

SUPREME COURT OF NIGERIA

13TH APRIL, 2012. SC. 192/2010

**CORAM:- A. M. MUKHTAR, F. F. TABAI, S. GALADIMA,
N. S. NGWUTA, O. ARIWOOLA, JJSC**

1. GOVERNOR OF ZAMFARA STATE
2. HOUSE OF ASSEMBLY OF
ZAMFARA STATE
3. ATTORNEY-GENERAL OF APPELLANTS
ZAMFARA STATE
4. ALH. SANI DANYARO
AND
1. ALH. SULEIMAN MOH'D
GYALANGE
2. ALH. ALIYU MOH'D GAYARI
3. SALISU HASSAN
4. MOH'D RAFI
5. ABARSHI GUNMI
6. DAWA ALIYU UMAR
7. NUHU GARBA RESPONDENTS
8. MOHAMMED IBRAHIM
9. GARBA LABBO
10. MOHAMMED KOKANE HASSAN
11. ABDULLAHI S. GULBI
12. MOHAMMED MUAZU
13. MAMAH SAIDU GAZAU

APPEALS - Briefs - Failure to file - Dismissal order - Court of Appeal Rules 0.6 r.10 - Dismissal based on such failure is final -And the court cannot give order of re-listing (H1)

STATUTES - Rights - Creation of - Barraclough v. Brown - Where statute creates new right - That is dependent on the statute - Both the right and remedy thereof must be linked (H2)

LEGAL PRACTITIONERS - Courts - Attendance - Where hearing notice has been served - And counsel fails to attend due to illness - Court must be notified of same (H3)

FAIR HEARING - Appeals - Breach - Adjournment - Counsel who fails to utilize opportunity to be heard - Cannot complain of breach of same (H4)

FAIR HEARING - Meaning - Fair hearing entails complying with - Rules of procedure in court - And giving each litigant - An opportunity of being heard (H5)

EVIDENCE - Unchallenged evidence - Admissibility - Evidence that is not challenged - Is deemed to have been admitted - And court can rely on same (H6)

FACTS

Gummi Local Government Council of Zamfara State was dissolved by the Governor of the State. The Council was subsequently replaced by a caretaker committee. Plaintiffs/respondents were unhappy with the action of the State Governor. Hence, respondents filed originating summons against defendants/appellants at the High Court of Zamfara State challenging the action of the Governor and asking for the following reliefs inter alia, that 1st appellant – the State Governor has no power to appoint any person(s) to perform the functions conferred on the Local Government by the 1999 Constitution of the Federal Republic of Nigeria. On their part, appellants filed notice of preliminary objections against the originating process and jurisdiction of the High Court to entertain the action. The court dismissed the objections and granted reliefs sought by respondents.

Dissatisfied, appellants filed an appeal at the Court of Appeal, Kaduna Division. Appellants equally filed an application for stay of execution pending the determination of the appeal. The court granted the application for stay. Appellants however, failed to pursue the appeal diligently as required. Consequently, respondents filed motion on notice for striking out of the appeal for failure of appellants to file appellants' brief of arguments. The court after hearing the application by respondents dismissed the appeal for want of diligent prosecution. Thereafter, appellants filed a motion on notice for re-listing of the appeal. The court refused the application for re-listing. Aggrieved, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

“a) Whether or not the Court of Appeal was right in declining jurisdiction to re-list or restore Appeal No. CA/S/95/09 after same was dismissed for want of diligent prosecution under Order 17 rule 10 of the Court of Appeal Rules 2007.

b) Whether the court of Appeal breached the Appellants’ constitutional right to fair hearing by its failure, refusal or neglect to consider the issue of failure of service or receipt of the record of appeal by the appellants and its effect before it declined jurisdiction to re-list the Appellants’ appeal.”

HELD (Unanimously dismissing the appeal per **MUKHTAR JSC**)
APPEALS - Briefs - Failure to file - Dismissal order

1. I have already in this judgment referred to Order 6 Rule 10 of the Court of Appeal Rules (1981) and pointed out the differences. It seems to me that there was no intention to give powers to the court to re-list an appeal dismissed under Order 6 Rule 10, hence no provisions was made for it since Order 3 Rule 20 (3) (4) and Order 3 Rule 25 (2) provided for an appeal dismissed or struck out respectively, the omission to make a similar provision with respect to failure to file appellant brief inevitably suggests that there was a deliberate omission to make the provision. It is not the function of the court when constructing statutes to supply omissions therein.

