

SUPREME COURT OF NIGERIA
28TH JANUARY, 2011. SC. 4/2008
CORAM:- A. M. MUKHTAR, F. F. TABAI, I. T.
MUHAMMAD, M. S. MUNTAKA-COOMASSIE, B.
RHODES-VIVOUR, JJSC

NATIONAL INLAND
WATERWAYS AUTHORITY APPELLANT/APPLICANT
AND
THE SHELL PETROLEUM
DEVELOPMENT COMPANY RESPONDENT
OF NIGERIA LIMITED

APPEALS - Extension of time - The word 'prepare' - Purpose - Respondent's submission that the application is incompetent - Was misconceived - As shown by the Supreme Court's interpretation of the word 'prepare' (H1)

APPEALS - Briefs - Competence - Mohammed v. Bamgbose - Distinguished - Where an appeal has already been filed - The brief is not made incompetent - For being filed before the appeal is entered - As distinguished from this case (H2)

APPEALS - Application - For extension of time to appeal - Grant of - Reason - The applicant has disclosed good and substantial reason - Why the application ought to be granted (H3)

FACTS

The appellant and respondent started this action before the Federal High Court where counsel to the respondent tendered documents which are illegible pages of Oil Mining Lease. The matter went on to Court of Appeal, Port-Harcourt, which its interlocutory appeal has come to the Supreme Court. Appellant, by an application to the Supreme Court, prayed the following reliefs: 1. An order for enlargement of time within which to compile the records of appeal. 2. An order deeming the record of appeal already compiled and attached to the affidavit exhibited as having been duly and properly compiled and served. 3. An order abridging the time within which

appellant may file its brief to the time of filing this application and an order deeming all documents annexed to the application as properly filed. The application was supported by an affidavit, which disclosed that the appellant had earlier applied to the Supreme Court for an order to compile the records of appeal out of time, which was refused in chambers, as some pages of proposed records of appeal were not legible.

The affidavit also disclosed that appellant's counsel was not notified of the outcome of his application and by the time he eventually knew the outcome, he had taken steps to obtain clear copies of the illegible pages of the records. Also, that the effort he made to obtain clear copies from respondent's counsel, who tendered the document at the trial court, proved abortive. In reaction to this, the respondent filed a counter affidavit, where it averred that appellant's counsel was notified of the outcome of his application, but did not exhibit proof of such notification. Respondent, in its application to the Supreme Court, has sought for an order to dismiss the appeal for want of diligent prosecution.

ISSUES FOR DETERMINATION

"a) Whether or not the present applicant/appellant's application is competent, when it contains no relief for extension of time to file records of appeal, as opposed to extension of time to compile records of appeal, which the appellant sought for.

b) Assuming but without conceding that the applicant/ application is competent, whether the appellant/applicant is entitled to the judicial discretion being sought in this application".

c) Whether the applicant/appellant has made out a case for grant of an order for enlargement of time within which to compile the record of appeal and an abridgement of time within which the appellant may file its brief of argument".

HELD (Unanimously granting appellant's application and striking out respondent's application per **MUNTAKA-COOMASSIE JSC**)

APPEALS - Extension of time - The word 'prepare' - Purpose

1. On the issue No 1, the Respondent submitted that this application is incompetent, when it contains no relief for extension of time to file record of appeal, as opposed to extension of time to compile record of appeal, which the applicant sought for.

The rule that is specifically relevant, is the provisions of order 7 Rule 7 (1) of the rule.

What the rules require an applicant in an interlocutory appeal from the decision of the Court of Appeal is to

a. "Either simultaneously with the filing of the Notice of Appeal, prepare a record for the use of the Justices of this court, or

b. Within 14 days after the filing of the Notice of Appeal, prepare a record for the use of this court"

In this context, it is my view that the word "prepare" is the same as "compile" the record for the use of this court, nowhere is it provided that the appellant shall file. This court will not impute into a statute a word or provisions not provided by it. Therefore the submission of the respondent in this respect is completely misconceived. (pp. 216 B/217 D)

Briefs - Competence - Mohammed v. Bamgbose - Distinguished

2. The respondent cited the case of Burai Mohammed Vs. Bamgbose (1989) 3 NWLR (pt. 109) 352 and submitted that the said brief of argument, filed when an appeal has not been entered, is incompetent. With tremendous respect to the contrary, what the learned Justice of the Supreme Court has said, did not support the position taken by the respondent. The learned Justice at page 360 of the report, stated the position as follows:

"A brief filed before the appellant obtained leave to appeal is a nullity" per Nnaemeka-Agu JSC.

