellant brought an interlocutory appeal No. SC/389/2001 to

this court. This court on the 3<sup>rd</sup> of May 2004 further varied the conditional stay in the appeal No. SC/389/2001. This interlocutory appeal was later dismissed by the Supreme Court on the 28<sup>th</sup> of March 2006. In order to quicken the hearing of the appeal to the Court of Appeal, the appellant filed the motion for departure - and compiled the Record while the respondent compiled the supplementary Record. B On the 26<sup>th</sup> of September 2005, the Court of Appeal on the application of the respondent and having been informed by the Registrar that the appellant had been served and there was no appellant's brief of argument filed, assumed jurisdiction and dismiss the appeal C under Order 6 rule 10 of the Court of Appeal Rules 2002. The appellant thereafter invoked the jurisdiction of the court of Appeal to set aside the order of dismissal made pursuant to Order 6 Rule 10 of the Court of Appeal Rules 2002. The Court of Appeal on the 11<sup>th</sup> of February 2002 held that it lacked jurisdiction to entertain the application of the appellant to re-list, re-enter or revive the appeal already D struck out being that the court has become functus officio. Was the lower court right to have claimed that it has become functus officio in the matter after the Ruling of the 26<sup>th</sup> of September 2005. The hearing of the 26<sup>th</sup> of September 2005 is at page 81 of the record of E appeal Vol. 1, reads-

*"Appearance - Chief A.O. Williams SAN with R.D. Tang (Miss) for the Respondent/Applicant.*

*Registrar: - Appellant/Respondent served on 23/9/05.*

*Williams - I have a motion filed on 23/9/05 brought under Order 6 F Rule 10 of the Court of Appeal Rules. We ask that the appeal be dismissed for Akanike-Olowu & ors v. Ahudatu and ors. (1993) 5 NWLR pt.255. Brief has not been filed and time has not been extended for the applicants. Court - Application meritorious. Appeal G dismissed under Order 6 Rule 10 of the Court of Appeal Rules.*

*Signed"*

Vide page 81 vol.1 of the Record.

Order 6 Rule 2 of the Court of Appeal Rules 2002 stipulates H that –

*"The appellant shall within sixty days of the receipt of the Record of Appeal from the court below file in the court a written brief, being a succinct statement of his argument in the appeal."*

Order 6 Rule 10 of the Court of Appeal Rules 2002 stipulates

that-

*“Where an appellant fails to file his brief within the time provided for in Rule 2 of this Order or within the time as extended by the court, the respondent fails to file his brief, he will not be heard in oral argument except by leave of the court. Where an appellant fails to file a reply brief within the time specified in Rule 5, he shall be deemed to have conceded all the new points or issues arising from the respondent’s brief.”*

Before the hearing and Ruling of the 11<sup>th</sup> of December 2006, the motion dated 5<sup>th</sup> June 2003 for extension of time to file brief by the appellant was stuck out by the court below on 14<sup>th</sup> June 2005 for want of prosecution. The appellant was not in court on 26/9/05, no Brief was filed, no application for extension of time. On 11/12/06, the same court of Appeal declined to revive the suit no.CA/L/200/D 2001 that it lacked jurisdiction – as it had become functus officio.

Order 5 Rule 3 of the Court of Appeal Rules 2002 states that

*“The court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intension. A judgment or order shall not be varied when it correctly represents what the court decided nor shall the operative and substantive part of it be varied and a different form substitute.”*

In the case of Olowu v. Abolere (1993) 5 NWLR pt.293 pg. 255 at 270 per Karibi-Whyte, JSC (as he then was) said -

*“After deciding a matter before it, the court of appeal becomes functus officio and lacks jurisdiction to deal with the matter. This is essentially because the court cannot sit on appeal on its own decisions, having not been vested with any power so to do. The constitutional and statutory jurisdiction of the Court of Appeal is not to hear appeals from the lower court. Thus having finally decided a case before it becomes funtus officio as to that case.”*

***In effect when a court of appeal dismisses an appeal before it under order 6 Rule 10 of its Rules 2002, that decision is a final decision, the Court of Appeal thereafter becomes functus officio and the court of appeal cannot re-list or re-enter such an appeal on its cause list. In the case of Kraus***

**Thompson Organisation v. NIPSS (2004) 17 NWLR pt.901 pg.44 at pg.59 the Supreme Court expatiated further on this by saying that-**

***“When an appeal is dismissed under Order 6 Rule 10 of the Court of Appeal Rules, its life terminates and it is therefore removed from the cause list. No court has jurisdiction to revive resuscitate it.”*** B

Asalu v. Dakan (2006) All NWLR pt.325 pg.90.