In this case therefore the omission to provide for re-listing an appeal dismissed for failure to file appellant’s brief suggests that the dismissal was to be regarded as final. Accordingly the failure to file appellants brief of argument should ordinarily not be regarded as a hearing which ought to result in a final determination of the appeal. The rule might have been guided by the principle of interest rei publicae ut sit finis litum. (p. 1545 A)

STATUTES - Rights - Creation of

2. It is however a settled principle of law that where a statute creates a new right which has no existence apart from the statute creating it, then in the words of Lord Watson in *Barraclough v. Brown* (1897) AC 622, the right and the remedy are given unoflatu and one cannot be dissociated from the other. So it is in this case. The right to file a brief in Order 6 Rule 2 has the consequence of breach of the Rule

LEGAL PRACTITIONERS - Courts - Attendance

3. The usual practice is that when a counsel has been served with a date to be in court and he is ill, he will send a letter to the court to notify it of his inability to attend for the business of the day concerning him. Better still another counsel could have appeared in court, as it is on record that the law firm of the appellants' counsel had more than one lawyer in its chambers as is revealed in the counter-affidavit of the respondents. (p. 1547 F)

FAIR HEARING - Appeals - Breach

4. I think I have dealt extensively with the proceedings that led to the dismissal of the appeal before the Court of Appeal by the court. The learned counsel for the appellants did not avail itself of the opportunity to be heard; when the application for dismissal of the appeal was heard on the day it was slated to be heard. He was very much aware of the date, as was admitted by him, and yet he chose to do nothing by sending a letter to the court to ask for an adjournment, as he did not deem it fit to do so. It was as though he wanted to hold the court to ransom. If he was actually ill, as he had maintained, how could the court be seized of the fact, when it was not so notified? A learned counsel, who decides to exhibit a lackadaisical attitude towards his brief, should be prepared to lay on his bed as he has made it, so to speak. (p. 1549 F)

FAIR HEARING - Meaning

5. The words 'fair hearing' used in a case is to portend that all the rules of procedure of court and the relevant laws that are applicable to an action in a court before whom the litigation is, are complied with absolutely. The rule of audi alteram partem i.e. to afford both sides to litigation opportunity to put forward to the court each side of its case to its satisfaction, forms part of the requirement of fair hearing, for it is when the case of both sides are considered and weighed against each other that the concept of fair hearing, will be said to have been met. In other words, to arrive at a just determination of a case, and avoid miscarriage of justice, the opponent must be given the same deserved attention as the party who sought a remedy from

the court, and unless this is done the court will fail in its duty as vested in it by the law, and the decision will be declared null and void.
(p. 1550 A)

Unchallenged evidence - Admissibility

6. To go further their affidavits and counter-affidavits are bereft of the facts that could have militated in their favour, for most of the depositions in their counter-affidavit were debunked. The settled law is that evidence that is neither attacked nor successfully challenged is deemed to have been admitted and the court can safely rely on the evidence in the just determination of a case.

On the other hand, evidence that is controverted and debunked will be ignored for they will add no value to the matter in controversy.
(p. 1550 E)

REPRESENTATION

Mr. A. A. Bello, with him Miss Z. A. Bello, for the Appellants
Mr. Victor Olisah, for the Respondents

CASES REFERRED TO

Akande Olowu & Ors v. Amudatu Abolore (1993) 5 NWLR 255

Chukwuka v. Ezulike (1986) 5 NWLR (Pt. 45) 892

Ogbu v. Urum (1981) 45 SC 1

Yonwuren v. Modern Signs Nig Ltd (1985) 2 SC 86

Customs v. Barau (1982) 10 SC 48

Barracrough v. Brown (1897) AC 622

Ogar v. James (2001) WRN 130

Uka v. Irolo (2002) FWLR (Pt. 127) 1167

Magna Maritime v. Oteju (2005) 22 NSCQR 295

Newswatch Communications Ltd v. Atta (2006) 26 NSCQR 435

Salu v. Egeibon (1994) 6 NWLR (Pt. 348) 433

Durosaro v. Ayorinde (2005) 8 NWLR (Pt. 927) 407

Elema v. Akenzua (2000) 13 NWLR (Pt. 683) 92

Onwuchekwa v. CCB Nig. Ltd. (1999) 5 NWLR (Pt. 603) 409

Kraus Thompson Org. v. NIPSS (2004) 17 NWLR (Pt. 901) 44 SC

STATUTES & RULES REFERRED TO

Court of Appeal Rules 2007, O. 3 rr. 20(3)(4) & 25(2), O. 6 rr. 2 &

10, O. 8 r. 20, O. 17 rr. 1 & 10, O. 18 r. 11(1), O. 19 rr. 3(1) & (2)
Court of Appeal Rules 1981, O.6 r. 10

LEAD JUDGMENT BY MUKHTAR JSC

B In the High court of Zamfara State, the respondents in this
appeal who were the plaintiffs, by way of originating summons sought
answers to the following questions, and reliefs against the defend-
ants/appellants.

