

SUPREME COURT OF NIGERIA
FRIDAY 31ST MAY, 2013. SC. 400/2010
CORAM:- I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,
S. GALADIMA, C. B. OGUNBIYI, S. S. ALAGOA, JJSC

FEDERAL REPUBLIC OF NIGERIA APPELLANT
V.
1. RAJI SHADE TAWAKALITU & 9 ORS RESPONDENTS

OBJECTIONS - Preliminary objection - Failure to reply - Absence of counter affidavit to objection - Does not mean that the objection is conceded - As courts are enjoined to consider the objection on its merits (H1)

SUPREME COURT - Criminal appeals - Time limit - By Supreme Court Act s. 27(2)(b) - Such appeals from CA to SC must be filed within 30 days - Otherwise leave of SC must be sought and obtained to do so (H2)

FACTS

1st respondent was discovered to be unworthy of being a graduate by her inability to complete relevant forms given to her at the NYSC orientation camp in Kwara State and also her failure to express herself in English language. These discoveries led to the arrest of 2nd to 10th respondents (lecturers at the Federal Polytechnic Offa) by men of the State Security Services (SSS) on the suspicion that they unjustly awarded marks to 1st respondent which ultimately led to her unmerited degree certificate awarded by the institution. 2nd to 10th respondents were thus arraigned before the Federal High Court Ilorin on a twelve count charge of Examination Malpractices contrary to and punishable under sections 6 and 9 of the Examination Malpractices Act Cap. F15, LFN 2004.

Respondents challenged the charge on jurisdictional competence of the court to entertain same. Respondents contended that the men of the SSS are not empowered to arrest and prosecute them in respect of the offences alleged against them (respondents). The court dismissed the objection. Respondents in dissatisfaction filed appeal to the Court of Appeal Ilorin Division. The court in its judg-

ment allowed the appeal and discharged respondents. The court however conceded that the SSS has limited powers to arrest and prosecute under sections 4 and 23 of the Police Act. Dissatisfied, appellant appealed to Supreme Court. Respondents raised preliminary objection to the hearing of the appeal on the ground of non-compliance with s. 27(2)(b) of the Supreme Court Act 2004. Respondents also cross appealed against the minority judgment of the Court of Appeal which held that respondents can be prosecuted under other relevant laws of the land.

HELD (Unanimously striking out the appeal per **CHUKWUMA-ENEH JSC**)

Preliminary objection - Failure to reply

1. Strangely enough, the appellant has not, as it were joined issue with the applicants in the preliminary objection that is to say on this fundamental issue. In that regard it has not filed a reply brief to take care of the instant objection as is expected of it nor has it filed a counter affidavit in response to the objection. I think that this is not good enough and is greatly deprecated.

However, the failure to so react does not entitle this court to assume the objection as having been conceded; this court as any other court all the same is enjoined to consider such an objection as the instant one on its merits on the available materials placed before it by the parties. Besides, the instant objection has raised an issue of law which can be determined on the available materials before this court.

(p. 2086 A)

SUPREME COURT - Criminal appeals - Time limit

2. I find the argument of the instant respondents very apt, formidable and sound in every respect. The time as well as the right for appealing any matters to this court is statutory and the appeal has to be against a decision of the court below as only appeals from the court below lie to this court. See section 233 of the 1999 constitution (as amended).

The statutory time for appealing in a criminal matter as the instant matter is as provided in section 27(2) (b) of the Supreme Court Act Cap. 515 Laws of the Federation of Nigeria 2004 as follows:

“27(2) The period prescribed for giving of notice of appeal or notice of application for leave to appeal are:

(a) not applicable.

(b) in an appeal in a criminal case, thirty days from the date of the decision appealed against.

(c) not applicable.

(d) The supreme court may extend the periods prescribed in subsection (2) of this section.”

The provision of the foregoing section being a mandatory provision as to the limitation of time to appeal does not admit of any ambiguity at all. It is clear and plain that as regards criminal appeals to this court that the period of 30 days is the period of time within which to appeal as of right otherwise leave of this court has to be first sought and obtained to enlarge the time pursuant to an application properly brought to appeal out of time. Meaning that failure to comply with the said statutory provision (or appealing out of time with leave) is a breach of a fundamental condition of appeal within the time prescribed by the Act to file an appeal in a criminal matter and is an incurable defect which deprives this court of any jurisdiction to entertain the appeal. This is so as a Notice of Appeal is an initiating process and so in this instance being an incompetent Notice of Appeal, it is incapable of sustaining any appeal as the instant one to this court.

