

SUPREME COURT OF NIGERIA
10TH JUNE, 2011. SC.418/2010
CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, O. O. ADEKEYE,
S. GALADIMA, JJSC

1. UYAEMENAM NWORA & 3 Ors. APPELLANTS
(For themselves and as
representing Okpuloji, Abba Town)

AND

1. NWEKE NWABUEZE & 2 Ors. RESPONDENTS
(For themselves and on
behalf of Umugama Village, Ukwulu)

APPEALS - Application for extension of time - Grant of the application is at discretion of court - Which must be exercised judicially and judiciously (H1)

APPEALS - Application for extension of time - 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 (H2)

SUPREME COURT - Jurisdiction - It is a misnomer for Supreme Court to decide substantive matter at interlocutory stage (H3)

SUPREME COURT - Appeals - Application for extension of time - Supreme Court will exercise its discretion in favour of appellant - When failure to file was due to negligence of counsel - Or lack of appreciation of judgment (H4)

JUDGMENTS - Appeals - Application for extension of time - Reason for delay - When irrelevant - It is not considered where ground of appeal is on lack of jurisdiction - Arising prima facie from the judgment (H5)

FACTS

Appellants/applicants filed this Motion on Notice on 12th
2041

November, 2010 at Supreme Court, praying for an order granting them extension of time to seek leave to appeal, leave to appeal and extension of time within which to file the Notice and Grounds of Appeal against the decision of Court of Appeal Enugu Division in its Ruling delivered on 3rd March, 2009 striking out their appeal on a Notice of Noncompliance with the conditions of appeal, filed in that Court by the Assistant Chief Litigation Officer of the High Court of Anambra State.

Applicants argue that the records in the original appeal could not be timeously compiled and transferred to the Court of Appeal not because of the lapse of the applicants or counsel but due to the loss of the Record of proceedings of the High Court by the Registrar of the Court. Applicants submit that they have not unduly delayed the filing of the appeal necessitating an extension of time. Applicants further contend that they were not party to the proceeding at the Court of Appeal that struck out their appeal. Consequently, they urge the Supreme Court to grant their application, as refusal is tantamount to the deprivation of the applicants' right to litigate and seek redress as guaranteed by the Constitution of the Federal Republic of Nigeria 1999.

HELD (Unanimously allowing the application per ADEKEYE JSC)
Appeals - Application for extension of time - Grant of

1. Application for extension of time within which to appeal is at the discretion of the court while such discretion must be exercised judicially and judiciously.

In the case *Williams v. Hope Rising Voluntary Funds Society* (1982) 2 SC 145 at pg. 152, the Supreme Court held that-

“When a court is called upon to make an order for extension of time within which to do certain things (i.e. extension of time presented by the Rules of court for taking certain procedural steps) the court ought always to bear in mind that the Rules of court must prima facie be obeyed and that it therefore follows that in order to justify the exercise of the court's discretion in extending the time within which a procedural step has to be taken, there must be some material upon which to base the exercise of that discretion.”
 (p. 2056 F)

Application for extension of time - Duty on applicant

2. The principles governing the grant of extension of time to apply for leave to appeal and extension of time to appeal as stated earlier in this ruling have been settled by several decisions of this court. They are:-

1. Substantial reasons for the failure to appeal within time
2. Grounds of appeal which prima facie show good cause

why the appeal should be heard -the two should co-exist.

For an application for extension of time to appeal to succeed, the applicant must show to the court that the delay in bringing the application is neither wilful nor inordinate that there are good and substantial reasons for failure to appeal within the prescribed period and there are grounds which prima facie show good cause why the appeal should be heard

The two conditions are held to co-exist. If one is non-existent the application must fail. The two conditions are conjunctive not disjunctive.

I cannot but quote from the judgment of this court in the case *Ukulu v. Bunge* (1997) 8 NWLR (pt.518) pg 527 as follows-

The principle governing the grant of extension of time to apply for leave And extension of time to appeal as stated earlier in this judgment have been settled in several decisions of this court, some of which have been considered in this judgment that there should be -

Substantial reasons for the failure to appeal within time and grounds of appeal which prima facie show good cause why the appeal should be heard. The two must be present.

(pp. 2057 D/2062 D/2064 H)

SUPREME COURT - Jurisdiction

3. It is however not the time as it is not within the jurisdiction of this court at this stage to enquire into the merit of the case as it will surely amount to deciding the substantive matter in an interlocutory application which the law frowns upon. (p. 2062 F)

Appeals - Application for extension of time

4. The Supreme Court will normally exercise its discretion judicially and judiciously. It will exercise its discretion in favour of the

appellant where failure to file on time was due to the negligence of the counsel or excusable or pardonable error of counsel. The failure of the party to act within time when caused by an omission or lapse of counsel will not be taken out on an appellant.

This is extended to error of judgment or inadvertence on the part of the counsel's clerk or failure of communication at the crucial time between him and the plaintiff/appellant/applicant particularly where the mistake or inadvertence is in respect of procedural matters. The court will usually lean towards accommodating the party in the interest and a determination of the case on the merits.

The court will also grant the application where his being out of time is due to lack of appreciation of the judgment. Though the court will however take into consideration the length of time in exercising its discretion, the length of time between the judgments appealed against and the application for extension of time is immaterial so long as the applicant can show good cause for the delay. The lists of factors to be taken into consideration are in-exhaustive. Each case has to be decided on its own peculiar facts and circumstances. The grounds of appeal must be substantial and arguable. (p. 2062 H)

Application for extension of time - Reason for delay

5. The lower court lacked this jurisdiction to have dismissed the appeal on the certificate of non-compliance issued directly by the registrar without hearing from the respondents. That was the position under the 2002 Rules of the Court of Appeal, which is now different under the 2007 Rules.

The decision of this court in *Oyegun v. Nzeribe* (2010) 7 NWLR (pt. 1194) pg. 577 is distinguishable as provisions of the Court of Appeal Rules was properly complied with in *Oyegun's* case. It is the stand of this court that the length of time that has passed is irrelevant where a judgment is given without jurisdiction. It can never be too late to appeal against it, as the reason for the delay ceases to be a relevant factor. The paramount interest of the court will be to consider whether or not it appears the judgment was given without jurisdiction.

But where the proposed ground of appeal complains of lack of jurisdiction and prima facie appears so, as in this case, I am of the view that it may not be necessary to inquire into the reasons for the

delay. The question of jurisdiction is a constitutional issue which may be raised at any stage of a proceeding even for the first time in this court. (pp. 2064 E/2065 B)

NOTABLE POINT OF INTEREST

ADEKEYE JSC

1. Powers to make Rules of Court

I have given painstaking consideration to the arguments, submission and the list of authorities cited by the parties in favour of and against granting of the application. In my opinion, the matter in hand is short and straightforward as it is predicated on the exercise of the applicant's constitutional right of appeal and the application of the Rules of court. It is worthy of note that the powers to make Rules of Court are vested in both the President of the Court of Appeal and the Chief Justice of Nigeria by the Constitution. In the case of the President of the Court of Appeal, section 248 of the 1999 Constitution provided as follows-

"Subject to the provisions of any Act of the National Assembly, the President of the Court of Appeal may make rules for regulating the practice and procedure of the Court of Appeal."

Section 236 of the same 1999 Constitution provides that-

"Subject to the provisions of any Act of the National Assembly the Chief Justice of Nigeria may make rules for regulating the practice and procedure of the Supreme Court."

Rules of court are designed to be lubricants of the machinery of justice and they contain certain minute details of the various steps which a litigant is expected to take in the process of getting the court to hear and adjudicate on the different types of cases which come before it. (p. 2055 B)

REPRESENTATION

Chief Wole Olanipekun SAN with Gbenga Adeyemi, Dr. Oladapo Olanipekun, Ismael Mutau, Kere-Chukwu Azie and Aisha Ali (Mrs.), for the Appellants

Dr. J.O. Ibik SAN with Chief J. K. Gadzama SAN, Patrick Agu, Victor Amako, M.A. Abubakar Esq., J. N. Egwuonwu Esq., C. P. Oli. Esq., N. N. Shaltha (Miss) A.S. Akingbade Esq., I.H. Ngada. Esq., and J. M. Ugbeji (Miss), for the Respondents

CASES REFERRED TO

- Doherty v. Doherty (1964) 1 All NLR pg.292
 Okere v. Nlem (1992) 4 NWLR (pt 234) pg.132 SC
 Bomaje v. Adediwura (1976) 6 SC pg.143 at pg. 147
 Erisi v. Idika (1987) 4 NWLR (pt.66) pg.503 at pg. 517
 B Ogar v. James (2001) 10 NWLR (pt. 722) pg.621 at pg. 636
 C.C.B (Nig.) Ltd. v. Oguru (1993) 3 NWLR (pt.284) pg 630
 Ahmadu v. Salawu (1974) All NLR pg.822 at pgs. 826- 827
 National Bank v. Are Brothers (1977) 11 NSCC pg 382 at 387
 C Elobisi v. Onyeonwu (1989) 5 NWLR (pt.120) pg.224 at pg. 252
 Shonu v. Afribank (Nig.) Plc (2000) 13 NWLR (pt. 684) pg. 392
 Ojora v. Agip Plc (2005) All FWLR (pt.267) pg.1433 at pg.1455
 FBN Plc. v. TSA Ltd (2010) 15 NWLR (pt.1216) pg 247 at pg. 96
 Tony Anozia v. A. G. Lagos State (2010) 15 NWLR (pt.1216) pg.207
 Chief John Oyegun v. Chief Francis Arthur Nzeribe (2010) 7 NWLR
 D (pt.1194) pg. 577

STATUTE AND RULES REFERRED TO

- Constitution of Federal Republic of Nigeria 1999, ss. 236, 248
 Court of Appeal Rules 2007, O.7 r.10, O.8 rr.1, 4, 18, 19, 20
 E Supreme Court Rules (amended) 1999, O.2 r.31 (1) (2)

LEAD JUDGMENT BY ADEKEYE JSC

- By an application filed on 12/11/10 and brought pursuant
 F to Order 2 Rule 31 of the Supreme Court Rules and the inherent
 jurisdiction of this Honourable Court the appellants/applicants for
 themselves and as representatives of Okpuloji, Abba Town prayed
 for the under-listed reliefs:-
 1. An order granting the appellants/applicants an extension
 of time to seek leave to appeal against the decision of the Court of
 G Appeal sitting at Enugu delivered on 3rd day of March, 2009 Coram
 V. A.O. Oimage, S. S. Alagoa and S.D. Bage (JJCA).
 2. An order granting the appellants/applicants leave to appeal
 against the said decision.
 3. An order granting the appellants/applicants an extension
 H of time within which to file the Notice and Grounds of Appeal against
 the decision referred to in (1) supra.
 4. An order granting leave for the appeal to be heard on the

bundle of documents compiled by the appellants/applicants as the
 Records of this appeal.

