

SUPREME COURT OF NIGERIA
25TH MAY, 2012. SC. 84/2004 (R)
CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, J. A. FABIYI,
B. RHODES-VIVOUR, JJSC

PROF. DUPE OLATUBOSUN APPELLANT
AND
1. TEXACO NIGERIA PLC
2. ENGINEER F. OLUSEYI GRAIG RESPONDENTS
(REGIONAL MANAGER SOUTH-WEST)

APPEALS - Application for enlargement of time - Reason for delay - Applicant's duty - Applicant must establish good reasons - To justify grant of the application (H1)

APPEALS - Enlargement of time - Exercise of discretion - Interference - Appellate courts do not interfere - Save where discretion was based on wrong principle of law - Or it occasioned miscarriage of justice (H2)

APPEALS - Enlargement of time - Discretion - Rules of court - Need to obey - Court must obey its rules - To justify exercise of discretion (H3)

APPEALS - Enlargement of time - Discretion - Basis - Doing substantial justice to the parties - Must be of paramount interest to court (H4)

FACTS

Plaintiff/appellant and defendants/respondents are involved in dispute over the management of a petrol station. Respondents took over the management of the station and transferred same to someone else. Being dissatisfied, appellant instituted this action at the High Court of Oyo State seeking for injunction to restrain respondents from taking over the petrol station and transferring same to another person. The court refused the application. Appellant was dissatisfied.

Hence, he filed an appeal at the Court of Appeal, Ibadan Di-

1986 Olatubosun v. Texaco Nig. Plc (2012) 5 KLR (pt. 312) 1985;

vision. Appellant also filed another application for injunction to restrain respondents. Following the failure of appellant to perfect the conditions of appeal imposed by the trial court within the time prescribed, appellant applied to the Court of Appeal for an extension of time to perfect the conditions of appeal imposed by the trial court. The court refused to exercise its judicial discretion in favour of appellant. The court dismissed the application. Aggrieved, appellant further appealed to Supreme Court.

ISSUES FOR DETERMINATION

“i. Whether the Appellant who is seeking extension of time to perfect the conditions of appeal imposed by the High Court is required under the Court Rules to exhibit the Notice of Appeal to his application.

OR

Whether the failure of the Appellant to exhibit his Notice of Appeal to his application for extension of time to perfect the conditions of appeal imposed by the High Court is fatal to his application.

2. Whether from the affidavit evidence Placed before the Court, the Court below was right in refusing the Appellant’s application for extension of time to perfect the conditions of appeal by the High Court”

HELD (Unanimously allowing the appeal per **MO-HAMMED JSC**)

APPEALS - Application for enlargement of time

1. There is no doubt that for an application for an enlargement of time within which an Appellant may take certain procedural steps to succeed, all the Applicant is required to do is to establish good substantial or exceptional reasons or circumstances, to explain satisfactorily the delay in taking the steps in the issue required to justify the grant of the enlargement of time applied for. (p. 1992 H)

APPEALS - Enlargement of time - Exercise of discretion

2. In this respect, whatever decision a court arrives at in such application, entirely depends on the exercise of its discretion,

taking into consideration the general principles of law governing the exercise of discretionary powers by the court and guided by the consideration of doing justice to all the parties to the dispute. In this regard, it is well settled that all judicial discretion must be exercised according to the common sense and justice in the matter. Where there is any miscarriage of justice in the exercise of such discretion, it is within the powers and competence of an appellate court to interfere and have that exercise of discretion reviewed, In the case at hand where the Appellant's application before the court below was merely for an enlargement of time to comply with conditions of appeal earlier imposed by the Registrar of the trial High court in the preparation of records of appeal but in the process he was required to comply with conditions which did not apply to his application, it is difficult to say that a miscarriage of justice did not creep into the exercise of discretion by the court below. It is therefore within the powers and competence of this court to interfere and have the discretion exercised under a wrong rule of court reviewed. Thus, the appeal being one against exercise of discretion, the general principle is that an appellate court like ours will not interfere with the exercise of discretion of the court below merely because this court would have acted differently. However, as laid down by this court in the case of *University of Lagos v. Olaniyan* (supra), this court will interfere where the discretion exercised is manifestly wrong, arbitrary, reckless and injudicious. In the present case however, I have found it necessary to interfere in the discretion exercised by the court below not because it was arbitrarily or recklessly exercised but because it was manifestly wrong and injudicious having been exercised on wrong principle of law not applicable to the application of the Appellant that was heard and determined by that Court.

