

SUPREME COURT OF NIGERIA
FRIDAY 25TH MAY, 2012. SC. 316/2006
CORAM:- D. MUSDAPHER CJN, I. T. MUHAMMED,
O. O. ADEKEYE, M. U. PETER-ODILI,
O. ARIWOOLA, JJSC

TSA INDUSTRIES LTD APPELLANT
AND
FIRST BANK OF NIGERIA PLC RESPONDENT

MOTIONS - Striking out - Effect - Applicant is not limited to number of times to file application - As an application that is merely struck out - Can be properly re-filed (H1)

COURT PROCESSES - Abuse - Characteristics - Saraki v. Kotoye - Abuse arises in improper use of judicial process by party - To interfere with due administration of justice (H2)

SUPREME COURT - Judgment - Review - The court does not have jurisdiction to alter its decision - Save inter alia where judgment was obtained by fraud - Or is a nullity (H3)

COURT PROCESSES - Abuse - Proper order - Where court comes to conclusion that its process is abused - Appropriate order is that of dismissal (H4)

FACTS

The High Court of Lagos State delivered a final judgment in suit no. ID/9/98 in favour of plaintiff/applicant and against defendant/appellant. Appellant filed appeal in the Court of Appeal Lagos against the judgment. Years later, appellant brought a motion on notice before the court seeking for extension of time within which to file appellant's brief of argument. However, the motion was struck out for want of diligent prosecution. Appellant's substantive appeal was on 26th September 2005 also dismissed for same reason. Later on, appellant filed yet another motion seeking for order of the court to set aside its dismissal of appellant's substantive appeal.

In its ruling, the court held that it is functus officio and thus

lacked the jurisdiction to grant the relief sought by appellant. Being dissatisfied, appellant appealed to Supreme Court. On 9th July 2010, the court dismissed the appeal of appellant. Subsequently, applicant filed this application seeking for order of Supreme Court to set aside its aforesaid judgment on the ground that same was given under the mistaken and erroneous assumption that there was an appeal before Supreme Court against the ruling of the Court of Appeal on 26th September 2005, when in fact there was no such appeal.

HELD (Unanimously dismissing the application per **ARIWOOLA JSC**)

MOTIONS - Striking out - Effect

1. What then constitutes an abuse of court process? In other words, how can the process of court be abused? Before I examine or answer the question posed above, it is pertinent to state clearly that except an application is dismissed properly by the court, which may necessitate or require the applicant to appeal against such dismissal order, the applicant is not limited to a number of times he can bring a particular application by way of re-filing the application which was struck out but not dismissed by the court. An application that is merely struck out without more can be properly re-filed over and over again by an applicant.

However, in the exercise of an applicant's right to re-file an application that was struck out but not dismissed, the use of such freedom or right to re-file a process of court merely struck out must not be abused by a party. (p. 4066 C)

COURT PROCESSES - Abuse - Characteristics

2. This court has in a plethora of cases considered the said question - what constitutes abuse of judicial process? One of such cases which set out the guiding principle is Mrs. F. M. Saraki & Anor v. N. A. B. Kotoye (1992) 9 NWLR (Pt. 264) 156 at pages 188-189, per Karibi-Whyte, JSC, as follows:

"The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite vari-

ety and conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice.

It is recognised that the abuse of the process may lie in both a proper or improper use of the judicial process in litigations. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues.

Thus the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right; rather than the exercise of the right, per se.

The abuse consists in the intention, purpose, and aim of the person exercising the right to harass, irritate and annoy the adversary, and interfere with the administration of justice; such as instituting different actions between the same parties simultaneously in different grounds. (p. 4066 G)

SUPREME COURT - Judgment - Review

3. There is no doubt that this court does not have the power or competence or jurisdiction to consider an application to review its judgment once delivered. The Supreme Court being the final court of justice of Nigeria, its decision is final and cannot be altered or reviewed by any other court or by itself except by itself on exceptional and specific circumstances.

Therefore, the following are such cases where this court will sequel to appropriate application, set aside its own judgment.

1. When the judgment is obtained by fraud or deceit either in the court or of one or more of the parties.

2. Where the judgment is a nullity and a person affected by the order of court which can be described as a nullity is entitled ex debito justicio to have it set aside.

3. When it is obvious that the court was misled into giving judgment under a mistaken belief that the parties consented to it.

4. Where the judgment was given in the absence of jurisdiction.

B **5. Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.**

There is no doubt, and I am of the firm view that this application does not fall into one of the exceptions listed above where this court can set aside its judgment. What is more, with the active participation of the applicant's counsel in the appeal that led to the judgment being sought to be set aside, this application is not only incompetent but also vexatious, to say the least. (pp. 4069 B/4070 D)

COURT PROCESSES - Abuse - Proper order

E **4. In the circumstance, this application is simply an abuse of court process and it is liable to dismissal. Where the court comes to the conclusion that its process is abused, the appropriate order to make is that of dismissal of the process.** (p. 4071 F)

REPRESENTATION

F R. T. Tarfa (Miss) with T. Ejiofor (Mrs.), for applicant
A.O. Olumide-Fusika, Esq. with O.C. Olagunju, for the Respondent

CASES REFERRED TO

- G F.B.N. v. TSA Ind. Ltd. (2010) 15 NWLR (Pt. 1216) 247
Asam v. Dakan (2006) All FWLR 91
F.M.B.N. v. NDIC (1999) 2 NWLR (Pt. 591) 333
Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156
Okorodudu v. Okoromadu (1977) 3 SC 21
H Harriman v. Hariman (1989) 5 NWLR (Pt. 119)
Chukwuka v. Ezulike (1986) 5 NWLR (Pt. 45) 892
Adegoke Motors Ltd v. Adesanya (1989) 5 SC 113
Alaka v. Adekunle (1959) LLR 76
Flower v. Lloyd (1877) 6 Ch. D 297

Olufunmise v. Falana (1990) 3 NWLR (Pt. 136) 1

Skenconsult Nig Ltd v. Ukey (1981) 1 SC 6

Craig v. Kansen (1943) 1 KB 256

Ogueze v. Ojiako (1962) 1 SCNLR 112

Okafor & Ors v. A-G Anambra State (1991) 6 NWLR (Pt. 200) 659

B

STATUTES & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, ss. 18(2), 232, 233(1)

Court of Appeal Rules 2002, O. 6 r. 10

C

Supreme Court Rules 2009, O. 8 r. 16

LEAD JUDGMENT BY ARIWOOLA JSC

This is a ruling on the application of the respondent. The applicant had sought the following:

D

“An order setting aside, the judgment given by this honourable court on the 9th July, 2010 on the ground that same was given under the mistaken and erroneous assumption that there was an appeal before this honourable court against the ruling of the court below given on the 26th September, 2005 when in fact there was no such appeal.”

E

The applicant gave the following as the grounds for seeking the said order.

“1. It is settled law that it is only a valid notice of appeal before the Supreme Court against the judgment or order of the Court of Appeal that activates the appellate jurisdiction of the Supreme Court to sit on a judgment or order of the Court of Appeal.

F

2. That an order of the Supreme Court made without its jurisdiction being properly and antecedently activated is a nullity.”

G

In support of the said application is an affidavit of 8 paragraphs deposed to by one Felix Orogun, the Managing Director of the applicant.

Attached to the application are the following documents marked as exhibits. .,

H

1. The judgment of the Supreme Court delivered on July 9th 2010 in SC/316/2006 - Exhibit TSA1.

2. Appellant’s further amended notice of appeal dated and filed on October 20th 2008 in SC/316/2006 - exhibit TSA2.

3. Drawn-up order and record of proceedings of the Court of Appeal dated September 26th 2005 dismissing appellant's substantive appeal No. CA/L200/2001 under Order 6 rule 10 of the Court of Appeal Rules, 2002 - Exhibit TSA3.

B 4. Record of proceedings, and drawn-up order of the Court of Appeal, dated June 14th 2005 and 16th 2005 respectively in Appeal No.CA/L/200/2001 - exhibit TSA4.

C 5. Ruling of the Court of Appeal, delivered on December, 11th2006 in CA/L/200/2001 (the Ruling appealed against in SC/316/2006 - exhibit TSA5. When moving the application, Chief Ladi Rotimi-Williams, SAN predicated same on Sections 233 (1), 18(2) of the 1999 Constitution of the Federal Republic of Nigeria and the inherent jurisdiction of this honourable court. He urged the court to grant the application.