5. An order deeming as properly filed and served the ap-
 pellants/applicants Notice of Appeal and all other processes already
 filed and served on the respondent.
 And for such further Orders as this Honourable Court may deem B
 proper to make in the circumstances.

The grounds on which the application is predicted are as follows:

1. That the decision of the Court of Appeal which the appli-
 cants are appealing against was delivered on 3/3/09. C
2. The applicants have 90 days within which to file their
 notice of appeal by the Rules of this Honourable Court.
3. The applicants' 90 days lapsed on 3/6/09.
4. The applicants were not aware that the said decision was
 given on the said date until their counsel was served with a supple- D
 mentary record of appeal on 12/01/10 by the respondents in respect
 of an interlocutory appeal against the ruling of the Court of Appeal
 delivered on 27th day of January, 2009 Coram Justice V.A.O. Oimage,
 Justice S. S. Alagoa and Justice S.D. Bage striking out the applicants
 motion dated 22/09/05 for a trial de novo. E

5. The applicants were already out of time to file their notice
 of appeal by the time they became aware of the said order vide the
 supplementary record of proceedings/decision of the Court of Appeal
 of 3/3/09 served on the applicants counsel by the respondents. F
 In the circumstance, it is mandatory under the Rules of this Honour-
 able Court for the applicants to seek the prayers embodied in this
 motion paper.

6. The decision of the Court of Appeal which the appellants
 are seeking leave to appeal against is a final decision of the Court of G
 Appeal on the matter under Section 318 (1) of the 1999 Constitution
 of the Federal Republic of Nigeria.

7. The Rules of this Honourable Court allow the appellants/
 applicants to prepare and transmit for the use of the Honourable H
 Justices of this Court and ensure service on all the respondents, a
 Record of Appeal either simultaneously with the Notice of Appeal or
 within 14 days after filing the Notice of Appeal which the appellants
 are now praying this Honourable Court for leave to file out of time.

8. This Honourable Court has the vires to grant the appellants/

applicants application for extension of time and other orders sought in this application.

The motion on notice is supported by a fifteen paragraphs affidavits with three exhibits attached. The three documents attached to this application are-

- B
- a. Certified True Copy of judgment of the Court of Appeal.
 - b. Supplementary Record of Appeal proceedings.
 - c. Notice of Appeal showing arguable grounds of appeal.

Other processes filed by the appellants/applicants relating to the application are-

- C
1. Further affidavit in support filed on 12/1/2011.
 2. Further and Better Affidavit in support filed on 9/3/2011.
 3. Further, Further and Better Affidavit in support filed on 9/3/2011.
 4. Written Argument in support of the Motion on Notice filed on 23/11/10.
 5. Counter-affidavit in opposition to the 1st set of Respondents' Notice of Supplementary objection dated 6th December, 2010 filed on 12/1/11.
 6. Notice of Appeal filed on 12/11/10.
 7. List of Additional Authorities dated 14/3/11.
- E

Dr. Dapo Olanipekun on behalf of the appellants/applicants adopted and relied on the above mentioned documents in urging the Court to grant the prayers sought by the appellants/applicants.

F

The learned counsel emphasized that the application is in respect of an appeal struck out by the lower court where the Rules of Court is quite clear on the circumstances prior to which the court can take such steps. The order of the lower court was a final decision. There is no appeal before that court to re-list. The only option is to invoke Order 8 Rule 11 of the Supreme Court Rules 1999 as amended. The case of Chief John Oyegun v. Chief Francis Arthur Nzeribe (2010) 7 NWLR (pt.1194) pg. 577 cited by the learned senior counsel for the 1st set of respondents is not relevant and quite distinguishable from the application in hand. The learned counsel cited cases.

G

Tony Anozia v. A. G. Lagos State (2010) 15 NWLR (pt.1216) pg.207. FBN Plc. v. TSA Ltd (2010) 15 NWLR (pt.1216) pg 247 at pg. 296. Ojora v. Agip Plc (2005) All FWLR (pt.267) pg.1433 at pg.1455.

H

Erisi v. Idika (1987) 4 NWLR (pt.66) pg.503 at pg. 517.

In the brief of argument the appellants/applicants submitted that this Court has the power to invoke Order 2 Rule 31 (1) of the Supreme Court rules 1999 as amended to extend time to do an act prescribed by the Rules. The discretion however must be exercised judicially and judiciously. Cases cited in support of the foregoing are-
B
Odofoin v. Agu (1992) 23 NSCC (pt 1) pg.520 at pg. 523 (1992) 3 NWLR (pt.229) pg.350 at pg.368.

National Bank v. Are Brothers (1977) 11 NSCC pg 382 at 387. Elobisi v. Onyeonwu (1989) 5 NWLR (pt.120) pg.224 at pg. 252. Doherty v. Doherty (1964) 1 All WLR pg.299 SC. Ogar v. James (2001) 10 NWLR (pt. 722) pg.621 at pg. 636. Sanusi v. Ayoola (1992) 23 NSCC (pt.111) pg. 420 at 431.

In view of the fact that the applicants are appealing out of time, they have filed a tripod application seeking prayers as follows-
D

- a. Extension of time to seek leave to appeal.
- b. Leave to appeal and
- c. Extension of time to file Notice and grounds of appeal.

The applicants further submitted that the Supreme Court in a plethora of cases, laid down principles for granting such application as provided in Order 3 Rule 4 (2) of the Supreme Court Rules. Some of these cases were cited. They are as follows-
E

Unipetrol Nig. Ltd. v. Bucknor (1994) 5 NWLR (pt.344 pg.360 at 364-365.

Chrisray Nig. Ltd. v. Elson & Neil Ltd. (1990) 3 NWLR (pt. 140) pg.630 at pg. 643.

Yesufu v. Co-operative Bank (1989) 20 NSCC (pt 11) pg.489 at 495-496 (1989) 3 NWLR (pt. 110) pg.483 at 494.

Bowaye v. Adediwura (1976) 6 SC 143, Ibodo v. Enarofia (1930) 5-7 SC 28.

Lawal v. Orbih (1980) 5-7 SC 28, Osinupebi v. Saibu (1932) 7SC 104.

Shittu & Anor. V. Osibanjo & Anor (1994)1 SCNJ (pt.1) pg.37.
H

The applicants made reference to paragraphs 4 (a-k) 5, 6, 7, 8, 9, 10, 11 and 12 of the affidavit in support as providing the necessary materials for granting the motion. The deposition show good cogent and substantial reasons for failure to apply for leave

within the prescribed time.

This Court is urged to grant the application as refusal is tantamount to the deprivation of the applicants' right to litigate and seek redress as guaranteed by the Constitution of the Federal Republic of Nigeria. The grounds of appeal as disclosed in the Notice of appeal prima facie show good cause why the appeal should be heard. The applicants were not aware of the judgment of the lower court delivered on 3/3/09 until the counsel was served with the supplementary Record of appeal by the respondents in suit No. SC/115/09. The Counsel-in-Chambers who was instructed to file an appeal against the judgment inadvertently omitted to do so. The applicants submitted that this Court should not punish the applicants for the inadvertence of counsel who failed to file the appeal within time. The applicants buttressed this with cases- Iroegbu v. Okuwordu (1990) 4 NWLR (pt.259) pg.643, Alagbe v. Abimbola (1978) 11 NSC pg. 84 at pg. 86-87.

The Records in the original appeal could not be timeously compiled and transferred to the Court of Appeal not because of the lapse of the applicants or counsel but due to the loss of the Record of proceedings of the trial court by the Registrar of the Court. The applicants submitted that they have not unduly delayed the filing of the appeal necessitating an extension of time. The applicants pray this Court to exercise its discretion in favour of granting the application.

Dr. J.O. Ibik (SAN) learned senior counsel for the 1st set of respondents representing themselves and on behalf of Umugama village, Ukwulu, opposed this application. The processes filed are (1) a Notice of preliminary objection filed on 8/12/2010.

(2) 1st set of respondents counter-affidavit and brief of Argument in opposition to the appellants/applicants' motion on notice filed on 12/11/10 in suit SC.418/2010. He adopted and relied on the arguments and submission in the processes.