(pp. 1993 B/1995 E)

APPEALS - Enlargement of time - Discretion - Rules of court

3. I am also not unaware that when there is an application for enlargement of time within which to do certain things or take certain procedural steps prescribed by the rule of court, the

court should always bear in mind that the rules of court must prima facie be obeyed and that to justify the exercise of its discretion, there must be some concrete materials upon which to base such exercise of discretion. (p. 1993 G)

B ***APPEALS - Enlargement of time - Discretion - Basis***

4. One may also emphasize that in the exercise of judicial discretion to extend time for the doing of anything under the rules of court, particularly in appellate courts where this appeal arose, substantial justice to the parties must be the main target or the cardinal determining factor. In other words, in the exercise of discretion in such application for enlargement of time to take steps in the course of proceedings of court, the court must necessarily be guided by consideration of doing substantial justice between the parties where the applicant's appeal giving rise to the application is ensured a hearing on its merits provided that no injustice is thereby caused to the Respondent on the other side. (p. 1993 H)

E **REPRESENTATION**

Adekunle Sobaloju, for the Appellant

Akeem Agbaje with Gboyega Alawode, for the Respondents

F **CASES REFERRED TO**

Mobil Oil Nig Ltd. v. Agadaigho (1988) 2 NWLR (Pt.77) 383

Soleye v. Sonibare (2002) FWLR (Pt. 95) 221

Long John v. Black (1998) 6 NWLR (Pt. 555) 524

Otem Odey v. Ovat Edim of Akam (1990) 6 WACA 63

G University of Lagos v. Olaniyan (1985) 1 NWLR (Pt. 1) 155

Eronini v. Iheuko (1989) 2 NSCC (Pt. 1) 503

Okoiko v. Esedalu (1974) 3 SC 15

University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143

Nzeribe v. Dave Engineering Ltd (1994) 8 NWLR (Pt. 361) 124

H Odusote v. Odusote (1971) 1 All NLR 219

Benson v. Nigeria Agip Oil Co. (1982) 5 SC 1

Okere v. Nlem (1992) 4 NWLR (Pt. 234) 132

Ibodo v. Enarofia (1980) 12 NSCC 195

Awani v. Erujuwa II (1976) 11 SC 315

Kwaham v. Elias (1960) SCNLR 516

RULES REFERRED TO

Court of Appeal Rules 2002, O. 3 rr. 4(1)(2)(11), 20(a)

LEAD JUDGMENT BY MOHAMMED JSC

This interlocutory appeal is against the Ruling of the Court of Appeal Ibadan delivered on 9th July, 2003 dismissing the Appellant/Applicant's application for extension of time to perfect the conditions of appeal imposed by the trial High court on the Appellant who was also the Appellant/Applicant in the Court of Appeal. Dissatisfied with that decision, the Appellant is now on a further appeal to this court on three grounds of appeal contained in his Notice of Appeal filed on 23rd July, 2003 from which the following issues were distilled in the Appellant's brief of argument. The issues framed in the alternative are:-

"1. Whether the Appellant who is seeking extension of time to perfect the conditions of appeal imposed by the High Court is required under the Court Rules to exhibit the Notice of Appeal to his application."

OR

"Whether the failure of the Appellant to exhibit his Notice of Appeal to his application for extension of time to perfect the conditions of appeal imposed by the High Court is fatal to his application."