D In opposing the application, the respondent/appellant filed a counter affidavit of 6 paragraphs to which one Tomi Olagunju deposed as a solicitor in the Law Firm of Citipoint (Legal Practitioners), counsel to the appellant. Attached to the said counter affidavit are various documents purportedly marked as exhibits TOA, TOB, TOC, E TOD, TOE and TOF respectively.

F The respondent later filed a further counter affidavit on 6/3/2012 and attached other documents stated in the counter affidavit to be marked as exhibits TOG, TOH, TOI, TOJ and TOK respectively.

G In his response to the application, Mr. Olumide-Fusika referred to both counter affidavits and contended that the applicant had brought two similar applications previously filed on 15/7/2010 and 5/5/2011 respectively. While the first application was struck out with costs of N30,000 against the applicant but in favour of the respondent, the second application was withdrawn by the applicant and struck out, again with costs of N30,000.00 in favour of the respondent. Learned counsel contended further, that the instant application is the third, seeking the same relief. He submitted that the H applicant's attitude is an abuse of court process and should not be allowed by the court.

Learned counsel to the respondent further argued that the same relief being sought in the instant application and the two previous ones had earlier been vigorously argued by way of preliminary

objection in the main appeal and was duly considered by the court in its judgment. The said preliminary objection was then resolved by this court against the applicant. He referred to the decision of this court reported in *F.B.N. v. TSA Ind. Ltd.* (2010) 15 NWLR (Pt. 1216) 247 in particular, page 301 paragraph (e) to page 302 paragraph (h). He submitted that this application constitutes an abuse of court process. B

On the conditions when this court can set aside its own decision, he referred to Order 8 rule 16 of this court's Rules, 2009. He submitted that the court cannot review its decision except to correct clerical mistakes or some errors or accidental slip or omissions or to vary the judgment or order to give its meaning or intention of a judgment. C

He finally submitted that the instant application is wholly abusive of the process of this court hence should be dismissed. D

When replying, as he is entitled to, on point of law, Chief Ladi Rotimi Williams, SAN stated clearly that he was not before the court to seek a review of its judgment but within a narrow compass. That only a valid notice of appeal can activate the appellate jurisdiction of this court against an appellable order of the court below. E

He referred to the ruling of this court per Mahmud Mohammed, JSC which struck out the application but did not dismiss same. He submitted that the application which challenged the jurisdiction of this court was merely struck out but not dismissed. He relied on the cases of *Panalpina World Transport Nig. Ltd. v. J. B. Oladeen International & Ors* (2010) 19 NWLR (Pt.1226) 1 at 20 and *Asam v. Dakan* (2006) All FWLR 91 at 107; *F.M.B.N. v. NDIC* (1999) 2 NWLR (Pt.591) 333 359. He urged the court to allow the application. F G

As shown earlier, this application which was filed on 16/11/2011 is seeking an order of this court setting aside the judgment of the court given on the 9th July, 2010, on the ground that same was given under the mistaken and erroneous assumption that there was an appeal before this honourable court against the ruling of the court below given on the 26th September, 2005. The applicant's contention was that there was no such appeal before the court upon which the said judgment could have been based. H

From the facts deposed to in the affidavit, counter affidavit

and further counter affidavit with the various annexure marked as exhibits, the following emerged as established, not requiring any further proof not being dispute.

Originally and before the trial court, the instant appellant was the defendant in suit No.ID/9/98 while the respondent herein was the plaintiff.

On 23/01/2001, the High Court of Lagos State, Ikeja Division delivered its judgment in favour of the plaintiff/ respondent.

Dissatisfied with the decision, the defendant/appellant filed a notice of appeal against the said judgment.

By way of departure, the appellant sought to compile the records of appeal while the respondent filed the supplementary record.

The defendant/appellant sometime on 5/6/03 filed an application for extension of time to file its brief of argument but the application was struck out by the Court of Appeal on 14/6/05.

On 26/9/2005 acting on the application of the respondent, the Court of Appeal dismissed the appeal pursuant to Order 6 rule 10 of the Court of Appeal Rules, 2002, for failure to file appellant's brief of argument.

The appellant filed an application on 01/6/2006 urging the Court of Appeal to set aside the order of dismissal made pursuant to Order 6 rule 10 (supra).

On 11/12/2006 the Court below in its considered ruling refused to set aside its ruling of 26/9/2005 for the reason, inter alia, that it had become functus officio on the matter.

Appeal No .SC.316/2006 upon which the instant application is predicated was the appeal against the ruling of the Court of Appeal delivered on 11/12/2006 refusing to set aside its ruling of 26/9/2005 and re-list the appeal that was dismissed by it.

The judgment of this court on the said appeal, delivered on 9/7/2010 is what is being sought to be set aside in this application by the respondent.

Ground 1 of the grounds of appeal in the further amended notice of appeal exhibited to this application as on TSA2 reads thus:

"1. The learned Justices of the Court of Appeal erred in law in refusing to set aside their order of September 26, 2005 dismissing the appellant's appeal No. CA/L200/2001 when the said order of dis-

missal was made at a time the Court of Appeal had no jurisdiction to contemplate any proceedings for the dismissal of the appellant's said appeal."

PARTICULARS

(a) *As of September 26, 2005 when the learned Justices of the Court of Appeal dismissed the appellant's appeal No. CA/L/200/2001, there was pending in the Supreme Court of Nigeria the Appeal No. SC/389/2001 emanating from and relating to the said Appeal No. CA/L/200/2001*

(b) *It is the law that when an appeal is pending at a higher court on a matter before a lower court, the lower court ought not to do anything which would present the higher court with a fait accompli or render the outcome of the appeal at the higher court nugatory.*

(c) *Respondent's application dated 23^d June 2005 (exhibit FBN7) which sought the dismissal of appellant's Appeal No. CA/L/200/2001 had the effect of also seeking the termination of appellant's Appeal No. SC/389/2001 and the Court of Appeal had no jurisdiction to contemplate or grant such an application before the hearing and or termination or determination of appellant's Appeal No. SC/389/2001 at the Supreme Court.*

(d) *The order made on the 26th of September, 2006 by the learned Justices of the Court of Appeal dismissing the said Appeal No. CA/L/200/2001 had the effect of terminating the appellant's Appeal No. SC/389/2001 which was then still pending before the Supreme Court.*

(e) *The Court of Appeal lacks the jurisdiction to dismiss an appeal, whether under Order 6 rule 10 of the Court of Appeal Rules, 2002, or for any other reason whatsoever, at a time an appeal relating thereto is also pending before the Supreme Court."*

Amongst the reliefs sought by the appellant in the appeal before this court then-was:-

"Setting aside the order of dismissal dated September 26, 2005 of the Court of Appeal in this matter."

It is interesting to note that the said appeal that culminated in the judgment being attacked and sought to be set aside, the applicant fought the appeal vigorously. Indeed, the applicant as respondent first raised preliminary objection to the appeal. Ground one of the grounds upon which the said preliminary objection was based is

as follows:-

“Where an appeal has been dismissed by the Court of Appeal under Order 6 rule 10 of the Court of Appeal Rules, 2002, it cannot be re-listed or registered as that court has become functus officio, since the dismissal is on final decision and once an appeal is so dismissed the Court of Appeal or any court has no jurisdiction to revive such an appeal by re-entering or re-listing same and this honourable court has no jurisdiction to do so as provided for in section 232 (1) of the Constitution of the Federal Republic of Nigeria, 1999.”

However, in the main appeal, one of the issues raised by the respondent/applicant is as follows:

“Whether the dismissal of an appeal in the Court of Appeal under Order 6 rule 10 of the Court of Appeal Rules, 2002 can be set aside by any court or whether such an appeal can be revived or re-listed under Order 7 rule 5 of the Court of Appeal Rules.”

This court in its reserved judgment had considered, *inter alia*, the above ground one of the preliminary objection and issue one of the issues formulated by the respondent for determination of the appeal. The court had opined as follows:

“Both the preliminary objection and the issue for determination raised the same question which to my mind is the core issue for determination in this appeal. In other words, where an appeal has been dismissed under the provisions of Order 6 rule 10 of the Court of Appeal Rules, 2002, can such an appeal be revived or re-listed under Order 7 rule 5 of the Court of Appeal Rules, 2002.”

After due consideration of the arguments and submissions of a counsel on the above issues, this court concluded in its judgment as follows:-

“Ordinarily, the appellant was entitled to challenge the dismissal order of the Court of Appeal at the Supreme Court. Order 7 rule 5 requires that the appellant in 3 exercising that option to make its application within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity and to state the grounds of the objection. It is pertinent to note that this issue was not canvassed for the appellant at the Court of Appeal, but now the appellant with the indulgence of this court pursuant to the leave granted on the 20th of June, 2007 permitting the appellant to argue same as a fresh issue. The Court is to hold that Order 6 rule 10

of the Court of Appeal Rules, 2002 can be challenged by the affected party for good cause and revisited and/or set aside by the Court of Appeal under the newly introduced Order 7 rule 5."

