

SUPREME COURT OF NIGERIA
FRIDAY 17TH MAY, 2013. SC. 418/2010
**CORAM:- M. MOHAMMED, J. A. FABIYI, B. RHODES-
VIVOUR, M. U. PETER-ODILI, K. B. AKA'AH, JJSC**

1. UYAEMENAM NWORA
2. ERIC OZUNMBA
3. EMESI OKEKE APPELLANTS
4. GABRIEL OKOYE
5. NWUDE IGWEONUWU
(For themselves and as representing
Okpulaji Abba Town)
AND
1. NWEKE NWABUEZE
2. PHILIP OKORO
3. REUBEN IFEKA RESPONDENTS
(For themselves and on behalf of
Umugama Village Ukwulu)
AND
1. NWOYE OFOEDU
2. EKEMEKA OMOGU
3. ICHIE TITUS OKEKE
4. EUGENE OTUNABO
(For themselves and on behalf of
Oranto and Akpu Village Ukpoko)

ACTIONS - Cause of action - Applicable law - Action is governed by the substantive law in force - At the time the cause of action arose - Which in this case is the 2007 Court of Appeal Rules (H1)

ACTIONS - Practice & procedure - Applicable rule - Is the rule in force at the time of trial of the action - Or when the application is heard - Unless there is any provision to the contrary (H2)

APPEALS - Dismissal - Fair hearing - Court of Appeal Rules 2007 O. 8 - Deprived the court the power to act on notice of noncompliance - With compilation & transmission of appeal records - Without putting parties on notice to dismiss the appeal (H3)

JURISDICTION - Basis - For court to assume jurisdiction over a matter - The matter must be commenced by due process of law - And upon fulfillment of any condition precedent (H4)

FACTS

Appellants' appeal No.CA/E/30/2009 pending at the Court of Appeal Enugu Division came up for striking out for non-compliance with the rules of that court. The record of appeal before the court showed that the parties were absent and were not represented. A certificate of non-compliance with conditions imposed upon a would be appellant, was issued and signed by the Registrar of Anambra State High Court (i.e. the trial court) and filed in the Registry of the Court of Appeal.

The Registrar had issued the Notice of Non compliance under Order 8 Rule 1 of the Court of Appeal Rules 2007. The Court of Appeal having considered the said non compliance notice struck out the appeal in the absence of the parties. Aggrieved, appellants filed appeal to Supreme Court challenging the striking out of their appeal by the Court of Appeal. Appellants' contention is that under the applicable Rules, their appeal ought not to be struck out in the circumstance of the matter. Respondents contend that appellants were not prejudiced by the order of the Court of Appeal as nothing therein was made in favour of respondents. Respondents further argued that since the notice of appeal at the Court of Appeal was filed before 2002, the Court of Appeal 2007 Rules is inapplicable in the circumstance.

ISSUE FOR DETERMINATION

"Considering the antecedent of this appeal, and the clear provisions of Order 8 and other relevant Provisions of the Court of Appeal Rules, as well as the Appellants' right to fair hearing whether the lower Court was not in grave error and acted without jurisdiction when it struck out the Appellants' appeal on 3rd March, 2009."

HELD (Unanimously allowing the appeal per
MOHAMMED JSC)

Cause of action - Applicable law

1. However, it is significant to state here that by the provisions of Order 1 Rule 1 (2) of the Court of Appeal Rules 2002 which came into force on 1st April, 2002, the entire Court of Appeal Rules, 1981 were revoked. In similar vein, the 2007, Court of Appeal Rules which came into force with effect from 1st September, 2007, specifically and clearly by Order 1 Rule 2 thereof, repealed the entire provisions of the Court of Appeal Rules, 2002. By these very clear provisions of the 2002 and 2007 Court of Appeal Rules, it is not at all in doubt that both the provisions of the 1981 and 2002 Rules of the Court of Appeal having been revoked or repealed, were not in force as at 27th January, 2009, when the Registrar of the trial High Court issued the notice or certificate of non-compliance to the Court below in respect of non-compliance with the rules of Court by the Appellants. In other words the applicable rules at the time the Court below took action on the Appellants' appeal are the 2007 Court of Appeal Rules and I so hold.

