

**SUPREME COURT OF NIGERIA**

16TH JULY, 2010, SC. 141/2003

**CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN, F. F.  
TABAI, M. MUNTAKA-COOMASSIE,  
O. O. ADEKEYE, JJSC**

E. B. UKIRI ..... APPELLANT

AND

GECO-PRAKLA (NIG.) LTD. .... RESPONDENT

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APPEALS - Grounds - From which no issue is raised - Fate - Such ground is deemed abandoned - And liable to be struck out - This is the case with grounds 3-6 herein (H1)

EVIDENCE - Conditions of appeal - Noncompliance - Whether proved - The records show no evidence of noncompliance - Rather they show evidence of compliance - Via certificate of fulfillment issued by Court of Appeal registrar (H2)

APPEALS - Conditions of appeal - Proof of compliance - Effect of registrar's certificate - It raises a presumption of law - That there was compliance as certified by it - Which presumption has not been rebutted (H3)

APPEALS - Issues - Power of registrar to extend time - Propriety of issue - In view of Court of Appeal's ruling restoring the appeal - And extending the time by implication - This issue does not arise for determination herein (H4)

APPEALS - Practice & Procedure - Cross-appeal by successful party - Propriety - Such cross-appeal serves no useful purpose - Appellate court may therefore ignore it (H5)

***FACTS***

The plaintiff/appellant sued the defendant/respondent before the High Court of Rivers State claiming a certain sum allegedly owed to him by respondent. The matter was placed under the undefended list and fixed for hearing as such. On the eve of the day fixed for

hearing, respondent filed a motion on notice praying for orders inter alia, setting aside the service of the writ on it, extending the time within which to file notice of intention to defend and deeming the notice already filed, together with the affidavit thereto annexed, as properly filed and served. But trial judge refused the application and gave judgment to appellant under the undefended list. Aggrieved respondent appealed to Court of Appeal. Consequently, the registrar of trial court on 22/02/96 imposed conditions of appeal to be perfected by respondent within 30 days from that date. When respondent failed to fulfill the conditions within 30 days, Court of Appeal had the appeal dismissed under O. 3 r. 20 of its rules.

However, on 19/02/98 respondent filed an application before the Court of Appeal praying for the restoration of the appeal on the ground that respondent had no notice of the conditions of appeal nor the time given within which to comply. Appellant objected to the application but the court found that there was no proof that respondent had notice and so restored the appeal and directed that respondent comply with the conditions. After the restoration, the registrar of trial court issued a certificate of compliance with the conditions of appeal and it proceeded to hearing. At the hearing, appellant again objected to the competence of the appeal on the ground that the compliance with the conditions was done outside the time stipulated by the registrar. Again he was overruled and the court heard and allowed the substantive appeal, granted respondent's prayers before trial court and remitted the case back to trial court for trial on the merits. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal. Respondent also cross-appealed on the ground that Court of Appeal did not consider all the issues raised in its appeal.

### **ISSUES FOR DETERMINATION** **APPEAL**

*i. Whether or not the registrar had the power to extend the time within which the respondent could comply with the conditions of the appeal.*

*ii. Whether or not the respondent's appeal was competent and whether or not the fundamental defect in the respondent's appeal affected the jurisdiction of the court."*

### **CROSS APPEAL**

*"(1) Whether the Court of Appeal was wrong when it failed to consider and determine the issues as raised by the Cross Appellant relating to the incompetence of the Preliminary Objection raised by the Cross Respondent.*

*(2) Whether in the circumstances of this case, particularly given the defects in the Preliminary Objection raised by the Cross Appellant, the Court of Appeal was wrong when it decided the merit of the Preliminary Objection in the manner it did in its judgment.*

*(3) Whether the Court of Appeal was wrong when it held that the Cross Appellant was in default as to the time for fulfilling the two conditions of appeal set by the Registrar of the Rivers State, High Court, and that the said Registrar had by implication extended the time for the Cross Appellant. "*

**HELD** (Unanimously dismissing both the appeal and the cross-appeal per **MUSDAPHER JSC**)

### **APPEALS - Grounds - From which no issue is raised - Fate**

1. The Notice of appeal filed in this appeal contains six grounds of appeal, see pages 192 - 195 of the printed record. There is no doubt that from the two issues for determination filed by the appellant, the appellant only canvassed his arguments in this appeal on grounds 1 and 2 alone and that no issues are raised or arguments offered in respect of grounds of appeal 3-6. I take it that grounds of appeal Nos. 3 - 6 are abandoned and are therefore liable to be struck out. It is now elementary law which requires no citation of any authority, that in an appeal where no argument is offered in support of a ground of appeal, the ground of appeal is deemed abandoned and should be struck out. I accordingly strike out grounds of appeal 3 - 6 in the instant appeal. (p. 2392 D)

### **Conditions of appeal - Noncompliance - Whether proved**

2. As mentioned above, there was no appeal against the decision of Court of Appeal made on the 8/2/1999 restoring the already dismissed appeal and in which it was held that the respondent had no notice of time given to comply with the conditions of appeal. There was no evidence either way whether the respondents were given

fresh time or not within which to comply with the conditions of appeal after the restoration of the appeal. The appellant had failed to show what happened after the appeal was restored in February, 1999.