I quite agree with the learned Justice Nnaemeka-Agu JSC. In the instant case, an appeal has already been filed, what the appellant was seeking was to enter the appeal, since the record has been prepared or compiled, of course, it does not make any sense for a brief of argument to be filed when a notice of appeal has not been filed and any such brief will definitely amount to a nullity. (p. 217 H)

Application - For extension of time to appeal - Grant of

3. On the last issue of disclosing good and substantial reason, it is my considered view that the applicant has disclosed good and substantial reasons why this application ought to be granted. The main cause of the delay was the non notification of the applicant of the ruling of this court, that refused the earlier application on the ground that some of

the pages of the record were not legible. The respondent averred that the applicant was notified, but no evidence of such notification was exhibited, what was exhibited by the respondent was the one served on him, no effort was made to show that such notification was actually served on the applicant. (p. 218 D)

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REPRESENTATION

Chief R. O. Akinjide SAN, with him, O. Abiloye Esq., for the Appellant. Mrs. Chinaba Unaegbunam, with her, Nathaniel Ajigi Esq., & Oyinye Akuma (Miss) for the Respondent.

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CASES REFERRED TO

Buraimoh vs Bamgbose (1989) 3 NWLR (pt. 109) 352/360
Ika Local Government Area V Mba (2007) 12 NWLR (pt. 104) 676
D at 700

Progress Bank (NIG) PLC vs O. K. Contact Point Ltd. (2008) 1 NWLR (pt. 1069) 514 at 534

RULES REFERRED TO

E Supreme Court Rules, O. 2 r. 31(1), O. 7 r. 1 (2), O. 7 r. 1(a)

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

By an application dated 29th day of April, 2010, the Applicant/
F Appellant prayed for the following reliefs: -

1. AN ORDER for enlargement of time within which the Appellant/Applicant may compile the record of appeal.

2. AN ORDER deeming the record of appeal already compiled by the Applicant and attached to the affidavit of Onyinye Akuma
G as exhibited OA1 as having been duly and properly compiled and served.

3. AN ORDER abridging the time within which the appellant may file its Appellant's brief to the time of filing of this application and an order deeming as properly filed contemporaneously with this ap-
H plication.

The application was supported by an affidavit sworn to by one Onyinye Akuma. As disclosed in the affidavit, the applicant had earlier applied to this court, for an order to compile the record of appeal, out of time. This application was refused in chambers as some

pages of the proposed record of appeal were not legible. This applicant was not notified of the outcome of this application and by the time it eventually knew the outcome of this application, he had taken steps to obtain a clear copy of the illegible pages of the records, which is the Oil Mining Lease (OML).

The counsel to the respondent who tendered the document at the trial court was contacted so that a clear copy could be obtained, but this effort did not yield any result. As a last result, the applicant has to embark on retyping the document, even at then, to get the document certified became another problem, hence the applicant has to start a fresh the process of re-compiling the record, which is now attached as Exhibit OA1.

The respondent filed a counter/affidavit in which the respondent averred that the application was filed to over-reach its pending application to dismiss the appeal for want of diligent prosecution. The respondent denied the averments contained in the applicant's affidavit. It was averred that the applicant was promptly informed of the outcome of its application heard in chambers which was refused. Applicant denied that he was informed about the illegibility of the document. It was then averred that this application is a ploy to delay the hearing of the substantive appeal at the Court of Appeal.

The applicant in its written submissions in support of the application formulated a sole issue for determination as follows:-

"Whether the applicant/appellant has made out a case for grant of an order for enlargement of time within which to compile the record of appeal and an abridgement of time within which the appellant may file its brief of argument".

The applicant referred to the provisions of Order 2 Rule 31(1) of the Supreme Court Rules and submitted that this court has the power to grant the application. Counsel also referred to cases of: Progress Bank (NIG) PLC vs. O. K. Contact Point Ltd. (2008) 1 NWLR (pt. 1069) 514 at 534; and Ika Local Government Area V. Mba (2007) 12 NWLR (pt. 104) 676 at 700. He referred to the averments contained in the affidavit in support of the application and submitted that he has disclosed substantial reasons, why the record was not compiled within the time prescribed by the rules.