The law is well settled that an action is governed by the substantive law applicable and in force at the time the cause of action arose. (p. 2442 C)

ACTIONS - Practice & procedure - Applicable rule

2. In the same vein, it is also well settled that the rule governing the practice and procedure in an action or in an application, is the rule in force at the time of the trial of the action or at the time that the application is heard, unless there is any provision to the contrary. This is based on the principle that there is no vested right in any course of procedure.

In other words, a litigant only has the right to rely on the procedure prescribed for the time being for the hearing of his matter by the court. Therefore where the procedure is changed or altered, the litigant must proceed according to the changed procedure as was the case in *Owala v. Anyigon* (1993) 2 N.W.L.R. (Pt.276) 380 at 391, where this Court found that the Supreme Court Rules 1961 which were applicable to the Court of Appeal which came into existence as an intermediate appellate Court in 1976, had ceased to apply to that Court when

the Court of Appeal Rules 1981 came into force on 1st July, 1981. (p. 2442 H)

APPEALS - Dismissal - Fair hearing

3. Some of the important features of the 2007 Court of Appeal Rules in Order 8 thereof are - the taking away of the power of the Registrar of trial Court to issue notice of non-compliance and serve the same on the Court of Appeal. The same Rules also deprived the Court of Appeal of the power to act on the notice of noncompliance without putting the parties on notice to dismiss or strike out the Appellants' appeal. In this respect therefore the 2007 Court of Appeal Rules have introduced elements of affording the parties to the appeal fair hearing before the Court of Appeal can strike out or dismiss a pending appeal for the Appellants' failure or neglect to comply with the rules of that Court regarding the compilation and transmission of the record of appeal. It is for this reason that the action of the Court below in striking out the Appellants' appeal pursuant to Order 8 Rule 1 of the Court of Appeal Rules 2007, which does not give it the power to do so, is a complete nullity with no effect whatsoever resulting in leaving the Appellants' appeal No. CA/E/30/2009, still intact and remains pending in that Court. (p. 2444 B)

JURISDICTION - Basis

4. The law is well settled that for a Court to have jurisdiction in a matter, it must be commenced by due process of law and upon the fulfillment of any condition precedent to assumption of jurisdiction. The result of the proceedings of the Court below undertaken in the absence of a motion by the Respondents in which the parties were given a hearing, was plainly embarked upon without jurisdiction resulting in the order of the Court below striking out the Appellants' appeal, a complete nullity. (p. 2444 H)

REPRESENTATION

D. D. Dodo, SAN; with Dr. Oladapo Olanipekun, Ameh Ebute, Nasir Dangiri, Audu Anuga, Aisha Ali (Miss), S. A. Eigege, Adedayo Adesina

and Adewale Adegboyega, for the Appellants

Dr. J. O. Ibik, SAN; with Nnamdi Ibegbu, SAN, Magaji SAN, O. J. Ibik, Odera Nnatu and Sa'adatu Ibrahim, for the 1st set of respondents

Chief J. K. Gadzama, SAN; with Paul Ekoru, SAN, G. S. Paul, SAN, Tagbo Ike, Henry Michael-Ihunde, A. S. Akingbade, U. M. Jawur, P. B. G. Paul, F. I. Bukar (Miss), Mukhtar Abdullahi, S. O. Manah (Miss), Victoria Agu (Miss), Barbara Omosun (Miss) and Eni Ojah, for the 2nd set of Respondents