This court had gone further in the judgment as follows:-

"There is no doubt about it that the appellant having been deprived of the opportunity to participate in the court proceedings of 26/9/05 where his appeal was dismissed under Order 6 rule 10 of the Court of Appeal Rules, 2002 due to lack of service, his right to fair hearing has been breached. Any judgment or ruling based on breach of the constitutional provisions of fair hearing as provided in Section 36 of the 1999 Constitution will not be allowed to stand on appeal"

In the final analysis in the said judgment, this court had overruled the preliminary objection of the respondent/applicant and allowed the appeal. The order of dismissal by the court below made on 26/9/2005 was set aside along with the order in the ruling of 11/12/2006 equally set aside.

It is note worthy that almost one year after the judgment of this court, the applicant brought an application filed on 5/5/2011 seeking the same prayer as sought in the instant application. The said application was withdrawn by the respondent/applicant and same was accordingly struck out on 5/3/2012. (See exhibit TOH attached to the further counter affidavit).

Subsequently, the applicant who had earlier filed another application on 12/7/2010 seeking to set aside the judgment of this court of 9/7/2010, though duly served with hearing notice and was aware of the hearing of his application yet was absent and not available to move his application, same was accordingly struck out on 3/5/2011.

The applicant again on 9/6/2011 filed another application seeking an order to set aside the ruling and proceedings of this court, delivered on 3/5/2011 which struck out the application of 15/7/2010.

On the 18th October, 2011 when the application came up for hearing, it was dismissed by this court with N30,000.00 costs to the respondent. (See exhibits TOJ and TOK attached to the further counter affidavit respectively).

Interestingly, it was after the dismissal order in exhibit TOK that the applicant again filed the instant application on 16/11/2011.

There is no doubt that the issue that is indirectly involved in the instant application was vigorously contested by the applicant as respondent to the appeal both in its preliminary objection and response to the appeal. The issue has been considered and resolved in the judgment of this court being sought to be set aside.

B The respondent therein had argued that the instant application is an abuse of court process, hence it should be dismissed. While the applicant's counsel, Chief Ladi Rotimi Williams referred to the ruling of this court, per Mahmud Mohammed, JSC which merely struck out the application he had earlier filed but did not dismiss same, hence learned senior counsel submitted that the applicant was right in bringing up the same application which challenges the jurisdiction of this court.

What then constitutes an abuse of court process? In other words, how can the process of court be abused? Before I examine or answer the question posed above, it is pertinent to state clearly that except an application is dismissed properly by the court, which may necessitate or require the applicant to appeal against such dismissal order, the applicant is not limited to a number of times he can bring a particular application by way of re-filing the application which was struck out but not dismissed by the court. An application that is merely struck out without more can be properly re-filed over and over again by an applicant.

F ***However, in the exercise of an applicant's right to re-file an application that was struck out but not dismissed, the use of such freedom or right to re-file a process of court merely struck out must not be abused by a party.***

G ***This court has in a plethora of cases considered the said question - what constitutes abuse of judicial process? One of such cases which set out the guiding principle is Mrs. F. M. Saraki & Anor v. N.A. B. Kotoye (1992) 9 NWLR (Pt. 264) 156 at pages 188-189, per Karibi-Whyte, JSC, as follows:***

"The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere

with the due administration of justice.

It is recognised that the abuse of the process may lie in both a proper or improper use of the judicial process in litigations. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues. See *Okorodudu v. Okoromadu* (1977) 3 SC 21; *Oyegbola v. Esso West African Inc.* (1966) 1 All NLR 170, (1966) 2 SCNLR 35. **Thus the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right; rather than the exercise of the right, per se.**

The abuse consists in the intention, purpose, and aim of the person exercising the right to harass, irritate and annoy the adversary, and interfere with the administration of justice; such as instituting different actions between the same parties simultaneously in different grounds. See *Harriman v. Hariman* (1989) 5 NWLR (Pt.119)

Also in *African Reinsurance Corporation v. J.D.P. Construction Nigeria Limited* (2003) 4 SCM 1 at 17; (2003) 13 NWLR (Pt. 838) 609 at 635 paras. E-G, this court had held as follows:

“...where a party duplicates a court process, the more current one which results in the duplication is regarded as an abuse of the court process.

Abuse of process of court is a term generally applied to a proceeding which is wanting in bona fide and is frivolous, vexatious or oppressive. Abuse of process can also mean abuse of legal procedure or improper use of legal process... See Amaefule v. The State (1988) 2 NWLR (Pt.75) 156. An abuse of process always involves some bias, malice, some deliberateness, some desires to misuse or pervert the system. See; Edet v. The State (1988) 4 NWLR (Pt.91) 722.”

As clearly shown above, the order of the Court of Appeal contained in the court’s ruling of September 26, 2005 dismissing the

appellant/respondent's Appeal No. CA/L 200/2001 was part of the grounds of appeal decided by this court in the judgment being sought to set aside. As stated earlier, the respondent in the said appeal argued vigorously both in its preliminary objection and the appeal on the merit. This court considered the submissions of both counsel and
 B clearly resolved the issue against the applicant herein but in favour of the respondent herein, who was the appellant in the appeal. In other words, the issue being sought to be considered again by way of this instant application is, to say the least, a misconception.

C It is interesting to note that the learned senior counsel by whose application the court below made the order given on the 26th September, 2005, dismissing the appeal of the respondent herein pursuant to Order 6 rule 10 of the Court of Appeal Rules 2002, also actively participated in the appeal that led to the judgment being
 D sought to set aside. This court considered extensively the appropriateness or otherwise of the court below in dismissing the respondent's appeal as it did.

Upon consideration of the appropriate issues for determination of the appeal to the issue, this court had held, inter alia as follows:
 E

*"There is no doubt about it that the appellant having been deprived of the opportunity to participate in the court proceedings of 26/9/2005 where his (sic) appeal was dismissed under Order 6 rule 10 of the Court of Appeal Rules, 2002 due to lack of service his (sic) right to fair hearing has been breached. Any judgment or ruling based on breach of the constitutional provisions of fair hearing as provided in section 36 of the 1999 Constitution will not be allowed to stand on appeal ... Order 6 rule 10 of the Court of Appeal Rules, 2002, shall
 F in the circumstance give way to section 36 of the Constitution. All the germane issues raised in this appeal, which I have considered, are decided in favour of the appellant."*
 G

Accordingly, the court made the following orders:

- H
- "(a) The preliminary objection is over-ruled.*
 - (b) The appeal succeeds and it is allowed.*
 - (c) The appeal is to be remitted back to the Court of Appeal, Lagos to be re-listed and heard before another panel of Justices of the Court of Appeal.*
 - (d) The order of dismissal of the appeal made on the 26* of*

September 2005 is set aside.

(e) The order in the ruling of 11/12/2006 is set aside.”

As noted earlier, this application is seeking an order of this court to set aside its judgment which was delivered on the 9th July 2010 on the ground that same was given under the mistaken and erroneous assumption that there was an appeal before it “against the ruling of the court below on the 26th September, 2005 when in fact there was no such appeal.”

There is no doubt that this court does not have the power or competence or jurisdiction to consider an application to review its judgment once delivered. The Supreme Court being the final court of justice of Nigeria, its decision is final and cannot be altered or reviewed by any other court or by itself except by itself on exceptional and specific circumstances. Order 8 rule 16 of the Supreme Court Rules (as amended) provides thus:

“The court shall not review any judgment once given and delivered by it, save to correct any clerical mistake or some errors arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the court decided nor shall the operative and substantive part of it be varied and a different form substituted.”

However, that is not to say that this court does not have the inherent power to set aside its judgment in appropriate cases. This court has in several decisions restated that its decision shall be final and appeal does not lie against it to any other court..