The Respondent in its written submissions formulated two (2) issues for determination thus:-

"a) *Whether or not the present applicant/ appellant's application is competent when it contains no reliefs for extension of time to file record of appeal as opposed to extension of time to compile record of appeal which the appellant sought for.*

B b) *Assuming but without conceding that the applicant/ application is competent, whether the appellant/applicant is entitled to the judicial discretion being sought in this application".*

On the issue No 1, the Respondent submitted that this application is incompetent when it contains no relief for extension of time to file record of appeal as opposed to extension of time to compile record of appeal which the applicant sought for. Being an appeal against Interlocutory decision of the Court of Appeal, the appellant is to compile and file the record of appeal at the Supreme Court. Learned counsel refers to the provisions of Order 7 Rule 1(2) of the Rules of this court.

It was also submitted that the Brief of argument which the appellant wants this Honourable Court to deem as properly filed is incurably incompetent as the appeal has not been entered. The Respondent cited in support the case of *Buraimoh vs Bamgbose* (1989) 3 NWLR (pt. 109) 352/360.

On the issue No 2, the Respondent submitted that the grant of this application is an exercise of judicial discretion, having regard to the facts and circumstances, and as such is not granted as a matter of course. In this case the appellant obtained the leave of this court in June 6, 2008, to appeal against the ruling of the Court of Appeal and since then no reasonable step was taken to ensure the compilation of the record of appeal till when this application was filed on 28/4/10. That the appellant has not been diligent in the prosecution of the appeal. That the entire reasons advanced by the appellant for failing to produce timeously legible copies of record of appeal are total fabrications and cannot be sustained. Hence, the applicant has failed to disclose good and substantial reasons why this application should be granted.

H On the issue of the incompetency of the application raised by the respondent, it would be necessary to examine the provisions of Order 7 rule 1 (2) of the rules of this court to determine whether the application is competent or not.

Order 7 r. 1 (a) "The provisions of rules 2, 3, and 4 of this

Order shall apply to appeal to the court from the final decisions of the Court of Appeal in civil and criminal cases other than decisions in appeal to that court from interlocutory decisions of a High Court.

2. The provisions of rules 6 and 7 shall apply to any decision of the Court of Appeal in respect of an interlocutory decision made by it..... B

6. It shall not be necessary for the registrar of the Court of Appeal to prepare a record in respect of the type mentioned in sub-rules (2) of rules (1) of that order unless this court otherwise directs, and accordingly the record for the purpose of such appeals shall be in the manner set forth in rule 7 of this order. C

7. (1) The appellant shall in appeals to which this rule applies, either simultaneously with filing his notice of appeal or within 14 days thereafter prepare for the use of the Justices a record comprising..... D

I have carefully set out the provisions of the rules in order to determine the competency or otherwise of the application. **The rule that is specifically relevant is the provisions of order 7 Rule 7 (1) of the rule.**

The express provision of the rule is that the applicant shall: E

“Prepare for the use of the Justices a record comprising ” what the rules require an applicant in an inter-

locutory appeal from the decision of the Court of Appeal is to a. “Either simultaneously with the filing of the Notice of Appeal prepare a record for the use of the Justices of this court, or F

b. Within 14 days after the filing of the Notice of Appeal prepare a record for the use of this court”

In this context, it is my view that the word “prepare” is the same as “compile” the record for the use of this court, nowhere is it provided that the appellant shall file. This court will not impute into a statute a word or provisions not provided by it. Therefore, the submission of the respondent in this respect is completely misconceived. So also is the issue of the competency of the brief of Argument raised by the respondent. Truth must be told. **The respondent cited the case of Burai Mohammed Vs. Bamgbose (1989) 3 NWLR (pt. 109) 352 and submitted that the said brief of argument filed when an appeal has not** G H

been entered is incompetent. With tremendous respect to the contrary, what the learned Justice of the Supreme Court has said did not support the position taken by the respondent. The learned Justice at page 360 of the report stated the position as follows:

B “A brief filed before the appellant obtained leave to appeal is a nullity” per Nnaemeka-Agu JSC.