CASES REFERRED TO

Oyegun v. Nzeribe (2010) 7 NWLR (pt. 1194) 577

Sken Consult v. Ukey (1981) 1 SC 6

Okoye v. N.C.E. & Co. Ltd. (1991) 6 NWLR (pt. 199) 501

Saleh v. Monguno (2006) 15 NWLR (pt. 1001) 26

Madukolu v. Nkemdilim (1962) 2 SCNLR 341

Tsokwa Motors Nig. Ltd. v. UBA Plc (2008) 2 NWLR (pt. 1071) 347

A-G Rivers State v. Ude (2006) 6 - 7 SC 131

Oke v. Aiyedun (1986) 2 NWLR (pt. 23) 548

Ukachukwu v. Uba (2005) 18 NWLR (pt. 956) 1

Mohammed v. Hussein (1998) 14 NWLR (pt. 584) 108

Maiwada v. First Bank of Nigeria Plc (1997) 4 NWLR (pt. 500) 497

Agbajo v. A-G Federation (1986) 2 NWLR (pt. 23) 528

Rica v. Erlanger (1874) 3 Ch. D. 69

Olaore v. Oke (1987) 4 NWLR (pt. 67) 769

Afolabi v. Adekunle (1983) 14 NSCC 398

RULES REFERRED TO

Court of Appeal Rules 2007, O. 7 rr. 1, 8, 9, O. 8 r. 1

Court of Appeal Rules 1981, O. 3 rr. 10, 20(1)

Court of Appeal Rules 2002, O. 1 r. 1(2)

High Court of Anambra State (Civil Procedure) Rules 2006, O. 1 r. 2

LEAD JUDGMENT BY MOHAMMED JSC

On 3rd March, 2009, the Appellants' appeal No.CA/E/30/2009 pending at the Enugu Division of the Court of Appeal came up before that Court for striking out for non-compliance with the rules of Court. The record of appeal at page 333 shows that the parties were

absent and not represented. The record of appeal at page 332 also shows that a certificate of non-compliance with conditions imposed upon a would be Appellant issued and signed by the Registrar of the trial High Court on 27th January, 2009 and filed the following day in the Registry of the Court of Appeal, was before the Court of Appeal on the 3rd day of March, 2009. The non-compliance Notice said to have been issued under order 8 Rule 1 of the Court of Appeal Rules 2007 reads -

"Pursuant to Order 8 Rule 1 of the Court of Appeal Rules 2007, I hereby certify that the Appellants in the above named case have not complied with the requirements of Order 8 Rule 1.

Dated at Awka the 27th day of January, 2009

V. O. Osieme (Mrs.)

Asst. Chief Litigation,

Awka Judicial Division"

The Court of Appeal therefore in the absence of the parties considered the Notice of Non-Compliance filed by the Registrar of the trial High Court and struck out the Appellants' appeal. The short but very clear Ruling of that Court at p. 333 of the record of appeal reads -

"The Registrar has issued a notice of non-compliance with the Rules and there is no Pending application for departure from the Rules. The appeal is therefore struck out."

The Appellants who were not happy with this order of the Court of Appeal Enugu striking out their appeal, have appealed to this Court by their Notice of appeal containing 3 grounds of appeal from which the learned Counsel to the Appellants identified only one issue for the determination of the appeal. That lone issue is -

"Considering the antecedent of this appeal, and the clear provisions of Order 8 and other relevant Provisions of the Court of Appeal Rules, as well as the Appellants right to fair hearing whether the lower Court was not in grave error and acted without jurisdiction when it struck out the Appellants appeal on 3rd March, 2009."

The 1st set of Respondents however after referring to the Notice of Appeal of the Appellants, decided to frame one issue each from the 3 grounds of appeal through their learned senior Counsel as follows -

"(a) Whether the decision of Court was perverse (Ground 1)

(b) Whether the Court misdirected itself in law by striking out non-Pending appeal (Ground 2)

(c) Whether the lower Court acted without jurisdiction by striking out Appellants' appeal (Ground 3)"

In the 2nd set of Respondents brief of argument on the other hand, their learned senior counsel identified 2 issues for the determination of this appeal as follows -

"(1) Whether the order of lower Court striking out the appeal of the Appellants on the 3rd March, 2009 was proper in the circumstances.

(2) Whether this appeal is properly (sic) before this Court. "

From the 3 grounds of appeal filed by the Appellants complaining of perverse, misdirection and absence of jurisdiction in relation to the decision of the Court of Appeal, the single issue identified in the Appellants brief of argument appears to have covered all the grounds of appeal. I shall therefore determine this appeal on the lone issue as identified in the Appellants brief of argument. This is because the issue number (b) in the 1st set of Respondents brief of argument on the question of misdirection in law in striking out non-pending appeal and the 2nd issue in the 2nd set of Respondents brief raising the alleged incompetence of this appeal, do not appear to have arisen from the 3 grounds of appeal filed by the Appellants. In any case the 2nd set of Respondents not having filed a Notice of Preliminary objection to the competence of this appeal, cannot be heard to be complaining of whether this appeal is properly (sic) before this Court.