In this matter the appellant having failed to appeal within 30 days allowed by the Act to so appeal as of right ought to have applied for extension of time to do so as the power to extend the time for appealing out of time of any decision from the court below to this court is vested in this court and no other court. See: *Onuoha v. Commissioner of Police* (1959) 4 FSC 25 and Section 27(2) (d) (*supra*). And so it is fatal to file a Notice of Appeal on the facts of this matter out of time unless and until an enlargement of time to do so is allowed by this court upon the instant appellant applying prop-

erly for extension of time to do so. (p. 2086 F)

REPRESENTATION

J. A. Mumini Esq. DPP, Ministry of Justice, Ilorin, for the Appellant
Chief R. O. Ashaolu Esq. for the 1st Respondent

- B Tunde Olomu Esq., for the 2nd, 8th and 9th Respondents
R. O. Balogun Esq., for the 4th - 6th Respondents
Salman Jawondo Esq. for the 3rd, 7th and 10th Respondents

CASES REFERRED TO

- C FRN v. Adewunmi (2007) 10 NWLR (pt. 1042) 399
Foko v. Foko (1968) NMLR 441
Madukolu v. Nkemdilim (1961) 2 NSCC 374
Agu v. Odofin (1992) 3 SCNJ 161
D Ejiogu v. Irona (2008) All FWLR (pt. 442) 1066
NNPC v. Odidere Enter. Nig. Ltd. (2008) All FWLR (pt. 426) 1867
Shehu v. Gobang (2009) All FWLR (pt. 496) 1866
Owoh v. Asuk (2008) All FWLR (pt. 426) 446
Onuoha v. Commissioner of Police (1959) 4 FSC 25
E Omo v. Inspector General of Police (1955-56) WRNLR 110

STATUTES REFERRED TO

- Federal Polytechnic Act Cap. F17 LFN 2004
Examination Malpractices Act Cap. F15 LFN 2004, ss. 6, 9
F Criminal Procedure Act, ss. 167, 217
Police Act, ss. 4, 23
Supreme Court Act Cap. 515 LFN 2004, s. 27(2)
Constitution of the Federal Republic of Nigeria 1999, s. 233

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LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

- The 2nd to 10th respondents (otherwise designated as the respondents herein) have been lecturers in the employ of the Federal Polytechnic Offa an institution set up under the Federal Polytechnic
H Act Cap. F17 Laws of the Federation of Nigeria, 2004. The said respondents have been arrested by men of the state security service (SSS) and arraigned before the Federal High Court Ilorin, on a twelve-count charge of Examination Malpractices contrary to and punishable under Sections 6 and 9 of the Examination Malpractices Act

Cap. F15, Laws of the Federation of Nigeria 2004. The crux of the allegation against the respondents is that they have awarded marks to the 1st respondent (Raji Shade Tawakalitu) indiscriminately culminating in awarding her a degree by which means she has been recommended for the National Youth Service (when she is not able to complete the relevant forms given to her at the NYSC camp and equally unable to communicate in English language). B

The charges have been challenged by the respondents on grounds of jurisdictional competence of the trial court to entertain the same - by alleging that the men of the State Security Service (SSS) have no power to arrest, investigate and arraign the respondents in respect of the alleged offences as have been preferred against them. The trial High court overruled the preliminary objection on the untenable ground that the preliminary objection has been raised after the respondents have pleaded to the charge, relying on Section 167 and 217 of the CPA and the case of FRN v. Adewunmi (2007) 10 NWLR (Pt.1042) 399; Hence the appeal to the court below filed by the respondents. The court below in a considered judgment given on 22/4/2010 has allowed the appeal holding that trial High Court has no jurisdiction to entertain the charges preferred against the respondents and consequently has discharged the respondents, although conceding that the State Security Service (SSS) has limited jurisdictional competence to arrest, investigate and arraign persons for certain offences relying on Sections 4 and 23 of the Police Act. C D E