The learned senior counsel, Mr. Ibik argued that the appeal SC.413/2010 filed on 12/11/10 is an abuse of court process. He based the grounds for the preliminary objection on the following points -

a. The decision of the Court of Appeal to strike out the appellants appeal in the consolidated suits No A/53/75 and A/11/77 was based solely on official certification of non-compliance with the requirements imposed on the appellants by the Registrar of the trial

court.

b. By striking out the appellants appeal, the lower court acted suo motu within the powers donated by the Court of Appeal Rules 2007.

c. An appeal struck out (or even dismissed) by the Court of Appeal for non-compliance with conditions or requirements imposed on the appellant is can be restored by the Court of Appeal as expressly provided by the Court of Appeal Rules.

d. Appellate jurisdiction can only be invoked if conferred by the Constitution or Statute.

e. There is no constitutional or statutory provision entitling the appellants/applicants to appeal against the said order of the Court of Appeal.

f. The appellants/applicants in the instant motion on notice have already filed in SC.418/2010 on 12th November, 2010 a notice of appeal dated 12th November, 2010 against the decision of the Court of Appeal, Enugu Division contained in the order of the said court Coram Omege Alagoa and Bage, JJCA dated 3rd March, 2009 -Exhibit OJ 1 hereto.

g. The proposed grounds of appeal marked Exhibit C and attached to the said appellants'/applicants' motion on notice are the same as the grounds of appeal contained in the appellant's notice of appeal dated and filed on 12th November, 2010 in SC.413/2010.

h. The same appellants/applicants had earlier brought a motion on notice dated 24th September, 2010 and filed on 5th October in SC 115/2009 on the same trinity prayers as contained in the instant motion on Notice in SC.418/2010 which said Motion in SC.115/2009 was struck out by the Supreme Court on 12th October, 2010 vide Ruling of the Supreme Court in SC.115/2009 dated 12th October, 2010 and marked Exhibit OJ 2.

i. The same appellants/applicants had on 5th October, 2010 as appellants appealed against the said decision of the Court of Appeal Enugu Division vide notice of appeal in SC.115/2009 dated 5th of October, 2010 and filed on 5th October, 2010 marked Exhibit OJ 3 hereto.

j. The appellants/applicants are aware that the Supreme Court made an order dated 3rd November, 2010 on SC 115/2009 that the appeal therein be heard out of turn and adjourned the appeal

to 15/3/2011 for hearing. Vide the Ruling delivered by Musdapher JSC marked Exh. OJ 4 hereto.

k. By bringing the Motion in SC.418/2010 the appellants/applicants intend to cause confusion and frustrate the hearing of the appeal in SC. 115/2009 thereby annoying and harassing the 1st set of respondents.

The learned senior counsel exhibited the two notices of appeal filed in the appeals, SC.115/2010 and SC 418/2010 and thereafter proceeded to argue and submit in the preliminary objection that the order of the lower court in CA/E/30/2009 of 3/3/09 is not appealable hence the appellants/applicants motion on notice is an abuse of process. The exercise of appellate jurisdiction is statutory. Order 8 Rule 20 of the court of appeal rules 2007 makes provision for restoration of an appeal struck out per such proceedings Exhibits B1 and B2 are not appealable at all.

Olowu & ors v. Abolobe & ors (1993) 3 NWLR (pt 293) pg.255 at pg.277

Chukwuka v. Ezulike (1986) 5 NWLR (pt.45) pg.892. Ogbu v. Urum (1981) 4 SC 1.

Yonmuren v. Modern Signs (Nig) Ltd. (1935) 1 NWLR (pt.110) pg. 483.

None of the appellants and Respondents was represented in the proceedings in CA/E/30/2009 Exh. B1 emanated from the Registrar of the trial court whose decision in Suit No. A/52/75 and A/11/77 consolidated was appealed against. Exh. B1 is an official communication to the lower court that the appellants/applicants failed to comply with the conditions of appeal imposed by the Registrar of the trial court. It is not therefore open to the appellants/applicants whose appeal was struck out for non-compliance to resort to appeal by seeking leave to appeal. The Rules of Court are strictly binding on the parties and the court. The learned senior counsel further contended that the implication of providing in the Rules for restoring an appeal dismissed or struck out is that the matter is regarded as having not been finally determined and can be re-opened for final adjudication. The learned senior counsel also emphasized that the appellants/applicants are not right in assuming that the Assistant Chief litigation Officer is a Registrar within the meaning, context and definition of Registrar in the High Court of Anambra (Civil Procedure)

Rules 2006.

He submitted that Rules of Court are strictly binding on the parties and the court and cited cases in support.

Onwuka v. Ononuju (2009) 11 NWLR (pt.151) pg 174, Mumu v. Agor (1993) 8 NWLR (pt.313) pg.573 at pg 582. Williams v. Hope Rising voluntary Funds Society (1982) 1 All NLR pt.1 at pg.45.

The learned senior counsel concluded that the application is an abuse of court process as it glaringly shows the mala fide of the applicants in the use of court process. He referred to cases. Abubakar v. Bebeji & 1 Or (2008) 15 WRN pg.1 at pg. 56-57, Ogoeiofo v. Ogoeiofo (2002) 12 NWLR (pt.780) pg.17. Okafor v. A-G Anambra State (1991) 7 SCNJ (pt. 11) pg.345 Okorodudu v. Okoromadu (2002) 23 WRN pg.188.

By way of response to the appellants'/applicants' written address on the motion on notice, the 1st set of respondents observed that when Exh. B2 was made the judgment which was delivered in the consolidated suits had not matured into an appeal entered in the lower court. The reference of the appellants/applicants is the written address to then main appeal before the court below is a misnomer because no such appeal was entered. This court is urged to dismiss the application, as the order of court below appealed against is not a final decision of the pending appeal arising from suit No. A/53/75 and A/11/77 as contemplated in Section 318 (1) and (4) of the 1999 Constitution. There is no constitutional or statutory provision to appeal or seek leave to appeal against the order in CA/E/30/2009 as there is an alternative provision in the Rules of appeal for restoration of an appeal struck out for non-compliance with the requirement of appeal.

The 2nd set of respondents represented by Mr. J. K. Gadzama (SAN) the learned senior counsel, filed the under mentioned processes to oppose the application

a. Counter affidavit filed on 14/1/2011.

b. A Written Reply filed on 14/1/11.

The learned senior counsel adopted and relied on the arguments and submission in the two processes. He gave brief background facts of the case before formulating two issues for determination in the address as follows-

a. Whether the appellants/applicants have duly complied

with the condition precedent to enable them bring this application.

b. Whether the appellants/applicants have satisfied the conditions for the grant of the reliefs sought by them in this application.

The learned senior counsel examined the provision of Order 8 Rule 1, 2, 3, 4 and 20 of the Court of Appeal Rule 2007 and concluded that the appeal was struck out for non-compliance with Order 8 Rule 1 of the Court of Appeal Rules 2007 - as the appellants/applicants did not fulfill any conditions imposed on them by the Registrar particularly did not comply with the Rules of Court to compile and transit the record of appeal within 60 days after filing of the Notice of appeal. The Registrar rightly issued the certificate of non-compliance under Order 8 Rule 1 of the Court of Appeal Rules 2007. But Order 8 Rule 20 of the same Rules provides for restoration of any appeal struck out upon filing a motion to the same court which has discretion for good and sufficient cause to order that such appeal be restored upon such terms as it may think fit. The application to appeal under consideration is incompetent as the appellants/applicants have failed to fulfill the conditions precedent to enable the court below to exercise its jurisdiction to hear the appeal. In this event failure to apply to the Court of Appeal to restore the appeal robs this court of the jurisdiction to entertain this application. The learned senior counsel rested his submission on cases

Chief John Oyegun v. Chief Francis Arthur Nzeribe (2010) 7 NWLR (Pt. 1194) pg. 577

L.O. Owoseni v. Joshua Ibiowotisi Faloye & Anor (2005) 14 NWLR (pt.719) at pg. 740.

Adesola v. Abidoeye (1999)14 NWLR (pt. 637) pg 28 at 58.

The learned senior counsel submitted that appellants/applicants failed to disclose cogent and sufficient reasons to enable this Court grant this application. This is one of the two grounds stipulated under Order 10 Rule 4 (2) of the Court of Appeal Rules whereas the two conditions must co-exist. The inadvertence of counsel will not avail the appellants/applicants because they have a duty over the matter. He cited cases in *National Inland Water Ways Authority v. Shell Petroleum Development Co. of Nig. Ltd.* (2008) 13 NWLR (pt.1103) pg.48 at pg. 64-65, *Agu v. Ayalogu* (1999) 6 NWLR (pt.606) pg.205. *Minister of Petroleum and Mineral Resources v. Expo Shipping Line Nig. Ltd.* (2010) 12 NWLR (pt.1203) pg. 261 at pg. 280.

The learned senior counsel submitted that Exhibits B1 and B2 are official Records of the Court compiled by officers of the court while the Assistant Chief Litigation Officer of the High Court of Anambra State is an official of that court and a Registrar of court by virtue of his position. The application is not only premature but it constitutes an abuse of the process of this court. This court is urged to dismiss it.

I have given painstaking consideration to the arguments, submission and the list of authorities cited by the parties in favour of and against granting of the application. In my opinion, the matter in hand is short and straightforward as it is predicated on the exercise of the applicant's constitutional right of appeal and the application of the Rules of court. It is worthy of note that the powers to make Rules of Court are vested in both the President of the Court of Appeal and the Chief Justice of Nigeria by the Constitution. In the case of the President of the Court of Appeal, section 248 of the 1999 Constitution provided as follows-

"Subject to the provisions of any Act of the National Assembly, the President of the Court of Appeal may make rules for regulating the practice and procedure of the Court of Appeal."