But, looking at the records, the objection of the appellant that the respondent failed to perfect the conditions of the appeal in that court was not discernible from the Record of Appeal. Rather, it is manifest that pursuant to his powers under rule 13(1) (b) of Order 3 of the Rules of the Court of Appeal, the registrar issued, together with the Record of Appeal, a certificate of fulfillment of the appeal conditions. (p. 2394 G)

***Proof of compliance - Effect of registrar's certificate***

3. In my view, the Certificate of the registrar is the conclusive proof of the perfection of the conditions within the time prescribed by the registrar.

By virtue of Section 114 and 150 of the Evidence Act, there is a presumption of law that the certificate of registrar is regular, valid and genuine and the burden of proof is on the appellant which is a heavy one, and which in this case, has not been disproved. Indeed there is no evidence on record to impugn the confirmation by registrar that the respondent had duly complied with the conditions of appeal as ruled in the application restoring the appeal on the 8/2/1999. It was a decision of the Court of Appeal for which there was no appeal. (p. 2395 B/D)

***Issues - Power of registrar to extend time - Propriety of issue***

4. In my view, the complaints of the appellant are misconceived. The finding of the Court of Appeal that the respondent perfected the conditions of appeal out of time or that the registrar had the power to extend the time within which to perfect the conditions of appeal imposed by him notwithstanding. In my view, the issues do not arise having regard to the unequivocal statement of the registrar at the beginning of the Record of Appeal and the fact that the appellant failed to adduce any evidence to the contrary. Significantly, the ruling of the Court of Appeal made on 8/2/1999 restoring the appeal at least of necessity extended the time to comply with the conditions of appeal. Having regard to the facts of this case, I do not think it is necessary to discuss the issue whether the registrar has the right or

not to extend time to comply with the conditions of appeal. I accordingly find no merit in the appeal and I accordingly dismiss it. (p. 2396 B)

***Cross-appeal by successful party - Propriety***

5. The cross-appellant in paragraph 4.02 of the cross-appellant's brief stated:-

*"4.02" Although the Court of Appeal considered, determined and dismissed the preliminary objection raised by the cross-respondent, that court failed to consider and decide all the issues argued by the cross-appellant in paragraphs 1.01 - 1.03 of its Reply brief. The issues questioned the competence of the Preliminary Objection."*

But the Court of Appeal had granted all the reliefs sought by respondent/cross appellant see page 110 of the printed record. In other word, the cross-appellant won his appeal completely before the lower court. The question whether the lower court had discussed all the issues raised while discussing the preliminary objection raised by the cross-respondent is in my view of no consequence. The cross-appeal therefore under the circumstances serves no useful purpose, and I decline to discuss it any further. (p. 2396 F)

**NOTABLE POINTS OF INTEREST**

**MUSDAPHER JSC**

*1. Appeals - Issues must arise from grounds of appeal*

In his brief for the respondent, the respondent's first issue for determination reproduced above, could not be properly described as an issue arising for the determination of an appeal as provided by the rules of this court. A proper issue for the determination of an appeal must arise from a complaint as contained in a ground or grounds of appeal against a decision appealed from. It is wrong for the respondent to do as he did, when he merely wanted to argue that the grounds should be struck out, for the failure of the appellant to raise issues for determination and offer arguments on them. Having regard to the fact that I have struck out the grounds I say no more. (p. 2392 G)

**ONNOGHEN JSC**

*2. Only appeal court can extend time to comply with conditions of*

*appeal*

- While it is the law that the conditions of appeal set by the registrar of the court for a party who has filed an appeal against the decision of the court must be fulfilled within the time allotted by the said registrar, where however the appellant fails to do so, he has to obtain an order for extension of time from the appellate court otherwise he is deemed to have lost his right of appeal, until and unless an order is made in his favour. That application for extension of time is to be made to the appellate court with jurisdiction to hear the appeal, not the registrar of the court that gave the conditions of appeal.
- (p. 2399 H)

**REPRESENTATION**

- E. B. Ukiri appear in person.
- D Uzoma H. Azikiwe with him O. Ojo for the respondent/cross appellant.

**CASES REFERRED TO**

- Echi v. Nnamani (2000) 8 NWLR (pt. 667) 1 at 11 - 12
- E SCOA VS. BOURDEX LTD. (1987) 4 NWLR (Pt. 293) 255
- Multi Dynamics Ltd V. M. V. Durag Sisters (2003) 3 NWLR (pt. 644) 241
- Kano Textile Plc. V. G. & H (Nigeria) Ltd (2002)2 NWLR (pt. 751) 420 at 453
- F UNITED BANK FOR AFRICA LTD. VS. DIKE NWORA 1978 11 - 12 SC 1 at 6 – 7
- OKOLO AND ANOR. VS. UNION BANK OF NIGERIA LTD. (2004) 3 NWLR (Pt. 859) 87