Babayagi v. Bida (1998) 2 NWLR pt.538 pg 367

National Electoral Commission & 438 v. ors. Prince Chijioke C

B.

Nnaji & anor. (2004) 16 NWLR pt.900 pg. 473 at 482.

***The phrase functus officio means “a task performed, fulfilling the function, discharging the office or accomplishing the purpose and thereby becoming of no further force or authority.”*** D

***A court is said to be functus officio in respect of a matter if the court has fulfilled or accomplished its function in respect of that matter and it lacks potency to review, re-open or re-visit the matter. Once a court delivers its judgment on a matter, it cannot re-visit or review the said judgment except under certain conditions. More importantly, a court lacks jurisdiction to determine an issue when it is Functus officio in respect of the issue or where the proceedings relating to the issue is an abuse of court process.*** E F

Ukachukwu v. Uba (2005) 18 NWLR pt.956 pg.1.

Anyaegebunam v. A-G Anambra State (2001) 6 NWLR pt.710 pg.532.

Mohammed v. Hussein (1998) 14 NWLR pt.584 Pg.108. G

In the case of UBA Plc v. Michael Ajileye (1999) 3 NWLR pt.663 pg.116 at pg.123, the Court of Appeal went a step further in respect of the effect Order 6 Rule 10 on an appeal struck out that –

***“Any order setting aside the dismissal can only be entertained by way of appeal to the supreme court as provided under section 233 (1) of the 1999 Constitution.”*** H

The case of Omoyinmi v. Oganiyi (2001) 10 NWLR pt.711 at 155 held that ***“The consequence is that the dismissal of an appeal for failure to file appellant’s brief under Order 6 Rule 10 is final decision***

*and the only cause open to a party adversely affected thereby is that of appeal to the Supreme Court.”*

**The appellant has chosen this option of coming to the Supreme Court in order to examine the jurisdiction of the court below to dismiss an appeal under the said Order 6 rule 10 of its Rules 2002. The applicant must satisfy the court that -**

**(a) There is a record of appeal already entered. A record is entered after it has been transmitted to and delivered to the Registry of the appellate court from the lower court.**

**(b) Time for filing the appellant’s brief of argument 60 days as provided by Rule 2 has expired.**

**(c) There is no extension of time ordered by the court within which the appellant would file its brief of argument.**

**(d) There is an application by the respondent for the dismissal of the appeal.**

The lower court found that all the foregoing were in existence when it made the order to dismiss the appeal under Order 6 Rule 10 on the 26<sup>th</sup> of September 2005. The lower court found that there was a Record of Appeal before it. The appellant had not filed the appellant’s brief and there was no pending application for extension of time to do so. The only application before the court was the respondent’s motion dated the 23<sup>rd</sup> of June 2005 for an order dismissing the appeal for want of diligent prosecution. All the conditions for invoking the court’s jurisdiction were present when the respondent moved his motion for an order to dismiss the appeal for want of diligent prosecution under Order 6 Rule 10 of the Court of Appeal Rules 2002. The conclusion of the respondent is that the court below had rightly invoked Order 6 rule 10 of the Court of Appeal to dismiss the appeal of the appellant in the circumstance of this case.