In *Chukwuka & Ors v. Ezulike & Ors* (1986) 5 NWLR (Pt.45) 892, (1966) 2 NSCC (Pt. 17) 1347, this court, per Uwais, JSC (as he then was) on the finality of the decision of this court, stated thus:

“There is no appeal in this court against the decision of 12th November, 1985, and it is obvious that there cannot be such an appeal since no jurisdiction has been conferred upon this court to sit on appeal over its own decision, no matter how manifestly wrong that decision may be. See Paul Cardoso v. John Bankole Daniel & Ors (1986) 2 NWLR (Pt.20) 1 at 28 (it proceeded to quote from it as follows:-

Consequently, it is clear that we cannot by the submissions

made by Chief Williams hold that the decision of this court on 12th November 1985 is a nullity by virtue of the appeal itself being incompetent and this court lacking in jurisdiction. However, this is not to say that the court cannot in a subsequent and different case, depart from its decision in a previous case, if the principles laid down for such departure apply. See: Akinsanya v. U.BA. Ltd. (1986) 4 NWLR (Pt.35) 273 at 325. But that is not the same as setting aside or declaring a nullity the decision in the previous case."

In Adegoke Motors Ltd v. Adesanya & Anor (1989) 5 SC 113; (1989) 3 NWLR (Pt.109) 250 at 274, on the inherent power of this court to set aside its decision whenever necessary, it had been stated thus:

"We are final not because we are infallible, rather we are infallible because we are final. Justices of this court are human beings, capable of erring. It will certainly be short-sighted arrogance not to accept this obvious truth."

Therefore, the following are such cases where this court will sequel to appropriate application, set aside its own judgment.

1. When the judgment is obtained by fraud or deceit either in the court or of one or more of the parties. Alaka v. Adekunle (1959) LLR 76; Flower v. Lloyd (1877) 6 Ch.D. 297; Olufunmise v. Falana (1990) 3 NWLR (Pt. 136) 1.

2. Where the judgment is a nullity and a person affected by the order of court which can be described as a nullity is entitled *ex debito justicio* to have it set aside. Skenconsult (Nig) Ltd v. Ukey (1981) 1 SC 6; Craig v. Kansen (1943) 1 KB 256, 262 and 263; Ogueze v. Ojiako & 7 Ors (1962) 1 SCNLR 112; Okafor & Ors v. A-G Anambra State & Ors (1991) 6 NWLR (Pt.200) 659 at 680.

3. When it is obvious that the court was misled into giving judgment under a mistaken belief that the parties consented to it. Agunbiade v. Okunogba & Co. (1961) All NLR 110; Obimonure v. Erinsho (1966) 1 All NLR 250, (1966) 2 SCNLR 228.

4. Where the judgment was given in the absence of jurisdiction. Madukolu v. Nkemdilim & Ors (1962) 2 SCNLR 341;

Skenconsult (Nig) Ltd v. Ukey (1981) 1 SC 6.

5. Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication. Igwe & Ors v. Kalu & Ors (2002) 14 NWLR (Pt. 787) 435, (2002) 12 SCM 89; Alao v. A.C.B. Ltd (2000) 9 NWLR (Pt. 672) 264. In a full court's decision of this court, viz, Eleazor Obioha v. Innocent Ibero & Anor (1994) 1 NWLR (Pt. 322) 503, the court reached the following conclusions:

"By virtue of Section 215 of the 1979 Constitution (now Section 235 of the 1999 Constitution), the Supreme Court cannot sit on appeal over its own judgment. The provision gives a stamp of finality to any decision of the Supreme Court. There is no constitutional provision for the review of the judgment of the court by itself. Indeed there can be no appeal questioning the decision of the Supreme Court to itself or to any body or person as there must be finality to litigation. Hence, the appellate jurisdiction of the Supreme Court section is limited by 213 of the 1979 Constitution (now Section 233 (2) of the 1999 Constitution) to hearing appeals from the Court of Appeal only and no more." (Italics mine)."

There is no doubt, and I am of the firm view that this application does not fall into one of the exceptions listed above where this court can set aside its judgment. What is more, with the active participation of the applicant's counsel in the appeal that led to the judgment being sought to be set aside, this application is not only incompetent but also vexatious, to say the least.

In the circumstance, this application is simply an abuse of court process and it is liable to dismissal. Where the court comes to the conclusion that its process is abused, the appropriate order to make is that of dismissal of the process. See Chief Arubo v. Aiyeleru (1993) 3 NWLR (Pt. 280) 126; Kode v. Alhaji Yusuf (2001) 4 NWLR (Pt. 703) 392 (2001) 3 SCM 62.

In the final analysis, this application is adjudged an abuse of process of court and it is embarrassingly misleading. Accordingly, it is hereby dismissed. There shall be costs of N30,000.00 to the respondent against the applicant.

MUSDAPHER C/JN

I have read before now the ruling in this matter just delivered by Olukayode Ariwoola JSC, with which I respectfully agree. His Lordship has meticulously considered all the relevant points arising and relevant for the ruling. I, with respect, adopted the reasonings as mine, accordingly I have no hesitation, in holding that the facts of this case does not constitute an exception to the rule, that this court cannot review its decision. I therefore find the application not only embarrassing misleading but an abuse of the process of this court. I dismiss the application to set aside the judgment of this court as it is devoid of any merit. I abide by the order for costs proposed in the aforesaid ruling of my Lord.

MUHAMMAD JSC

I have had the advantage of reading the ruling of my learned brother, Ariwoola JSC, just delivered. I am in agreement with my learned brother that the application lacks merit and must, and is hereby, refused. I abide by consequential orders made therein.

ADEKEYE JSC

I read in draft the judgment just rendered by my learned brother Olu Ariwoola JSC. The respondent/applicant, T.S.A Industries Limited, prayed this court for: -

“An order setting aside, the judgment given by this honourable court on the 9th of July, 2010 on the ground that same was given under the mistaken and erroneous assumption that there was an appeal before this court against the ruling of the court below given on the 26th September, 2005 when in fact there was no such appeal”.

The grounds relied upon by the applicant reads:-

1. It is settled law that it is only a valid notice of appeal before the Supreme Court against the judgment or order of the Court of Appeal that activates the appellate jurisdiction of the Supreme Court to sit on a judgment or order of the Court of Appeal.

2. That an order of the Supreme Court made without its jurisdiction being properly and antecedently activated is a nullity.

The application is supported by an affidavit of 8 paragraphs - with annexure as follows:-

1. The judgment of the Supreme Court delivered on July 9th 2010 in SC/316/2006-exhibit TSA1.

2. Appellants further amended notice of appeal dated and filed on October 20 2008 in SC/316/2006 exhibit TSA2. B

3. Drawn up order and record of proceedings of the Court of Appeal dated September 26th 2005 dismissing appellant's substantive appeal No. CA/L/200/2001 under Order 6 rule 10 of the Court of Appeal Rules, 2002 exhibit TSA2.

4. Record of proceedings and drawn-up order of the Court of Appeal dated June 14th 2005 and June 16th, 2005 respectively in appeal No. CA/L/200/2007 exhibit TSA4. C

5. Ruling of the Court of Appeal delivered on December 11th 2006 in CA/L/2001 (the ruling appealed against in SC/316/2006) exhibit TSA5. D

The appellant/respondent attached to the counter affidavit filed in opposing the application, exhibits TOA - TOK respectively.

The arguments and submission of the parties expose that the applicant actively participated in the hearing of the appeal SC/316/2006. The judgment of this court delivered on July 9th, 2010 which the applicant presently sought to set aside emanated from that appeal. On gleaning through the record of the appeal, the preliminary objection of the applicant in the appeal SC/316/2006 and the prayers in the two previous applications filed on 15/7/2001 and 5/5/2011 are a re-cycle of the same prayers before this court. This court had judiciously and judicially refused the applications except that filed on 5/5/2011 which was withdrawn by the applicant and struck out. The respondent/applicant continued to be adamant with his request thus deliberately misconceiving the legal implication of the repeated applications. E
F
G

The judgment of this court delivered on the 9th of July 2010 in SC/316/2006 exhibit TSA1 is a final judgment which cannot be altered or reviewed by any other court or by itself save on exceptional or specific circumstances. H

Order 8 rule 16 of the Supreme Court Rules, 1999 as amended stipulates that:-

“The court shall not review any judgment once given and

delivered by it save to correct any clerical mistake or some errors arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the court decided nor shall the operative or substantive part of it be varied and a different form substituted.”

I agree with the circumstances enumerated in the lead judgment under which this court has an inherent power to set aside its decision whenever necessary. It is glaringly apparent that this application does not fall into one of these exceptions. I associate myself with my learned brother’s conclusion in the lead judgment that this application is incompetent, vexatious and an abuse of court process.