G **STATUTE & RULES REFERRED TO**

Evidence Act, ss. 114 and 150

Court of Appeal Rules, O. 3 r. 20

H **LEAD JUDGMENT BY MUSDAPHER JSC**

The appellant who appears in person, is a legal practitioner and was retained according to the terms of their agreement, by the respondent company to handle its legal matters. The relationship continued for some time but later misunderstanding arose. Matters

came to a head when on 20/7/1994, the respondent wrote to the appellant terminating the retainership agreement and tendered the sum of N490,000.00 being what it considered it owed the appellant as outstanding professional fees. The appellant disagreed with the figure and on the 22/5/1995, applied for a writ of Summons from the High Court of Rivers State under the “undefended list” procedure and claimed what according to him, was the outstanding remaining professional fees owed to him by the respondent. The matter was placed on the “undefended list”. The matter suffered two adjournments and was on 14/7/1995, fixed for hearing on 28/9/1995. Meanwhile on the 27/9/1995 the respondent caused to be filed on its behalf, a Motion on Notice praying for the following prayers:-

- “1. An order setting aside the purported service on the defendant/applicant of the Writ of Summons xxxx xxxxxxxxxxxx*
- 2. An order extending the time within which the defendant/applicant should file its Memorandum of Appearance.*
- 3. An order deeming the Memorandum of Appearance annexed to the affidavit in support of this Motion and marked as Exhibit “F1” as properly filed and served xxxxxxxxxxxxxxxx.*
- 4. An order extending the time within which the defendant/applicant should file its Notice of Intention to Defend this suit.*
- 5. An order deeming the Notice of Intention to defend the suit, annexed to the affidavit in support of this Motion and marked as Exhibit “F2” as properly filed and served. xxxxxxxx”.*

On the 31/1/1996, the learned trial judge ruled on the application and refused it. He entered judgment in favour of the plaintiff on the undefended list. The defendant felt aggrieved and appealed to the Court of Appeal Port Harcourt Division.

The registrar of the trial court on the 22/2/1996 imposed the conditions of appeal to be perfected by the defendant within 30 days from that date. It appeared that the conditions were not met by the defendant and after some protracted applications, the Court of Appeal on the 8th of February 1998 dismissed the defendant’s appeal for failure to comply with the conditions of the appeal as provided by order 3 rule 20 of the Court of Appeal Rules. On the 19/2/1998 the defendant filed on application in the Court of Appeal praying among other prayers the restoration of the dismissed appeal. It was claimed

that the defendant had no notice of conditions of appeal imposed by the registrar on the 22/2/1996. The plaintiff objected to the application and filed not only a counter-affidavit but also a Notice of Preliminary Objection. The preliminary objection filed on the 27/2/1998 was in these terms:-

B       *“a.” That the application is incompetent, an abuse of the process of the Court.*

*b. The Honourable Court lacks the jurisdiction to entertain and grant the applicant’s motion.*

C       *And the grounds of the preliminary objection are as follows:-*

*(i) There is no pending appeal capable of being restored by this Honourable Court.*

*(ii) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.”*

D       Arguments were heard for and against the defendant’s application to restore the dismissed appeal and in its Ruling delivered the 8/2/1999. The Court of Appeal held:-

          xx

E       *“I shall quickly dispose of the preliminary objection by saying that if there were pending an appeal, then the application for the restoration of the appeal will be meaningless. But the truth of the matter lies in the provision of the Rules Order 3 rule 20 (4) of Court of Appeal Rules. It provides, inter alia, that “An appellant whose appeal has been dismissed under this rule may apply by Notice of Motion that his appeal be restored.” And “Any such application may be*

F       *made to the Court and the Court may xxxxxxxxxxxxxxxx.”*

          XX

*Based on the above Rules, it is my respectful view that the preliminary objection lacks merits. It is accordingly Dismissed.”*

G       The Court of Appeal proceeded to consider the issue of whether the defendant or its solicitor were aware of the conditions of appeal imposed by the registrar and at the end of the day ruled in favour of the defendant and restored the appeal.

H       It was after the restoration of the appeal that the registrar of the trial court issued a certificate of compliance with the conditions of the appeal on the 15/9/1999.

          After the restoration of the appeal, the parties filed briefs of argument in accordance with the rules of the Court of Appeal. The plaintiff once again raised preliminary objections as to competency of



the defendant's restored appeal. The objection was based on two main grounds, namely, (1) that the defendant failed to fulfill the conditions of appeal set for him by the registrar of the trial court within the time prescribed by the registrar and (2) that the appeal being an interlocutory one, and that the grounds of appeal must of necessity include grounds of mixed law and facts or facts, the defendant ought to have first obtained leave before filing the appeal. B

Now in its determination of the preliminary objection and the appeal, the Court of Appeal per IKONGBEH JCA (of blessed memory) stated in part:-

*"It can be seen that it is the registrar who is expressly given the power by rules 10 and 11 to give direction as the period of time within which the appellant shall fulfill the conditions as to the payment of deposit for the record and the entering of a bond. Such power is not given to the court. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx* C D