"2. Whether from the affidavit evidence Placed before the Court, the Court below was right in refusing the Appellant's application for extension of time to perfect the conditions of appeal by the High Court"

In the Respondents brief of argument, only one issue was identified from the Appellant's 3 grounds of appeal. The issue as identified is:-

"Whether or not the Supreme Court will interfere with the exercise of judicial discretion by the Court of Appeal to refuse to grant extension of time to Perfect conditions of appeal in order to enable the Appellant to prosecute this appeal having regard to all the circumstances of the case?"

The Appellant was the plaintiff at the High court of Justice Ibadan where he filed a case on 6th October, 2002 against the Re-

spondents who were the Defendants in the action, challenging the termination of the operator's Agreement dated October 1997 between the Appellant and the 1st Respondent/Defendant. On 22nd October, 2002, the Appellant as Plaintiff filed an application for interlocutory injunction restraining the Defendants, their agents, servants and or privies from taking over the running and management of the petrol station in dispute or transferring same to anybody whatsoever, pending the determination of the substantive action. The application was heard and refused by the High court in its Ruling of 21st November, 2003. Dissatisfied with this decision of the High court, the Appellant then appealed against it to the Court of Appeal where he at the same time filed another application for injunction on 25th November, 2002, pending the determination of the appeal. Following the failure of the Appellant/plaintiff to perfect the conditions of appeal imposed by the trial High court within the time prescribed, the Appellant applied to the Court of Appeal for an extension of time to perfect the conditions of appeal imposed by the trial High court. This application was heard and dismissed by the Court of Appeal thereby giving rise to the present appeal which I shall determine on the issues as framed in the Appellant's brief of argument.

Arguing the first issue for determination, learned counsel to the Appellant quoted from the Ruling of the Court of Appeal and argued that the court was wrong in dismissing the application on the ground that the application was not accompanied by the Notice of Appeal, particularly when that court held that it was the provisions of order 3 Rule 4(2) of the Court of Appeal Rules 2002, that applied to the application. Learned counsel explained that the Appellant's application was brought under Order 3 Rule 4(1) and 11 of the Rules of that court; that since by the Notice of compliance Exhibit 'A' to the application the Appellant was given 30 days to comply with the conditions of appeal, the Appellant having failed to comply with the conditions of appeal within the time prescribed, all he was required to do under the rules was to give reasons for the failure to comply without exhibiting his Notice of Appeal; that the application is not the same as the one under order 3 Rule 4(2) of the Rules of the Court of Appeal; that what was required of the Appellant/Applicant under Order 4 Rule 1 of the Rules, was to justify reasons for the failure to comply with the conditions of appeal within the time given by the Registrar

of the High Court as contained in the guiding principles stated in Long John v. Black (1998) 6 NWLR (Pt.555) 524 at 542, Learned Counsel further submitted that the requirements for the grant of an application for extension of time to perfect the conditions of appeal under Order 3 Rule 20 of the Court of Appeal Rules are the same with the requirements for extension of time within which to file brief which are quite different from the requirements under order 3 Rule 20(a) of the Rules where the appeal had been dismissed and application is brought to restore the appeal on the cause list. Learned Counsel emphasized that even where the certificate of non-compliance had been issued and the appeal is listed for dismissal, the appellate Courts have always exercised their discretion by extending time within which to comply with the conditions of appeal imposed by trial courts as was done in Soley v. Sonibare (2002) FWLR (Pt.95) 221 at 235. B C

In conclusion, learned Counsel maintained that the Court of Appeal was clearly in error in applying the requirements of extension of time to appeal under order 3 Rule 4(2) of the Court of Appeals Rules as applied in cases like Mobil Oil (Nig.) Ltd. v. Agadaigho (1988) 2 NWLR (Pt.77) 383, in the present application by the Appellant for extension of time to perfect conditions of appeal, as the Appellant's Notice of Appeal was already filed within time. D E

