

SUPREME COURT OF NIGERIA
3RD DECEMBER, 2010. SC. 198/2002
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, F. F.
TABAI, S. GALADIMA, B. RHODES-VIVOUR JJSC

1. FEDERAL HOUSING AUTHORITY
2. ALHAJI KABIR UMAR APPELLANTS
AND
MR. A. A. KALEJAIYE RESPONDENT

APPEALS - Extension of time to appeal - Application - Duty of applicant - He must show good and substantial reasons for failing to appeal within time - And good cause why the appeal should be heard (H1)

APPEALS - Extension of time to appeal - Reason for failure to appeal in time - Sufficiency - Where reason is the election of alternative option - When applicant had option to appeal - Such reason is insufficient (H2)

APPEALS - Particulars - Grounds of appeal - Competence - Effect of particulars - Where particulars in support of a ground - Are not related to the ground - Such ground is incompetent (H3)

APPEALS - Issues - Propriety - Complaint against jurisdiction - Such complaint can only be properly entertained where it is on an appeal against the judgment - Or against the assumption of jurisdiction by the trial court (H4)

FACTS

The plaintiff/respondent sued defendants/appellants in the High Court of Lagos State claiming special and general damages for trespass as well as an order of injunction to restrain 1st appellant from committing further acts of trespass to the property in dispute known as House 9, "A" close, 7th Avenue, Festac Town, Lagos. The parties filed and exchanged pleadings with the appellants filing separate statements of defence. But neither of the appellants appeared in court to defend the case. Respondent gave evidence and closed his case in June, 1997.

Judgment was eventually given to respondent on 19th March, 1998. On 27th April, 1998, appellants applied to the trial court to set aside the judgment. Their application was heard and dismissed by the trial court on 22nd July, 1998. On 17th November, 1998 they applied to the Court of Appeal for extension of time within which to seek leave to appeal against the ruling dismissing their application. However, they left the application unattended for over two years and eventually had it withdrawn on 27th March, 2001 and in its place filed another application for extension of time within which to seek leave to appeal against the judgment delivered on 19th March, 1998. The Court of Appeal heard and eventually refused the application. Aggrieved, appellants have brought this appeal against the ruling of Court of Appeal.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in holding that no good and sufficient reason was adduced accounting for delay in filing the Notice and Ground of Appeal to warrant extension of time.

2. Whether the Court of Appeal was right in refusing to hold that the Notice and Ground of Appeal disclosed arguable Grounds of Appeal.

3. Whether the trial court lacked jurisdiction to hear the respondent's claims.

HELD (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**) ***Extension of time to appeal - Application - Duty of applicant***

1. Order 2 Rule 31 of the Supreme Court Rules provides for enlargement of time to appeal or/and to seek leave to appeal. The important factors to be taken into consideration before granting or refusing an application for extension of time within which to appeal are:

(a) Good and substantial reasons for failure to appeal within the prescribed period; and

(b) Grounds of appeal which prima facie show good cause why the appeal should be heard.

An applicant must show by affidavit evidence good and substantial reasons for failure to appeal within the prescribed period and the proposed Notice of Appeal must contain grounds of appeal which prima facie show good cause why the appeal should be heard. An applicant need not show that his grounds of appeal must succeed on

appeal. He is only to show that they are arguable.

Both factors (a) and (b) above must co-exist for the application to succeed. (p. 2919 G)

Reason for failure to appeal in time - Sufficiency

2. According to the appellants' counsel, he was unable to appeal within three months after 19/3/98 because he was trying to get the judgment set aside, an error, or mistake by counsel who ought to have appealed immediately he became aware of the Judgment.

The Court of Appeal was not impressed. I agree with the Court of Appeal. This is what that court had to say:

“...The option to appeal against the judgment delivered on 19/3/98 was very much open to the applicants' counsel as at 27/4/98 when he elected instead to bring an application to set that judgment aside”

The above is founded in Equity that once an election is made it cannot be recalled.