Before proceeding to resolve the single issue arising for determination in this appeal, it is important to emphasize that on 3rd March, 2009, the Enugu Division of the Court of Appeal acting on the certificate of non-compliance with conditions of appeal signed by the Registrar of the trial High court where the consolidated suits numbers AA/53/75 and AA/11/77 were heard giving rise to the pending appeal by the Appellants at the court of Appeal No. CA/E/30/2001, struck out the appeal. The present appeal is therefore strictly confined to the appeal against that order of the Court of Appeal of 3rd March, 2009, striking out the Appellants appeal. Although there had been an attempt by the learned senior counsel of the Appellants to have the Appellants appeal against the striking out of the Appellants

motion on 13th January, 2009 by the same Court of Appeal Enugu to be heard with the present appeal, that attempt was not successful. All the same, the Appellants brief of argument appeared to have included arguments touching on that Appellants appeal against the decision of the Court of Appeal given on 13th January, 2009 before
B the decision of the same Court given on 3rd March, 2009, which is the subject of this appeal.

On the only issue for determination, learned counsel to the Appellants referred to the Ruling of the Court below being appealed
C against and pointed out that the Ruling was based on two grounds, namely, the issuance of a Notice of non-compliance and absence of pending application for departure from the rules. The learned Counsel explained that the Appellants in their consolidated suits numbers AA/53/75 and AA/11/77 before the Anambra State High Court Awka,
D lost in the judgment against them delivered by that Court on 12th November, 1999 and therefore had appealed against that judgment on 12th November, 1999.

Learned Counsel narrated all efforts made to compile the records of appeal but without success up to the date when the Appel-
E lants appeal was struck out on 3rd March, 2009 and referred to Order 8 Rules 1, 2, 3, 4 and 18 of the Court of Appeal Rules 2007, to say that it was the duty of the Registrar of the trial Court on receipt of the Notice of Appeal filed by the Appellants to compile and transmit
F the records of appeal; that it was after the failure of the Registrar to compile the record that the duty to do so devolved on the Appellants; that the same Rules provide that where the Registrar and the Appellants have failed to compile the records, the Respondents may, by Notice of motion move the Court of Appeal to dismiss the appeal;
G that by Order 7 Rules 1, 8 and 9 of the Court of Appeal Rules, that Court can make an order dismissing the appeal on hearing the parties having regard to the decision of this Court in *Oyegun v. Nzeribe* (2010) 7 N.W.L.R. (Pt. 1194) 577 at 588.

Learned counsel therefore argued that in the absence of the
H motion filed by the Respondents and the hearing of the parties by the Court below, that Court lacked the jurisdiction to strike out the Appellants' appeal; that the decision of the Court below of 3rd March, 2009, was also eroded by the absence of any provision in order 8 of the Rules of the Court of Appeal 2007, empowering the Registrar of

the trial court to file Notice of Non-compliance thereby making the decision of the Court below striking out the Appellants appeal a nullity on the authority of several cases including *Sken Consult v. Ukey* (1981) 1 S.C. 6, *Okoye v. N.C.E. & Co. Ltd.* (1991) 6 N.W.L.R. (Pt. 199) 501 and *Sale v. Monguno* (2006) 15 N.W.L.R. (Pt. 1001) 26 at 74. Relying on the case of *Madukolu v. Nkemdilim* (1962) 2 S.C.N.L.R. 341 and *Tsokwa Motors (Nig.) Ltd. v. U.B.A. Plc* (2008) 2 N.W.L.R. (Pt. 1071) 347 at 367, learned Counsel stressed that in the absence of a motion on Notice filed by the Respondents, the Court below was deprived of jurisdiction to hear the matter before it in the absence of a condition precedent to the initiation of the case resulting also in making the decision of the Court below of 3rd March, 2009, a nullity. It was also the contention of the Appellants that failure of the Court below to serve notice of the hearing of the appeal on 3rd March, 2009, rendered the striking out of the appeal a nullity having regard to the cases of *Attorney General Rivers State v. Ude & 12 Ors.* (2006) 6 - 7 S.C 131 at 143 and *Oke v. Aiyedun* (1986) 2 N.W.L.R. (Pt. 23) 548 at 558. Learned Counsel concluded by urging this Court to allow the appeal and set aside the order of the Court below striking out the appeal.