C “1. *Whether the 1st and or the 2nd Respondent can dissolve a
democratically elected Local Government Council and replace same
with a caretaker committee or Sole Administrator?*

D 2. *Whether the 1st Respondent (sic) virtue of S.7(1) of the
1999 Constitution of the Federal Republic of Nigeria (sic) appoint
the 4th Respondent as Sole Administrator of Gummi Local Govern-
ment Council?*

3. *Are section (sic) 79 and 80 of Law No. 21 Zamfara State
Local Government 2000 not inconsistent with S.7(1) of the 1999
Constitution of the Federal Republic of Nigeria?”*

The reliefs sought against the respondents are:-

E “a. *A Declaration that:*

F i. *The 1st Respondent, Governor of Zamfara State has no
power whatsoever to appoint any person, or body of persons for the
purpose of acting as, or performing any of the function conferred
on a Local Governor by law or by the Constitution of the Federal
Republic of Nigeria.*

G b. *An injunction restraining the 1st and 2nd Respondents by
themselves, their agents, staff, officers or whoever from interfering,
in any manner whatsoever, with Gummi Local Government Council
elected on the 27th day of March, 2004 and Constituted on the 21st
day of April, 2004 especially by dissolving or purporting to dissolve
same or giving effect to any purported dissolution of Gummi Local
Government Council or preventing the Applicants from functioning
in office as the elected Chairman, Vice Chairman and Councillors
H respectively of Gummi Local Government Council.*

c. *An injunction restraining the 4th Respondent from parading
himself or holding, representing himself as Sole Administrator of
Gummi Local Government Council appointed by the 1st Respond-
ent or in any manner whatsoever performing the statutory function*

as the Council of Gummi Local Government Council.”

An affidavit in support of the originating summons was sworn to by the 1st applicant, and annexed to it are some documents. The respondents filed a notice of preliminary objection, the grounds of which are:-

“1. That the suit ought to have been commenced by a writ of summons and not by originating summons.

2. The Hon. Court lack jurisdiction to entertain the suit as constituted.”

Argument was heard on the preliminary objection, but it was dismissed. The originating summons was taken, and after considering the submissions of learned counsel, the learned trial judge found in favour of the plaintiffs and granted the reliefs sought by the plaintiffs. Dissatisfied with the decision the respondents appealed to the Court of Appeal, and there after filed and moved an application for an order of stay of execution pending the determination of the appeal which the court granted on 17/07/07. Apparently after obtaining an order of stay of execution, the appellants went to sleep and did not bother to file processes in pursuance of the prosecution of the appeal they had filed. Consequently, the respondents filed and argued a motion for the striking out of the appeal for lack of diligent prosecution for the failure and or refusal of the appellants to file appellants brief of argument. The application was heard, and the Court of Appeal dismissed the appeal for want of diligent prosecution under Order 17 rules 10 of the rules of the Court of Appeal Rules. Thereafter, the appellants filed a motion for the re-listing of the appeal. The motion on notice reads thus:-

“1. An order re-listing or restoring Appeal No. CA/S95/09 struck out by this honourable court on 11th June 2009 for want of diligent prosecution.

2. Subject to (1) above, an order granting the Appellants/Applicants extension of time within which to file their Appellants’ Brief of argument.”

Again, the Court of Appeal considered the submissions of the learned counsel, and at the end of the day refused the application and dismissed it. The appellants were aggrieved by the dismissal of the application to re-list, and appealed to this court on two grounds of appeal. In compliance with the rules of this court, learned counsel

exchanged briefs of argument, which were adopted at the hearing of the appeal. In the appellants' brief of argument are two issues formulated for determination. The issues are:-

B "a) *Whether or not the Court of Appeal was right in declining jurisdiction to re-list or restore Appeal No. CA/S/95/09 after same was dismissed for want of diligent prosecution under Order 17 rule 10 of the Court of Appeal Rules 2007.*