In response to this first issue for determination, learned senior counsel to the Respondents pointed out that the application of the Appellant was not dismissed solely on the ground that he did not exhibit his notice of appeal as there are other factors taken into consideration by the court below in refusing the application particularly those contained at page 69 of the record; that as the Appellant not having appealed against the other factors upon which the application was dismissed, is deemed to have conceded the appeal on those points to justify dismissing the appeal if cases like Ibodo v. Enarofia (1980) 12 N.S.C.C. 195 and Unilag v. Olaniyan (1985) 1 N.W.L.R (Pt.1) 156, are taken into consideration where insufficient materials filed by Applicants for extension of time, resulted in the refusal of the applications. Relying further on the case of Okere v. Nlem (1992) 4 N.W.L.R. (pt.234) 132 at 149, the learned senior counsel insisted that the court below was right in applying the requirements under order 3 Rule 4(2) of the Court of Appeal Rules in dismissing the Appellant's application for failure to exhibit his notice of appeal in F G H

support of the application. The Appellant's application brought under order 3 Rule 4(1) of the Court of Appeal Rules 2002, was filed in that court on 7th March, 2003, asking for a single relief:-

"Extending the time within which the Appellant/Applicant may perfect the conditions of appeal"

B Order 3 Rule 4(1) of the Court of Appeal Rules, 2002, under which the application was brought states as follows:-

"4.(1) The Court may enlarge the time Provided by these Rules for the doing of anything to which these Rules apply."

C However, order 3 Rule 4(2) of the same Rules under which the Court of Appeal considered the Appellant's application states:-

"4.(2) Every application for enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed Period, and D grounds of appeal which prima facie show good cause why the appeal should be heard. When the time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

E It is quite clear that while the provisions of Rule 4(1) of order 3 of the Rules are for any application for the doing of anything to which the Rules of the court apply, such as filing of any processes like briefs of argument or the taking of any step in the proceeding of court like compliance with conditions of appeal, the provisions of Rule 4(2) are specifically for enlargement of time within which to appeal and the F conditions required under the rule for making the application. Certainly the Appellant whose appeal was already on the ground having been filed within the time prescribed by law, is not required to comply with the requirements of Rule 4(2) of the Rules which require the G application for enlargement of time in which to appeal to be supported by a notice of appeal with grounds of appeal which prima facie show good cause why the Appellant's appeal should be heard. All the Appellant was looking for in his application in the instant case was for enlargement of time to perfect the conditions of appeal so as H to allow the Registrar of the trial High court to prepare the record upon which his appeal shall be heard. He was indeed properly before the court under order 3 Rule 4(1) of the Rules of the Court of Appeal.

There is no doubt that for an application for an enlarge-

ment of time within which an Appellant may take certain procedural steps to succeed, all the Applicant is required to do is to establish good substantial or exceptional reasons or circumstances, to explain satisfactorily the delay in taking the steps in the issue required to justify the grant of the enlargement of time applied for. See Chief T.O.S. Benson v. Nigeria Agip Oil Co. (1982) 5 S.C. 1. **In this respect, whatever decision a court arrives at in such application, entirely depends on the exercise of its discretion, taking into consideration the general principles of law governing the exercise of discretionary powers by the court and guided by the consideration of doing justice to all the parties to the dispute. In this regard, it is well settled that all judicial discretion must be exercised according to the common sense and justice in the matter. Where there is any miscarriage of justice in the exercise of such discretion, it is within the powers and competence of an appellate court to interfere and have that exercise of discretion reviewed,** as was decided in the case of Abiodun Odusote v. Olaitan Odusote (1971) 1 All NLR 219 at 222. **In the case at hand where the Appellant's application before the court below was merely for an enlargement of time to comply with conditions of appeal earlier imposed by the Registrar of the trial High court in the preparation of records of appeal but in the process he was required to comply with conditions which did not apply to his application, it is difficult to say that a miscarriage of justice did not creep into the exercise of discretion by the court below. It is therefore within the powers and competence of this court to interfere and have the discretion exercised under a wrong rule of court reviewed. I am also not unaware that when there is an application for enlargement of time within which to do certain things or take certain procedural steps prescribed by the rule of court, the court should always bear in mind that the rules of court must prima facie be obeyed and that to justify the exercise of its discretion, there must be some concrete materials upon which to base such exercise of discretion** as was explained by this court in N. A. Williams & ors. v. Hope Rising Voluntary Fund Society (1982) 1 - 2 S.C. 145 at 152.