Aggrieved by the decision the appellant has appealed to this court as per the Notice of Appeal filed on 29/6/2010 (clearly more than 30 days from the date of the delivery of the judgment of the court below). F

For whatever it is worth, I have to mention that the appellant has filed a brief of argument and has raised one issue for determination therein. The appellant has not filed a reply brief even then to cover the preliminary objection taken by 3rd, 7th and 10th respondents, which has become most crucial in this proceeding. The respondents 3rd, 7th and 10th have filed their joint brief of argument and have taken and argued their preliminary objection therein and have alongside it argued in the alternative a sole issue for determination. The respondents 4th to 6th have also filed a joint brief of argument and have raised a sole issue for determination. The respon- G H

dents 2nd, 8th and 9th have also filed a joint brief of argument and have raised a sole issue for determination. They also have raised a preliminary objection as regards the sole issue for determination as raised by the appellant. The 1st respondent also has filed a brief of argument. In the cross-appeal filed by 4th and 6th respondents they
 B also have filed their joint cross-appellants brief of argument. The 1st cross-respondent has filed a brief of argument without adverting its attention to the preliminary objection. I have tried to identify the briefs so far filed in this matter just to complete the processes filed in
 C this appeal as they would become relevant only if there is a competent Notice of Appeal leading to a pending appeal in this matter.

In view of the overall stance taken by the 3rd, 7th and 10th respondents in this matter, they have raised and argued a preliminary objection on the competency of the appeal and have premised
 D their preliminary objection on three grounds as per paragraph 3 of their brief of argument as follows:

“(i) The judgment, the subject of this appeal was delivered on 22nd April, 2010.

*(ii) The Notice of Appeal was filed on 29/6/2010 more than
 E 30 days after the delivery of the judgment.*

(iii) The appellant did not seek and obtain the leave of the court to file appeal out of time.

(iv) By virtue of (i), (ii) and (iii) above, the appeal is incompetent.”
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Prima facie the above grounds for challenging the competency of the instant appeal in this court are fundamental and go to the root of this appeal and clearly the purpose of the objection is to avoid the hearing of the appeal. In other words it is raised to terminate the
 G appeal without much ado.

What is significant about the instant objection is that it is premised upon a statutory requirement, a condition precedent to this court entertaining this appeal and not a mere irregularity that can be waived and so it can be raised at any stage of the instant proceedings. Thus any defect in this regard renders the proceedings however
 H well conducted a nullity and clearly it does not matter that the respondents have taken steps in prosecuting the appeal as the defect is extrinsic to the adjudication. Because the issue is one very decisive of the instant appeal, I see the need to sort out this matter firstly before

delving if at all into the main appeal itself. See: Foko v. Foko (1968) NMLR 441, Madukolu v. Nkemdilim (1961) 2 NSCC 374.

Even then the right to appeal in this matter is statutory so also the time for appealing and so, where there is no competent notice of appeal (as here - on having filed it out of time) the appeal is a non-starter. In which case there is no appeal before the court. Meaning that to embark on hearing such an appeal is no more than an exercise in futility. See: Agu v. Odojin (1992) 3 SCNJ 161 at 172-173. B

In the circumstances of this matter it is incumbent that I deal with this issue first. There can be no doubt that if the objection is sustained it is a complete answer to the matter and it saves the time of the court. C

The instant respondents have argued that the instant appeal is a criminal matter and so that by the provision of Section 27(2) of the Supreme Court Act Cap. 515 laws of the Federation of Nigeria 2004, an appellant has only 30 (thirty) days from the date of a judgment given against him within which to file his appeal against the judgment. And that in the instant matter the time allowed to file a competent notice of appeal has expired on 22/5/2010 excluding the day of delivery of the judgment. And thereafter that an appellant as the instant appellant in this matter can only appeal with the leave of this court and so that the instant Notice of Appeal having been filed on 29/6/2010 without such leave as per an order of this court extending the time within which to do so is incompetent and by extension that the purported appeal premised on it is also incompetent and that both processes ought to be struck out. And I entirely agree that these submissions are well taken and are in tandem with the law. See: Ejioogu v. Irona (2008) All FWLR (Pt.442) 1066 at 1106, N.N.P.C. v. Odidere Enterprises (Nig.) Ltd. (2008) All FWLR (Pt.426) 1867 at 1888, Shehu v. Gobang (2009) All FWLR (Pt.496) 1866 at 180. Also see Owoh v. Asuk (2008) All FWLR (Pt.426) 446 at 449 - 460. Therefore, they have prayed the court to uphold the preliminary objection and strike out the Notice of Appeal and the purported appeal as being incompetent. They have even then gone on to argue the appeal in extenso in the event of overruling their objection. I do not find it useful in determining the instant preliminary objection stating their case in that regard as well as the respective cases of the other D E F G H

parties to the issues raised in the main appeal itself. As can be seen it will amount to taking the matter too far upon an incompetent notice of appeal.