*On the second ground the respondent has contended that the appeal is in substance an interlocutory one, xxxxxxxxxxxxxxxxxxxxxxxx the order made by the judge completely settled the dispute between the parties. There was in my view, nothing interlocutory about it. It brought the particular proceedings to the final close.* E

*xxxxxxxxxxxxxxxxxx the appellant did not therefore require leave to file its appeal. xxxxxxxxx."*

Thus the preliminary objections raised by the plaintiff were rejected by the Court of Appeal. In the consideration of substantive appeal, the court allowed the appeal of the defendant and set aside the decisions of the trial court including the judgment entered in favour of the plaintiff, in its place it granted the prayers of the defendant in relation to the leave to defend the action and remitted the case back to the trial court for trial on the merits in the normal manner by filing of pleadings. F G

The plaintiff hereinafter referred to as the appellant (and the defendant, the respondent) felt unhappy with the decision of the Court of Appeal has now appealed to this court. The respondent also felt unhappy with some aspects of the decision has also cross appealed to this court. I shall deal with the appeal first, before considering the cross-appeal. In his brief for the appellant, the appellant has identified and submitted two issues arising for the determination of H

the appeal. The issues are:-

*i. Whether or not the registrar had the power to extend the time within which the respondent could comply with the conditions of the appeal.*

*ii. Whether or not the respondent's appeal was competent and whether or not the fundamental defect in the respondent's appeal affected the jurisdiction of the court."*

For the respondents two issues for the determination of the appellant's appeal were also identified and submitted. The issues are:-

*"1. Whether having not canvassed any arguments on grounds of appeal Nos. (iii), (iv), (v) and (vi) the appellant is deemed to have abandoned those grounds of appeal.*

*(2) Whether having regard to the circumstances of this case, the Certificate of Compliance with the condition of appeal, that court rightly overruled the first ground of preliminary objection."*

Now, ***the Notice of appeal filed in this appeal contains six grounds of appeal, see pages 192 - 195 of the printed record. There is no doubt that from the two issues for determination filed by the appellant, the appellant only canvassed his arguments in this appeal on grounds 1 and 2 alone and that no issues are raised or arguments offered in respect of grounds of appeal 3-6. I take it that grounds of appeal Nos. 3 - 6 are abandoned and are therefore liable to be struck out. It is now elementary law which requires no citation of any authority, that in an appeal where no argument is offered in support of a ground of appeal, the ground of appeal is deemed abandoned and should be struck out. I accordingly strike out grounds of appeal 3 - 6 in the instant appeal.***

The appeal is thus merely concerned with the competence of the appeal before the Court of Appeal as raised by the appellant herein as the respondent on the question of the competency of the respondent's appeal before the Court of Appeal in his preliminary objections referred to above.

Now in his brief for the respondent, the respondent's first issue for determination reproduced above, could not be properly described as an issue arising for the determination of an appeal as provided by the rules of this court. A proper issue for the determination of an appeal must arise from a complaint as contained in a ground or grounds of appeal against a decision appealed from. It is wrong for

the respondent to do as he did, when he merely wanted to argue that the grounds should be struck out, for the failure of the appellant to raise issues for determination and offer arguments on them. Having regard to the fact that I have struck out the grounds I say no more.

As mentioned above, the Court of Appeal proceeded to hear the appeal of the respondent on the merits and at the end of the day allowed the appeal, it set aside the decisions of the trial court, including the judgment and remitted the matter to the High Court and there to be tried by another judge in the normal manner.

Now as mentioned above, the appellant has again raised two issues for the determination of the present appeal namely, (1) whether the registrar of the trial court had the power to extend time within which the respondent could comply with the conditions of the appeal and (2) whether or not the respondent's appeal was competent and whether or not the fundamental defect in the respondent's appeal affected the jurisdiction of the court below. The issues were argued together by the appellant.

It is submitted that the registrar of the trial court gave the respondent 30 days from 22/2/1996 to comply with the conditions of appeal. It is further submitted that the respondent's motion for extension of time to comply with the conditions of appeal was dismissed by the Court of Appeal on 18/11/1999, however, the registrar after a period of 3 years and when the 30 days allowed by him elapsed, purportedly extended the time. The Court of Appeal acted in error when it ruled that the registrar of the court had the power to extend time when the court itself had dismissed the application to extend the time. It is submitted that, the registrar had no power to extend the time under the law, it is only the court that had the power to extend the time. Learned counsel referred to the case of OKOLO AND ANOR. VS. UNION BANK OF NIGERIA LTD. (2004) 3 NWLR (Pt. 859) 87.

It is submitted further that once the appellant contends and alleges non-compliance with the conditions of the appeal under rule 20(3), the Court of Appeal ought to have dismissed the appeal vide SCOA VS. BOURDEX LTD. (1987) 4 NWLR (Pt. 293) 255. The incompetence of the appeal robbed the Court of Appeal of the jurisdiction to entertain the appeal.