The view of the respondent has the blessing of the Supreme Court in the case of Kraus Thompson Organisation v. NIPSS (supra) where the court said -

*“The provisions of Order 6 Rule 10 of the Court of Appeal Rules 1981 as amended is in pari materia with the 2002 rules are very clear and needs no further interpretation. It says very clearly that if the appellant fails to file its brief within the time provided by the Rules or the time extended by the Court for doing so, the respondent may apply to the court for the appeal to be dismissed for*

*want of prosecution. This did not seem to give the court any discretion. Once the respondent applies under the said rule, the appeal must be dismissed and such dismissal is final."*

The appellant has a contrary view which this court shall now unfold. The appellant is of the impression that there was no proper record of appeal already entered before the court. The record which the lower court relied on was compiled by the parties and not by the registry of the trial court. By so doing, the Record will only become the Record of court to be used for the purpose of the appeal through an application for departure from the Rules. The appellant submitted that though the application for departure was filed on 7/6/01, it was not heard by any court or granted contrary to the impression of the lower court at the time of delivering its judgment on 11/1/06. The view of the court expressed in the judgment delivered on the 11/12/06 that there was a Record in existence for which departure was granted on 6/6/01 was not correct. The record in existence as at that time are TSA3 and TSA3<sup>A</sup> - a main record compiled by the appellant and a supplementary record compiled by the respondent. The appellant now refers to an officially complied record emanating from the Registry of the lower court which has given birth to the appeal CA/L/250/2006. The appeal in existence is CA/L/200/2001. It was the mistake of the registry that gave two different numbers to the same appeal. The respondent filed a motion on notice dated 21<sup>st</sup> of December 2006 praying this court to depart from the Rules by admitting the bundle of documents Exhibit AAA/01 as the Record for the purpose of this appeal. The respondent took the steps for the expeditious and accelerated hearing of this appeal so that it may not suffer any further delay in reaping the fruits of the interest on the judgment. The application for departure was heard and granted in Chambers of this court on the 20<sup>th</sup> of June 2007. This has also generated series of questions; was the application for departure granted on 20/6/07 in respect of the Record already compiled by the parties, used to dismiss the appeal CA/L/200/2001 under Order 6 Rule 10 for failure of the appellant to file brief.

(2) Has the respondent now taken it upon itself to compile a new set of record altogether?

(3) What is the position of the official Record now transmitted from the trial court registry and entered at the Court of Appeal?

The official Records were transmitted on 20/4/2006

(4) Is the appellant not right to hold that there was no Record before the court when the application for invoking Order 6 Rule 10 was heard?

(5) If there was no proper record, is it right to blame the B appellant for failure to file its brief on 26/9/05?

(6) Exhibit TSA3 and TSA3 are records meant for the interlocutory appeal.

(7) Has the lower court not invoked Order 6 Rule 10 of the C Court of Appeals 2002 prematurely?

***The appellant is of the impression that Order 6 Rule 10 of the Court of Appeal now wears a bit of human face. It is not as ruthless as it was under the 1981 rules now repealed. The reason being that the Court of Appeal Rules 2002 now D has a new provision in the form of Order 7 rule 2 and Order 7 Rule 5.***

Order 7 Rule 2 states that –

*“The court may direct a departure from these Rules in any way this is required in the interest of justice.”*

E Order 7 Rule 5 (1) states that-

*“An application to strike out or set aside for non-compliance with these Rules or for any other irregularity arising from the Rules of Practice and Procedure in this court any proceedings or any document, judgment or order therein shall only be entertained by the F court if it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”*

Order 7 Rule 5 (2) reads -

G *“An application under this Rule may be made by motion on notice and the grounds of objection must be stated.”*

***It is certainly obvious that this section of the Court of Appeal Rules which is a miscellaneous provision is meant to aid the vigilant and not a sluggard. The appeal in the instant H case was struck out since the 26/9/05. I do not see from the records how the appellant has taken advantage of this section which according to Order 7 Rule 5 must be invoked within a reasonable time.*** The words used in the 2002 Court of Appeal Rules are simple, clear and unambiguous and this court has no op-



tion but to give effect to them as such as they clearly demonstrate the intention of the framers in employing the Rules of court not only to promote the interest of justice but also to obtain same with dispatch. The appellant's only option here is to file an appeal to this court as this is clear from the provision of the Rules. The appellant made a fruitless journey to the lower court to set aside or re-visit its ruling in a situation where the lower court is *functus officio*. The appellant complained about breach of his right to be properly heard before his right of appeal was thrown overboard by the lower court. The appellant's core grouse is that he was not put on notice about the motion for dismissal of his appeal for want of diligent prosecution filed by the respondent, which it prayed the court to move on the 26/9/05 following which his appeal was not struck out as he had not filed the appellant's brief.