Strangely enough, the appellant has not, as it were joined issue with the applicants in the preliminary objection that is to say on this fundamental issue. In that regard it has not filed a reply brief to take care of the instant objection as is expected of it nor has it filed a counter affidavit in response to the objection. I think that this is not good enough and is greatly deprecated.

However, the failure to so react does not entitle this court to assume the objection as having been conceded; this court as any other court all the same is enjoined to consider such an objection as the instant one on its merits on the available materials placed before it by the parties. Besides, the instant objection has raised an issue of law which can be determined on the available materials before this court.

It is equally important to observe that it is totally immaterial that only the 3rd, 7th and 10th respondents have jointly in their brief of argument taken the instant objection as against the other respondents who cannot by their apparent acquiescence confer on this court the power not grounded as per the Constitution. I would have thought that an appellant in the circumstances should have taken a cue from an objection of this nature to reconsider his appeal with a view to putting his house in order. This is not to be as has been showed by the instant appellant pressing on with this appeal in spite of its obvious incurable defect.

I find the argument of the instant respondents very apt, formidable and sound in every respect. The time as well as the right for appealing any matters to this court is statutory and the appeal has to be against a decision of the court below as only appeals from the court below lie to this court. See section 233 of the 1999 constitution (as amended).

The statutory time for appealing in a criminal matter as the instant matter is as provided in section 27(2) (b) of the Supreme Court Act Cap. 515 Laws of the Federation of Nigeria 2004 as follows:

“27(2) The period prescribed for giving of notice of

appeal or notice of application for leave to appeal are:

(a) not applicable.

(b) in an appeal in a criminal case, thirty days from the date of the decision appealed against.

(c) not applicable.

(d) The supreme court may extend the periods prescribed in subsection (2) of this section. ^B

The provision of the foregoing section being a mandatory provision as to the limitation of time to appeal does not admit of any ambiguity at all. It is clear and plain that as regards criminal appeals to this court that the period of 30 days is the period of time within which to appeal as of right otherwise leave of this court has to be first sought and obtained to enlarge the time pursuant to an application properly brought to appeal out of time. Meaning that failure to comply with the said statutory provision (or appealing out of time with leave) is a breach of a fundamental condition of appeal within the time prescribed by the Act to file an appeal in a criminal matter and is an incurable defect which deprives this court of any jurisdiction to entertain the appeal. This is so as a Notice of Appeal is an initiating process and so in this instance being an incompetent Notice of Appeal, it is incapable of sustaining any appeal as the instant one to this court. ^C ^D ^E

In this matter the appellant having failed to appeal within 30 days allowed by the Act to so appeal as of right ought to have applied for extension of time to do so as the power to extend the time for appealing out of time of any decision from the court below to this court is vested in this court and no other court. See: *Onuoha v. Commissioner of Police* (1959) 4 FSC 25 and Section 27(2) (d) (*supra*). And so it is fatal to file a Notice of Appeal on the facts of this matter out of time unless and until an enlargement of time to do so is allowed by this court upon the instant appellant applying properly for extension of time to do so. See: *Isaac Omo v. Inspector General of Police* (1955-56) WRNLR 110. ^F ^G ^H

For all this, I find merit in the preliminary objection, I uphold it and being decisive of this matter there is no cause to examine the other issues raised in this matter any further on their merits as there is

no competent Notice of Appeal and indeed no appeal before this court upon which to predicate such an exercise. The instant Notice of Appeal is accordingly struck out and so also the purported appeal in this matter.

Appeal struck out.

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OGUNBIYI JSC

I read in draft the lead judgment just delivered by my learned brother Chukwuma-Eneh, JSC and I agree that the purported notice of appeal filed is incompetent and ought to be struck out.