C b) *Whether the court of Appeal breached the Appellants' constitutional right to fair hearing by its failure, refusal or neglect to consider the issue of failure of service or receipt of the record of appeal by the appellants and its effect before it declined jurisdiction to re-list the Appellants' appeal.*"

These issues were adopted by the respondents in their brief of argument. I will commence the treatment of this appeal with issue (1) D supra. The application from which this appeal emanates was brought under Order 7 Rules 1 and 10 (1) and Order 8 Rule 20, order 18 Rule 11 (1) of the Court of Appeal Rules. The reliefs sought have already been reproduced above. The rule that is salient and succinct to this appeal is Order 8 Rule (20) of the Court of Appeal Rules E 2007, which reads as follows:-

F "20. *An appellant whose appeal has been dismissed under this Rule may apply by notice of motion that this appeal be restored and any such application may be made to the court, who may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit.*"

The application for re-listing of appeal having been filed in 2009, it is the 2007 Rules that was applicable, and so the application was properly brought under the said rules. Perhaps I should reproduce the rules that precede the said Rule 20 above i.e. Rules 18 and G 19 at this juncture. They read as follows:-

H "18. *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 records in accordance with Rule 4, the respondent may by notice of motion move the court to dismiss the appeal.*

19. *Where an appeal has been dismissed under Rule 18 of this order, a respondent who has given notice under Order 9 may give notice of appeal and the provisions of Order 11 Rule 6 shall apply as if the appeal were brought under that Rule.*"

Rule 18 supra is about the circumstances that will lead to the dismissal of an appeal, which according to Rule 20 may be revived by way of a motion on notice. It is also instructive to note that the entire Order 8 is to do with compilation and transmission of records and the consequence upon the failure to comply with the rules, i.e. non compliance, in particular rule (1) which reads:- B

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

In other words the dismissal that will ensue under this order is as a result of the failure to compile and transmit records, and so such dismissal may be remedied by virtue of the provision of rule 20 supra, and not where an appeal is dismissed for lack of diligent prosecution i.e. failure to file an appellant brief of argument within time. C

It is on record that the genesis of the appeal at hand was the result of the dismissal of the appeal before the lower court, on the application for *“an order striking out this appeal for lack of diligent prosecution for the failure and refusal of Appellant to file appellant brief within time”*, which accords with the provision of Order 17 Rule 10 of the Court of Appeal Rules of 2007, which reads as follows:- D

“10. Where an appellant fails to file his brief within the time provided for in Rule 2 of this Order; or within the time as extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument...” E

The application having been moved by the respondent/applicant, even though in the absence of the appellant, who had been duly served, was granted by the learned Court of Appeal in the following terms:- F

“Facts deposed to in the affidavit in support of this application have not been implicating traversed and/or denied. It remains that Appellants have failed to file their brief within the time required by or rules or every (sic) seek extension of time to do so. The Appeal appears abandoned as same is not diligently being prosecuted. It is accordingly dismissed for want of diligent prosecution (sic) to the Order 17 Rule 10 of the rules of this court.” G

How then, can the learned counsel for the appellants pretend or seek to mislead the court that the dismissal of the appeal was done H

under Order 8 Rule 18, which may necessitate a re-listing under Rule 20 of the Court of Appeal Rules of 2007? I think this is a misconception for one cannot compare the enormity of the failure to file a brief of argument within the time provided by the rules, (unless where there is an application for extension of time) with that of the non-
 B compilation and/or transmission of records, which forms part of the preliminary processes of the appeal. At any rate, as I have already posited, the application for dismissal was brought in accord with the provision of Order 17 Rule 10 supra, which is a replica of the provi-
 C sion of Order 6 Rule 10 of the Court of Appeal Rules of 1981 which reads thus:-

*“Where an appellant fails to file his brief within the time provided for in Rule 2 above, or within the time as extended by the court, the respondent may apply to the court for the appeal to be
 D dismissed for want of prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of court...”*

The effect of a dismissal pursuant to this latter provision of 1981 has been dealt with in a plethora of authorities, a locus classicus of which is *Akande Olowu & Ors v. Amudatu Abolore* 1993 5 NWLR
 E page 255 where Karibi Whyte JSC thrashed out the issue of whether the court can restore an appeal dismissed pursuant to order 17 Rule 10, (i.e. does the court have jurisdiction to do so) thus:-

*“It is well settled that the exercise of appellate jurisdiction is
 F statutory. A court cannot exercise jurisdiction to hear an appeal unless such jurisdiction is conferred by the constitution or enabling statute. Hence in the instant case the jurisdiction to re-list an appeal dismissed under Order 6 Rule 10 should be found in the Rules of the court. I have not been lucky to discover any in the rules...”*