Furthermore the appellant never bothered to explain why the application was brought on 27th of March, 2001, over two years after his application to set aside the judgment was dismissed on 22nd July, 1998. Since no credible excuse is given for the delay, no indulgence can be granted. (p. 2921 B)

Grounds of Appeal - Competence - Effect of particulars

3. On reading a ground of appeal and its particulars the adverse party must be left in no doubt as to what the complaint of the appellant is. A ground of appeal and its particulars go together. Where the particulars in support of the ground are not related to the ground, the ground is incompetent.

Ground 1 Particular (a) and Ground 2 Particular (c) mention jurisdiction, but the Grounds do not raise the issue of jurisdiction. The particulars are independent of the grounds. They are in no way related to the grounds and a discerning counsel would be in grave doubt after reading both grounds and their particulars to know what the complaint of the appellants really is. (p. 2923 C)

APPEALS - Issues - Propriety - Complaint against jurisdiction

4. It should have been obvious to counsel that a complaint that a case

was conducted and judgment delivered without jurisdiction cannot be entertained on appeal except the said judgment is on appeal or there is an appeal against the trial judge assuming jurisdiction. The appeal before the Court of Appeal and this court is against the refusal of the Court of Appeal to allow the appellant appeal against the judgment of the High Court. Raising the issue of jurisdiction in such circumstances is a clear attempt by counsel to hoodwink this court into considering an issue of jurisdiction on a judgment that is not on appeal. That explains why there is no relationship between the Grounds of Appeal and its Particulars. The judgment remains inviolate for all time. (p. 2923 E)

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

D *1. Reason for delay may be dispensed with*

The appellant raised the issue of jurisdiction of the learned trial judge to hear the case in his proposed Notice of Appeal and in this appeal. Indeed in *Wilbahi haulage Ltd v. Anambra Motor Manufacturing Co. (Anamco) Ltd* 2009 FWLR pt. 485 p. 1790. I said that:

E *“It is only where a ground of appeal complains of jurisdiction and it appears so, that the court would no longer consider the reason for delay and would grant the application if no good reason was advanced to explain the delay.”*

F The issue of jurisdiction can be raised for the first time in any court and at any stage of the proceedings and in the Supreme Court for the first time.

G The issue of jurisdiction is fundamental, in that where a court has no jurisdiction to hear and determine a claim, and it proceeds to hear the claim the entire proceedings and judgment would be an exercise in futility, a waste of precious judicial time, and a nullity. (p. 2921 G)

REPRESENTATION

Mr. C. Ekemezie for the Appellants

H Mr. K. Ogunlana for the Respondent.

CASES REFERRED TO

Kotoye v. Saraki 1995 5 NWLR pt. 395 p. 256

Iroegbu v. Okwordu 1990 NWLR pt. 159 p. 649

Oba v. Egberongbe 1999 8 NWLR pt. 615 p. 485

Mobil Oil v. Agadaigho 1988 2 NWLR pt. 77 p. 383

Olowoake v. Salawu 2000 11 NWLR part 677 page 127

Olusanya v. Osineye 2001 13 NWLR part 730 page 298

Total International Ltd. v. Anogboro 1994 4 NWLR pt. 337

U.B.N. (Nig.) PLC v. Wallace 1998 3 NWLR part 541 page 331

Okafor v. Bendel News Papers Corporation 1991 7 NWLR page 206

A-G Anambra State v. A-G Federation 1993 6 NWLR Pt. 302 p. 700

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979, ss. 241 & 230
(as amended by Decree 107 of 1993)

Supreme Court Rules, Order 2 Rule 31; Order 6 Rule 5 (1) & (2)

LEAD JUDGMENT BY RHODES-VIVOUR JSC

The respondent as plaintiff sued the appellants as defendants in the Lagos High Court for the sum of N39,340,800 as special and general damages for trespass and an order of injunction to restrain the 1st defendant from:

(a) Committing acts of trespass to the plaintiff's property being a house situate at House 9, "A" close, 7th Avenue, Festac Town, Lagos.

(b) Committing any further acts preventing the plaintiff from exercising his legal right of ownership over the said property or remaining on the said premises unlawfully.

The parties filed and exchanged pleadings. The defendants filed separate pleadings but did not appear in court to defend the case.

The plaintiff gave evidence and closed his case in June, 1997. After two adjournments at the instance of the defendants the learned trial Judge closed the case and reserved judgment since it was clear that the defendants were not defending the case. Before the close of the case learned counsel for the defendants cross-examined the plaintiff extensively.