Section 236 of the same 1999 Constitution provides that-

"Subject to the provisions of any Act of the National Assembly the Chief Justice of Nigeria may make rules for regulating the practice and procedure of the Supreme Court."

Rules of court are designed to be lubricants of the machinery of justice and they contain certain minute details of the various steps which a litigant is expected to take in the process of getting the court to hear and adjudicate on the different types of cases which come before it. *Akanbi v. Alao* (1939) 3 NWLR (pt 108) pg 118, *Chime v. Ude* (1996) 7 NWLR (pt 461) pg.379, *Oyeyipo v. Oyinloye* (1987) 1 NWLR (pt.50) pg 356.

In the case of *Erisi v. Idika* (1987) 4 NWLR (pt. 66) pg. 503 the court held that :-

"From the foregoing it has to be borne in mind that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction, inherent powers endure to a superior court of record enabling it to make such orders or take such actions as will protect or enhance the

dignity of the court or promote the speedy or fair dispensation of justice. Inherent jurisdiction however does not empower it to act in a manner outside its jurisdiction and cannot override the finality of a court's judgment."

B In this application brought pursuant to Order 2 Rule 31 of the Supreme Court Rules 1999 as amended and under the inherent jurisdiction of this court, the appellants/applicants are seeking by way of tripod prayers an extension of time to appeal against the decision of the Court of Appeal sitting in Enugu, delivered on 3rd day of March, 2009 - Coram V. A.O. Omaxe, Justice S.S. Alagoa and S.D. Bage (JJCA) and also for leave to be heard in the appeal on the bundle of documents complied by the appellants/applicant as the Records of Appeal.

Order 2 rule 31 (1) of the Supreme Court Rules 1999 as amended provides that-

D "The court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply or may direct a departure from these Rules in any other way when this is required in the interest of justice."

E The Court of Appeal has a relevant provision in its Rules incorporated as Order 7 Rule 10 (1).

At the time the appellants/applicants filed this motion-

1. The decision of the Court of Appeal in Appeal CA/E/30/2009 was delivered on 3/3/09.

F 2. The applicants have 90 days within which to file their Notice of Appeal by the rules of the court - Section 25 of the Court of Appeal Act 1976 as amended, which expired on 3/6/09.

Application for extension of time within which to appeal is at the discretion of the court while such discretion must be exercised judicially and judiciously.

G In the case *Williams v. Hope Rising Voluntary Funds Society* (1982) 2 SC 145 at pg. 152, the Supreme Court held that-

H When a court is called upon to make an order for extension of time within which to do certain things (i.e. extension of time presented by the Rules of court for taking certain procedural steps) the court ought always to bear in mind that the Rules of court must prima facie be obeyed and that it therefore follows that in order to justify the exercise of the court's discretion in extending the time within which

a procedural step has to be taken there must be some material upon which to base the exercise of that discretion."

Elobisi v. Onyeonwu (1939) 5 NWLR (pt.120) pg. 224 at pg 252. Doherty v. Doherty (1964) 1 All WLR (pt.279), Ogar v. James (2001) 10 NWLR (pt. 722) pg.621 at pg. 636, Sanusi v. Ayoola (1992) 23 NSC (pt 111) pg 420 at pg 431.

All the parties in this application unanimously agree that-

"Where leave to appeal against a decision is required and time to seek leave to appeal and file notice of appeal has expired it is imperative that tripod application be filed, that is, a prayer for

a. Extension of time to seek leave to appeal

b. Leave to appeal and

c. Extension of time to appeal

For it to be a valid appeal the three reliefs must be granted according to the Rules of court."

The principles governing the grant of extension of time to apply for leave to appeal and extension of time to appeal as stated earlier in this ruling have been settled by several decisions of this court. They are:-

1. Substantial reasons for the failure to appeal within time

2. Grounds of appeal which prima facie show good cause why the appeal should be heard -the two should co-exist.

Ukwu v. Bunge (1997) 3 NWLR (pt.518) pg.527 at pg.541, Unipetrol (Nig.) Plc v. Bucknor (1994) 5 NWLR (pt 344) pg 360 at 364-365.

Chrisray Nig. Ltd. v. Elson & Neil Ltd. (1990) 3 NWLR (pt.140) pg.630 at pg. 643, Yesufu v. Co-operative Bank (1989) 20 NSCC pg 489 at pgs. 495 - 496, Ibodo v Enarofia (1980) 5-7 SC 28. Lamai v. Orbih (1980) 5-7 SC 28. Osinupebi v. Saibu (1982) 7 SC 104, Shittu & Anor v. Osibanjo & Anor (1998) 1 SCNJ (pt.1) 37.

It is apt at this stage of this Ruling to recapitulate the background facts of the land matter leading to this application. I find it convenient and also for ease of reference to incorporate the relevant paragraphs of the affidavit in support of this application so as to serve the dual purpose of shedding light into the background facts of the appeal and to serve as the cogent materials in support of the application.

The most relevant paragraphs are as follows-

4 (a) The appellants/applicants herein were plaintiffs in a land

matter at the High Court of Justice Anambra State wherein judgment was given against them by the trial court on 12th November, 1999 in a consolidated Suit Nos. AA/FF/75 and AA/11/77.

(b) Dissatisfied with the judgment in paragraph (a) supra, the appellants/applicants appealed to the court of appeal vide a Notice of Appeal dated 17th November, 1999 and subsequently filed a stay of judgment of the trial court.

(c) The appellants/applicants made all necessary funds available for the compilation and transmission of the Records of appeal to the Court of Appeal but the Registry of the High Court of Anambra State failed to do so.

(d) On failure of the Registrar of the trial court to file the Records of Appeal/proceedings within time, the appellants/applicants therein having mobilized the registry accordingly filed a motion on Notice before the Court of Appeal to compel the said Record of appeal/proceedings and transit same to the Court of Appeal. The Court of Appeal granted the order as prayed.

(e) Despite the said order of the Court of Appeal in the foregoing paragraph and upon the continued failure of the Registrar to transmit the Record as ordered, the Chief Registrar of the trial court wrote a letter dated April 14, 2005 informing the Court of Appeal that the trial court's Record book could still not be located. Annexed hereto and marked as Exhibit A is the Chief Registrar's letter dated 14/4/05.

(f) A panel of enquiry was set up by the Chief Judge of Anambra State to unravel the mystery surrounding the disappearance of the record book of the trial court.

(g) When the record could still not be located after the panel of enquiry concluded its enquiry, the appellants/applicants filed a motion before the court of appeal for an Order directing the Chief Judge of the Anambra State High Court to re-assign the matter to another judge for a re-trial or a trial de novo and order the accelerated hearing of same.

(h) The lower court per Ogebe Rowland and Mikailu JJCA ordered counsel to file and exchange written addresses within stipulated time after which the lower court adjourned the matter to 3rd October, 2006 for hearing of the motion praying for an order directing the Chief Judge of Anambra State to re-assign the matter for re-trial

or trial de novo.

(i) After a couple of adjournments and some lapse of time the matter came up on 13th January, 2009 before another constituted panel of the Court of appeal Coram Omage, Isamiya and Ariwoola JJCA which panel without considering the appellants/applicants motion and the written addresses filed by the parties filed on the Order of the court, struck out the appellants'/applicants' motion, thereafter appealed against the said order to this Honourable Court striking out their motion vide Appeal No. SC.115/09

(j) While the appellants/applicants were pursuing their appeal against the lower courts' Order striking out their motion before this Honourable Court, their main appeal before the lower court was struck out by the Court of Appeal upon the certificate of non-compliance issued by the lower court's Assistant Chief Litigation Officer instead of the Registrar and without an application of any of the respondents praying the Court of Appeal to do so.

5. Upon becoming aware of the facts disclosed in paragraph 3 supra, Chief Wole Olanipekun SAN, my principal upon the instructions of the applicants instructed a counsel in our firm and myself to conduct a search on the case file at the Court of Appeal and take all steps necessary to appeal against the said lower courts decision by filing all the necessary processes.

6. I conducted the search as instructed and briefed my colleague appropriately to enable her file the appeal as directed by my principal.

7. However, unknown to me and my principal and due to a mix-up in coordinating my principal's instructions, it was discovered after my colleague had travelled to the United Kingdom for post graduate studies that the appeal had not been filed, which knowledge came to light on the 7th day of September, 2010.

8. My principal who was displeased upon discovering the above facts directed me to comply with the instructions aforementioned by ensuring that all necessary processes are filed in this matter.

9. The applicants are now out of time to appeal against the said Order of the Court of Appeal hence the filing of this application.

10. I know that the proposed Notice of Appeal attached hereto and marked Exhibit C and the grounds contained therein, disclose good cause why the appeal should be heard against the striking out

order of the lower court.

11. To ensue the prompt hearing and determination of this appeal the applicants are willing to help both the court below and this honourable court in compiling and transmitting the record of appeal to this honourable court and serve same on all the respondents from the foregoing facts deposed to in the affidavit, it is apparent that-

a. The appellant/applicants were not aware of the decision of the lower court until when the respondents filed and served on the appellants/applicants the supplementary records of appeal.

b. Non-compilation and transmission of the Record of Appeal from the High Court of Anambra State to the Court of Appeal Enugu State which formed the basis of the decision of the Court of Appeal in dismissing appellants/applicants appeal was not due to failure of the appellant/applicants or their counsel, bit the loss of the Record of proceeding by the Registrar of the trial court.