Just for purpose of emphasis, I wish to restate that the provision of section 27(2) of the Supreme Court Act reproduced in the lead judgment is apt and clear. With the 30 days within which to appeal having been expended, the appellant had lost its right of appeal. The only option open is to come by way of an application on notice pursuant to subsection 2(d). In other words leave of this court for extension of time within which to appeal is a must. It is also at the discretion of the court and not a matter of course.

My learned brother has adequately dealt with the appeal in the lead judgment and I also adopt same and strike out the purported notice of appeal for incompetence.

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ALAGOA JSC

This is an appeal against the judgment of the Court of Appeal Ilorin Division (hereinafter simply referred to as the Lower Court or the Court below) which set aside the ruling of the Federal High Court Ilorin Division wherein the present Respondents were accused persons. The facts of the case which are fairly straight forward are briefly stated below.

At the orientation camp of the National Youth Service Corps (NYSC) in Kwara State, the 1st Respondent was found incapable of filling out forms given to her. As if that was not bad enough, she was also found incapable of communicating in the English language. Suspecting that she was a fake youth Corper, she was handed over to operatives of the State Security Service (SSS) who arrested and took her to the Federal Polytechnic Offa where she claimed to have stud-

ied and graduated. Her claim was verified and found to be authentic. The operatives of the State Security Service (SSS) then proceeded to swoop on and arrest the other Respondents, her former lecturers at the institution on suspicion of having unfairly and criminally aided her (the 1st Respondent) to earn a degree which was unmerited. All the Respondents as accused persons were arraigned before the Federal High Court Ilorin on a 12 count charge of Examination Malpractices contrary to and punishable under Sections 6 and 9 of the Examination Malpractices Act, Laws of the Federation of Nigeria 2004 where they pleaded not guilty and the case was adjourned to a future date for trial proper to commence. Some of the Respondents separately raised preliminary objections challenging the jurisdiction of the court to try the case on the grounds inter alia that the law under which the Respondents were charged - the Examination Malpractices Act is not applicable to the Federal Polytechnic Offa because the institution is not an examination body contemplated by the Act. The various objections were consolidated and taken together and in his ruling the learned trial judge found against the Respondents. He reasoned that the Respondents' plea having earlier been taken, he had the jurisdiction to hear the case. The Respondents appealed to the Court below on the grounds that the said Exam Malpractices Act is not applicable, the trial court lacked jurisdiction and the State Security Service (SSS) lacked the power to arrest, detain, investigate and prosecute the Respondents. The Court below in its judgment allowed the appeal in its entirety. Aggrieved by the judgment of the Court below, the State as Appellant has appealed to the Supreme Court on two grounds. The Respondents filed preliminary objections to the competence of the Appeal. The 3rd, 7th and 10th Respondents contended that although the judgment of the lower court was delivered on the 22nd April, 2010, the Notice of Appeal to this court was filed on the 29th June, 2010 well outside the 30 day period allowed to do so pursuant to Section 27 (2) (b) of the Supreme Court Act Cap. 515, Laws of the Federation of Nigeria 2004, being a criminal matter.

On the part of the 2nd, 8th and 9th Respondents it was submitted that the lone issue raised is not related to the two grounds of appeal. Incidentally it is the same lone issue that has been raised for determination in all the briefs of argument save that they are differ-

ently worded. Without much ado let me say right away that the submission of the 3rd, 7th and 10th Respondents that the Appellants' Notice of Appeal was filed outside the 30 day period allowed by the Supreme Court Act is correct. No leave of court was obtained for so doing. The appeal is liable to be struck out and it is hereby so struck
B out.

In this wise, I agree with the lead judgment just delivered by my learned brother Chukwuma-Eneh, JSC. I am not oblivious of the fact that the Respondents filed a Cross Appeal which has to do with that part of the judgment of the Court below wherein Denton
C West, JCA, while concurring with the lead judgment which is also the majority judgment made an order that the Respondents should be arrested and prosecuted under the proper law and proper court following the directive of the Hon. Attorney General that they be so
D prosecuted. That judgment of Denton West, JCA after she had concurred with the majority judgment of the Court below should be seen for what it is - a MINORITY judgment which is not the judgment of the court below. The Cross Appeal is therefore incompetent.

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