I have touched upon the complaint of the appellant about the Record. The sum total of it all is that right now, there are two sets of Records before this court, one officially prepared and transmitted after parties have settled records. The other prepared by the parties themselves. Appellant's brief and even the respondent's brief can only be prepared from the Record. It is obvious from the argument and submission of the parties - that the appellant is biased towards the officially prepared Record of Appeal, while the respondent is in favour of the Record prepared by way of departure. The appeals based on the Records bore different numbers which is the mistake of the Registry. The appellant complained of improper service. The Records show that the appellant in the course of trial of this case had briefed four eminent members of the bar - namely Professor M.I. Jegede, SAN; Chief Afe Babalola, SAN; Chief Richard Akinjide SAN and this incumbent legal representative. While the appellant engaged the service of Professor M.I. Jegede he filed the Notice of Appeal, Chief Afe Babalola, SAN filed the Record of Appeal on the 6<sup>th</sup> of June 2001 and the motion dated 5<sup>th</sup> of June 2003 for an extension of time to file brief based on the record. Chief Richard Akinjide, SAN filed record which he said was for argument in the interlocutory appeal. The change of baton of these counsel have brought about legal complication in the service of process. Though notification of their briefing and when they were de-briefed generated some official lapse. There are provisions in the rules of court as to the notification of their

engagement particularly to the Court Registry in view of the importance of service of various court processes by the court Registry. Clients must be served through their counsel. The counsel to the appellant at the time of the hearing of this appeal was Chief Richard Akinjide, SAN. Though he communicated his engagement to the Court Registry by writing letters to the Registry while he took the proper step to notify his colleagues. The provision of Order 1 rule 3 (1) and Order 3 Rule 7 (4) of the Court of Appeal Rules of the Court of Appeal Rules 2002 are not in doubt.

Order 1 Rule 3 (4) stipulates that-  
*“Any person desiring to change his address for service shall notify the Registrar and shall communicate the new address to all other persons to the suit.”*

Order 3 Rule 7 (4) of the Court of Appeal Rules 2002 reads  
 D as follows -

*“Any party to an appeal or intended appeal may change his address for service at any time by filing and serving on all parties to the appeal or intended appeal notice of such change.”*

The learned senior counsel for the appellant wrote letters to the registry and the other counsel in the matter. It is argued that he was supposed to file Notice of change of address at the Court Registry and serve same on all the parties. Exhs. FBN2, FBN3, FBN4, FBN5, FBN6, FBN7, FBN8, FBN9, FBN18 and FBN19 are correspondence between the appellant’s learned senior counsel, the respondent’s learned senior counsel and the Court Registry. When the motion on Notice was filed in the Registry pending the hearing on the 26/12/05 in court, the respondent’s counsel decided to put the name and address of a counsel already debriefed who to his knowledge was no longer appearing in the matter. The court bailiff relied on the address on that Motion to invite the supposed appellant’s counsel to court. As observed by the learned counsel for the appellant, there was no notice of who accepted service of the process at Chief Afe Babalola’s chamber. There is all likelihood that the chamber may not even accept such service of the motion since they have been debriefed by the appellant. The registrar believing service was rightly effected at the address on the motion indicated to court at the hearing of the motion on 26/9/06 that the counsel and by extension, his client have been served. The paramount outcome of such non-

service is that the appellant was deprived of being heard in a matter of great interest to him.

***The bottom line is that the appellant was not present where a major decision was taken against him based on wrong information contained in his address for service. The appellant was not heard before his appeal was dismissed. I agree with the reasoning and view of the appellant that a citizen's right to an opportunity to be heard before a decision is made against him in a suit to which he is a party is of fundamental and constitutional nature that ought not to be taken from him simply because of the procedural error of his counsel, his opponent or the Court registry; particularly when it does not fundamentally affect the opposing side.***

The essence of service of process on parties in a case is to enable them to appear to prosecute and defend the case and also to ensure the appearance of the parties and those of their respective counsel in court. These are fundamental conditions to be seen to have been fulfilled before a court can have competence and exercise jurisdiction over a case. This also accords with the principle of natural justice which postulates that both sides to a case must be heard. Consequently, failure to serve a process where service of process is required to be served renders any order made against the party not served with process null and void. ***In the instant appeal not properly serving the appellant with process, whereupon service was served on it through counsel already debriefed by him to the knowledge of the applicant in the motion renders any order made against it in the application null and void.***

Madukolu v. Nkemdilim (1962) 2 SCNLR pg.341.