I quite agree with the learned Justice Nnaemeka-Agu JSC. In the instant case, an appeal has already been filed, what the appellant was seeking was to enter the appeal, since the record has been prepared or compiled, of course, it does not make any sense for a brief of Argument to be filed when a notice of appeal has not been filed and any such brief will definitely amount to a nullity.

D On the last issue of disclosing good and substantial reason, it is my considered view that the applicant has disclosed good and substantial reasons why this application ought to be granted. The main cause of the delay was the non notification of the applicant of the ruling of this court that refused the earlier application on the ground that some of the pages of the record were not legible. The respondent averred that the applicant was notified, but no evidence of such notification was exhibited, what was exhibited by the respondent was the one served on him, no effort was made to show that such notification was actually served on the applicant.

F My Lords, having considered both briefs of argument together with the submissions of both counsel, I hold that this application has merit and it is hereby granted. Consequently I order as follows:-

- 1. “The appellant/Applicant is hereby granted an enlargement of time within which to compile the record of Appeal in this appeal.**
- 2. The record of appeal exhibited as OA1 is deemed as having been duly and properly compiled and served.**
- 3. The time to file the appellant’s brief of argument is hereby abridged, and the appellant’s brief of argument already filed is deemed as duly filed and served today”.**

In view of the above orders, it goes without saying, that the

respondent's application dated 22/7/2009 and filed on the same date, which seeks an order dismissing the appeal for want of diligent prosecution is hereby struck out, as it has been over taken by event. N30,000 naira costs is awarded in favour of the appellant/applicant.

Application is granted.

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MUKHTAR JSC

The application before this court is for the following orders:-

"1. AN ORDER for enlargement of time within which the Appellant/Applicant may compile the record of appeal in this appeal.

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2. AN ORDER deeming the record of appeal already compiled by the Appellant and attached to the affidavit of Onyinye Akuma as exhibit OA1, as having been duly and properly compiled and served.

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3. AN ORDER abridging the time within which the Appellant may file its Appellant's brief of argument to the time of the filing of this application and an order deeming it as properly filed and served."

The application is supported by an affidavit, and the learned counsel for the applicant has filed an applicant's brief of argument. The pertinent depositions in the affidavit are as follows:-

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"4. On the 6th June, 2008, this honourable court delivered a ruling which granted the orders sought by the Appellant/Applicant in the application referred to in paragraph 3 above. Although the ruling was readily available for collection, the drawn up order which needed to be attached to the notice of appeal for filing at the lower court was not signed until a few days before the 31st of July, 2008. This is why the appeal was filed on the 31st of July, 2008.

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6. Being out of time by some weeks, due to the difficulty in compiling the record, which required procuring certified true copies of certain processes from the Court of Appeal Port Harcourt and pressure of work, an application before this court seeking an extension of time to compile the record of appeal and deeming the compiled record of appeal as duly compiled was made

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7. We did not receive any notification of the outcome of the said application that this honourable court (in chambers) had refused the appellant's application for extension of time to compile

records of appeal on account that several pages of the said record being illegible, was averred.

9. *Having directed ourselves to the ruling of this honourable court, we perused the compiled record of appeal and noted that the illegible pages are 281 - 320 of the said record. The document contained in the said pages is the Oil Mining lease (OMI) of the Respondents made in 1964 and typed using very old typewriting equipment. This document was exhibited at the Federal High Court by the Respondent and even the original copy filed from which the copy contained in the compiled record was made, is just as illegible.*

10. *Upon being served with the application to dismiss the appeal, lead counsel from our firm on behalf of the appellant Mr. Etigwe Uwa (SAN), called Chief Akinjide lead counsel for the Respondent and drew his attention to the fact that the documents which are illegible was an exhibit which was attached to his client's affidavit at the Federal High Court and that the original copy of the document filed, is itself illegible as a result of which he inquired if Chief Akinjide (SAN) would furnish us with a more legible copy of the said exhibit. Chief Akinjide (SAN) warmly but firmly replied that he would not procure a more legibly copy."*

The respondent in its counter-affidavit denied the above depositions, stating their own correct position of things, and exhibiting the useful and relevant documents. In addition to the submissions contained in the briefs of argument of both sides, learned counsel for the respondent proffered oral argument in court.