For the 1st set of the Respondents, their learned senior Counsel citing and relying on a number of cases on the features of a perverse decision or what constitutes a perverse decision, had argued that the decision of the Court below now on appeal, was not perverse. Some of the decisions relied upon include *Baridan v. State* (1994) 1 N.W.L.R. (Pt. 320) 250, *Opeyemi v. Bamidele* (1968) 1 All N.L.R. 31, *Maja v. Stocco* (1958) 1 All N.L.R. 141 and *Egba v. Appah* (2005) 10 N.W.L.R. (Pt. 934) 464. On the alleged irregularity regarding the officer who issued the certificate of non-compliance, learned senior Counsel referred to the definition of "Registrar" under Order 1 Rule 2 of the High Court (Civil Procedure) Rules, 2006 of Anambra State to say that the officer who issued the certificate was fully covered by the definition under the Rule; that since it is not the case of the Appellants that the 1st set of Respondents were privy to the initiation of the process leading to the order of the Court below now on appeal, nor was it their case that any of the sets of Respondents was served with a hearing notice for the hearing of the appeal on 3rd March, 2009, there was no order made in favour of the Re-

spondents and as such the Appellants were not prejudiced by that order as they were at liberty under the Rules to apply for its being set aside. Learned senior Counsel emphasized that the Notice of Appeal in the present case was filed before the coming into force of the 2002 Court of Appeal Rules and as such the parties are bound to comply
 B with the prevailing Rules of Court in force when their case was being heard which therefore ruled out the application of the 2007 Rules of that Court because under the 2002 Rules by Order 3 Rule 20(1), on the receipt of certificate of non-compliance with rules 10 and 11 of
 C that Order by the Court of Appeal, thereupon the Court shall order that the appeal be dismissed.

On the argument of the Appellants that failure to serve hearing notice on them before their appeal was struck out deprived the Court below of jurisdiction to strike out the appeal, learned senior
 D Counsel for the 1st set of Respondents pointed out that the Rule under which the appeal was struck out required no service of notice of hearing on the parties; that by filing the appeal and not taking steps to prepare or pay for the preparation of the records of appeal, the Court below on the authority of *Ukachukwu v. Uba* (2005) 18
 E N.W.L.R. (Pt. 956) 1 and *Mohammed v. Hussein* (1998) 14 N.W.L.R. (Pt. 584) 108, was right in regarding the Appellants appeal as an abuse of process of Court and the Court was right in striking out the appeal.

As for the 2nd set of Respondents, their learned senior Coun-
 F sel contended that although the Registrar of the trial Court in issuing the Notice of non compliance with rules acted under Order 8 Rule 1 of the Court of Appeal Rules 2007, the applicable rule having regard to the time the appeal was filed and settlement of record was made
 G by the parties before the Registrar of the trial Court, the applicable Rule to the present case is Order 3 Rule 20(1) of the Court of Appeal Rules 1981; that on failure of the Appellants to comply with the conditions of appeal in Rules 10 and 11 of Order 3 of the applicable Rules, the Court below was right in striking out the Appellant's ap-
 H peal under Rule 20(1) of the Rules relying on the cases of *Oyegun v. Nzeribe* (2010) 7 N.W.L.R. (Pt. 1194) 577 at 500 and *Maiwada v. First Bank of Nigeria Plc* (1997) 4 N.W.L.R. (Pt. 500) 497 at 507. Learned senior Counsel referred to the provision of the Court of Appeal Rules requiring compliance with conditions of appeal by Ap-

pellants in Order 3 Rule 10 of the Court of Appeal Rules 1981, Order 8 Rule 2 of the 2007 of the same Rules and Order 8 Rules 2 of the same Rules of 2011 and submitted that where there was non-compliance as was the case in the present appeal, the Court below acted correctly in striking out the Appellants appeal, pointing out that the order of the Court below was without prejudice to the right of the Appellants under Order 8 Rule 20 of the Court of Appeal Rules 2007, to apply to the same Court to restore the appeal thereby making the steps taken to pursue this appeal, quite unnecessary. B