One may also emphasize that in the exercise of judicial

discretion to extend time for the doing of anything under the rules of court, particularly in appellate courts where this appeal arose, substantial justice to the parties must be the main target or the cardinal determining factor. See *Otem Odey v. Ovat Edim of Akam* (1990) 6 W.A.C.A 63 at 64. **In other words, in the exercise of discretion in such application for enlargement of time to take steps in the course of proceedings of court, the court must necessarily be guided by consideration of doing substantial justice between the parties where the applicant's appeal giving rise to the application is ensured a hearing on its merits provided that no injustice is thereby caused to the Respondent on the other side.** See *Nalsa and Team Associates v. NNPC* (1991) 8 NWLR (Pt. 212) 652 and *Kwaham v. Elias* (1960) SCNLR 516

In the resolution of this issue therefore, I am firmly of the view that since the Appellant's application that was heard and determined by the Court below was not an application for extension of time to appeal against the decision of the High Court, the Court of Appeal was certainly in error in placing a burden on the Appellant/Applicant to exhibit his notice and grounds of appeal which prima facie show good cause why his appeal should be heard before his application could be granted. The Appellant who had already filed a valid Notice and grounds of appeal, was merely seeking an enlargement of time within which to comply with the conditions of appeal imposed by the Registrar of the trial Court and as such the letter of the Registrar of the trial Exhibit 'A' to the affidavit in support of the application showing that the period of 30 days within which the Appellant was required to comply with conditions 1 and 2 of the appeal had expired on 3rd February, 2003, was indeed enough to support the application. To this end, the absence of the Appellant's Notice and grounds of appeal was not fatal to his application as found by the Court below thereby making it possible for this Court to interfere with the exercise of discretion by that Court to refuse the application.

The second issue in the Appellant's brief is whether from the affidavit evidence placed before the court, the court below was right in refusing the Appellant's application for extension of time to perfect the conditions of appeal by the High court. Learned counsel to the Appellant referred to the facts averred in paragraphs 5, 6, 7 and 8 of

the affidavit in support of the application and submitted that clear reasons have been disclosed for the failure of the Appellant to comply with the conditions of appeal within the time given by the Registrar of the trial court, to justify granting the application.

Learned senior counsel to the Respondents is however of the view that having regard to the points considered by the court below, there can be no doubt that that court considered all the merits of the case before exercising its discretion to refuse the application; that the appeal being one against exercise of discretion, the general principle is that appellate court will not interfere with the exercise of discretion merely because it would have acted differently but that it will interfere where the discretion exercised is manifestly wrong, arbitrary, reckless and injudicious as was decided in *University of Lagos v. Olaniyan* (1985) 1 N.W.L.R. (Pt.1) 155. B C

In the second issue for determination I do not think it is in dispute at all that the Appellant/Applicant's affidavit in support of his application for enlargement of time of 30 days earlier given to him to comply with conditions of appeal, contains clear facts averred in paragraphs 5-8 of the affidavit and the letter of the Registrar of the trial court dated 3rd January, 2003 Exhibit 'A' to the affidavit in support of the application giving him 30 days to comply with conditions 1 and 2 of the conditions of appeal, are enough in the absence of his Notice and grounds of appeal, to support his application. D E

Thus, the appeal being one against exercise of discretion, the general principle is that an appellate court like ours will not interfere with the exercise of discretion of the court below merely because this court would have acted differently. However, as laid down by this court in the case of University of Lagos v. Olaniyan (supra), this court will interfere where the discretion exercised is manifestly wrong, arbitrary, reckless and injudicious. In the present case however, I have found it necessary to interfere in the discretion exercised by the court below not because it was arbitrarily or recklessly exercised but because it was manifestly wrong and injudicious having been exercised on wrong principle of law not applicable to the application of the Appellant that was heard and determined by that Court. F G H

Taking into consideration the circumstances under which the

Court below exercised its discretion in refusing the Appellant's application, I find merit in this appeal which I hereby allow. The decision of the Court below in its Ruling of 9th July, 2003, is hereby set aside and replaced with an order granting the Appellant/Applicants application. Accordingly the Appellant/Applicant shall have 30 days from today to comply with the conditions of appeal given by the Registrar of the High Court Ibadan on 3rd January, 2003. There is no order on costs.