Furthermore, the counsel who was instructed to file the appeal inadvertently omitted to file the appeal. On the overall, the appellants/applicants urged that they have complied with the conditions and requirements of both the Rules of this court and the case laws by deposing in the affidavit in support of the application good and substantial reasons for the delay in filing an appeal and have also exhibited materials to wit-certified True copy of judgment of the Court of Appeal dismissing the appeal, the supplementary record of appeal/proceedings and the Notice of Appeal showing arguable grounds of appeal to entitle them to the grant of this application.

In opposing this application - the 1st set of respondents filed a Notice of Preliminary objection and a brief of argument. The legal points raised and argued in both processes are interwoven - hence they shall be considered together. The points raised by the 2nd respondents are equally similar. The facts argued by the respondents are that-

1. No appeal was entered at the lower court before the appeal CA/E/30/09 was struck out as the Record of Appeal was not compiled and transmitted to the court.

2. The certificate of non-compliance was issued by the Registrar - an officer of court upon which the court relied to strike out the appeal. Exhibit B1 and B2 are official acts respectively taken by the lower courts as prescribed by the respective Rules of court dealing

with consequence of non-compliance by appellants. The 1st sets of respondents were not privy to or represented by counsel in the proceeding in CA/E/30/2009.

3. Order 8 Rule 20 of the Court of Appeal Rules 2007 makes adequate provision for restoration of any appeal struck out per such proceedings.

4. There is no statutory enactment rending such order of the court below as in Exhibit B2 appealable.

a. The 2nd set of respondents in the prevailing circumstance see this application to appeal as premature.

b. There were no sufficient materials before the court based on the affidavit evidence of the applicants to enable this court to exercise its discretion in favour of granting the application in favour of the applicants.

The application is an abuse of court process.

It is mandatory for me to examine the provisions of the Rules of court pursuant to this application.

Order 2 Rules 31 (2) of the Supreme Court Rules (as amended) in 1999 provided that-

“Every application for an enlargement of time in which to appeal or in which to apply for leave to appeal shall be supported by an Affidavit setting out good and substantial reasons for the failure to Appeal or to apply for leave to appeal within the prescribed period. There shall be exhibited or annexed to such affidavit.

a. A copy of the judgment from which it is intended to appeal.

b. A copy of other proceedings necessary to support the complaints against the judgment and

c. Grounds of appeal which prima facie show good cause why the appeal should be heard.”

Order 8 Rule 1 of the court of Appeal rules 2007 provides that-

“The Register of the court below shall within sixty days after the filing of a notice of appeal compile and transmit the record of appeal to the court.”

Order 8 Rule 4 stipulates that-

“Where at the expiration of 60 days after the filing of the notice of appeal the Registrar has failed and or neglected to compile and transmit the records of appeal in accordance with the proceeding provisions of this Rule, it shall become mandatory for the appellants

to compile the records of all documents and exhibits necessary for his appeal and transmit to the court within 30 days after the registrar's failure or neglect."

Order 8 Rule 19 provided that -

B "If the registrar has failed to compile and transmit the records under Rule 1 and the appellant has also failed to compile and transmit the record in accordance with Rule 4, the respondent may by notice of motion move the court to dismiss the appeal."

Order 8 rule 20 provides that -

C "An appellant whose appeal has been dismissed under this rule may apply by notice of motion that this appeal be restored and by any such application may be made to the court, which may in its discretion for good and sufficient cause order that such appeal be restored upon as it may think fit."

D For an application for extension of time to appeal to succeed, the applicant must show to the court that the delay in bringing the application is neither wilful nor inordinate that there are good and substantial reasons for failure to appeal within the prescribed period and there are grounds which prima facie show good cause why the appeal should be heard. Okere v. Nlem (1992)4 NWLR (pt 234) pg.132 SC., C.C.B (Nig.) Ltd. v. Oguru (1993) 3 NWLR (pt.284) pg 630, Ukpe Ibodo & ors v. Enorofia (1981) 5-7 SC 41 at pg. 51.

F The two conditions are held to co-exist. If one is non-existent the application must fail - the two conditions are conjunctive not disjunctive. It is however not the time as it is not within the jurisdiction of this court at this stage to enquire into the merit of the case as it will surely amount to deciding the substantive matter in an interlocutory application which the law frowns upon. E.F.P. Co. Ltd v. NDIC (2007) 9 NWLR (pt.1039) pg.216, University of Lagos v. Olaniyan (1985) 1 NWLR (pt.1) 156, Obikoya v. Wema Bank (1989) 1, NWLR (pt. 96) pg 157, Holman Bros (Nig.) Ltd v. Kigo (Nig.) (1980) 8-11 SC pg 43, Egbe v. Onogun (1972) 1 All NLR (pt.1) pg. 95, Ojukwu v. Governor of Lagos State No. 1 (1985) 2 NWLR (pt.10) pg.806.

H The Supreme Court will normally exercise its discretion judicially and judiciously. It will exercise its discretion in favour of the appellant where failure to file on time was due to the negligence of the counsel or excusable or pardonable error of counsel. The failure of the party to act within time when caused by an omission or lapse

of counsel will not be taken out on an appellant.

Ahmadu v. Salawu (1974) All NLR pg.822 at pgs. 826- 827, Shonu v. Afribank (Nig.) Plc (2000) 13 NWLR (pt. 684) 392, Doherty v. Doherty (1964) 1 All NLR pg.292, Bomaje v. Adediwura (1976) 6 SC pg.143 at pg. 147.

B This is extended to error of judgment or inadvertence on the part of the counsel's clerk or failure of communication at the crucial time between him and the plaintiff/appellant/applicant particularly where the mistake or inadvertence is in respect of procedural matters. The court will usually lean towards accommodating the party in the interest and a determination of the case on the merits. C

D The court will also grant the application where his being out of time is due to lack of appreciation of the judgment. Though the court will however take into consideration the length of time in exercising its discretion, the length of time between the judgments appealed against and the application for extension of time is immaterial so long as the applicant can show good cause for the delay. The list of factors to be taken into consideration are in-exhaustive each case has to be decided on its own peculiar facts and circumstances. The grounds of appeal must be substantial and arguable. The applicants attached a copy of Notice of Appeal with the grounds to this application. In the grounds of appeal, the appellants/applicants raised legal issues as follows-

F a. No Notice of non-compliance was issued by a Registrar of the Anambra State High court of Justice, Awka as the purported notice was issued by an Assistant Chief Litigation Officer of the Anambra State High Court of Justice, Awka.

G b. Order 8 rule 1 of the Court of Appeal rules 2007 does not empower the Registrar or any officer of the High Court to issue notice of non-compliance.

c. No application was made to the court by the respondents as required by Order 8 rule 18 of the Court of appeal Rules 2007.

H d. There was no pending appeal before the lower court-to be struck out.

e. The lower court acted without jurisdiction by striking out the appellants/applicants appeal as no hearing notice was issued and served on the appellants to notify them of the proceedings of 3rd March, 2009. Subsequently, the appellants did not participate

in the proceedings leading up to the order. This is a strong reason why I think the submission of the respondents that this application is premature must be faulted. Though the Rules stipulate a provision for restoration of an appeal dismissed for reason of non-compliance, the applicants in the instant application cannot take advantage of Order 8 rule 20. The glaring reason being that the procedure stipulated in Order 8 rule 18 of the Court of Appeal Rules 2007 was not followed. For the sake of emphasis I shall restate the provision-

“If the registrar has failed to compile and transmit the records under Rules 1 and the appellant has also failed to compile and transmit the records in accordance with Rule 4, the respondent may by notice of motion move the court to dismiss the appeal.”

The foregoing procedure was not followed. The lower court lacked this jurisdiction to have dismissed the appeal on the certificate of non-compliance issued directly by the registrar without hearing from the respondents. That was the position under the 2002 Rules of the Court of Appeal, which is now different under the 2007 Rules.

The decision of this court in *Oyegun v. Nzeribe* (2010) 7 NWLR (pt. 1194) pg. 577 is distinguishable as provisions of the Court of Appeal Rules was properly complied with in *Oyegun's* case. It is the stand of this court that the length of time that has passed is irrelevant where a judgment is given without jurisdiction. It can never be too late to appeal against it, as the reason for the delay ceases to be a relevant factor. The paramount interest of the court will be to consider whether or not it appears the judgment was given without jurisdiction.

I cannot but quote from the judgment of this court in the case *Ukulu v. Bunge* (1997) 8 NWLR (pt.518) pg 527 as follows-

The principle governing the grant of extension of time to apply for leave And extension of time to appeal as stated earlier in this judgment have been settled in several decisions of this court, some of which have been considered in this judgment that there should be -

Substantial reasons for the failure to appeal within time and grounds of appeal which prima facie show good cause why the appeal should be heard. The two must be present.

But where the proposed ground of appeal complains of lack of jurisdiction and prima facie appears so, as in this case, I am of the view that it may not be necessary to inquire into the reasons for

the delay. The question of jurisdiction is a constitutional issue which may be raised at any stage of a proceeding even for the first time in this court.”

Lauwers Import Export v. Jozebson Industries Ltd. (1988)3 NWLR (pt.83) pg. 429, *Timitimi v. Amabebe* (1953) 14 WACA 379. *Westminster Bank Ltd. v. Edwards & ors* (1942) A.C. 529, *Tukur v. Government of Gongola State* (1987) 2 NWLR (pt. 117) pg. 517 at 545, *Mustapha v. Governor of Lagos State* (1987) 2 NWLR (pt. 58) pg. 539.