From the supplementary Record of Appeal filed by the 1st set of Respondents on 8th July, 2011, it is clear that the Notice of Appeal was filed on 8th November, 1999 while the Principal Registrar of the trial High Court by a letter dated 16th March, 2001 invited the Appellants' Counsel to come to the Registry for the settlement of the records of appeal on 28th March, 2001. It is apparent from the records of appeal also that up to the 27th day of January, 2009, the Appellants Counsel had failed to comply with the requirements of the Rules of the Court of Appeal on the settlement of the records of appeal. The question therefore is whether the steps taken by the Registrar of the trial Court to terminate the Appellants appeal by issuing a certificate of non-compliance to the Court below, ought to have been done under the 1981 Court of Appeal Rules operating at the time the Notice of Appeal and the invitation to the Appellants for the settlement of records was issued in 1999 and 2001 or the 2007 Court of Appeal Rules which were in force at the time the notice or certificate of non-compliance with the rules was signed and issued by the Registrar of the trial Court on 27th January, 2009. Under the 1981 Rules the relevant Rule is Order 3 Rule 20(1) which states - C D E F

"20(1) If the Appellant has not complied with any of the requirements of rules 10 and 11 of this Order, the Registrar of the Court below shall certify such fact to the Court, which shall thereupon order that the appeal be dismissed either with or without costs and shall cause the Appellant and the Respondent to be notified of the terms of its order." G H

If the Court below were to have proceeded under the above rule as insisted by the two sets of Respondents, the Court below was quite right on seeing the notice or certificate of non-compliance with the rules to apply the rule by dismissing the Appellants appeal with-

out any requirement of hearing the parties before making the order. In other words under the provisions of order 3 Rule 20(1) of the court of Appeal Rules, 1981, all the court below was required to do on being served with the Notice or certificate of non compliance with the rules by the Registrar of the trial Court, was to proceed in the
 B absence of the parties who are not required to be put on notice under the rule and dismiss the appeal with or without any order on costs. The parties are merely to be put on notice by the court of its order of dismissal of the appeal. This provision of Order 3 Rule 20(1)
 C of the 1981 Rules of the Court of Appeal are the same with the Rules of that Court of 2002.

***However, it is significant to state here that by the provisions of Order 1 Rule 1(2) of the Court of Appeal Rules 2002 which came into force on 1st April, 2002, the entire Court of
 D Appeal Rules, 1981 were revoked. In similar vein, the 2007, Court of Appeal Rules which came into force with effect from 1st September, 2007, specifically and clearly by Order 1 Rule 2 thereof, repealed the entire provisions of the Court of Appeal Rules, 2002. By these very clear provisions of the 2002
 E and 2007 Court of Appeal Rules, it is not at all in doubt that both the provisions of the 1981 and 2002 Rules of the Court of Appeal having been revoked or repealed, were not in force as at 27th January, 2009, when the Registrar of the trial High
 F Court issued the notice or certificate of non-compliance to the Court below in respect of non-compliance with the rules of Court by the Appellants. In other words the applicable rules at the time the Court below took action on the Appellants' appeal are the 2007 Court of Appeal Rules and I so hold.***

The law is well settled that an action is governed by the substantive law applicable and in force at the time the cause of action arose. See *Agbajo v. Attorney General of the Federation* (1986) 2 N.W.L.R. (Pt. 23) 528 and *Savannah Bank of Nigeria Ltd. v. Pan Atlantic Shipping & Transport Agencies Ltd.* (1937) 1 N.W.L.R.
 H (Pt. 49) 212.