This court has decided several principles in *Chukwuka v. Ezulike* (1986) 5 NWLR (pt.45) 892. It was held there that it has no jurisdiction under the 1979 Constitution, the Supreme Court Act, 1960 and the Rules of the Supreme Court 1985, or under its inherent jurisdiction or powers to entertain an application for re-entering an appeal
 H dismissed under Order 8 Rule 16 of the Supreme Court Rules for want of prosecution. *Ogbu v. Urum* (1981) 45 SC. 1, *Yonwuren v. Modern Signs (Nig) Ltd* (1985) 2 S.C. 86; (1985) 1 NWLR (Pt.110) 483. It was also held that it has no inherent jurisdiction to set aside an order of dismissal properly made in the valid exercise of its jurisdic-

tion and to re-enter the appeal. An appeal dismissed on the ground of the failure to file appellant's brief of argument is final. The appeal so dismissed cannot be revived.

I have already in this judgment referred to Order 6 Rule 10 of the Court of Appeal Rules (1981) and pointed out the differences. It seems to me that there was no intention to give powers to the court to re-list an appeal dismissed under Order 6 Rule 10, hence no provisions was made for it since Order 3 Rule 20 (3) (4) and Order 3 Rule 25 (2) provided for an appeal dismissed or struck out respectively, the omission to make a similar provision with respect to failure to file appellant brief inevitably suggests that there was a deliberate omission to make the provision. It is not the function of the court when constructing statutes to supply omissions therein. See Customs v. Barau (1982) 10 S.C. 48. In this case therefore the omission to provide for re-listing an appeal dismissed for failure to file appellant's brief suggests that the dismissal was to be regarded as final. Accordingly the failure to file appellants brief of argument should ordinarily not be regarded as a hearing which ought to result in a final determination of the appeal. The rule might have been guided by the principle of interest rei publicae ut sit finis litum.

It is however a settled principle of law that where a statute creates a new right which has no existence apart from the statute creating it, then in the words of Lord Watson in Barracrough v. Brown (1897) AC 622, the right and the remedy are given unoflatu and one cannot be dissociated from the other. So it is in this case. The right to file a brief in Order 6 Rule 2 has the consequence of breach of the Rule in Order 6 Rule 10. Both go together.

Thus, having finally determined the appeal, in the absence of any provision, the Court of Appeal had neither statutory, nor inherent jurisdiction to re-list the appeal already dismissed by the court. The court below was therefore, manifestly wrong to have applied the provisions of its rules designed for re-listing appeals dismissed for non-compliance with conditions of appeal and non-appearance to an appeal dismissed for failure to file appellant's brief.

The situation and circumstance that led to the above encapsu-

lated exposition of the law are on all fours with those in the instant appeal, and I am fortified by it. Applying and adopting the above interpretation I will say that the Court of Appeal was functus officio and had no power to restore the appeal it had already dismissed pursuant to Order 17 Rule 10 of the court's rules. In this respect, I
B endorse the finding of the court below which reads:-

*"In the light of the foregoing, it is crystal clear that a dismissal under Order 17 Rule 10 of the Court of Appeal Rules, 2007 is final and this court has no power, inherent or statutory to re-enter the
C appeal so dismissed."*

For the foregoing reasoning I answer issue (1) in the affirmative and dismiss ground (1) of appeal to which it is married.

I will now proceed to issue (2) supra. The various argument proffered by the learned counsel for the appellants on the court's
D power to waive provisions of the rules, particularly Order 19 Rule 3 (1) and (2) are to my mind of no consequence. By virtue of Order 19 Rules 3 (1) of the Court of Appeal Rules, *"the court may, in an exceptional circumstance, and where it considers it in the interest of
E justice so to do, waive compliance by the parties with these rules or any part thereof."* Again these rules the learned counsel is relying on are in relation to non-compliance with the rules in respect of records of appeal from the Sharia Court of Appeal or the Customary Court of Appeal. I will emphasis here that because the rules concentrate on
F non-compliance and waiver, not failure to file an appellant's brief of argument, as it is in this case it is not applicable to this discussion.

However, the above notwithstanding, I will look at the exceptional circumstances, which the learned counsel is claiming the appellants have shown to warrant the restoration of the appeal. I will now
G go back to the affidavit in support of the motion to strike out the appeal on 4/3/2008, and reproduce the salient depositions hereunder. They read:-

"4(c) That the appellants took no step to settle the Record and have it transmitted to the Court of Appeal.