All the respondents referred to a sister appeal No. SC/115/2009 now before this court in which the parties have joined issues. The sister appeal had been adjourned for hearing by this court. It will in the circumstance amount to a waste and bad management of litigation time to direct the parties in this application to invoke the provisions of Order 8 Rule 20 of the Court of Appeal Rules to re-list the appeal before the lower court while this application to appeal in Appeal No SC.418/2010 can be granted in the interest of justice.

In the final analysis, this court has ample materials before it on which it can exercise its discretion to grant this application.

(1) The application to appeal out of time predicated on the tripod prayers is granted.

Since it will amount to putting the cart before the horse, to file the Notice of Appeal before granting this application.

(2) The applicants are allowed seven days to re-file the Notice of Appeal filed on 12/11/2010.

(3) Order for departure from the Rules of this court is also granted.

(4) The bundle of documents compiled by the appellants/ applicants shall become the record for the purpose of this appeal.

(5) The Record shall be filed and served on all the respondents within 14 days of filing the Notice of Appeal.

(6) The 1st and 2nd set of respondents is allowed 21 days to file supplementary record if necessary.

No order as to costs.

MOHAMMED JSC

By a motion on Notice filed on 12th November, 2010, the Applicants prayed for an order granting them extension of time to seek leave to appeal, leave to appeal and extension of time within which to file the Notice and Grounds of Appeal against the decision of the court of Appeal Enugu Division in its Ruling delivered on 3rd March, 2009, striking out their appeal on a Notice of Non-compliance with the conditions of appeal filed in that Court by the Assistant Chief Litigation Officer of the trial Court.

I have been privileged to read advance, the lead Ruling of my learned brother Adekeye, JSC in this application which has just been delivered. I am fully in support of her view that this application deserves to succeed. This is because the principles governing the requirements of granting application for extension of time to seek leave to appeal, leave to appeal and extension of time within which to file the Notice of Appeal, have been well settled in several decisions of this Court including *Lauwers Import/Export v. Jozebson Industries Ltd.* (1988) 3 N.W.L.R. (pt. 83) 429 and *Unipetrol Nigeria Ltd. v. Bucknor* (1994) 5 N.W.L.R. (Pt. 344) 360 at 364 - 365. For such application to succeed the applicant must show by evidence in the affidavit in support of the application that the failure to file the appeal within the prescribed period is neither wilful nor inordinate and there are substantial reasons for the failure. The grounds of appeal contained in the Notice of Appeal in support of the application must also prime facie show good cause why the appeal should be heard.

In the present application, it is not disputed that the applicants became aware of the decision of the Court of Appeal of 3rd March, 2009 on 12th January, 2010, when they were served the supplementary records of appeal in another pending appeal between the same parties. It is obvious therefore that the applicants were already out of time before they became aware of the decision to be appealed against which satisfies the first requirement. With regard to the second requirement of the substance of the grounds of appeal, I quote below the 3 grounds of appeal filed in support of the application. They are-

“1. The lower Court erred in law and came to a perverse decision when it held thus:

“The Registrar has issue (sic) a notice of non-compliance with the Rules and there is no pending application for de-parture (sic) from the Rules. The appeal is therefore struck-out.”

PARTICULARS OF ERROR

I. No notice of non-compliance was issued by the Registrar of the Anambra State High Court of Justice, Awka.

II. The purported notice of non-compliance relied on by the lower Court in arriving at its decision was issued by one V. O. Osime (Mrs.) an Assistant Litigation Officer of the Anambra State High Court of Justice, Awka.

III. Order 8 Rule 1 of the Court of Appeal Rules, 2007 pursuant to which the said notice of non-compliance was issued does not empower the Registrar or any officer of the High Court to issue notice of non-compliance.

2. The lower Court misdirected itself in law by striking out the Appellants appeal

WHEN:

i. No application was made to it by the Respondents as required by Order 8 Rule 18 of the Court of Appeal Rules, 2007.

ii. There was no pending appeal before the lower Court to be struck out.

3. The lower Court erred in law and acted without jurisdiction by striking out the Appellants' appeal.

WHEN:

i. No hearing notice was issued and/or served on the Appellants to notify them of the proceeding of 3rd March, 2009.

ii. The condition precedent to making the order it made was not satisfied by the lower Court.

iii. Appellants did not participate in the proceedings leading up to the order.”

The above proposed grounds of appeal, which are grounds of law, in my view, having regard to the substance of the judgment of the Court of Appeal sought to be appealed against, prima facie show good cause why the appeal, the subject of this application, should be heard thereby justifying the exercise of the discretion of this Court in favour of granting the application which is hereby granted. I abide by the orders made in the lead Ruling including the order on cost.

I have the benefit of reading in draft the lead ruling of my learned brother Adekeye, JSC just delivered. I agree with the reasoning and conclusion that the application be granted. I wish to add some point in support of the lead Ruling.

The Appellants/Applicant filed a motion dated 12/11/2010 in which they prayed this court for the following reliefs:-

1. An Order granting the Appellants/Applicants and extension of time to seek leave to appeal against the decision of the Court of Appeal sitting in Enugu delivered on 3rd day of March, 2009, Coram: V.A.O. Omega, Justice S.S. Alagoa and S.D. Bage (JJCA).

2. An Order granting the Appellants/Applicants leave to appeal against the said decision

3. An Order granting the Appellants/Applicants an extension of time within which to file the Notice and grounds of appeal against the decision referred to in (1) supra.

4. An Order granting leave for the appeal to be heard on the bundle of documents compiled by the Appellants/Applicants as the records of this appeal.

5. An Order deeming as properly filed and served the Appellants'/Applicants' Notice of Appeal and all other processes already filed and served on the respondents. The Appellants/Applicants stated the grounds on which they brought the application and also supported it with 22 paragraph affidavit Attached to the affidavit as exhibits are the following documents -

(a) Exhibit A - Letter from the Chief Registrar of the Anambra State High Court's office dated 14/4/2005

(b) Exhibit B Enrolled order of the Court of Appeal Enugu Division made on 3/3/2009

(c) Exhibit B2 - The supplementary record of appeal in suit No. SC/115/09.

The 1st set of respondents filed a counter affidavit of 14 paragraphs Affidavit dated 17/12/2010, which was also supported with a written argument in opposition to the application. The 2nd set of respondents also filed a counter affidavit containing 8 paragraphs and dated 4/1/2011 and also filed written argument dated 13/1/2011.

In reply to these counter affidavits, the applicants filed two additional affidavits. A further affidavit dated 13/1/2011 with a reply on points of law was filed, also dated on 9/3/2011 was a further and

better affidavit containing 23 paragraphs and attached as exhibits C1-C5 at -

(a) C1 - Court of Appeal Order of 3/3/2001

(b) C2 - Motion of Notice fated 2/2/2001 filed by 2nd set of respondents in SC/115/2009.

(c) C3 - A letter dated 19/1/2009 written by Dr. J O. Ibik and Associates

(d) C4 - A motion dated 28/4/2010 in suit No. SC/115/2009 filed by 1st set of respondents and;

(e) C5 - A letter dated 4/2/2011 written by Wole Olanipekun & Co.

The 1st set of respondents also filed a Notice of a Preliminary Objection dated 6/12/2010 on the ground that the applicants' motion dated 12/12/2010 amounts to an abuse of court's process. The preliminary objection was supported by a 14 paragraph affidavit and attached D as exhibits are

(a) Exhibit OJ1 Notice of Appeal dated 12/11/2010 in Suit No. SC/418/2010

(b) Exhibit OJ2 - The enrolled order of this court dated 12/10/2010 in Suit No. SC/115/2009.

(c) Exhibit OJ3 Notice of Appeal dated 6/10/2010 in Suit No. 115/2009.

The appellants in response to the preliminary objection filed a counter-affidavit containing 28 paragraphs and dated 12/11/2011 and also supported by Exhibits DA1 - DA4 as follows:-

(a) DA1 - Motion on notice dated 2/1/2011 filed by 2nd set of respondents in Suit No. SC/115/2010.

(b) DA2 Court of Appeal ruling dated 13/1/2009 in Suit No. CA/E/195M/2009

(c) DA3 - Notice of Appeal dated 23/1/2009 filed by the applicants in Suit No. SC/115/2009.

(d) DA4 - The Court of Appeal order dated 8/3/2009 in Suit No. CA/E/30/2009.

(e) DA5 - Notice of Appeal dated 12/11/2010 in Suit No. SC/418/2010.

The counter affidavit was accompanied by a written address also dated 12/1/2011 in which they opposed the preliminary objection. These are all the processes filed in the case. The order of the

lower court in which the applicants are seeking to appeal against was made on 3/3/2009 in which the lower court ordered as follows:-

“that the Registrar has issued a notice of non-compliance with rules and there is no pending application for departure from the rules the appeal is therefore struck out.” (Underlining mine for emphasis).