In a judgment delivered by the learned trial judge on the 19th of March 1998 judgment was entered for the plaintiff as follows:

"In sum, I am satisfied that the plaintiff has proved his case by his uncontroverted evidence. He is entitled to judgment against both defendants. I accordingly find the two Defendants liable for trespass by going into the plaintiff's house, ejecting him therefrom and depriving

him of possession of it. There will be judgment for the plaintiff for damages in the sum of N5,000 for trespass and a further sum of N9,557,300 being value of the plaintiff's property taken away by the 1st defendant and not returned to him."

Finally, the learned trial Judge restrained the defendants from:

B *"(1) Committing further acts of trespass to the plaintiff's property, House No.9 'A' Close 7th Avenue, Festac Town, Lagos.*

(2) Committing further acts of preventing the plaintiff from exercising his legal rights of ownership over the said property, House No. 9 'A' Close, 7th Avenue, Festac Town, Lagos, or remaining on the said
C *house unlawfully.*

The defendants claim to have been aware of this judgment on the 24th of April, 1998 i.e. over a month after it was delivered. On the 27th of April, 1998 the defendants applied to set aside the judgment.
D

In a Ruling delivered on the 22nd of July, 1998 the learned trial Judge refused to set aside the Judgment and dismissed the application. On the 17th of November, 1998 the defendants sought for extension of time within which to seek leave to file Notice of Appeal. They
E withdrew the application and on the 27th of March, 2001 they filed an application before the Court of Appeal praying for the following Orders:

1. An order extending the time within which to seek leave to appeal against the judgment delivered by his Lordship Hon. Justice A.O. Silva on the 19th day of March, 1998
F

2. An order extending the time to file Notice of Appeal against the said judgment.

3. An Order granting leave to the applicants to appeal against
G the judgment delivered on the 19th day of March, 1998 by his Lordship Hon. Justice A.O. Silva.

4. An order deeming the Notice of Appeal already filed and served as duly filed and served.

In a considered Ruling delivered on the 9th of May, 2002, the
H Lagos Division of the Court of Appeal (Coram: Oguntade, Aderemi, Chukwuma-Eneh JJCA as they then were) found the application to be unmeritorious and dismissed it with costs of N4,000 to the respondent.

This appeal is against that Ruling. In accordance with Order

6 Rules 5(1) (a) and (2), briefs were filed and exchanged by counsel. The appellants' brief was filed on the 23rd of July, 2002 while the respondent's brief was filed on the 12th of January, 2006. The appellants filed a Reply brief on the 28th of October, 2008.

The appellants formulated two issues as arising for determination in the appeal: B

1. Whether the Court of Appeal Lagos was right in refusing to hold that the Notice and Grounds of Appeal found at pages 13-15 of the Records disclosed arguable grounds of Appeal.

2. Whether the Court of Appeal Lagos Division was right in holding that no good and sufficient reason was adduced accounting for delay in filing the Notice and Grounds of Appeal to warrant an extension of time. C

The respondent, on the other hand, formulated four issues which are: D

1. Whether the court of Appeal Lagos was right in refusing to grant the defendants/applicants order extending the time within which to seek leave to appeal against the judgment delivered by his Lordship Hon. Justice A.O. Silva on the 19th of March, 1998.

2. Whether that Court of Appeal in Lagos was right in its Ruling E that the defendants/applicants failed to explain away their inordinate delay to take necessary procedural steps to file Notice of Appeal having regard to the fact that application to set aside judgment of the High Court was delivered on the 22nd July, 1998.

3. Whether the plaintiff/respondent's claim of damages for trespass came under the purview of Section 230(1) (a), Section 250 (1) of 1979 Constitution as amended by Decree 107 of 1993 which transferred jurisdiction of such claim to the Federal Court and if it did, whether the applicants raised jurisdiction in their pleadings in the trial court. F

4. Whether considering the totality of the proceedings before the trial court, the appellants were afforded a fair hearing.