H *(d) That it was the Respondents/Applicants who settled the Record of Proceedings on their behalf and have same transmitted to the Court of Appeal Kaduna.*

(e) That the Appellants were served with the Record of Proceedings on the 21st day of November 2007.

(f) That it is more than 90 days after the service of the Records on the Appellants.

(g) That the Appellants have not filed their Appellants brief as at date.”

Apart from the general denials of the above depositions, the respondents/appellants in their counter affidavit deposed thus:- B

“(iv) That counsel to the Appellants/Respondents herein have on several occasions visited the registry of the High Court Gummi to press for the compilation of the said record all to no avail.”

I am at a loss as to why the counsel had to go to Gummi for the compilation of the record of proceedings, when the suit was initiated in the High court of Gusau, and terminated in the said High court of Gusau. Could this be a mistake on the part of the deponent, or was the deposition in respect of another case which was erroneously put in the present case? Unfortunately learned counsel for the appellants/respondents was not in court to explain this misnomer on the day the motion to strike out was heard, although he supplied a reason for his absence in paragraph ix of his affidavit in support of his motion to re-list the appeal. In the said paragraph ix the following was deposed:- C D E

“ix. That when this fact came to the attention of counsel who, due to ill health, was unavoidably absent from court when the matter came up for hearing on 11th June 2009 counsel caused further inquiry to be conducted by an associate at the registry of this court whereupon it was confirmed that indeed the said record of appeal was transmitted to this court and a copy was made available to him for the use of the appellants/applicants.” F

The usual practice is that when a counsel has been served with a date to be in court and he is ill, he will send a letter to the court to notify it of his inability to attend for the business of the day concerning him. Better still another counsel could have appeared in court, as it is on record that the law firm of the appellants’ counsel had more than one lawyer in its chambers as is revealed in the counter-affidavit of the respondents. G H

In a counter-affidavit sworn to by Amaka Okolie, a litigation clerk in the chambers of learned counsel for the respondents can be seen the following deposition.

“(o) That there are at least 3 counsel in the Law Firm of counsel to the appellants, from the processes filed by J. C. Shaka Esq. A. A. Tahir Esq. and Misbahu Salaudeen Esq., and another counsel whom they called an Associate who purportedly conducted search on their behalf, that any of them could have been in court but elected to treat
B the hearing by this Honourable court with levity.”

This the learned counsel did not do, so the learned court below proceeded to hear the motion. By the content of paragraph ix above it is clear that the learned counsel had been served, and he
C was aware of the date. By the same said paragraph ix the deponent admitted that upon further inquiry it was confirmed that the record of appeal had been transmitted to the court below, even though that was after the proceeding of 11th June 2009. This fact negated the deposition in paragraph x.

D In the reply to counter affidavit in support of the motion to re-list the appeal, the following crucial facts were deposed:-

“v. That at all material times in the year 2007 there were only two counsel in chambers in the law firm of Alhasan Law Chambers i.e. Mr. J. C. Shaka who is the Principal Counsel and Mr. Misbahu
E Salaudeen and one Barrister E. Odegigo whose address as endorsed on an exhibit accompanying the Respondents counter affidavit purports to be ‘No. 3 Dan Madami Street Gada Biyu Gusau is not a staff or agent of the said firm and had no authority to receive any process on this the firm’s behalf.”

F vi. That even then the said E. Odegigo neither informed counsel of nor did hand over any process to them in connection with the appeal of the appellants/applicants.

G vii. That the appellants/applicants appeal was not heard or dismissed on the merit on 11/6/09 but rather for want of diligent prosecution i.e. in default of the appellants/applicants filing their brief of argument.

viii. That Mr. Misbahu Salaudeen of counsel was the person who had been assigned this appeal for prosecution and has been the
H counsel appearing in the matter on the several occasions it came up before the Kaduna Division of this Court as mentioned by the Respondents...

ix. That on 11/6/09 when this appeal was scheduled for hearing of motion for dismissal Mr. J. C. Shaka was in Abuja to attend for

other matters hence could not immediately take over the matter and attend to represent the appellants/applicants in place of Mr. Misbahu Salaudeen who had become indisposed that morning.”