U.B.A Plc v. Ajileye (1999) 13 NWLR pg.633 pg.116.

Oke v. Aiyedun (1986) 2 NWLR pt.23 pg.548.

Also non-service of process affects the jurisdiction of a court in respect of any matter. Where a case comes before it by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction, the court competently assumes jurisdiction. Proceedings conducted in a trial without due process being served on the parties or one of the parties amount to a nullity. The outcome of the proceedings will surely be against the principle of natural justice -affecting the competence of the court which sat over the matter.

Skenconsult Nig. Ltd. v. Ukey (1981) 1 SC 6.

A person who is affected by an order of the court which can properly be described as a nullity is entitled as a matter of right, *ex debito justitiae* to have it set aside in order to meet the end of justice. In the absence of service of the initiating process on an appellant, the trial court lacked the jurisdiction to enter judgment in favour of the respondent. The appellant did not realise that his appeal had already been dismissed until the notice about the Record in respect of the same appeal was served on the counsel from the Registry of the trial court. The appellant claimed that his right to fair hearing has been breached. ***It is apparent that a hearing cannot be said to be fair if any of the parties is refused hearing or denied the opportunity to be heard, or to present his case.***

The right to fair hearing is a right guaranteed by section 36 of the 1999 Constitution, the supreme law of the country to every citizen of Nigeria. It cannot be waived neither can its breach acquiesced in. The right to fair hearing is a fundamental and constitutional right of a party to a dispute to be afforded an opportunity to present his case to the adjudicating authority. The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived at in the case. As reasoned in the case of *Otapo & ors. v. Sunmonu & ors.* (1987) 2 NWLR pt.58 pg.587 at pg.605 - the Supreme Court held that -

*“A hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused hearing or not given an opportunity to be heard, the hearing cannot qualify as a fair hearing. Without fair hearing, the principle of natural justice are (sic) abandoned.”*

*Ogundoyin v. Adeyemi* (2001) 13 NWLR pt.750 pg.430

*U.B.A. Ltd. V. Achonu* (1990) 6 NWLR pt.156 pg.254.

*Mohammed v. Kano Native Authority* (1968) 1 ALL NLR pg.424.

*Salu v. Egabor* (1994)6 NWLR pt.348 pg.23.

*Mohammed v. Olawunmi* (1990) 2 NWLR pt.133 pg.458.

*Union Bank of Nigeria v. Nwokolo* (1995) 6 NWLR pt.400 pg.127.

*Bamigboye v. University of Ilorin* (1999) 10 NWLR pt.622 pg.290.

Okafor V. A-G Anambra State (1991) 3 NWLR pt.200 pg.59.

There is no doubt about it that the appellant having been deprived of the opportunity to participate in the court proceedings of 26/9/05 where his appeal was dismissed under Order 6 Rule 10 of the Court of Appeal Rules 2002 due to lack of service, his right to fair hearing has been breached. **Any judgment or ruling based on breach of the constitutional provisions of fair hearing as provided in section 36 of the 1999 Constitution will not be allowed to stand on appeal. Furthermore, Order 6 rule 10 of the Rules of the Court of Appeal relied upon by the respondent to hold that neither the Court of Appeal and no other court can revive, or re-list or resuscitate an appeal dismissed “relying on the decision in Kraus Thompson Organisation v. NIPSS (2004) 17 NWLR pt.901 pg.44 at pg.59 is only a rule of court, while section 36 of the 1999 Constitution is a constitutional provision. By virtue of the provision of section 1 (3) of the 1999 Constitution, the doctrine of supremacy of the Constitution demands that if any law is inconsistent with the provision of the 1999 Constitution, the constitution shall prevail and the other law shall to the extent of the inconsistency be void.”**