This Court and the Court of Appeal are free to adopt or even formulate issues that in its view would determine the real grievance in an appeal. H

This appeal is not an appeal against the judgment of Silva Delivered on the 19th of March, 1998. This is an appeal against the refusal of the Court of Appeal to allow the appellant to appeal from

that judgment. Issue 4 formulated by the respondent asks the question, whether the appellant was afforded fair hearing. This issue is completely irrelevant in this appeal.

In my view the appellants issues 1 and 2 and the respondents issue 3 on jurisdiction would be considered in this appeal. I now reproduce the issues as they would be examined.

Issue 1

Whether the Court of Appeal was right in holding that no good and sufficient reason was adduced accounting for delay in filing the Notice and Ground of Appeal to warrant extension of time.

Issue 2

Whether the Court of Appeal was right in refusing to hold that the Notice and Ground of Appeal disclosed arguable Grounds of Appeal.

Issue 3

Whether the trial court lacked jurisdiction to hear the respondent's claims.

At the hearing of the appeal on the 27th of September, 2010, learned counsel for the appellants MR. C. EKEMEZIE adopted both appellants briefs filed on the 23rd of July, 2002 and 28th of October, 2008 and urged us to allow the appeal. MR. K. OGUNLANA, learned counsel for the respondent adopted his brief filed on the 12th January, 2008. Both counsel said nothing in amplification of their briefs. The judgment of the trial court delivered on the 19th march, 1998 is a final decision. By the clear provisions of Section 241 (1) (a) of the Constitution, a right of appeal is conferred on a dissatisfied party to appeal to the Court of Appeal on any ground, be it pure Law, mixed Law and fact or facts see: Total International Ltd. v. Anogboro 1994 4 NWLR pt. 337 p.147 where, as in this case the time for appealing had expired, the dissatisfied party no longer has a constitutional right of appeal. He could only file a valid appeal if the judges of the Court of Appeal exercise their discretion in his favour by extending time to enable him appeal. This court is concerned with whether the Court of Appeal was correct bearing in mind that the granting or dismissing of the application is one within the Judges' discretion, and this court will not interfere unless it can be shown that this discretion has not been exercised judicially and judiciously. That is to say the exercise of discretion must be with sufficient, correct and convincing reason, and not the judge acting as he likes.

In his brief, learned counsel for the appellants observed that the reason for delay was that counsel pursued setting aside the judgment, instead of appealing the judgment, contending that it was an error or mistake of counsel. He submitted that, that is a good reason or ground for the delay in filing appeal on time. Reference was made to *Iroegbu v. Okwordu* 1990 NWLR pt.159 p. 649. B

In further submissions, learned counsel argued that the grounds of appeal show arguable grounds of appeal and grounds 1 and 2 are hinged on the jurisdiction of the State High Court to hear and determine the suit. He observed that the 1st appellant being a Federal Agency is covered by Section 230 (1) (a) of the 1979 Constitution as amended by Decree No. 107 of 1993 contending that the Federal Housing Authority cannot be impleaded before a State High Court, submitting that if a State High Court sits and tries the 1st appellant, as is the case here the proceedings amounts to a nullity for lack of jurisdiction by virtue of Section 230 (1) of the 1979 Constitution as amended by Decree 107 of 1993 which vests jurisdiction exclusively to the Federal High Court. Relying on *Barclays Bank Ltd v. Central Bank of Nigeria* 1976 6 SC p.175. C D

A. G of Lagos v. Dosunmu 1989 3 NWLR pt.111 p.552. He urged us to hold that jurisdiction is both arguable and a good ground for extension of time to appeal to be granted. E

Learned counsel for the respondent observed that the appellants did not show sufficient reason to explain the delay to appeal and no good, substantial and arguable grounds of appeal were filed. On jurisdiction he argued that the respondents claims do not come under the purview of Section 230(1)(a) of the 1979 Constitution. He urged us to dismiss the appeal. F

Order 2 Rule 31 of the Supreme Court Rules provides for enlargement of time to appeal or/and to seek leave to appeal. The important factors to be taken into consideration before granting or refusing an application for extension of time within which to appeal are: G

(a) Good and substantial reasons for failure to appeal within the prescribed period; and H

(b) Grounds of appeal which prima facie show good cause why the appeal should be heard.