C

CHUKWUMA-ENEH JSC

The gist of this appeal based on its peculiar facts is as to which provisions, that is to say, of Order 3 Rule 4(2) or Order 3 Rule 4(1) and 11 of the Court of Appeal Rules 2002 is the proper Rule upon which to ground the appellant's application for extension of time to fulfil the conditions of appeal imposed by the trial court in this matter.

The lower court having misconceived the purport of Order 3 Rule 4(1) under which the application for extension of time has been brought before it has dismissed the application for failure to exhibit to the affidavit in support of the application the proposed Notice of Appeal as a necessary material to ground the application and as if the said application has been brought pursuant to Order 3 Rule 4(3) of the Court of Appeal Rules. Under Order 3 Rule 4(1) it is not required to annex the proposed Notice of Appeal to the supporting affidavit as would otherwise be the case in an application under Order 3 Rule 4(2). The appellant under order 3 Rule 4(1) is required simply to proffer cogent reasons for failing to apply timely. There is merit in the appeal.

It is in this light that I agree entirely with my learned brother Mohammed JSC that there is merit in the appeal and that it should be allowed. I allowed it and abide by the orders contained in the lead judgment.

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MUNTAKA-COOMASSIE JSC

I have had an opportunity of reading before now the Leading judgment of my learned brother Mahmud Mohammed, JSC just delivered. I have gone through the reasons and reasoning relied on

by my learned brother in allowing this appeal. I adopt same as mine. I too allow this appeal and set aside the decision of the lower court. I abide by the consequential orders made by my Lord in the Lead judgment. I too make no order as to costs.

Appeal is allowed.

B

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Mahmud Mohammed, J.S.C. I agree with the reasons therein ably advanced to arrive at the conclusion that the appeal should be allowed. C

At the Court of Appeal, Ibadan Division, the Appellant's application was filed under Order 3 Rule 4 (1) and 11 of the Rules of that court for leave to perfect conditions of appeal. The application was supported by an affidavit to which the condition of appeal was annexed as Exhibit 'A'. The main reason for failure to perfect conditions of appeal was the failure by the clerk of the appellant's counsel to deliver the required stationery to the Registrar of the High Court in good time. D E

The Court of Appeal inadvertently in my view acted under Order 3 Rule 4 (2) of its Rules instead of Order 3 Rule 4(1) when it dismissed the application. It seems that the lower court forgot that the appellant was not seeking for leave to appeal out of time as his appeal was already on ground. There was no need to attach Notice of appeal which contains grounds of appeal which prime facie show good cause why appeal should be heard and good substantial reasons for failure to appeal within the prescribed period. The appellant only needed to show good, substantial/exceptional reasons to explain the delay as dictated by Order 3 Rule 4(1) of the Rules. As indicated earlier in this judgment, the delay was caused by the inaction of counsel's clerk. F G

This court will not ordinarily interfere with the exercise of discretion of the lower court except where same is not in tandem with the dictates of its rule or is capricious or inhibits the due application of substantial justice principle. There is no doubt about it that a judex must exercise his discretion not only judicially but judiciously as well. In so doing, he should be discrete and if need be, apply the sixth H

sense in a bid to facilitate room for the invocation of substantial justice principle. See *University of Lagos v. Olaniyan* (1985) 16 SSCC (Pt.1) 98 at 113; *Eronini v. Iheuko* (1989) 2 NSCC (Pt. 1) 503, 513; (1989) 3 SC (Pt.1) 30.