Order 6 Rule 10 of the Court of Appeal Rules 2002, shall in the circumstance give way to section 36 of the Constitution. All the germane issues raised in this appeal, which I have considered, are decided in favour of the appellant. I hereby make order as follows -

- (a) The preliminary objection is over-ruled.
- (b) The appeal succeeds and it is allowed.
- (c) The appeal is to be remitted back to the Court of Appeal, Lagos to be re-listed and heard before another panel of justices of the Court of Appeal.
- (d) The order of dismissal of the appeal made on the 26<sup>th</sup> of September 2005 is set aside.
- (e) The order in the Ruling of 11/12/06 is set aside.
- (f) It is important in the interest of justice that all parties shall approach the citadel of justice putting all their cards on the table. N50,000.00 costs of the appeal is awarded in this court and N20,000.00 at the lower court in favour of the appellant.

**MUSDAPHER JSC**

I agree.

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B

**TABAI JSC**

I was privileged to read in advance the lead judgment of my learned brother ADEKEYE JSC and I agree entirely with the reasoning and conclusion therein that the appeal has merit and should be allowed. Accordingly I also allowed the appeal. I adopt the order on costs as contained in the lead judgment.

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**MUHAMMAD JSC**

D

I have had the privilege of reading in advance the leading judgment just delivered by my learned brother, Adekeye, JSC. I am in complete agreement with my learned brother in the reasoning process and conclusions arrived at in dismissing the preliminary objection as well as in allowing the appeal.

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One vital issue which captured my attention is dismissal of the appeal No. CA/L/200/2001 by the court below when it was clear from the records of appeal placed before that court that there was no proper service of the process, especially the motion on notice to dismiss and the hearing notice which notifies the other party of the date of hearing. The court below relied upon the affidavit of service sworn to by the court bailiff who effected service, wrongly; I must say, on a counsel's chambers who was debriefed. The fact of debriefing the chambers of Chief Afe Babalola, SAN, was rightly brought to the attention of the respondent and the court's below Registry. Equally,

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it is not in dispute that Chief R. Akinjide, SAN, was the new counsel now engaged by the appellant and all services of that court's processes must be effected on his chambers. Thus, the fact that both the court below and the respondent were put on notice of change of counsel by the appellant now shifted the duty to the court below and the respondent (who filed the process in respect of the dismissal of the appeal) to ensure that the right steps are followed in order not to shut out the appellant. Indeed, the court has a duty to meticulously verify/scrutinize the claim to service of process on any of the parties

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before it. Service must be effected as required by law. Swearing of Affidavit of service by a court bailiff, is not only required but the court must be convinced that the facts stated therein are relevant and more likely to be true in a given case. Any fact put in evidence or step taken by a bailiff which creates doubt, suspicion or confusion should not be relied upon by the court to deprive or deny a party fair hearing or trial which is guaranteed to every citizen by the constitution. Thus, the service of the processes leading to the dismissal of Appeal No. CA/L/200/2001, on the Chambers of Chief Afe Babalola, SAN could not confer jurisdiction on the court below as at the date of service as Chief Afe Babalola, SAN was debriefed. Thus, any step taken by that court, without jurisdiction is a nullity. B  
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Secondly, striking out or dismissal of an appeal pursuant to Order 6 Rule 10 of the Court of Appeal Rules 2002, no doubt is a final order made by the court below and cannot, if properly made, be re-visited or revived by the same court see Order 5 Rule 3 of the Court of Appeal Rules 2002. Where, however, a decision has been reached by a court and which decision, for some reasons, (like in this appeal) is without jurisdiction and a nullity due to absence of fair hearing; or it has been reached as a result of fraud, or where it is a default judgment, the same court that made the order, can set that same order aside. See: *Witt & Busch Ltd v. Dale Power Systems Plc* (2007) 17 NWLR (Pt.1062) 1. But an order made within jurisdiction can only be reviewed by an appellate court. D  
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See: *Fajinbi v. The Speaker Western House of Assembly* (1962) 1 SCNLR 300; *Oke v. Aiyedun* (1986) 2 NWLR (Pt.23) 548. F