Now, it should be recalled that on the application of the appel-

lant herein, the Court of Appeal on 8/2/1998 dismissed the appeal of the respondent for failure of the respondent as the appellant to comply and fulfill the conditions of appeal imposed by the registrar. It was on the later application of the respondent that the appeal was restored by the Court of Appeal on the 8/2/1999. While opposing the application to restore appeal, the appellant raised the same issues on the competency of the application; when the respondent had failed to comply with the conditions of the appeal. The appellant also made the same arguments both in Court of Appeal at the hearing of the appeal and also in this court. But in the respondent's application in which the appeal was restored, the Court of Appeal made far reaching decisions on the issue of the failure of the respondent's to fulfill the conditions of appeal. The appellant did not deem it necessary to appeal against the decision. Part of the decision of the Court of Appeal of 8/2/1999 reads:-

*"Now, the question is what are the reasons for, or the cause shown by the applicants for the restoration? The gist of their reasons is this; the notice for the Settlement of the Record of Appeal and the Summons to appear to fulfill the conditions of appeal were not served on the applicants or through their solicitors.*

*The respondent filed an affidavit to the contrary, i.e. that the solicitors to the applicants were duly served with the processes.*  
 xxxxxxxxxx

*And indeed that contention is the bedrock of the arguments for and against the application to restore the appeal. Erring on side of caution, having said above, it is my view that the appeal be restored, then it pends before the court below and in the registrar's court. Thereat, the applicants may then satisfy or fulfill the conditions of appeal, if they be served with notice or if they have notice of them.*  
 xxxxxxxxxxxxxx

**As mentioned above, there was no appeal against the decision of Court of Appeal made on the 8/2/1999 restoring the already dismissed appeal and in which it was held that the respondent had no notice of time given to comply with the conditions of appeal. There was no evidence either way whether the respondents were given fresh time or not within which to comply with the conditions of appeal after the restoration of the appeal. The appellant had failed to show what**

**happened after the appeal was restored in February, 1999.**

**But, looking at the records, the objection of the appellant that the respondent failed to perfect the conditions of the appeal in that court was not discernible from the Record of Appeal. Rather, it is manifest that pursuant to his powers under rule 13(1) (b) of Order 3 of the Rules of the Court of Appeal, the registrar issued, together with the Record of Appeal, a certificate of fulfillment of the appeal conditions. And in my view, the Certificate of the registrar is the conclusive proof of the perfection of the conditions within the time prescribed by the registrar.**

The Court of Appeal found as a fact that the respondent had perfected the conditions of appeal and was issued with a certificate to that end together with the records of appeal by the registrar. **By virtue of Section 114 and 150 of the Evidence Act, there is a presumption of law that the certificate of registrar is regular, valid and genuine and the burden of proof is on the appellant which is a heavy one, and which in this case, has not been disproved. Indeed there is no evidence on record to impugn the confirmation by registrar that the respondent had duly complied with the conditions of appeal as ruled in the application restoring the appeal on the 8/2/1999. It was a decision of the Court of Appeal for which there was no appeal.**

It is settled law that the courts are enjoined in the adjudication of disputes between the parties to do substantial justice and not to have an undue regard to technicalities. This court in the case of UNITED BANK FOR AFRICA LTD. VS. DIKE NWORA 1978 11 - 12 SC 1 at 6 – 7 held that a Statement of Defence filed out of time and in contravention of the rules of court was not a void document and remains “a valid document until set aside”. FATAYI WILLIAMS JSC (as he then was) stated in that case:-

*“xxxxxx if a defence has been put in, though irregularly, the court will not disregard it, but will see whether it set up grounds of defence which, if proved, will be material and if so, will deal with the case in such manner that justice can be done.”*

Similarly, in this case where the respondent complied with the conditions of appeal and even if out of time is of no moment. See

also NOFIU SURAKATU VS. NIGERIA HOUSING SOCIETY LIMITED (1981) 4 SC 26. Where it was held that, the court has a duty to do substantial justice between the parties hence it would not allow any irregularity which does not affect the real justice of the matter to affect an otherwise just decision. This case has overruled the earlier  
 B decisions in ADESINA MOSES VS. OGUNLABI (1975) 4 SC 81, and ADDIS ABABA VS. ADEYEMI (1976) 12 SC 51 which voided appeals for failure to execute bonds.

***In my view, the complaints of the appellant are misconceived. The finding of the Court of Appeal that the respondent perfected the conditions of appeal out of time or that the registrar had the power to extend the time within which to perfect the conditions of appeal imposed by him not withstanding. In my view, the issues do not arise having regard to the  
 D unequivocal statement of the registrar at the beginning of the Record of Appeal and the fact that the appellant failed to adduce any evidence to the contrary. Significantly, the ruling of the Court of Appeal made on 8/2/1999 restoring the appeal at least of necessity extended the time to comply with the  
 E conditions of appeal. Having regard to the facts of this case, I do not think it is necessary to discuss the issue whether the registrar has the right or not to extend time to comply with the conditions of appeal. I accordingly find no merit in the appeal and I accordingly dismiss it.***