Do the facts stated above, (challenged or unchallenged the materials and processes inclusive) amount to exceptional circumstance? I think not and I am not satisfied that they do, for all the excuses put forward by the appellants show they are not serious. It is on record that the appellants sought and obtained an order for stay of execution of the judgment pending the determination of the appeal before the Court of Appeal. It seems that was what they were out to achieve, and having achieved their goal of probably depriving the respondents the fruit of their judgment, they conveniently went to sleep, and obviously found no need to pursue the appeal any further. The vigorous argument of the learned counsel for the appellants that the appellants having not been served with record of proceedings before taking the step to dismiss the appeal, constituted a breach of their constitutional right to fair hearing, and thus made the proceedings null and void and of no effect, is neither here nor there. See the cases of Ceder v. M.G.A. PLC 2001 18 W.R.N. 144, and Ogar v. James 2001 W.R.N. 130 cited by the learned counsel.

It is the respondents counsel's argument that the failure of the court to rule on the failure to serve the record on the appellants was not a breach of the appellants' right to fair hearing. See the cases of Uka v. Irolo 2002 FWLR part 127 page 1167, Magna Maritime v. Oteju 2005 22 NSCQR page 295, Newswatch Communications Ltd v. Alhaji Aliyu Ibrahim Atta 2006 26 NSCQR page 435 upon which the learned counsel for the respondents relied.

I think I have dealt extensively with the proceedings that led to the dismissal of the appeal before the Court of Appeal by the court. The learned counsel for the appellants did not avail itself of the opportunity to be heard; when the application for dismissal of the appeal was heard on the day it was slated to be heard. He was very much aware of the date, as was admitted by him, and yet he chose to do nothing by sending a letter to the court to ask for an adjournment, as he did not deem it fit to do so. It was as though he wanted to hold the court to ransom. If he was actually ill, as he had maintained, how could the court be seized of the fact, when it was not so

notified? A learned counsel, who decides to exhibit a lackadaisical attitude towards his brief, should be prepared to lay on his bed as he has made it, so to speak.

The words ‘fair hearing’ used in a case is to portend that all the rules of procedure of court and the relevant laws that are applicable to an action in a court before whom the litigation is, are complied with absolutely. The rule of audi alteram partem i.e. to afford both sides to litigation opportunity to put forward to the court each side of its case to its satisfaction, forms part of the requirement of fair hearing, for it is when the case of both sides are considered and weighed against each other that the concept of fair hearing, will be said to have been met. In other words, to arrive at a just determination of a case, and avoid miscarriage of justice, the opponent must be given the same deserved attention as the party who sought a remedy from the court, and unless this is done the court will fail in its duty as vested in it by the law, and the decision will be declared null and void. See *Salu v. Egeibon* 1994 6 NWLR part 348 page 433. However, the situation is not so in this case. In the present case, as has been laboriously set out in the early part of this judgment, the appellants were afforded the opportunity to be heard, but they did not avail themselves of the opportunity.

To go further their affidavits and counter-affidavits are bereft of the facts that could have militated in their favour, for most of the depositions in their counter-affidavit were debunked. The settled law is that evidence that is neither attacked nor successfully challenged is deemed to have been admitted and the court can safely rely on the evidence in the just determination of a case. See *Durosaro v. Ayorinde* 2005 8 NWLR part 927 page 407, *Omo v. J.S.C.* 12 NWLR part 682 page 444, and *Elema v. Akenzua* 2000 13 NWLR part 683 page 92. **On the other hand, evidence that is controverted and debunked will be ignored for they will add no value to the matter in controversy.**

All said, I find no exceptional circumstances shown by the appellants to have warranted the learned Court of Appeal to confer upon itself jurisdiction that it did not have by restoring the appeal it has already dismissed. Since the court had already dismissed the appellant’s appeal, it became functus officio and it was in no position to

review its decision. In the light of the above discussion this issue is resolved in favour of the respondents, and the related ground of appeal number (2) from which it is distilled is hereby dismissed.

The end result is that the appeal lacks merit and substance and deserves to be dismissed. The appeal is hereby dismissed with N50,000.00 costs in favour of the respondents, against the appellants. B

GALADIMA JSC

The lead judgment just delivered by my learned brother Mukhtar JSC was made available to me. C

The background facts leading to this appeal has been carefully set out in the Lead Judgment. The court below dismissed the Appellants' appeal pursuant to order 17 Rule 10 of the Court of Appeal Rules, 2007 which provides: D

"Where an appellant fails to file his brief within the time provided for in Rule 2 of this Order or within the time as extended by the court, the Respondent may apply to the court for the appeal to be dismissed for want of prosecution. If the Respondent fails to file his brief, he will not be heard in oral argument where an appellant fails to file a reply brief within the time specified in Rule 5, he shall be deemed to have conceded all the new points or issues from the Respondent's brief." E