An applicant must show by affidavit evidence good and

substantial reasons for failure to appeal within the prescribed period and the proposed Notice of Appeal must contain grounds of appeal which prima facie show good cause why the appeal should be heard. An applicant need not show that his grounds of appeal must succeed on appeal. He is only to

B show that they are arguable. See. *Ibodo v. Enarofia* 1980 5-7SC p. 42. *Kotoye v. Saraki* 1995 5 NWLR pt. 395 p. 256 **Both factors (a) and (b) above must co-exist for the application to succeed.** See *Mobil Oil v. Agadaigho* 1988 2 NWLR pt. 77 p. 383. *Oba v. Egberongbe* 1999 8 NWLR pt. 615 p. 485.

C In dismissing the application on the issue of delay in filing the appeal the Court of Appeal had this to say after examining relevant extracts of the affidavit in support....

D “.....What more the ruling on the application to setting aside was delivered on the 22nd of July, 1998. The present application was brought on 27th march, 2001. Undoubtedly the time lapse is too long. That there is non-compliance with the Law prescribing time to file a Notice of Appeal is beyond any doubt in this case. ...

EI say that this application is not worthy of further consideration.

The paragraphs of the affidavit in support which the appellants relied on to explain the delay and which were examined by the Court of Appeal are paragraphs 5,6,7,8,9,10 and 11. They read thus:

F 5. That the Lagos High Court entered Judgment for the plaintiff on the 19th of March, 1998 for non-attendance of the trial by the applicants.

G 6. That the 2nd appellant has no knowledge of the trial date and judgment until the 24th day of April, 1998 after the judgment had long been entered.

7. That the second applicant then applied to the High Court to set aside the judgment on the 27th day of April, 1998 and Ruling was delivered on the 22nd of July, 1998.

H 8. That the court did not grant the application to set aside the judgment.

9. That the applicants have the intention of appealing to the Court of Appeal, against the judgment of the High Court.

10. That there are serious fundamental issues of Law to be heard on appeal and the appeal has a good ground of success.

11. That the delay in filing the appeal on time was caused by the hearing and ruling on the motion to set aside the judgment which took time in which the time limited for filing the appeal lapsed.

Judgment was delivered on 19/3/98. Appellants became aware of the Judgment on 24/4/98. Appellants applied to set aside the judgment on 27/4/98. Application to set aside judgment was refused and dismissed in 22/7/98. As at 22/7/98 the three months prescribed by Law to appeal had since run out. **According to the appellants' counsel, he was unable to appeal within three months after 19/3/98 because he was trying to get the judgment set aside, an error, or mistake by counsel who ought to have appealed immediately he became aware of the Judgment.**

The Court of Appeal was not impressed. I agree with the Court of Appeal. This is what that court had to say:

"...The option to appeal against the judgment delivered on 19/3/98 was very much open to the applicants' counsel as at 27/4/98 when he elected instead to bring an application to set that judgment aside"

The above is founded in Equity that once an election is made, it cannot be recalled. See Pitman v. Gum Ewing 1991 AC p. 217.

Furthermore the appellant never bothered to explain why the application was brought on 27th of March, 2001, over two years after his application to set aside the judgment was dismissed on 22nd July, 1998. Since no credible excuse is given for the delay, no indulgence can be granted.

The Court of Appeal did not consider the grounds of appeal. This could be explained in that since the reasons for the delay are not credible, there was no need to consider grounds of appeal, as both must co-exist before the application can be successful. The appellant raised the issue of jurisdiction of the learned trial judge to hear the case in his proposed Notice of Appeal and in this appeal. Indeed in Wilbahi haulage Ltd v. Anambra Motor Manufacturing Co. (Anamco) Ltd 2009 FWLR pt. 485 p. 1790. I said that:

"It is only where a ground of appeal complains of jurisdiction and it appears so, that the court would no longer consider the reason for delay and would grant the application if no good reason was advanced to explain the delay."