The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. But a common feature of it is the improper use of the “judicial process” by a party in litigation to interfere with due administration of justice. One of such circumstance is where a court process is premised on frivolity or recklessness. *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) pg. 156; *Okorodudu v. Okoromadu* (1977) 3 SC 21; *Oyebola v. Esso West Africa Inc.* (1966) 1 All NLR 170, (1966) 2 SCNLR 35; *Arubo v. Aiyeleru* (1993) 3 NWLR (Pt. 280) pg. 126; *Ogoejeofe v. Ogoejeofe* (2006) 3 NWLR (Pt. 966) pg. 205.

The court has a duty to jealously guard and protect its process from abuse and therefore will not allow a litigant to abuse its process.

Where the court identifies that its process is abused the appropriate order to make is that of dismissal of the process. This application is accordingly dismissed. I abide by the consequential orders in the lead judgment including the order as to costs.

PETER-ODILI JSC

This is a motion on notice brought by the respondent/applicant for an order setting aside the judgment given by this honourable court on the 9th July, 2010 on the ground that same was given under the mistaken and erroneous assumption that there was an appeal before this honourable court against the ruling of the court below given on the 26th September, 2005 when in fact there was no such

appeal. The grounds for the application are thus: -

1. It is settled law that it is only a valid notice of appeal before the Supreme Court against the judgment or order of the Court of Appeal that activates the appellate jurisdiction of the Supreme Court to sit on a judgment or order of the Court of Appeal.

2. That an order of the Supreme Court made without its jurisdiction being properly and antecedently activated is a nullity. And for such further orders as this honourable court may deem fit to make in the circumstances.

This application is supported by an eight paragraph affidavit deposed to by Felix Orogun, Managing Director of the respondent/applicant. The respondent filed a counter affidavit on the 30/1/11 and on the 6/3/12. On 23rd January, 2001 the High Court of Lagos State delivered a final judgment in suit no. ID/9/98 in favour of the plaintiff therein, who is the applicant/respondent herein, and against the defendant who is the respondent/appellant herein. By a notice of appeal dated and filed on 1st February, 2001, the respondent/appellant filed an appeal against the whole judgment referred to above.

On 10th June, 2003, the respondent/appellant herein, filed a motion on notice dated 5th June, 2003 in the Court of Appeal, seeking among other prayers, for extension of time within which it may file its appellant's brief of argument in the appeal out of time, and on 14th June, 2005, the respondent/appellant's said motion on notice was struck out by the Court of Appeal for want of diligent prosecution. The respondent/appellant's substantive appeal was dismissed by the Court of Appeal on 26th September, 2005 for want of diii sent prosecution under Order 6 rule 10 of the Court of Appeal Rules, 2002. There are no appeals filed by the respondent/appellant against the following orders of the Court of Appeal:

"The order striking out the respondent/appellant's motion on notice dated 5th June, 2003 (exhibits TSA, 5 A and TSA/5B);

2. The final order dismissing the substantive appeal under Order 6 rule 10 of the Court of Appeal Rules, 2002 made on 26th September, 2005 (exhibits TSA/3A and TSA/3B). "

After the dismissal of the respondent-appellant's substantive appeal under Order 6 rule 10 of the Court of Appeal Rules, 2002 by the Court of Appeal on 26th September, 2005, the respondent appellant filed a motion on notice dated 1st June, 2006 at the Court of

Appeal seeking, *inter alia*, prayers for the Court of Appeal to set aside the order of dismissal dated 26th September, 2005.

On 11th December, 2006 the Court of Appeal delivered its ruling holding that the court is functus officio and therefore lacked the jurisdiction to grant the reliefs sought in the respondent-appellant's motion on notice dated 1st June, 2006. The ruling of the Court of Appeal of 11th December, 2006 is exhibit TSA/4 attached to the application herein. The respondent/appellant herein appealed to this court against the said ruling of the Court of Appeal delivered on 11th December, 2006 (Exhibit TSA/4) by its notice of appeal dated and filed on 11th December, 2006 which was amended, and further amended on 20th October, 2008, The respondent/appellant's said further amended notice of appeal against the said ruling of the Court of Appeal delivered on 11th December, 2006 is exhibit TSA/2 attached to the application herein, which is the only proper notice of appeal in appeal No. SC/316/2006.

The respondent/appellant's said appeal against the ruling of the Court of Appeal delivered on 11th December, 2006 was finally determined by this honourable court on 9th July, 2010 as shown in exhibit TSA/1, whereat this court set aside the said final decision of the Court of Appeal (exhibits TSA/3A) when the court lacked jurisdiction to do so and under the mistaken and erroneous assumption that there was an appeal before this court against the said final order of the Court of Appeal, when in fact there was no such appeal before this court.

In the leading judgment of this honourable court delivered on 9th July, 2010 in this matter (exhibit TSA/1), this court in setting aside the said final order of the Court of Appeal made on 26th September, 2005 dismissing the respondent/appellant's appeal under Order 6 rule 10 of the Court of Appeal Rules, 2002, held at page 38 (exhibit TSA/1) in respect of an appeal dismissed by the Court of Appeal under Order 6 rule 10 of the Court of Appeal Rules, 2002) as follows:-

H “...In effect when a Court of Appeal dismisses an appeal before it under Order 6 rule 10 of its Rules, 2002 that decision is a final decision, the Court of Appeal thereafter becomes functus officio and the Court of Appeal cannot re-list or re-enter such an appeal on its cause list.”

In the case of Kraus Thompson Organisation Ltd. v. N.I.P.S.S. (2004) 17 NWLR (Pt. 901) p.44 at p.59 paras. E-F, the Supreme Court expatiated further on this by saying that:

“When an appeal is dismissed under Order 6 rule 10 of the Court of Appeal Rules, its life terminates and it is therefore removed from the cause list. No court has jurisdiction to revive or resuscitate it. Asalu v. Dakan (2006) All FWLR (Pt. 325) at 90; Babayagi v. Bida (1998) 2 NWLR (Pt. 538) p. 367; Independent National Electoral Commission & 438 Ors v. Prince Chijioke B. Nnaji & Anor. (2004) 16 NWLR (Pt. 900) p.473 at 482...”

and at page 39 of the said exhibit TSA/1 i.e. the judgment herein, this court further held in respect of an appeal dismissed by the Court of Appeal under Order 6 rule 10 of its Rules, 2002 as follows:-

“...In the case of UBA Plc v. Michael Ajileye (1999) 13 C D NWLR (Pt. 633) pg. 116 at p.123 para. G, the Court of Appeal went a step further in respect of the effect Order 6 rule 10 on an appeal struck out that -

“Any order setting aside the dismissal can only be entertained by way of appeal to the Supreme Court as provided under section 233 of the 1999 Constitution.”

In the case of Omoyinmi v. Ogunsiji (2001) 7 NWLR (Pt.711) 149 at 155 para. B held that

“The consequence is that the dismissal of an appeal for failure to file appellant’s brief under Order 6 rule 10 is a final decision and the only cause open to a party adversely affected thereby is that of appeal to the Supreme Court...”

In effect, according to the learned senior advocate for the applicant there was no appeal against the said final decision of the Court of Appeal of 26th September, 2005 yet and unfortunately, this court set aside the said final decision notwithstanding the fact that the appellant did not appeal against it and contrary to the appellate jurisdiction of the Supreme Court as enacted under section 233 of the 1999 Constitution (as amended). The appellant crafted four issues for determination as follows:

“1. Whether the respondent/appellant herein whose appeal was dismissed under Order 6 rule 10 of the Court of Appeal Rules, 2002 on 26th September 2005 took the only option held by this

court to be available to him. Namely, did he appeal against the final order of the Court of Appeal of 26th September, 2005?

2. *Whether with regards to the provision of section 233 of the 1999 Constitution (as amended), the appellate jurisdiction of the Supreme Court can be invoked in respect of a final order of the Court of Appeal without the filing of a proper notice of appeal against the said order.*

3. *Whether the applicant/respondent herein can apply to this court for an order setting aside its judgment delivered on 9th July, 2010 in this matter (exhibit TSA/1), made without jurisdiction ex debito justitiae.*

4. *Whether this court has the inherent power and jurisdiction to set aside its order made without its jurisdiction and which consequently is a nullity. Or in other words*

Whether given the circumstances of this case, this court has the inherent power to overrule and set aside its judgment (exhibit TSA/1) on grounds that same was made without jurisdiction thereby amounting to a nullity, notwithstanding that this court is the final court."