It is to be noted that Order 17 Rule 2 of the 2007 Court of Appeal Rules is in pari materia with Order 6 Rule 10 of the 1981 Court of Appeal Rule. The latter provides as follow: F

"The Appellant shall within sixty days of the receipt of the record of appeal from the court file in the court a written brief, being a succinct statement of his argument in appeal." G

Order 17 Rule 2 of the 2007 Court of Appeal Rule provides:

"The Appellant shall within forty-five days of the receipt of the record of appeal from the court below file in the court a written brief being a succinct statement of his argument in appeal." H

The contention of the Appellants is that the dismissal under order 17 Rule 10 of the 2007 Court of Appeal Rules is not a dismissal on the merit and that the court can, in exceptional circumstances, restore an appeal dismissed pursuant to order 17 Rule 10. This is not

the correct position of the law. This is contrary to the decision of this court in the case of **AKANDE OLOWU & 3 ORS v. AMUDATU ABOLORE** (1993) 5 NWLR 280; and its earlier decisions in **CHUKWUKA v. EZULIKE** (1985) 5 NWLR (pt.45) 892; **YONWUREN v. MODERN SIGNS (NIG) LTD** (1985) 2 SC 86. The Court of Appeal Sokoto was functus officio with regards to the appeal dismissed pursuant to order 17 Rules 10 of the Court of Appeal Rules 2007 on 11/6/2009. The only remedy available to the Appellants was to appeal to this court and not to apply for restoration to the same court. Consequently the present appeal is incompetent and it is dismissed. I abide by the order for costs made in the lead judgment.

NGWUTA JSC

I had the privilege of reading in draft the lead judgment just delivered by my learned brother Mukhtar, JSC. Order 17 Rule 10 of the Court of Appeal Rules 2007, on the consequences of failure to file briefs provides:

“Where an appellant fails to file his brief within the time provided for in Rule 2 of this Order, or within the time as extended by the Court, the respondent may apply to the Court for the appeal to be dismissed for want of prosecution...”

If the appellant defaults in filing his brief within the time prescribed in the rules and he does not seek extension of time to file the brief or to regularise the filing of same if he filed it out of time, the appeal will be dismissed for want of prosecution at the instance of the respondent. A dismissal of appeal pursuant to Ord. 17 rule 10 of the Court of Appeal Rules disposes of the appeal to finality. It cannot be re-listed. See **Kraus Thompson Org. v. NIPSS** (2004) 17 NWLR (pt.901) 44 SC. Note that this Court decided the above case under Ord. 6 r. 10 of the Court of Appeal Rules, 1981 which is in pari materia with Ord. 17 r. 10 of the Court of Appeal Rules, 2002 under which the appeal herein sought to be re-listed was dismissed. Having dismissed the appeal under Ord. 17 r.10 (supra) the lower Court became functus officio and is not competent to review its order dismissing the appeal. See **Onwuchekwa v. CCB Nig. Ltd.** (1999) 5 NWLR (Pt.603) 409 wherein it was held that the Court of Appeal, having entered a final judgment became functus officio.

In my view, an order dismissing an appeal under Ord. 17 r.10 (supra) is no less final a judgment than one dismissing an appeal on the merit. An appellant aggrieved in the circumstance can appeal to the Supreme Court, rather than ask the lower Court to re-list the appeal. This appeal is a sad commentary on the conduct of learned Counsel for the appellants. In an appeal that has some constitutional implications, learned Counsel obtained an order of stay of execution pending the determination of the appeal after which his clients went to sleep, as it were. Can it be said that learned Counsel discharged his duty of properly advising his clients with respect to their duties in the appeal? With respect, he did not. As if that was not enough to raise questions on his professional conduct, he further staked his integrity on the assertion that the appeal was struck out by the lower Court, even when he had the record of proceedings during which the appeal was/dismissed by the Court below. Even when record for the appeal, was compiled and transmitted by the Respondents and the same was served on him, he did nothing to prosecute the appeal pending the determination of which he obtained an order staying the judgment against his clients. I think this was an attempt to convert the order pending the determination of the appeal to an order in perpetuity, thereby denying the respondents the fruits of the judgment in their favour. This Court will never lend its aid to a party in an attempt to make an ass of the law or rules.

For the above, I adopt as mine the lucid reasoning and conclusion arrived at by my learned brother Mukhtar, JSC. Consequently, I also dismiss the appeal. I abide by the order for costs.

G

H