The issue of jurisdiction can be raised for the first time in any court and at any stage of the proceedings and in the Supreme Court for the first time. See *Usman Dan Fodio University v Kraus Thompson Organisation Ltd* 2001, 15 NWLR pt. 736 p. 305. The issue of jurisdiction is fundamental, in that where a court has no jurisdiction to hear and determine a claim, and it proceeds to hear the claim the entire proceedings and judgment would be an exercise in futility, a waste of precious judicial time, and a nullity. Consequently before a court can claim jurisdiction in any matter it must -

(a) Be properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or another;

(b) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(c) The case comes by due process of Law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. See *A-G Anambra State v. A.G Federation* 1993 6 NWLR Pt. 302 p. 700 *Sea Trucks Ltd v. Anigboro* 2001 1 SC pt 1 p. 56

Once the issue of jurisdiction is raised in these circumstances it is the duty of the court to examine it to see if it's a spurious or genuine ground. The grounds that touch on jurisdiction reads:

GROUND 1

The Court of Appeal erred in Law when it held thus:

In conclusion the result of all I have said is that this application is unmeritorious. It is accordingly dismissed.

PARTICULARS OF ERROR

(a) The Appellants had raised a fundamental issue challenging the jurisdiction of the High Court to hear and determine the case, which the appellants were seeking to challenge in the proposed Appeal before the Court of Appeal. See *Shell Petroleum Dev. Co. Ltd. v. Abel Isaih and Ors* 2001 FWLR pt. 56 p. 608. (b) ... (c) ... (d) ...

GROUND 2

The Court of Appeal erred in Law when it held as follows:

“What are the materials needed to persuade the court to exercise its discretion? They are: (1) the reasons for not filing the Notice of Appeal within the time prescribed by the Law.....(2) whether there has been undue delay.

PARTICULARS OF ERROR (a) (b)

(c) The proposed Notice of and grounds of Appeal before the Court of Appeal raised the issue of whether the High Court of Lagos State had jurisdiction. (d)

In the briefs of counsel arguments were advanced on whether the Lagos State High Court had jurisdiction to hear the respondent's claims in view of the provisions of Section 230 (1) (S) of the 1979 Constitution, which according to learned counsel for the appellants is within the exclusive jurisdiction of the Federal High Court because the 1st appellant is a Federal Government Agency and so cannot be impleaded in a state High Court.

Now, ***on reading a ground of appeal and its particulars the adverse party must be left in no doubt as to what the complaint of the appellant is. A ground of appeal and its particulars go together. Where the particulars in support of the ground are not related to the ground, the ground is incompetent.*** See Hambe v. Hueze 2001 SC Aderounmu v. Olowu 2001 2 SCNJ p. 180.

Ground 1 Particular (a) and Ground 2 Particular (c) mention jurisdiction, but the Grounds do not raise the issue of jurisdiction. The particulars are independent of the grounds. They are in no way related to the grounds and a discerning counsel would be in grave doubt after reading both grounds and their particulars to know what the complaint of the appellants really is.

It should have been obvious to counsel that a complaint that a case was conducted and judgment delivered without jurisdiction cannot be entertained on appeal except the said judgment is on appeal or there is an appeal against the trial judge assuming jurisdiction. The appeal before the Court of Appeal and this court is against the refusal of the Court of Appeal to allow the appellant appeal against the judgment of the High Court. Raising the issue of jurisdiction in such circumstances is a clear attempt by counsel to hoodwink this court into considering an issue of jurisdiction on a judgment that is not on appeal. That explains why there is no relationship between the Grounds of Appeal and its Particulars. The judgment remains inviolate for all time.

I find no merit in the appeal. The appeal fails and it is hereby dismissed.

The Ruling together with the order on costs by the court below are hereby affirmed, and the appellant shall pay the respondent costs in this appeal fixed at N50, 000.00 (Fifty thousand Naira).

MUKHTAR JSC

B In the High Court of Lagos State, the respondent who was the plaintiff instituted a suit for the following claims against the defendants.

C A claim against the 1st defendant/appellant for the sum of N39,340,800 as special and general damages for trespass and an order of injunction to restrain the 1st defendant from:

“(a) Committing acts of trespass to the plaintiff’s property being a house situate at House 9, “A” Close, 7th Avenue, Festac Town, Lagos.

D *“(b) Committing any further preventing the plaintiff from exercising his legal rights of ownership over the said premises unlawfully.”*

E The plaintiff gave evidence, but the defendants even though having filed separate statements of defence did not appear in court. The learned trial judge gave judgment in favour of the plaintiff as follows:-

“In sum, I am satisfied that the plaintiff has proved his case by his uncontradicted evidence. He is entitled to judgment against both Defendants.