To my mind, the reason adduced for not complying with conditions of appeal as stated earlier on was good and substantial. Apart from that, outright dismissal of the application will foreclose the determination of the appeal for all times. That will be against the principle of substantial justice. For these reasons, the discretion exercised under the wrong Rule of the court and the attendant jettisoning of substantial justice propels me to reconsider the position of things.

For the above reasons and the fuller ones adumbrated in the lead judgment, the decision of the court below delivered on 9th July, 2003 is hereby set aside. The appeal is allowed. The application is hereby granted as contained in the lead judgment. I make no order on cost.

RHODES-VIVOUR JSC

I read in advance in draft the leading judgment prepared by my learned brother, Mohammed, JSC, and I am in complete agreement with his Lordships reasoning and conclusions, In view of the fact that the facts and circumstances of the application which was before the Court of Appeal were set out in detail in the leading judgment I shall restrict my comments to the application, The appellant/applicants application before the Court of Appeal was for:

- (i) Extension of time within which the appellant/applicant may perfect the conditions of appeal.
- (ii) Such further orders.

In support of the application was a 12 paragraph affidavit deposed to by the applicant, Annexed to it was the condition of appeal marked Exhibit A. The respondent filed a counter-affidavit. Other processes not directly relevant to this application were also filed. After examining the processes and hearing counsel the Court of Appeal dismissed the application. The concluding paragraph of the Ruling reads:

“Non-compliance with the Rules of court is fatal to this application and it cannot for that reason stand. The application fails - and it

is accordingly dismissed...”

The relief which the appellant/applicant asked for was:

“extension of time within which the appellant/applicant may perfect the conditions of appeal”.

Order 3 Rule 4 (1) of the Court of Appeal Rules 2002 states that:

“4(i) The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply”.

The application was necessary because the appellant/applicant was out of time to perfect conditions of appeal. That is to say he wanted more time for the Registrar of the trial court to prepare the Record of Appeal. The grant of an application for extension of time is an exercise of discretion by the judge who hears the application and as with all exercise of discretion on Appeal Court is always loath to interfere with the discretion of the judge, or the way he exercises his discretion, but would be compelled to interfere if the exercise was in clear breach of the law, was tainted with some illegality, and if not disturbed would amount to a definite miscarriage of justice. See *Awani v. Erujuwa II* 1976 11 SC p. 315, *Okoiko & Anor v. Esedalu & Anor* 1974 3 SC p.15, *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt.1) p.143, *Nzeribe v. Dave Engineering Co. Ltd* 1994 8 NWLR pt.361 p.124.

The judge must consider the Rules governing the particular application before exercising his discretion. For example to succeed in on application for extension of time to appeal on applicant must show:

(a) good and substantial reasons for failure to appeal within the prescribed Period; and

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

While in an application for extension of time to perfect conditions of appeal all that is required are good and substantial, or exceptional reasons to explain the delay. Before a judge grants extension of time to perfect conditions of appeal, it is mandatory that he examines the affidavit filed in support of the application to see if there are good, substantial, exceptional reasons to explain the delay. If good reasons to explain the delay can be seen in the affidavit in support the judge would be justified to grant the application for extension of

time. Where contents of the affidavit explaining the delay are not considered or brushed aside the judge would be acting arbitrarily or as he likes and that would be wrong.

In this application the appellant/applicant deposed to facts in paragraph 5, 6, 7 and 8 of his affidavit in support. These are good reasons why he was unable to perfect conditions of appeal within the time allowed. This was enough to grant the application. The Court of Appeal mistakenly in my view acted under Order 3 Rule 4(2) as if it was considering on application for extension of time to appeal instead of under Order 3 Rule 4 (1). This court is in the circumstances compelled to interfere as the exercise of discretion by the Court of Appeal was in clear breach of the Rules to be considered in an application for extension of time to perfect conditions of appeal.

For this and the more elaborate reasoning in the leading judgment the decision of the Court of Appeal delivered on the 9th of July, 2003 is hereby set aside. The application is granted and the appellant/applicant shall within 30 days from the 25th of May, 2012 comply with the conditions of appeal given by the Registrar of the High Court Ibadan on 3/1/2003.

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