On the 5/3/12 date of the hearing of the application, learned counsel for the applicant Chief Ladi Williams SAN referred to their written brief of argument filed on 16/2/12 and deemed filed on 5/3/12. Arguing, Chief Williams SAN said the appellant/respondent had not filed a proper notice of appeal against the said final decision of the Court of Appeal of 26th September, 2005 which would have been the foundation of its appeal against the said final decision and thereby properly invoked the appellate jurisdiction of this court over the said final decision. That the above contention is the fundamental feature in appeal No. SC/316/2006 which prevented this court from exercising its appellate jurisdiction and the said final decision of the Court of Appeal was not instituted nor initiated in this court by due process of law and the condition precedent to the exercise of the appellate jurisdiction of this court was not fulfilled hence the said judgment (exhibit TSA/1) can properly be described as a nullity warranting this court to exercise its inherent powers and overrule itself in exhibit TSA/1 and set aside the same.

Learned counsel for appellant/respondent, Mr. Olumide Fusika in response said the relevant rule is Order 8 rule 16, Rules of the Supreme Court which provides that the court shall not review any

judgment or decision which it had made. That on the 3/5/11 an earlier application seeking the same relief as the present was struck out by this court. Continuing on the 15/3/12, learned counsel for the respondent said this is not the first time that this type of application was considered by this court and those two previous applications were filed on 15/7/10 and 5/5/11 respectively and they are exhibits TOG and TOI respectively. That another motion of a similar nature filed on 5/5/11 is exhibit TOH which was withdrawn and struck out on 5/3/12. B

Mr. Olumide Fusika said a third application seeking to set aside the ruling of the court striking out the application for non attendance was the motion on notice dated 9/6/11 and filed on the same day and that is exhibit TOJ. That this application was dismissed by a ruling of this court on 18/10/11 and that is exhibit TOK in the further counter affidavit. That after that dismissal learned counsel, Chief Williams said he had another application and when the application could not be found, the court adjourned to 5/3/12 and that is the motion exhibited in the further counter affidavit as TOH. That it was withdrawn and struck out with N30,000.00 costs against the applicant. C D

Learned counsel for the respondent further contended that it was after the 18/10/11 ruling that the applicant filed this current application dated 16/11/11 which is application No. 3 on the same issue and clearly an abuse of the court's process. E

Mr. Olumide Fusika said the second reason for submitting that the application is an abuse of court process, is that, what he is seeking in all the applications were the subject of his preliminary objection in the main appeal for which judgment was given and which judgment applicant had exhibited in his supporting affidavit to this application as exhibit TSA/1 which judgment is now reported in First Bank of Nigeria Plc v. TSA Industries Ltd. (2010) 15 NWLR (Pt. 1216) 247. F G

For the respondent was also submitted that this is not one of the circumstances in which this court can set aside its own judgment. He referred to Order 8 rule 16 of the Supreme Court Rules. That this court cannot review its decision in a considered judgment except to correct some typographical error or amend an accidental slip or omission or to vary an order. That those three are the only three conditions upon which the Supreme Court can revisit its judgment be- H

tween parties. He said the application is an appeal to the Supreme Court from the Supreme Court between the same parties and same subject matter and the application should be dismissed as wholly abusive of the processes of this court.

Replying on points of law, Chief Ladi Williams SAN said the application is not for the review of the judgment of this court rather it is whether this court has, in the exercise of its appellate jurisdiction, a proper appeal in respect of an appealable order. He referred to page 49 of the certified copy of the judgment. That it was TOI, a ruling dated 3/5/11 which struck out the application and they brought an application to set aside that striking out, which motion was dismissed. He said the appeal on the jurisdiction of this court was not dismissed. That it was their re-filed motion that was adjourned on 8/10/11 and which is the current one being now moved. He cited *Panalpina World Transport (Nig.) Ltd v. J. B. Olandeen International* (2010) 19 NWLR (Pt. 1226) 1 at 20; *Asalu v. Dakan* (2006) All FWLR (Pt. 325) 90; *FMBN v. NDIC* (1999) 2 NWLR (Pt. 591) 333 at 359.

That there is only one judgment in this matter and this court should grant the application. He cited section 233 of the Constitution. For better clarity I shall recast the depositions. First is the supporting affidavit of the applicant which is as follows:-

"I Felix Orogun, Male, Christian, Nigerian Citizen, Managing Director of No. 7B, Acme Road, Ogba, Ikeja, Lagos, do hereby make Oath and state as follows:-

1. *That I am the Managing Director of the applicant/respondent herein in Supreme Court appeal No. SC/316/2006 and as such, I am conversant with the facts I depose to herein, and I have the consent and authority of the applicant to depose to this affidavit.*

2. *That a judgment was delivered by this honourable court in this appeal on the 9th July, 2010 now shown to me and marked as exhibit TSA/1 is a copy of the said decision.*

3. *That the respondent/appellant herein filed its further amended notice of appeal dated 20th October, 2008. A copy of the said further amended notice of appeal is hereby attached and marked exhibit TSA/2*

4. *That earlier, on the 26th September, 2005, the substantive appeal filed by the respondent/appellant herein at the Court of Appeal on February 1st, 2011, was dismissed under Order 6 rule 10 of*

the Court of Appeal Rules, 2002. The said dismissal order/record of proceedings are hereby attached and marked exhibit TSA/3.

5. That I was informed by my counsel Chief Ladi Rotimi-Williams, SAN of 20 Idowu Martins Street, Victoria Island, Lagos on the 14th November, 2011 at about 1. 00 p.m and I verily believe him as follows:- B

(a) That the respondent/appellant never filed any notice of appeal to this honourable court in respect of the said dismissal order.

(b) That the appellate jurisdiction of the Supreme Court is prescribed under the Constitution of the Federal Republic of Nigeria, 1999 (as amended). C

(c) That the Supreme Court has no jurisdiction to entertain any decision of the Court of Appeal which has not been appealed against to the Supreme Court as was done in this appeal.

(d) That once the Supreme Court is made aware and is persuaded that it acted without jurisdiction in any matter before it, the court being one of law will not hesitate to correct its errors.

(e) That the appellant filed its further amended notice of appeal dated and filed on October 20th, 2008 which only complained or appealed against the decision of Court of Appeal delivered on December 11th, 2006. The said ruling of the Court of Appeal in appeal No. CA/L/200/2001 is herewith attached and marked exhibit TSA/4. E

(f) That I am aware that it is the practice of this honourable court not to entertain an appeal against an order of the Court of Appeal unless a proper appeal has been filed. F

(g) That any appeal against a decision or order of the Court of Appeal to the Supreme Court can only be initiated by a notice of appeal against that decision or order. G

6. That I am further informed by my counsel Chief Ladi Rotimi Williams, SAN of 20, Idowu Martins Street, Victoria Island, Lagos on the 14th November, 2011 at 1.00 p.m. and I verily believe him as follows:-

(a) That on June 14th, 2005, the Court of Appeal struck out the appellant's motion on notice dated June 5^h, 2003 (for want of diligent prosecution) seeking extension of time within which it may file its brief of argument in the substantive appeal out of time. The striking out order/record of proceedings, are attached herewith and H

marked exhibit TSA/5.

(b) That there has been no appeal by the appellant against the striking out of its said motion on notice for want of diligent prosecution.

(c) That the two orders of the Court of Appeal dated June 14th, 2005 and September 26th, are appealable decisions under the law.

(d) That the two aforementioned decisions of the Court of Appeal of June 14th, 2005 and September 26th 2005 have never been appealed against by the appellant herein.

(e) That the appellant had abandoned their appeal at the material time the said judgment of this honourable court was delivered on July 9th, 2010.

(f) That this honourable court is conversant with all the records, processes and proceedings before it.

7. That it is in the interest of justice to grant this application.

8. I swear to this affidavit in good faith and in accordance with the Oaths Act."

Exhibits	Particulars
E TSA/1	Judgment of the Supreme Court delivered on July 9 th 2010 in SC/3162006
TSA/2	Appellant further amended notice of appeal dated and filed on October 20 th , 2008 in SC/316/2006
F TSA/3	Drawn up order and record of proceedings of the Court of Appeal dated September 26 th , 2005 dismissing appellant's substantive appeal No. CA/L/200/2001 under Order 6 rule 10 of the Court of Appeal rules.
G TSA/4	Record of proceedings and drawn up order of the Court of Appeal dated June 14 th 2005 and June 16 th , 2005 respectively in appeal No. CA/L/200/2001.
TSA/5	Ruling of the Court of Appeal delivered on December 11 th , 2006 in CA/L/200/2001 (the ruling appealed against in SC/316/2006)
H	

Counter-affidavit to application dated 16th November 2011 seeking to set aside the Supreme Court judgment of 9th July 2010.