F *I accordingly find the defendants liable for trespass by going into the plaintiff’s house, ejecting him there from and depriving him of possession of it. There will be judgment for the plaintiff for damage in the sum of N5,000 for trespass and a further sum of N9,557,300 being value of the plaintiffs property taken away by the 1st Defendant*
 G *and not returned to him ”*

H The judgment was delivered on 19th March, 1998. The 2nd defendant filed and moved an application for extension of time to apply for the setting aside of the judgment and an order to set aside the said judgment. The learned judge refused the application and the defendants sought to appeal to the Court of Appeal vide a motion on notice for extension of time within which to appeal. The motion contained the trinity prayers of extension of time to seek leave to appeal, leave to appeal, and extension of time to file the appeal. It was also for stay of execution. The Court of Appeal refused the appli-

cation and dismissed it. The defendants not satisfied with the dismissal, have now appealed to this court on two grounds of appeal. Briefs of argument were exchanged and adopted at the hearing of the appeal. The issues raised for determination in the briefs have been set out in the lead judgment.

In my opinion, the questions that beg for answer in this appeal are whether the appellants satisfied the requirements in law for the grant of extension of time to appeal, and whether the lower court exercised its discretion judicially and judiciously in refusing the application. In answering the first question, I will reproduce the salient averments in the supporting affidavit. They are:-

"5. That the Lagos High Court entered judgment for the plaintiff on the 19th of March, 1988 for non-attendance of the trial by the applicants....."

6. That the 2nd applicant had no knowledge of the trial date and judgment until the 24th day of April, 1998 after the judgment had long been entered.

7. That the second applicant then applied to the High Court to set aside the judgment on the 27th day of April, 1998 and ruling was delivered on the 22nd of July, 1998.

8. That the court did not grant the application to set aside the judgment.

That the applicants have the intention of appealing to the Court of Appeal, Lagos against the judgment of the High Court.

10. That there are serious fundamental issues of law to be heard on appeal and the appeal has a good ground of success.

11. That the delay in filing the appeal on time was caused by the hearing and ruling on the motion to set aside the judgment which took time in which the time limited for filing the appeal lapsed."

The conditions to be fulfilled for the success of the application are set out by this court in a plethora of authorities. See *Williams v. Hope Rising Voluntary Funds Society* 1982 12 SC 45, *Olowoake v. Salawu* 2000 11 NWLR part 677 page 127, *Osinupebi Saiku* 1982 7 SC 104, *Okafor v. Bendel News Papers Corporation* 1991 7 NWLR H page 206 and *U.B.N. (Nig.) PLC v. Wallace* 1998 3 NWLR part 541 page 331.

One of the conditions is that the affidavit must disclose good and substantial reasons for the delay in appealing. The applicants/appellants

have attempted to set out their reasons in paragraphs 6, 7, and 11 of the supporting affidavit reproduced above. In his counter-affidavit, the respondent deposed inter alia thus:-

B *“4. That in fact the present application and the Notice of Appeal filed under the Appeal No. C/L/163M/01 should be dismissed with costs for the following reasons:-*

(a) There is a pending appeal matter between same parties and the same subject matter pending before Appeal Court No. 2, which has not been disposed of and the Appeal is No. CA/L/413M/98.

C *(c) That there is no substantial point of law involved in their Notice of Appeal.”*

In their reply to the counter-affidavit the applicants swore to the following deposition:-

D *“3. That paragraph 4 of the counter affidavit is not correct in that the applicants duly withdrew the appeal No. CA/L/413 on the 26th March, 2001, a day before filing this present application.....”*

That therefore puts to rest the issue of the existence of a prior appeal.

E Reading carefully the reasons for the delay disclosed in the affidavit and set out above, I find them to be bereft of substance. That the 2nd appellant had no knowledge of the judgment does not justify the delay, because he was very much aware of the case pending against him, to the extent that he had even filed a statement of defence. See page 6 of the printed record of proceedings, where the F learned trial judge in his judgment observed that, *“the two Defendants filed separate statements of Defence but did not appear in court to offer any defence.”* Common sense demands that a party who is very much aware of a case pending against him, and has in fact taken G some steps, should be diligent in following the progress of the case, even if he has no interest in taking an active part in it. Equity aids the vigilant and not the indolent.