The Cross-appeal, is only to do with failure of the court below to consider and determine all the issues “raised and argued by the parties” while considering the preliminary objection raised by the appellant. ***The cross-appellant in paragraph 4.02 of the cross-appellant’s brief stated:-***  
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***“4.02” Although the Court of Appeal considered, determined and dismissed the preliminary objection raised by the cross-respondent, that court failed to consider and decide all the issues argued by the cross-appellant in paragraphs  
 H 1.01 - 1.03 of its Reply brief. The issues questioned the competence of the Preliminary Objection.”***

But the Court of Appeal had granted all the reliefs sought by respondent/cross appellant see page 110 of the printed record. In other word, the cross-appellant won his appeal

***completely before the lower court. The question whether the lower court had discussed all the issues raised while discussing the preliminary objection raised by the cross-respondent is in my view of no consequence. The cross-appeal therefore under the circumstances serves no useful purpose, and I decline to discuss it any further.***

In the end I dismiss both the appeal and the cross-appeal. I affirm the decision of the court below in that the judgment of the trial court is set aside. The respondent/cross-appellant's alternative prayers 2, 3, 4 and 5 in the application filed by it on 27/9/1995 is granted. The matter is remitted back to the High Court of Rivers State and thereat to be decided in the normal manner by another judge. I make no order as to costs.

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### **ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal, Holden at Port Harcourt, in appeal No. CA/PH/523/95 delivered on the 20<sup>th</sup> day of January, 2003 in which the court allowed the appeal of the present respondent against the decision of the High Court of Rivers State, Holden at Port Harcourt in suit No. PHC/249/99 delivered on the 31<sup>st</sup> day of January, 1996.

There is also a cross appeal by the respondent herein against the decision of the lower court of 20<sup>th</sup> January, 2003.

The issues for determination identified by the appellant who appears in person, in the appellant's brief deemed filed on 18<sup>th</sup> May, 2005 are as follows:-

*"(i) Whether or not the registrar had the power to extend the time within which the respondent could comply with the conditions of appeal.*

*(ii) Whether or not the respondent's appeal was competent and whether or not the fundamental defect in the respondent's appeal affected the jurisdiction of the court."*

On the other hand, the issues identified by learned Counsel for the cross appellant in the cross appellant's brief filed on 30<sup>th</sup> July, 2007 are as follows:-

*"(1) Whether the Court of Appeal was wrong when it failed to consider and determine the issues as raised by the Cross Appellant*

*relating to the incompetence of the Preliminary Objection raised by the Cross Respondent.*

(2) *Whether in the circumstances of this case, particularly given the defects in the Preliminary Objection raised by the Cross Appellant, the Court of Appeal was wrong when it decided the merit of the Preliminary Objection in the manner it did in its judgment.*

(3) *Whether the Court of Appeal was wrong when it held that the Cross Appellant was in default as to the time for fulfilling the two conditions of appeal set by the Registrar of the Rivers State, High Court, and that the said Registrar had by implication extended the time for the Cross Appellant. “*

The facts of the case relevant to the issues for determination have been fully stated in the lead judgment of my learned brother, MUSDAPHER, JSC just delivered and I do not intend to repeat them except as may be needed for the point(s) being made.

I must state that I have read the lead judgment of my learned brother, and I agree with his conclusion that both appeals lack merit and should be dismissed. I however do not agree with the lower court that the registrar of the court has the power to extend time for an appellant to perfect the conditions of appeal, on grounds appearing hereunder.

At pages 177 and 178 of the record, the lower court found and held inter alia, as follows:-

*“The only area where the appellant was in default was as to the time for fulfilling the two conditions. He did not fulfill them within the time set by the registrar. He fulfilled them well outside the 30 days fixed by the registrar. He was in fact out of time by over two years.*

*I however agree with Mr. Azikiwe for the appellant, that it was within the competence of the registrar to extend time. It is necessary, I think, to examine the provisions of order 3, rules 10, 11 and 20(1) and (3) of the 1981 Rules of this Court, applicable to this matter for support. They read:-*

*“10. The appellant shall within such time as the Registrar of the Court below directs deposit with him a sum fixed to cover the estimated expense of making up and forwarding the record of appeal calculated at the full cost of one copy for the appellant and one-seventh cost for each of the seven copies for the use of the Court, or*



*where twenty copies are sent, one-twentieth.*

*11. The appellant shall within such time as the Registrar of the Court directs deposit such sum as shall be determined by such Registrar or give security therefore by bond with one or more sureties to his satisfaction as such Registrar may direct for the due prosecution of the appeal and for the payment of any costs which may be ordered to be paid by the appellant.*

*Provided that no deposit or security shall be required where the deposit would be payable by the Government of the Federal Republic of Nigeria or of a State, or by any Government department.*

*20(1) If the appellant has not complied with any of the requirements of rules 10 and 11 of this Order, the Registrar of the Court below shall certify such fact to the Court, which shall thereupon order that the appeal be dismissed either with or without costs, and shall cause the appellant and the respondent to be notified of the terms of its order.*

*(3) If the respondent alleges that the appellant has failed to comply with a party of the requirements of rules 2, 10 or 11 of this Order, the Court, if satisfied that the appellant has so failed, may dismiss the appeal for want of due prosecution or make such other order as the justice of the case require."*