In the appeal on hand, the appellant came to this court, for a rescue. I think it is right in taking that course. I agree with my brother Adekeye, JSC, that the court below ought not to have deprived the appellant from exercising its constitutional right to fair hearing. Further, when the order of dismissal was made, there was no record of appeal in respect of the appeal lodged; there was no proof of proper service of process on the appellant; there was a matter pending at the Supreme Court which would have impact on the appeal dismissed. The court below thus, would have exercised more diligence before making the dismissal order. G  
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For the detailed reasons contained in the lead judgment of my learned brother Adekeye, JSC, I too allow this appeal. I abide by

all consequential orders made in the lead judgment including order as to costs.

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**MUNTAKA-COOMASSIE JSC**

B I have the privilege of reading in advance the lead judgment of my learned brother Adekeye JSC, and I am in complete agreement with the reasoning and conclusion reached thereat. The facts of this case had been fully set out in the lead judgment I do not intend to add anything thereto. The reasons and the analysis of his Lordship clearly tally with my little understanding of the law on the subjects.

C I wish however, with respect to make a brief comment on some of the issues that arose for our determination.

D One issue that really agitates my mind is whether the lower court, Court of Appeal Lagos Division, was right in dismissing the Appellant's appeal under the provisions of Order 6 Rule 10 of the Court of Appeal Rules 2002, without putting the appellant on Notice of the hearing of the Motion praying the court to dismiss the appeal notwithstanding the fact that all conditions precedent as required by the provisions of Order 6 Rule 10 of the Court of Appeal Rules 2002 have been met. Where an appeal is dismissed under the provisions of Order 6 Rule 10 of the Court of Appeal Rules 2002, herein call Rules), the general consensus of judicial pronouncement is that such an appeal cannot be revisited nor relisted. The only remedy open to such an appellant is to appeal to this court being the court having the appellate jurisdiction over the decisions of the Court of Appeal. See Krauns Thompson Organisation V. NIPPS (2004) 17 NWLR (pt. 601) 44 at 59; Asalu V. Dakan (2006) All NWLR (pt. 325) at 90. In Omoyinmi V. Ogunsiji (2001) 10 NWLR (pt. 711) at 155. It was held as follows:-

H *"..... The consequence is that the dismissal of an appeal for failure to file appellant's brief under Order 6 Rule 10 is a final decision and the only cause open to a party adversely affected thereby is that of appeal to the Supreme Court....."*

Per Tabai JCA as he then was. I allow myself to be persuaded by the above decision.

Thus, for the provisions of Order 6 Rule 10 of the Court of Appeal Rules 2002 to apply there must be:-



- (a) Record of appeal already entered
- (b) The Appellant must have been out of the 60 days provided for the filing of the brief of argument after the receipt of the record of appeal.
- (c) There is no extension of time Ordered by the court; and
- (d) An application by the respondent for the dismissal of the appeal.”

In the appeal at hand, there are two sets of record of appeal, the one attached to an application to depart from the rules filed by the respondent and a supplementary record by the Appellant, which was granted in chambers on 20/6/2007, and a record of appeal transmitted to the lower court’s registry by the High Court Registrar after the application to dismiss the appeal has been granted. These two records are before this court but I have gleaned through the records and I have not seen any proof that the proceedings of 20/6/2007 wherein the application for departure from the rules was granted, was served on the appellant in Order to put him on notice that the time to file the brief of argument has started running. Can the appellant therefore be blamed for this? Definitely it is the mistake of the Registry which failed to serve the appellant the order of the court which granted the application to depart from the rules, more so, when the application was heard and granted in chambers, of course, in the absence of the parties. This position even becomes more confusing when the High Court Registry transmitted another official records of appeal from the trial court, after the application to dismiss the appeal have been heard and granted. It is therefore clear that at the time the application to dismiss the appeal was heard and granted the appellant was not aware that there was a record of appeal properly so called, before the lower court, hence could not be said to be out of time to file its brief of argument. That being the case, it is my humble and candid view that the application to dismiss the appeal granted by the lower court was made and granted prematurely.