I have considered the submissions together with the depositions in the affidavits. It is on record that the applicants gave copious reasons for the delay in bringing the application, some of which have been punctured by the respondent in its counter affidavit. Although, I am inclined to discountenance some of the reasons deposed to in the supporting affidavit, as they are not cogent, the grant or refusal of the application is however discretionary, and this court can exercise its discretion in favour of the applicant, when it is satisfied to so do. See *Bowaje v. Adediwura* 1976 6 SC. 143, and *G. B. A. Akinyede v. The Appraiser* 1971 1 All N.L.R. 62.

A very careful perusal of the materials before this court, satisfies me that in the interest of justice, and in order not to shut the applicant out, the application ought to be granted. The applicant/

appellant has already filed its appellant's brief of argument to show their seriousness in prosecuting the appeal. In the circumstance of this case, I am mindful of granting the application. For the fuller reasoning in the lead ruling of my learned brother Muntaka-Coomassie, JSC, which I agree with, I also grant the application. I abide by the consequential orders made in the lead ruling. B

MUHAMMAD JSC

I have had the advantage of reading the ruling just delivered by my brother, Coomassie, JSC. I agree with the conclusions he reached. I have nothing to add. I abide by all the consequential orders made including order as to costs. C

RHODES-VIVOUR JSC

I read in draft the leading ruling delivered by Muntaka-Coomassie, JSC. I am in complete agreement with his lordship. I would, though say a thing or two on the application. An application for extension of time to compile record of appeal under Order 2 rule 31 of the Supreme Court Rules succeeds or fails entirely at the discretion of this court. To succeed, the affidavit in support of the application must show good and substantial reasons why the record of appeal was not compiled within the time prescribed by the rules. See: Akinyede v The Appraiser 1971 1 ALL NLR page 164. E F

If the application succeeds, it in effect means that convincing reasons have been laid before the court to explain the delay. The court in the circumstances would be said to have acted judicially and judiciously and not arbitrarily. G
Relevant extracts from the affidavit in support to explain the delay in compiling the record of appeal runs as follows:

"4. On the 6th June, 2008, this honourable court delivered a ruling which granted the orders sought by the Appellant/applicant in the application referred to in paragraph 3 above. Although the ruling was readily available for collection, the drawn up order which needed to be attached to the notice of appeal for filing at the Lower Court was not signed until a few days before the 31st July, 2008. This is why the appeal was filed on July, 2008. H

6. *Being out of time by some weeks, due to the difficulty in compiling the record which required procuring certified true copies of certain processes from the Court of Appeal Port Harcourt and pressure of work, an application before this court seeking an extension of time to compile the record of appeal and deeming the compiled record of appeal as duly compiled was made.*

7. *We did not receive any notification of the outcome of the said application that this honourable court (in Chambers) had refused the appellant's application for extension of time to compile records of appeal on account that several pages of the said record being illegible, was averred.*

9. *Having directed ourselves to the ruling of this honourable court, we perused the complied record of appeal and noted that the illegible pages are 281 - 320 of the said record. The document contained in the said pages, is the Oil Mining Lease (OMI) of the Respondents made in 1964 and typed using very old typewriting equipment. This document was exhibited at the Federal High Court by the Respondent and even the original copy filed from which the copy contained in the compiled record, was made is just illegible.*

10. *Upon being served with the application to dismiss the appeal, lead counsel from our firm on behalf of the appellant, Mr. Etigwe Uwa SAN, called Chief Akinjide lead Counsel for the Respondent and drew his attention to the fact that the documents which are illegible was an exhibit which was attached to his clients affidavit at the Federal High Court and that the original copy of the document filed is itself illegible, as a result of which he inquired if Chief Akinjide, SAN would furnish us with a more legible copy of the said exhibit. Chief Akinjide, SAN warmly but firmly replied that he would not procure a more legible copy".*

My Lords, the record of appeal is a reproduction of all that occurred in the court from which the appeal emanates. The need to compile a comprehensive document, (Record of Appeal) which must contain all processes, documents and the day to day proceedings cannot be over emphasized.

Affidavit evidence portrays the difficulty encountered by learned counsel for the appellant/applicant compiling the record of appeal within the time prescribed by the rules. In the circumstances, good reasons have been laid before this court to justify extending time to compile

the records of appeal.

Furthermore and finally, the fact that the record of appeal and the appellant's brief have already been compiled, shows the seriousness of the appellant/applicant to ensure a quick hearing of his appeal. I would grant this application.

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