"I. Tomi Olagunju, Male, Christian. Nigeria. Lawyer of Equity Union House, 11 C.I.P.M. off Obafemi Awolowo Way, Ikeja Cen-

tral Business District, Alausa-Ikeja, Lagos, do make oath and state as follows:-

1. *I am a solicitor in the firm of Citipoint (Legal Practitioners) which represented the appellant in the appeal that ended with a unanimous judgment of the Supreme Court delivered on Friday the 9th day of July 2010 in favour of the appellant, and in the subsequent several post-judgment applications of the applicant/respondent. The matters herein deposed are therefore at the behest of my client, the successful appellant, are within my direct knowledge.*

2. *I have seen the affidavit deposed on 16th November 2011 by one Felix Orogun in support of applicant/respondent's motion on notice dated 16th November 2011, which seeks to set aside the final judgment delivered in this case by this court on the 9th day of July 2010.*

3. *The said Felix Orogun claimed in his said affidavit to be the Managing Director of the applicant/respondent with address as "No. 7B, Acme Road, Ogba, Ikeja, Lagos." I know as of fact that No. 7B Acme Road, Ogba, Ikeja, Lagos is the premises of Friesland Campina WAMCO Nigeria Plc., manufacturers of the popular 'Peak Milk' brand. Attached herewith and marked 'Exhibit TOA' and 'Exhibit TOB' are exchange of correspondences respectively dated July 19, 2010 and 20 July 2010 between my law firm and the said Friesland Campina WAMCO Nigeria Plc evidencing the fact to which I depose in this paragraph of my counter-affidavit.*

4. *The above-stated fact has been repeatedly drawn to the attention of Chief Ladi Rotimi-Williams SAN and his chambers, in particular in suit no. LD/148/2009 now pending at the High Court of Lagos State between T.S.A. Industries Ltd v. First Bank of Nigeria Plc in which they are also legal counsel for the present applicant/respondent. Chief Ladi Rotimi-Williams' Chambers and their client have nonetheless persisted with the use of the fake address in several court processes, including the present affidavit before this court which Chief Ladi Rotimi-Williams' Chambers prepared and caused the deponent to depose on Oath. In further establishment of this unbecoming conduct, I attach herewith as 'exhibit TOC' the statement of claim filed and dated as lately as 25th November, 2011 in the aforementioned suit no. LD/148/2009 the paragraph 1 of which states that 'The claimant is a Limited Liability Company incorporated in Nigeria, carrying*

on the business of garments and textile manufacturing at No. 7B Acme Road, Ogba Industrial Estate, Ikeja, Lagos.

B 5. The present application dated 16th November 2011 is a repeat of two previous similar applications respectively dated 15th July, 2010 and 5th May, 2011 by the same applicant/respondent in its unrelenting abuse of the appeal process to filibuster the implementation of the orders which this court directed at the Court of Appeal in the final judgment of this court delivered as far back 9th July 2010.

C 6. Few days after this court delivered its said final judgment on 9th July, 2010, the present applicant who was the unsuccessful respondent in the appeal came to this court with the first of its strange applications dated 15th July, 2010 asking this court to set aside a considered final judgment delivered by this court in an appeal that was thoroughly contested.

D 7. The applicant/respondent then followed up with another strange application dated 5th November, 2010 to the Court of Appeal wherein it asked the Court of Appeal to not obey the directive of this court (in its said judgment of 9th July, 2010) to relist and hear the respondent/appellant's appeal on the merit and to stay execution of the costs awarded against it in the same judgment "pending the hearing and determination of the respondent/applicant's motion on notice dated and filed 15th July, 2010 at the Supreme Court," A copy of the said motion on notice to the Court of Appeal is herewith attached and marked 'exhibit TOD.'

F 8. Sometime in the month of March 2011, the Court of Appeal served the parties with a hearing notice dated 15th March, 2011 scheduling a preliminary hearing (towards giving effect to the judgment of the Supreme Court) for Thursday the 24th of March. 2011. G A copy of the said hearing notice is herewith attached and marked 'exhibit TOE.'

H 9. One day to the scheduled hearing at the Court of Appeal, the applicant/respondent filed at the Court of Appeal what it titled 'respondent's further affidavit to its counter affidavit dated 8th November 2010' which was deposed by one Azeez Biodun. A copy of the said further affidavit is herewith attached and marked "exhibit TOP."

10. With a view to preventing the Court of Appeal from going ahead with the scheduled hearing, the applicant/respondent's Azeez

Biodun deposited in paragraphs 4 and 5 of “exhibit TOP” thus:

I swore to the respondent’s counter-affidavit to the appellant/applicant’s motion on notice on 21st of September 2010 to which exhibit AV/6 being the respondent’s motion on notice dated 15th of July, 2010 filed at the Supreme Court is attached to the said affidavit in support. B

...I herewith attach exhibit AV/12, being the hearing notice dated the 17th day of February 2011 from the Supreme Court in respect of the said exhibit AB/6.

This further affidavit is to inform this honourable court that the Supreme Court has given a hearing date of 3^d May, 2011 for exhibit AB/6 and to properly place the hearing notice (exhibit AB/12) before this honourable court. C

I know as a fact that the said exhibit AB/12... will assist this honourable court in... awaiting the decision of the Supreme Court in respect of exhibit AB/6 before entertaining the appellant/ applicant’s said motion herein. D

11. As per the records of this court, the 3^d May, 2011 scheduled hearing at this court was reaffirmed in open court at a sitting of this court on 11/4/2011 at which the applicant/respondent appeared by a team of lawyers led by Chief Ladi Rotimi-Williams SAN. E

12. On 3^d May, 2011, the applicant/respondent deliberately failed to show up in court to argue the first in the series of his strange application (dated 15th July, 2010) which was there and then struck out by this court. Barely a day after applicant/respondent sought to resurrect the same application by filing a second one dated 5th May 2011. F

13. On the 9th day of June, 2011 the applicant/respondent also filed an application asking, inter alia, to set aside “the ruling and proceedings of this honourable court delivered on the 3^d of May, 2011... striking out the applicant/respondent’s motion on notice dated 15th July, 2010. G

14. The said application was grounded on the claim-that the applicant was unaware of the sitting of 3/5/2011. It was argued on the 18th day of October, 2011 during which applicant/respondent’s counsel was confronted by the court with the record of the proceeding of 11/4/2011 at which the 3/5/2011 schedule was reaffirmed in open court. In desperation, the applicant/respondent sought to with- H

draw its said application but this court rejected the move and dismissed it.

15. *Knowing fully well that the decision of this court made on 18th day of October to not set aside the the ruling and proceedings of this honourable court delivered on the 3^d of May, 2011... striking out the applicant/respondent's motion on notice dated 15th July, 2010 effectively terminated its second application dated 5th May 2011, the applicant/respondent has resorted to filing it a third time, one dated 16th November 2011.*

16. *The present application dated 16th November, 2011 which is no different from the first one of 15th July, 2011 and the second one dated 5th May, 2011 seeks to set aside the judgment of 9th July, 2010... On the ground that same was given under mistaken and erroneous assumption that there was an appeal before this honourable court against the ruling of the court below given on the 26th September, 2005 when in fact there was no such appeal.*

17. *It is not true that the Honourable Justices of the Supreme Court (Dahiru Musdapher, Francis Fedode Tabai, Ibrahim Tanko Muhammad, Muhammad Saifullahi Muntaka-Coomassie and Olufunlola Oyelola Adekeye, JJSC) that delivered the judgment of 9/7/2010 (applicant's exhibit TSA/1) did so on the assumption that there was an appeal before this Honourable Court against the ruling of the court below given on the 26th September, 2005.*

18. *To the contrary, in the last two lines of the first paragraph of P.3 of the lead judgment of his Lordship Adekeye, JSC, the direction which the learned Justices gave to themselves was that "The instant appeal is against the decision of the Court of Appeal delivered on the 11th of December 2006." The notice of appeal and the ruling to which the Supreme Court appropriately directed itself in the said judgment are the exhibits TSA/2 and TSA/4-in. applicant's present application before this court.*

19. *The relief no. 4 (3) sought by the appellant in the amended notice of appeal attached as exhibit TSA/2 in the present application was for the "setting aside of the order of dismissal dated September 26, 2005 of the Court of Appeal in this matter.*

20. *It was, inter alia, against the above stated relief that the respondent in the appeal filed a preliminary objection to the effect that the Supreme Court lacked the jurisdiction to entertain because,*

according to the respondent, the appellant ought to have appealed it to the Supreme Court rather than applying to the Court of Appeal to set it aside.