This order was made on the appeal brought before it against the judgment of the High Court of Justice Anambra State delivered on 12/1/1999 in Suit Nos. AA/53/75 and AA/11/77. The applicants stated that all necessary arrangements for the compilation and submission of the record of appeal from the trial court to the lower court were made. When this did not yield any result, a motion on notice was filed before the lower court to compel the Chief Registrar of the trial court. This motion was granted and in spite of this order, the Chief Registrar wrote a letter dated 14/4/2005 (Exhibit A) in which it was alleged that the record of the trial court was missing. The Chief Judge of the trial court consequently set up a panel of enquiry to unravel the mystery surrounding the disappearance of the record book all these efforts did not yield any result, the applicants therefore filed a motion on Notice before the lower court praying the court to order a retrial before another Judge of the High Court. However, on the 13/1/2009 the lower court, without considering this motion struck out the motion. The applicants appealed against this order in Suit No. SC/115/2009. While the applicants were still taking steps to see if the records of appeal could still, by any means, be produced from the trial court, the lower court struck out the main appeal. This position was not known to the applicants until they were served a supplementary record of appeal in Suit No SC/115/2009 Exhibit B2 hence this application was brought. The applicants in their written argument in support of the application formulated one issue for determination as follows:-

“Whether from the circumstances of the case, and the necessary materials placed before this Honourable Court, the appellants/applicants are not entitled to the prayers sought in the application.” The 1st set of respondents in the written argument adopted the sole issue formulated by the applicants. In respect of his Notice of Preliminary Objection two issues were formulated thus:-

(i) Whether the order in CA/E/30/2009 is appealable.

(j) Whether the appellants/Applicants motion on Notice in CA/E/30/2009 is not an abuse of court process.

The 2nd set of respondents in their written argument formulated two issues for determination in the following terms:-

(a) Whether the appellants/applicants have duly complied with the condition precedent to enable them bring the application.

(b) Whether the appellants/applicants have satisfied the conditions for granting of the reliefs sought by them in this application.

I think my lords, having set out the issues for determination formulated by all the parties for our consideration, it will be more expedient for me to take both the main application and the preliminary objection together, and I shall so Proceed.

The applicants adopted their written argument at the hearing and urged this court to grant the application. The learned counsel to the applicants submitted that this Honourable Court has power to extend time within which to do an act prescribed by the rules, he referred to Order 2 Rules 31 of the rules of this court and the decision in the case of Odofun v. Agu (1992) 23 NSCC (Pt. 1) 520 at 528. It was also submitted that the grant of the application for extension of time is discretionary which must be exercised judicially and judiciously, the case of Elobibi v. Onyeonwu (1989) 5 NWLR (Pt.120) 224 at 252. That in the instant case he has complied with the “tripod prayers” principles of applying for:-

(1) Extension of time to seek leave to appeal

(2) Leave to appeal.

(3) Extension of time to appeal

Learned Senior Counsel further submitted that he has complied with the requirements for this application to be granted, that it is by the affidavit in support of the motion he has disclosed:

(1) Good and substantial reasons for failure to appeal within the prescribed time: and

(2) Grounds of appeal which prima facie, shows good cause why the appeal should be heard. Learned counsel referred to paragraphs 4, 5, 6, 7, 8, 9, 10 11 and 12 of the affidavit which show that the applicants were the judgment of the lower court until when the respondents filed and served on them the supplementary records of appeal. It was further submitted that the applicants have complied with the provisions of Order 2 Rule 31(2) of the rules of this court

in that he has submitted the judgment of the lower court, the supplementary record of appeal and the Notice of Appeal particularly learned senior counsel referred to Exhibit A and submitted that the non-compliance was due to the inability of the High Court of Justice Registry in Anambra State to produce and forward the record to the lower court.

Learned counsel to the 1st set of respondents pointed out that the Order of the lower court dated 3/3/2009 was based on the certificate of non-compliance with conditions on the appellants to the effect that the appellants have not complied with the requirement of Order 8 Rule 1. Learned counsel stated that on 3/3/2009 when the Order striking out the appeal was made all the parties were recorded absent. It was pointed out that record was transmitted from the trial court to the lower court. Learned Senior Counsel started his argument the Preliminary Objection.

On the 1st issue formulated on the objection, it was submitted that the exercise of appellate jurisdiction is statutory. A court cannot exercise jurisdiction to hear appeal unless and until such jurisdiction is conferred by the constitution or some enabling statutes. The following cases were cited:-

- (i) *Olowu v. Abolore* (1993) 3 NWLR (Pt. 293) 225 at 277;
- (j) *Chukwuka v. Uzulike* (1986) 5 NWLR (Pt. 45) 892, and *Ogbu v. Urum* (1981) 4 SC. 1.

It was pointed out that the Order the applicants are seeking to appeal against was not made in civil proceedings between the appellants and the respondents, as they were not notified or represented all the proceedings. The lower court acted suo motu without hearing the parties, but in accordance with the Court of Appeal rules 2007 struck out the appeal after reading Exhibit B1. Thus the Order of the lower court is not appealable. He cited in support the case of *Olowu v. Abolere* supra 271.

On the interpretation of the Order 3 Rule 20 (1) of the Court of Appeal Rules 1981 that the only option opened to the appellants is to apply to the lower court by motion on notice for an order restoring the appeal. It was therefore contended that same lower court has the statutory power and jurisdiction to strike out an appeal for non-compliance with the requirement imposed on the appellant for the prosecution of appeal, the appellant whose appeal has been

struck out for non-compliance can only resort to the specified rule of court which Provides for restoration of such appeal, it is wrong for the appellant to resort to an appeal. This is so because the rules of court are binding on the parties and the court, see the following authorities:-

(a) *Onwuka v. Ononuju* (2009) 11 NWLR (pt. 1151) 174; and

(b) *Williams v. Hope Raising Voluntary Fund Society* (1982) 1 ALL NLR (Pt. 1) at 45.

On the 2nd issue, it was the contention of the learned senior counsel that an application of this nature, which has complied with the trinity prayers, the applicant is expected to annex the Order enlarging the time to appeal with the notice of appeal before filing same in the registry of the court below.

In the instant case the applicants have filed the motion on D notice as well as their notice of appeal simultaneously on the 12th November, 2010. By so doing the applicants were clearly acting in abuse of process.

On the substantive application, it was the contention of the learned counsel that the time the Order of 3/3/2009 was made there was no pending appeal as no appeal has been entered before the lower court and as such the words “their main appeal before the court below” is a misnomer. It was further submitted that the applicants provided inadequate details about the name of counsel who left for post-graduate studies overseas and the name of the country he went to as deposed in paragraphs 20, 21, 22 and 23 of the affidavit in support. It was further contended that the proposed grounds of appeal prima facie showing good cause why the appeal ought to be heard were not furnished. The Exhibit C attached was not signed. He therefore urged the court to refuse the application. Learned counsel to the 2nd set of respondents also adopted his written argument. On the 1st issue formulated by the respondents, it was pointed out that the applicants did not fulfill any of the conditions imposed on them by the registrar of the trial court most especially under Order 8 Rules 2 and 3 warranting compliance under Order 8 Rule 1. Also that the appellants did not comply with Order 8 Rule 4 of the Court of Appeal Rules 2007 by failing to compile and transmit the record of appeal within 60 days after filing of notice of appeal. As a result, the

registrar of the lower court was right when he issued the certificate of non-compliance under Order 8 Rule 1 of the Court of Appeal Rules. Learned counsel referred to Order 8 Rules 20 of the lower court rules and submitted that the only option to the application is to file an application to seek to restore the appeal and not by way of seeking to appeal to this court. The case of Chief John Oyegun v. Chief Francis Arthur Nzeribe (2010) 7 NWLR (Pt.1194) 577 at 595 - 596, was cited.

On the 2nd issue for determination, it was submitted that an applicant of this nature must satisfy two conditions that -

(a) show good and substantial reasons for his failure to appeal within time; and

(b) ground of appeal which, prima facie, show good cause why the appeal should be heard. These conditions must co-exist. See the following authority:-

The Minister of Petroleum and Mineral Resources vs. Ex-
po-Shipping Nigeria Ltd. (2010) 12 NWLR (Pt.1208) 261 at 281. Learned counsel referred to the applicants' affidavit in support and submitted that they do not disclose any cogent and sufficient reasons why this court should exercise its discretion on their behalf. This is a clear lack of defence on the part of the appellants/applicants to follow up the issue of obtaining the records and on filing an appeal in this case. It was further contended that the applicants themselves were negligent as they did not follow up their instruction to have their appeal properly entered and heard and as such the application should be refused, the case of Emmanuel v. Gomez (2009) 7 NWLR (Pt.1139) 1 at 16 was cited.

On the second conditions, it was the contention of the counsel that the grounds of appeal are not substantial and are not likely to succeed in that the notice of non-compliance issued by the trial court was properly issued by the registrar.

The applicants filed separately a reply on points of law in response to the submissions of both the 1st and 2nd sets of respondents.

In a written reply on points of law dated 12/1/2011, the applicants, in reply to the 1st of respondents, submitted that the word "may" used in the provisions of Order 8 Rules 20 does not connote peremptoriness; rather it indicates the existence of option.

Counsel cited in support the cases of Kamba v. Bawa (2005) 4 NWLR (Pt.914) 43 at 72. M & B Electrical v. Government of Cross River State (2005) 6 NWLR (Pt.922). It was further contended that the party's right of appeal is deeply entrenched in the Constitution of the Federal Republic of Nigeria, particularly section 233 (3) of the 1999 Constitution. Thus a party dissatisfied with the decision of the Court of Appeal has a constitutional right of appeal to the Supreme Court. It was also the contention of the applicants that the lower court's decision of 3/3/2009 falls within the word "decision" used in section 318 of the 1999 Constitution, and as such the said decision is appealable, he referred to the case of Erakeyan v. Alion (Nig.) Ltd. (2003) FWLR (Pt 161) 223 at 227; and Kotoye v. UBN (1989) 1 NWLR (Pt. 98) 419 at 466. In respondents' submissions, learned counsel to the applicants submitted that the lower court did not strike out appeal based on the provisions of Order 8 of the Court of Appeal Rules 2007 as the respondents did not file any motion on Notice praying the court to strike out the appeal for non-compliance. In the case of Oyegun v. Nzeribe (supra) it was pointed out that the respondents filed a motion on Notice at the Court of Appeal in which he sought an Order dismissing the appeal under the provisions of the then Order 3 of the Court of Appeal Rules 1981.