H Then on the deposition in paragraph (11) supra, after the ruling of the learned trial judge refusing to set aside the judgment on 22nd July, 1998, the appellants did not deem it expedient to file an application for extension of time and leave to appeal against the judgment of the Court of Appeal until 17th of November, 1998, over three months after. It took the appellants over two years before they withdrew the said application, and filed another one on 27th March,

2001. All these lapses certainly point to the unseriousness of the appellants in this matter. Assuming that the court is inclined to believe the reason given in paragraph (11) *supra*, the nonchalant attitude of the appellants is enough to discourage any exercise of discretion in their favour.

On the other condition that requires the grounds of appeal to be substantial. Although the appellants have raised the issue of jurisdiction, (which this court has consistently said could be raised at any stage of proceedings. It is not every ground of appeal that raises the issue of jurisdiction that will be regarded as one. The particulars supporting the ground must be thoroughly examined in order to convince a court that there exists a breach complained of. I find none in this case. In the circumstances I believe that the lower court exercised its discretion judicially and judiciously in refusing the application for extension of time and leave to appeal. This court cannot therefore interfere with its exercise of discretion. See *Duwin Pharmaceutical Chemical Co. Ltd. v. Beneke Pharmaceutical and Cosmetics Ltd & ors* 2000 15 NWLR part 689 page 66, and *Olusanya v. Osineye* 2001 13 NWLR part 730 page 298. I also dismiss the application. The same also goes for this appeal, as I find no merit in it whatsoever. The issues formulated in the briefs of argument are resolved in favour of the respondent, and the grounds of appeal fail. The appeal is dismissed in its entirety. I am in full agreement with the reasoning and conclusion reached in the lead judgment of my learned brother Rhodes-Vivour, JSC that the appeal be dismissed. I abide by the consequential orders made in the lead judgment.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother, RHODES-VIVOUR, J.S.C just delivered. I agree with his reasoning and conclusion that the appeal is devoid of merit and ought to be dismissed.

It must be pointed out that the role of the court in adjudication is to maintain a level playing field for the parties by offering them equal opportunity to present their case or grievances; if they so wish. Once the opportunity is offered, it is the duty of a party to litigation or his counsel to utilize same in accordance with the rules of procedure and substantive law.

Where, however, he or his counsel fails or neglects to utilize the opportunity so offered, he cannot turn round to blame the court for the loss of the opportunity as the court will not allow a party to hold the opponent or the court to ransom under the guise of the desire to protect the principles of fair hearing.

B To me the right to fair hearing remains the right to opportunity to be heard on any matter affecting one's right(s). Once that opportunity is offered, the duty of the court ends there.

C In the instant case, the appellants failed to satisfy the lower court that their applications deserved to be granted or that the said court ought to exercise its discretion in their favour neither have they satisfied this court that the lower court did not exercise its discretion in refusing their application judicially and judiciously.

D In the circumstance, I too dismiss the appeal for lacking in merit with costs as assessed in the said lead judgment.

Appeal dismissed.

GALADIMA JSC

E I have had the advantage of reading in draft, judgment just delivered by my learned brother BODE RHODES-VIVOUR, JSC. I agree with his reasoning and conclusion reached in the lead judgment that the appeal be dismissed. I only wish to add that I have carefully read salient averments in the affidavit supporting the appellant's application for trinity reliefs. These are for extension of
F time to seek leave to appeal, and extension of time to file the said Appeal. The conditions for the success of the application set out in a number of decisions of this Court particularly in WILLIAMS v HOPE RISING VOLUNTARY FUNDS SOCIETY (1982)12 SC. 45; and
G U.B.N. (NIG)PLC v WALACE (1998) 3 NWLR (pt 541) 331, have not been met.

H On the requirement that the grounds of Appeal should be substantial, again, although the Appellant has raised the issue of jurisdiction, the particulars supporting this ground, when carefully examined, do not support the breach complained of.

In the circumstances I agree that the appeal be dismissed. I also dismiss it with costs of N50,000.00 to the Respondent.