21. This honourable court, in the judgment now sought to be set aside for alleged misdirection, gave appropriate direction and extensive consideration to the ground of the preliminary objection raising exactly the same argument now being repeated in this application to set aside the judgment. For example:

(a) in the second paragraph at P.6 of the lead judgment of His Lordship, Adekeye, JSC., this honourable court directed itself to the effect that one of the grounds upon which the respondent in the appeal predicated its preliminary objection was that “(ii) where there is no appeal against a decision of a court, the Supreme Court has no jurisdiction to entertain any ground of appeal not appealed against by the appellant.

(b) in the second paragraph at P.7 of the said lead judgment, this honourable court further directed itself to the effect that the respondent in the appeal also relied on the ground of objection “(iv) That this honourable court lacks the jurisdiction to grant the reliefs sought in the appellant’s 2 (two) notices of appeal herein.

(c) in line 22 at P.11 of the same lead judgment, it was recorded that the respondent in the appeal submitted in support of its preliminary objection, the argument that the appellant has not challenged the decision of the Court of Appeal dismissing appeal No. CA/L/200/2007 (sic: should read CA/L/200/2001) rather all it had been doing was to raise fresh issues; and

(d) in line 22 of P.16 of the same lead judgment, this honourable court also recorded that “The respondent drew attention to the fact that the appellant has failed to appeal against the decision of the Court of Appeal dismissing the appeal on 26th September, 2005.” The said preliminary objection and the arguments canvassed in support of it were given painstaking consideration in the judgment: and in the end, the honourable court dismissed the preliminary objection and upheld the appeal. At page 49 of the lead judgment, the honourable court said in no uncertain terms that “All the germane issues raised in this appeal which I have considered are decided in favour of the appellant.” To leave no room for doubt, the court went on by saying “The preliminary objection is over-ruled”.

It is the same preliminary objection that has been dismissed that the unsuccessful objection is by the current application, attempting to resurrect on the false claim that the judgment granted by the honourable court was based on a "mistaken and erroneous assumption." I make this affidavit in good faith, believing the truth of every-
 B *thing I have therein stated, and in accordance with the Oaths Act."*

Applicant's further and better affidavit to its motion on notice dated 5th May, 2011.

I. Honesty Eguridu, Male, Legal Practitioner, Christian and
 C Nigerian Citizen of No. 20 Idowu Martins Street, Off Adeola Odeku Street, Victoria Island, Lagos State, do hereby make oath and state as follows:-

1. I am a counsel in the law firm of Ladi Rotimi William's Chambers Legal practitioners to the applicant herein and by virtue of
 D my employment, I am familiar with the facts I depose to herein.

2. I have the Consent and authority of the applicant and that of my employer to depose to this affidavit on their behalf.

3. I know as a fact that a motion on notice dated 5th May, 2011 was filed in this court in this suit on behalf of the applicant and
 E I deposed to the affidavit in support of the said motion on notice.

4. I am informed by Chief Ladi Rotimi Williams, SAN, lead senior counsel for the applicant herein at our office on 12th February, 2012 at about 11.00 a.m. and I verily believe him as follows:-

(a) That the respondent filed a counter affidavit dated 3rd
 F June, 2011 to the said motion on notice dated 5th May, 2011. That the said motion on notice and the respondent's said counter affidavit are processes before this court in these proceedings and shall be relied on at the hearing of the motion on notice dated 5th May, 2011.

(b) That on 9th June, 2011 Rotimi Obasuyi, filed a further
 G affidavit dated 9th June 2011 in respect of the said motion on notice dated 5th May. 2011. The said further affidavit is a process before this court in these proceedings.

(c) That at the hearing of the applicant's motion on notice
 H dated 5th May 2011, the applicant' respondent shall no longer rely on paragraph 6 (a) - (o) of the affidavit in support of the said motion on notice dated 5th May, 2011, because he as counsel was under a mistaken, genuine and honest belief that on 11th April, 2011 when he appeared before this court in respect of this matter, no date was

given for hearing the applicant's motion on notice dated 15th July 2010 when in fact a date was given but he did not hear it.

(d) That it was during the proceedings on the 18th October, 2011, when he appeared before this court in respect of this matter that it was shown from the records of this court that a date was given during the proceedings of 11th April 2011. B

(e) That his mistaken belief that no date was given on 11th April, 2001 is genuine, compelling, and honest and not deliberate, as the records of this court in this matter will show that he as counsel for the applicant/respondent, has always honoured all hearing notices issued from the registry of this court in respect of this matter, save for 3rd May, 2011, which was due to his mistake. C

(f) That he knows as a fact that on 18th October, 2011 when it was shown from the records of the court that a date was given during the proceedings in this matter on the said 11th April 2011, he as counsel for the applicant/respondent herein apologized profoundly to this court for his genuine mistaken and erroneous belief that no date was given on the 11th April, 2011. D

(g) That he knows as a fact that this court will not visit his genuine mistake as counsel on the applicant/respondent. E

(h) That his mistake as counsel is not an afterthought, as exhibit TSA/9 attached to the applicant's motion on notice dated 5th May, 2011 predates the proceedings of 18th October, 2011 in the matter.

(i) That he knows as a fact that the said exhibit TSA/9 was dispatched to the Honourable Chief Justice Aloysius Iyorgyer Katsina-Alu CJN (as he then was), (DHL Shipment Waybill No. 1791700035 of 27/4/2011), and same was delivered on 28/4/2011 and received by one Udensi A. E. of the said CJN's Chambers. Attached herewith as exhibit TSA/9B is a photocopy of the DHL Shipment Air Waybill No. 1791700035 of 27/4/11; exhibit TSA/9C is DHL Outbound Shipment Receipt dated 27th April 2011 showing payment to dispatch exhibit TSA/9; and exhibit TSA/9D is DHL Shipment Detail showing the dispatch of exhibit TSA/9 from Lagos to Abuja and its delivery to the said Udensi A. E. of the said CJN's Chambers on 28/04/11 at 13.30. F G H

(j) That the applicant/respondent has done everything that needs to be done including depositing funds for travel, accommodation

and transportation to Abuja for his counsel to prosecute this matter on its behalf and ensure that its said motion on notice dated 5th May, 2011 is heard on the merits by this court.

B (k) That he knows as a fact that the motion on notice and the grounds upon which it is based are very substantial issues which go to the adjudicatory powers of the court.

C (l) That he knows as a fact that this court will not deny nor deprive the applicant its right to be given a fair hearing in respect of the said motion on notice dated 5th May, 2011 because of the mistake of its counsel.

(m) That he knows as a fact that exhibit TSA1 attached to the said motion on notice dated 5th May, 2011 was not properly placed before this court at the time of filing the said motion on notice.

D (n) That a proper copy of the said exhibit TSA1 is attached herewith and marked exhibit TSA1.

(o) That he knows as a fact that the interest of justice will be better served for the said motion on notice dated 5th May, 2011 to be heard on the merits.

E On the 22/2/12, the applicant had deposed to a reply to the affidavit which is not only copious or voluminous but clearly a lecture on the procedures of court and what this court should do.

F I have considered the submissions of counsel on either Side and perused in-depth the supporting affidavit, further and better affidavit, counter affidavit and the reply to the counter affidavit. All these affidavit evidence with the accompanying exhibits in all its glory of verbosity and story telling. The long and short of it is nothing else than a reincarnation of the preliminary objection raised by this same applicant in the main appeal between these same parties and in a G considered ruling, the objection was dismissed. That appeal was handled by a coram of five Justices: Dahiru Musdapher, Francis Fedode Tabai, Ibrahim Tanko Muhammad, Muhammad Saifullahi Muntaka- Coomassie, Olufunlola Oyelola Adekeye JJSC, which appeal was heard and determined by those Justices aforesaid with H Olufunlola Oyelola Adekeye JSC delivering the lead judgment which decision is reported as First Bank of Nigeria Plc v. T.SA Industries Ltd., (2010) 15 NWLR (Pt. 1216) 247 and which judgment learned counsel had attached as exhibit TSA/1 in the supporting affidavit.

This application is clearly a classic case of the abuse of the court's

process under the guise of an intellectual display in clear disregard of Order 8 rule 16 of the Supreme Court Rules. That rule provides thus:

“The court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the court decided nor shall the operative and substantive part of it be varied and a different form substituted.”

What this application denotes is an appeal of a case decided fully by the Supreme Court on appeal to the Supreme Court. The basis for such a procedure has not been brought forward. In fact from whatever angle the matter is looked at, a gross abuse of this court and its processes stare one in the face.

From the above and the fuller reasons in the lead Ruling of Olukayode Ariwoola JSC, I dismiss this application as lacking in merit. I abide by the consequential orders in the lead ruling

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