Both parties were heard before the appeal was dismissed. These are the submissions of the learned counsel to the parties in this case.

Before I proceed, I wish to point out that the counsel for the parties, without knowing, have indirectly invited this court to determine the propriety of the order of the lower court made on 3/3/2009 and the powers of the registrar to issue, the Notice of non-compliance that whether the order was validly made or not. With tremendous respect, this court cannot do that at this stage. This is the basic issue to be determined at the hearing of the substantive appeal, if this application succeeds. To do that at this stage would amount to determining the real issue of the appeal at the interlocutory stage. Hence, this court would only concern itself with whether:-

(a) the Order of 3/3/2009 made by the lower court is appealable as to warrant the granting the applicable; and

(b) the applicants have satisfied the requirement of Order 2 rule 31 other rules of this court exercising its discretion in their favour.

Both learned counsel to the respondents strenuously submitted the this application in essence is incompetent in that the only option open to the appellants/applicants is to apply to the lower court by way of motion on Notice to restore the appeal. Also since the Order of 3/3/2009 was not made as a result of contest between the Parties, the said order is not appealable, as it was not a decision that arose from the proceedings in the case. In the case of John Oyegun v. Arthur Nzeribe supra these courts per my learned brother Adekeye, JSC at page 595 hold thus:-

“A curious aspect of this appeal is that regardless of the provisions of Order 3 Rules 20 (4), the appellant’s counsel decided to come to this Court of Appeal. I regard this reaction of the appellant’s counsel to the Order of the lower court as an abuse of legal process. In the first place, when the registrar of the lower court issued the application for non-compliance and served it on the parties, the appellant’s counsel did not give the matter a prompt attention - either by asking not give the matter a prompt attention - either by asking for an extension of time to comply with the condition of appeal whatsoever to suspend the application of Order 3 Rules 20(1) of the Court of Appeal Rules 1981. The appeal filed by the appellant rather than invoking the provision of Order 3 Rules 20(4) is in my opinion, frivolous, aggressive waste of litigation time, waste of money and an improper use of legal Process...”

With respect, I agree with the decisions of this court as they relate to these facts. Each case is determined on its facts shown in the record and in a case where the discretion is involved, and in exercising that discretion the lower court is not bound by an earlier authority’ as that may put an end to the exercise of the discretion itself. It is not in dispute that the appeal before the lower court was struck out as a result of certificate of non-compliance filed by the registrar of the High Court. By virtue of Order 8 Rules 20 of the Court of Appeal Rules 2007, a party whose appeal is struck out for reason of non-compliance may have the appeal restored if good and sufficient cause is shown. The rule provides thus:-

“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 made to the court who may to its discretion for good and sufficient cause Order that such an appeal be

restored upon such terms as it may think fit.”

These similar provisions have been considered in the case of (1993) NWLR (Pt.293) 255 at 271- 272 where this court held as follows:-

“An appellant whose appeal is dismissed under this rule is allowed by Order 3 Rules 20 (4) to apply by Notice of motion that his appeal be restored. Where appellants shows sufficient and good cause why the appeal should be restored, the court may exercise its discretion to restore the appeal upon such terms as to costs as it may think fit.”

These decisions were divided on the facts as apparent on the record. Order 8 Rule 20 (4) of the Court of Appeal Rules 2007, affords an opportunity to a party whose appeal was dismissed for non-compliance to either apply to the court by Notice of motion to seek to restore the appeal or in Proper case to appeal against the order, if the facts of the case warrant it. The word “may” in the rules is discretionary. It is therefore in my view that Plans of the appellants’ counsel is to use its professional knowledge to decide whether it would be proper to apply to the court which dismissed the appeal for non-compliance to restore or to appeal. See: Kamba v. Bawa (2005) 4 NWLR (Pt.914) 43/72.

My Lords in the instant case, the appellants/applicants deposed in paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12 to the effect that all arrangements including funds and materials were made available to the trial court registrar to compile and transmit the record to the lower court, but nothing was done; an Order was sought and obtained from lower court compelling the trial court registrar to transmit the record of appeal to the lower court the Order was not compiled with, rather the trial court, Chief Registrar wrote to the lower court that the record of proceedings could not be traced. Therefore a Panel of enquiry was set up by the Chief Judge of Anambra State to unravel the mystery surrounding the record of appeal and nothing came out of it. Thereafter, the appellants filed a motion on Notice praying the lower court to order a re-trial of the case since the record of appeal could not be found. The lower court ordered written address, which was filed by the parties. However, without hearing the parties the motion was struck out in the absence of the parties. Surprisingly, it was the same trial court Registrar who wrote in Exhibit A that the record of the case is missing that now filed a certificate of non-compliance with

the condition of appeal at the lower court. The appellants were not served, at least to allow an opportunity of hearing before the lower court went ahead and struck out the appeal on the ground that there was no application for departure from the rules before the court. If I may ask, how could a party who was not on notice of the service of certificate of non-compliance file an application for departure from the rules? More so when the order of the lower court compelling the trial court to produce the record has not been discharged. This is much I would say on the issue for now. In my respectful opinion, this is a proper case in which the appellants could appeal without filing a motion on notice before the lower court for the restoration of the appeal. As I have said earlier, the decision of this court in *Olowu v. Abolere* (supra) and *Oyegun v. Nzeribe* (supra) are good laws but they cannot constitute a bar on a party who properly preferred to appeal against the order striking out his appeal for non-compliance as in this case rather than filing a motion on Notice to restore the appeal. In addition, it is also my view that the decision of the lower court made on 3/3/2009 is an appealable decision. It falls within the meaning of “decision” provided in section 233 (3) of the 1999 Constitution. See the following case:-

(i) *Eferakeyan v. Akran* (Nig.) Ltd (2003) FWLR (Pt.164) 223 at 277

(ii) *Automatic Telephones & Electric Co. Ltd. v. The Federal Military Government of Nigeria* (1968) 1 ALL NLR 429; and (iii) *Deduwa v. Ukurodudu* (1976) 9 & 10 SC 329 at 341 particularly see;

(iv) The case of *Kotoye v. C.B.N. & Ors* (1989) 1 NWLR (Pt.98) 49 at 446 where this court per Nnaemeka-Agu, JSC held thus:-

“It is therefore wide enough to include the type of order appealed against in this case. It follows therefore that by the very letter of the Constitution which is not only the Supreme law of the land but also, in appropriate metaphor, the touchstone and yardstick of measurement of the validity of all other laws. It is intended that such decisions should be appealable all rules of court which run counter or are inconsistent with the enabling provision of the constitution are ipso facto, null and void to the extent of the consistent “

For purposes of emphasis, I am not saying that the provisions

of order Rule 20 (4) of the Court of Appeal rule 2007 is inconsistent with constitution, but that it gives a party who is dissatisfied with the order of striking out his appeal for non-compliance, the option of either appealing the decision in proper case, like the one at hand or to file a motion on Notice to restore the appeal upon showing good cause. It is my view therefore that the order of the lower court dated 3/3/2009 is appealable and this application is not therefore incompetent.

The last leg of the preliminary objection is to the effect that the application is an abuse of court process because the applicants filed the Notice of Appeal simultaneously with the application for leave, instead of waiting for the application to be heard and if granted the applicants could then file the Notice of appeal at the court below with enrolled Order granting them extension of time to appeal. Apparently the learned counsel to the 1st set of respondents did not advert his mind to the 4th prayers of the applicants in which they are seeking the leave of this court to be heard on the bundle of documents compiled by the appellants as the record of this appeal. Thus, if the said prayer is granted there would be no need to file any notice of appeal at the Court of Appeal in that case the appeal would have been entered in this court. I also see no merit in this leg of preliminary objection; same is misconceived and is hereby dismissed.

Also the issue formulated by the 2nd set of respondents is equally resolved in favour of the Appellants/Applicants.

Turning to issue 2 formulated by the 2nd set of respondents which is the same as the sole issue formulated by appellants, it is my view that the applicants have shown good cause why they were out of time in filing this appeal. The facts of this case have earlier been stated particularly when the lower court made the Order the subject of this application, the applicants were not on Notice. They are not served with the notice of non-compliance, neither were they served with the hearing notice against the date the appeal was struck out. They only became aware when the supplementary record of appeal was served on their counsel after which steps were taken to challenge the order. In view of what I have earlier stated about the circumstances leading to the Order of the lower court made on 3/3/2009 it is my view that the grounds cause why the appeal prima facie, shows good cause why the appeal should be heard. The appeal would involve the

determination of the power of the of the Chief Registrar of the High Court to issue notice of non-compliance and when and how such notice could be issued and how such Notice ought to be treated by the appellate court. I have no slightest doubt in my mind that these are weighty issue that may sanitise our judicial system, particularly the system of administration of justice from the High Court to the appellate court. This application, in a nutshell, succeeds and it is hereby granted. I abide by order on costs in leading Ruling.

Application is granted.

C _____

GALADIMA JSC

I have had the privilege of reading in advance the sound ruling just delivered by my learned brother ADEKEYE JSC. I agree with the reasons therein advanced leading to the conclusion that the application is meritorious and it ought to be granted. Accordingly I too grant it. I abide by the consequential orders made, including costs.

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