*My Lords, I wish to add that except in cases of extreme urgency, Court of Appeal must restrain itself from granting an application to depart from the rules and to admit bundles of documents as records of appeal of the trial court. Sometimes it creates more problem than the mischief it intends to cure, it may even lead to unnecessary delay by the other party disputing the record compiled by the*

*applicant, this may cause further delay than to expedite the hearing of the appeal. (Italics Mine)*

Thus, in considering such application court must be satisfied with the reasons why the Registrar of the lower court was not allowed to compile the record as required by the law. Under the new Court of Appeal Rules 2007, clear provisions were made as to when a party may compile the record itself instead of the Registrar of the trial court. By the provisions of Order 8 Rule 1, the Registrar of the trial court is given sixty days (60 days) to compile and transmit the record of proceedings to the Court of Appeal from the date the Notice of appeal was filed. Order 8 Rule 1 of the Court of Appeal Rules 2007 provides as follows:-

*“The Registrar of the Court below shall within sixty days after the filing of the Notice of appeal compile and transmit the record of appeal to the court”.*

Thereafter whenever the Registrar fails to comply with the provisions of Order 8 Rule 1 of the Court of Appeal Rules 2007 that a party can by himself embark to compile the record of proceeding, and this shall be done within 30 days after the Registrar has failed. This is provided in Order 8 Rule 4 of the Court of appeal Rules 2007 thus:-

*“Where at the expiration of 60 days after the filing of the Notice of appeal the Registrar has failed and or neglected to compile and transmit the records of appeal in accordance with the proceeding provisions of this Rules, it shall become mandatory for the appellant to compile the record of all documents and exhibits, necessary for his appeal and transmit to the Court of Appeal within 30 days after the Registrar’s failure or neglect.*

*While Order 8 Rule 6 of the Rules 2007, gives the respondent 15 days after the service of the record compiled by the appellant on him, to file any supplementary records if he so wishes.”*

In all of these processes the Court has no role to play, and I believe that these provisions have adequately taken care of procedure of transmitting record to the appeal court and render an application to depart from the rules as it relates to records of appeal irrelevant. With the new procedure as provided in 2007 Rules of the Court of Appeal a situation where there are competing two records of appeal, as in this case, could not arise.

As I said earlier, apart from my holding that the application to dismiss the appeal was made and granted prematurely, there is also the issue of service. The record clearly shows that the motion was served on a counsel who had earlier withdrawn from the case. At the hearing of the Motion the lower court relied on the viva-voce evidence of the Registrar that the Appellant has been served and the court proceeds to hear and granted same. B

*With tremendous respect, it is the duty of a judge who is seized with the proceeding before him to ensure that there is proper service of the process on the other party who may be affected by the outcome of the proceeding before it. Where as in this case a party was neither in court nor represented by a counsel, it is the duty of a judge, not only to rely on the evidence of its registrar that there was a service of its process, but to examine the proof of service, in order to determine on whom and when the service was affected. (italics mine)* C D

This is so because service of the court's process is fundamental to the jurisdiction of the court to determine the matter before it. Where a court proceeds to determine the matter before it without a proper service, the proceeding would amount to a nullity. It is not only null and void but also, unconstitutional. It amounts to a denial of fair hearing and the party affected by the outcome of the proceedings is entitled to have it set aside. See:- E

(i) Sken-Consult (Nig.) Ltd v. Ukey (1981)1 SC 6.

(ii) Otapo & Ors V. Sunmonu & Ors (1989) 2 NWLR (Pt. 58) 587 at 605; F

(iii) Bamigboye V. Unilorin (1999) 6 NWLR (pt. 400) 127; and

(iv) Section 36 of the 1999 Constitution of the Federal Republic of Nigeria. G

In the instant case, if the lower court had examined the proof of service and its records, I would have found that a wrong party was served and not the appellant. As a result, I hold that the motion to dismiss the appeal was heard and granted without jurisdiction, it is a nullity and it is accordingly set aside. H

For those humble reasons and the fuller and more articulate reasons contained in the lead judgment of my learned brother Adekeye JSC I also resolved this appeal in favour of the Appellant herein,

and same is therefore allowed by me. I abide by the consequential orders made by my lord Adekeye including orders as to costs.

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