*It can be seen that it is the registrar who is expressly given the power by rules 10 and 11 to give direction as the period of time within which the appellant shall fulfill the conditions as to payment of deposit for the record and the entering of a bond. Such power is clearly not given to the Court as the primary done, although I think the Court could, in the exercise of its inherent powers of doing justice within the bounds of the law, let an appellant be heard even if he had not fully and strictly, but only substantially, fulfilled the set conditions. The registrar can, therefore, in my view, legitimately extend the time. By accepting the payment of the deposit and the bond from the appellant after the expiration of the time he had earlier fixed, he had clearly, by implication, extended the time for the appellant. He could have certified noncompliance under rule 20(1) and have this Court dismiss the appeal, but he did not. He decided to accommodate the appellant, the latter's tardiness notwithstanding."*

It is my considered view that the above does not represent the true position of the law on the issue. While it is the law that the con-

ditions of appeal set by the registrar of the court for a party who has filed an appeal against the decision of the court must be fulfilled within the time allotted by the said registrar, where however the appellant fails to do so, he has to obtain an order for extension of time from the appellate court otherwise he is deemed to have lost his right of appeal, until and unless an order is made in his favour. That application for extension of time is to be made to the appellate court with jurisdiction to hear the appeal, not the registrar of the court that gave the conditions of appeal. From the provisions of the Rules of Court relied upon by the lower court in coming to the conclusion in issue, it is very clear that the provisions do not support the decision on the matter, as they clearly have the court in mind, not the registrar.

In the case of *Obiamalu vs. Nwosu* (1973) 1 NMLR 307, the defendants against whom the High Court entered judgment on 11<sup>th</sup> March 1967, filed a notice of appeal against same but failed to fulfill the conditions of appeal within the time specified, they brought an application before the trial court on the 5<sup>th</sup> of February, 1968 for extension of time to perfect the conditions of appeal. The application was granted and they consequently fulfilled same on 25/2/68.

In dealing with the matter, this Court held that the time for fulfilling the conditions of appeal having expired, the High Court had no jurisdiction to entertain an application for enlargement of time within which to perfect the said conditions and that even if the defendants perfected the conditions upon the order extending time by the said High Court made without jurisdiction, the step is unacceptable; that as the defendants did not obtain any order from the Supreme Court after failing to perfect the conditions within time, being the only court in the circumstance with jurisdiction to do so, it follows that no appeal was pending in the matter. The above decision clearly shows that the court of trial or the lower court whose decision is the subject of the appeal, has no power to extend time to perfect the conditions of appeal fixed by the registrar of the court as specified by the Rules of Court and that the power to extend the said time resides in the appellate court to which the appeal lies.

In the recent case of *Okolo vs. Union Bank of Nigeria Ltd* (2004) 3 NWLR (pt. 859) 87 where one of the issues for determination was whether the Chief Registrar or Assistant Chief Registrar of High Court of Delta State has power to extend time for an appellant

to comply with the conditions laid down for the prosecution of the appeal before the Court of Appeal, this Court held that the said registrar has no power to extend time to perfect the conditions of appeal earlier given; that where there is failure to perfect the conditions within time, it is the appellate court that has the jurisdiction to extend time for the appellant, upon application, to perfect the said conditions and consequently declared the appeal to the Court of Appeal under the circumstance a nullity. B

However, in the instant appeal, the lower court found as fact that the failure of the respondent to fulfil the conditions of appeal within the time allotted was due to non service of the conditions on the respondent. There is no appeal against that finding. It is settled law that it is not every mistake by a lower court that would lead to the decision reached in the proceedings being set aside by the appellate court. In view of the fact that the respondent was unaware of the existence of the conditions of appeal until years after the time allowed for their fulfillment which finding/holding goes to the root of the matter, it follows that the error by the lower court holding that the registrar has the power to extend time for an appellant to fulfil conditions of appeal is, in the circumstance, of no moment particularly as there is no challenge to the said finding and holding. Therefore the resolution of the two issues formulated by the appellant in his favour cannot result in the setting aside of the judgment of the lower court which decision is sustainable by other reasons assigned in the said judgment including the reason that the respondent was never served with the conditions of appeal, which it was alleged to have failed to comply with within the time allotted therein. E

Having made my point(s) as above, I agree with the conclusion of my learned brother, MUSDAPHER, JSC that the appeal and cross appeal are without merit and should be dismissed. F

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

Appeals dismissed.

H

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### **MUNTAKA-COOMASSIE JSC**

I had the advantage of reading in advance the illuminating lead judgment just delivered by my learned brother Musdapher JSC.