In the same vein, it is also well settled that the rule governing the practice and procedure in an action or in an application, is the rule in force at the time of the trial of the action or at the time that the application is heard, unless there is any

provision to the contrary. This is based on the principle that there is no vested right in any course of procedure. See *Rica v. Erlanger* (1874) 3 Ch. D. 69. **In otherwords, a litigant only has the right to rely on the procedure prescribed for the time being for the hearing of his matter by the court. Therefore where the procedure is changed or altered, the litigant must proceed according to the changed procedure as was the case in Owala v. Anyigon (1993) 2 N.W.L.R. (Pt.276) 380 at 391, where this Court found that the Supreme Court Rules 1961 which were applicable to the Court of Appeal which came into existence as an intermediate appellate Court in 1976, had ceased to apply to that Court when the Court of Appeal Rules 1981 came into force on 1st July, 1981.** See also the case of *Olajide Olaore & Ors. v. Titus Adigun Oke* (1987) 4 N.W.L.R. (Pt. 67) 769.

In the present case, the Notice or Certificate of non-compliance with the rules of Court issued and signed by the Registrar of the trial Court on 27th January, 2009, was clearly issued to the court below under order 8 Rule 1 of the then applicable Court of Appeal Rules 2007.

That Rule 1 of Order 8 of the Rules for the avoidance of doubt states -

“8(1) The Registrar of the Court below shall within sixty days after the filing of the notice of appeal compile and transmit the record of appeal to the Court.”

It is not difficult to see from the above rule that it does not give the Registrar of the trial Court power to issue any notice of non-compliance with the rules of the Court below for use in striking out the Appellants' appeal. The rule only gives the Registrar 60 days to compile and transmit the record of appeal to the Court of Appeal, after the date of filing the Notice of appeal. The same Order 8 in Rules 2, 3 and 4 thereof only gave the Registrar of the trial Court power to summon parties for the purpose of the settlement of the record of appeal and even to proceed to settle the record where the parties put on notice fail to attend. Where the Registrar fails to settle the record of appeal within 60 days of filing the notice of appeal, the Appellant himself is empowered under Rule 4 of order 8 to compile the record and transmit the same to the court of Appeal. However, where both the Registrar of the trial Court and the Appellant fail to

discharge their responsibilities regarding the settlement and transmission of the record of appeal to the court of Appeal, these 2007 Court of Appeal Rules in Rule 18 of Order 8 allow the Respondent to approach the Court of Appeal by way of motion on Notice to dismiss the appeal after giving the parties a hearing.

- Some of the important features of the 2007 Court of Appeal Rules in Order 8 thereof are - the taking away of the power of the Registrar of trial Court to issue notice of non-compliance and serve the same on the Court of Appeal. The same Rules also deprived the Court of Appeal of the power to act on the notice of noncompliance without putting the parties on notice to dismiss or strike out the Appellants' appeal. In this respect therefore the 2007 Court of Appeal Rules have introduced elements of affording the parties to the appeal fair hearing before the Court of Appeal can strike out or dismiss a pending appeal for the Appellants' failure or neglect to comply with the rules of that Court regarding the compilation and transmission of the record of appeal. It is for this reason that the action of the Court below in striking out the Appellants' appeal pursuant to Order 8 Rule 1 of the Court of Appeal Rules 2007, which does not give it the power to do so, is a complete nullity with no effect whatsoever resulting in leaving the Appellants' appeal No. CA/E/30/2009, still intact and remains pending in that Court.*** See *Skenconsult v. Ukey* (1981) 1 S.C 6 and *Saleh v. Monguno* (2006) 15 N.W.L.R. (Pt. 1001) 26 at 74.

- Looking at the proceedings of the Court of Appeal of 3rd March, 2009, now on appeal from the angle of the requirements of Order 8 Rule 18 of the 2007 Rules of the Court of Appeal which prescribes new method of terminating an appeal for failure to comply with the rules of Court in the production of records of appeal, the fact that there was no motion by the Respondents in which the parties were given a hearing before the Appellants' appeal was struck out, means that the necessary conditions precedent were not complied with to invoke the jurisdiction of the Court below to hear the matter.