I wish to adopt his reasoning and conclusions as mine. I however wish to add a little bit as my supporting decision to the lead judgment thus:-

The respondent herein Geco-Prakla (Nigeria) Ltd appealed against the judgment of the Rivers State High Court, which entered judgment in favour of the appellant, in suit brought by him under the undefended list proceedings. This was after the trial court had turned down the request by the respondent's company to file its memorandum of appearance and notice of intention to defend the suit. The respondent then appealed to the Court of Appeal, the registrar of the High Court i.e. trial court, extended the time for the respondent by 30 days to regularize his papers. The respondent, the appellant before the Court of Appeal, failed to comply and its appeal was dismissed. The respondent herein filed an application to restore their appeal earlier dismissed. His application was granted and the appeal was restored by the lower court. The lower court proceeded to hear the appeal on its own merit. Both parties filed and exchanged their respective briefs of argument. At the end of the hearing the appeal was allowed and the court below ordered the remittance of the case to the trial court for the parties to file their pleadings.

Dissatisfied with the decision of the court below the appellant had now appealed to this court. The respondent also cross appealed on some aspects of the judgment of the court below. Parties filed and exchanged briefs before us. The appellant formulated two issues for the determination of the appeal thus:-

1. *"Whether or not the Registrar had the power to extend the time within which the respondent could comply with the conditions of the appeal;*
2. *Whether or not the respondent's appeal was competent and whether or not the fundamental defect in the respondent's appeal affected the jurisdiction of the court"*

While the respondents in its brief of argument also formulated two Issues for determination as follows:-

- (1) *"Whether having not canvassed any argument on grounds of appeal Nos. III, IV, V and VI, the appellant is deemed to have abandoned those grounds of appeal.*
- (2) *Whether having regard to the circumstances of this case, the certificate of compliance with the conditions of appeal, that court*

*rightly overruled the first ground of preliminary objection”.*

With due respect to the learned counsel to the respondent, the issues or the determination formulated in his brief of argument could not be said to be issues as required by the Rules of this court. Issue I formulated is the criticism of the appellant’s failure to formulate issues for determination on grounds III - IV of his Notice of Appeal. This issue could not be said to be borne out of any of the grounds of appeal, rather, he ought to come by way of objection and pray the court to strike out the affected grounds of appeal. B

The second issue is in respect of the ruling of the lower court on the preliminary objection. It is to be noted that there was no appeal filed against the lower court’s ruling on the preliminary objection. That issue did not arise from any of the grounds of appeal and they are therefore incompetent. This is trite law. C

Be that as it may, this court will not close its eyes to the failure of the appellant to formulate any issue in respect of the grounds III - VI of this Notice of appeal. These grounds are deemed to be abandoned and they are subsequently struck out. See Kano Textile Plc. V. G. & H (Nigeria) Ltd (2002) 2 NWLR (pt. 751) 420 at 453. Pacers Multi Dynamics Ltd V. M. V. Durag Sisters (2003) 3 NWLR (pt. 644) 241. D

On the issue I formulated by the appellant, it is my considered view that the issue did not arise from the judgment of the lower court. In its ruling on the preliminary objection filed by the appellant against the competence of the appeal, the lower court held as follows:- F

*“Erring on the side of caution having said above, it is my view that the appeal be restored; then it depends (sic) before the court below and in Registrar’s court, there at, the applicants may then satisfy or fulfill the conditions of appeal, if they be served with Notice or if they have Notice of them.....”* G

As I stated above, the appellant did not appeal against this finding of the lower court, the legal effect is that this finding is valid and subsisting. See Echi v. Nnamani (2000) 8 NWLR (pt. 667) 1 at 11 - 12. It does not therefore lie in the mouth of the appellant to argue as he did that it was the Registrar that extended the time within which the Respondent was to comply with the conditions of appeal after it has been restored by the lower court, and this order has not been challenged. The alleged incompetency of the appeal raised in H

issue No II was based on the issue I, i.e. the alleged extension of time by the Registrar for the respondent to comply with the conditions of appeal. Having resolved issue No I against the appellant, issue No II has no legs to stand, it is also resolved against the appellant.

B On the record, it was found by the lower court that the re-  
spondent perfectly the conditions of appeal and was issued with a  
certificate to that effect with the record of appeal by the Registrar.  
This in my view is presumed to be regular and genuine. See Section  
114 and 150 of the Evidence Act. This presumption has not been  
C rebutted by the appellant.

For the reasons above and the fuller reasons, adumbrated in  
the lead judgment I hold as held by my learned brother Dahiru Mus-  
dapher JSC that this appeal is unmeritorious and it is accordingly  
dismissed. The cross-appeal lacks merit it is similarly dismissed. I abide  
D by the consequential orders made in the lead judgment. For the sake  
of emphasis, the matter is remitted back to the High Court of Rivers  
State to be decided normally by another Judge of that court. I also  
make no order as to costs.

E

### **ADEKEYE JSC**

I have read before now the judgment just delivered by my  
learned brother D. Musdapher, JSC.

F My Lord had exhaustively considered all the issues raised for  
determination by the parties in this appeal. I have nothing to add.

I also agree that the main appeal lacks merit and that the cross-  
appeal served no useful purpose. The alternative prayers filed by the  
cross-appellant on 27/9/95 are granted.

G The matter is to be remitted back to the High Court of Rivers  
State to be heard afresh by another judge.

No order as to costs.

H