The law is well settled that for a Court to have jurisdiction in a matter, it must be commenced by due process of law

and upon the fulfillment of any condition precedent to assumption of jurisdiction. See *Madukolu & Ors. v. Nkemdelim & Ors.* (1962) 2 S.C.N.L.R. 341, *Skenconsult v. Ukey* (1981) 1 S.C 5 and *Tsokwa Motors (Nig.) Ltd. v. U.B.A. Plc* (2008) 2 N.W.L.R. (Pt. 1071) 347 at 367. **The result of the proceedings of the Court below undertaken in the absence of a motion by the Respondents in which the parties were given a hearing, was plainly embarked upon without jurisdiction resulting in the order of the Court below striking out the Appellants' appeal, a complete nullity.** B

For the foregoing reasons, this appeal must succeed and the same is hereby allowed. For the reasons also already given in this judgment, the Judgment/Ruling of the Court below given on 3rd March, 2009 striking out the Appellants' appeal No. CA/E/30/2009 shall be and is hereby declared a nullity. With this conclusion, it is my view that the need to set aside the decision of the Court of Appeal now on appeal as urged by the Appellants in their Notice of Appeal and brief of argument, is hardly necessary as the nullification of the order of the Court of Appeal of 3rd March, 2009 leaves the Appellants' appeal still in place to be pursued in accordance with the law. C D

I make no order on costs. E

FABIYI JSC

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

The Registrar of the trial court issued an ostensible certificate of non-compliance to the Registrar of the Court of Appeal under Order 8 Rule 1 of the Court of Appeal Rules, 2007 on 27th January, 2009. On 3rd of March, 2009, the court below struck out the appeal without affording the appellants a hearing under Order 3 Rule 20(1) of the Court of Appeal Rules, 1981. But Order 8 Rule 1 of the Court of Appeal Rules, 2007 which is extant and applicable at the material time provides that parties be heard before the appeal can be struck out. The court below erred by not complying with the applicable rules. Both parties, as well as the court are bound by the existing rules of the court. See: *Afolabi v. Adekunle & Ors.* (1983) 14 NSCC G H

398, 405.

There is no doubt that the order of dismissal of the appeal, in the prevailing circumstance of this matter, without hearing the appellants is a nullity. The decision in the case of *Oyegun v. Nzeribe* (2010) 7 NWLR (Pt. 1194) 577 at 600 cited by senior counsel to the 2nd set of respondents was decided in tune with the dictate of the then applicable Order 3 Rule 20 (1) of the Court of Appeal Rules, 1981. It is not applicable to the matter herein. Perhaps, I need to say that it is distinguishable.

For the above stated reasons and the detailed ones adumbrated in the lead judgment which I hereby adopt, I too feel that the appeal should be allowed. I abide by all consequential orders contained in the judgment of my learned brother.

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RHODES-VIVOUR JSC

I read in advance the draft of the leading judgment prepared by my learned brother, Mohammed, JSC, and I am in full agreement with His lordships reasoning and conclusions. I intend to add a few observations. This appeal is against the order of the Court of Appeal, Enugu Division made on the 3rd day of March 2009, wherein the court struck out the appellants appeal in the absence of counsel. The Order reads:

“The Registrar has issued a notice of non-compliance with the Rules and there is no pending application for departure from the Rules, The appeal is therefore struck out.”

The question to be answered is:

Whether the Court of Appeal acted under the applicable Rules of the time the Order was made on the 3rd day of March 2009.

An action is governed by the substantive law applicable and in force of the time the cause of action arose. See *Uwaifo v. A.G. Bendel State* 1983 4 NCLR p.1, *Savannah Bank of Nig. Ltd. v. Pan Atlantic Shipping & Transport Agencies Ltd.* 1987 1 NWLR pt. 49 p. 212.

And the long settled position of the Law is that the rule governing the practice and procedure in an action or in an application is the rule in force at the time of the trial of the action or at the time the application is heard unless there is any provision to the contrary. See *Owata v. Anyigor* 1993 2 NWLR pt. 276 p. 386.

On the 3rd of March 2009 the rules of court in force were the Court of Appeal Rules 2007; prior to 2007 the Rules in force were the 1981 and 2002 Court of Appeal rules. Under the 1981 and 2002 Court of Appeal Rules, specifically Order 3 Rule 20(1) of the 2002 Court of Appeal Rules, once the Registrar of the Court from which the appeal emanates issues a certificate of non compliance with conditions of appeal and transmits it to the Court of Appeal the appeal shall be dismissed. B

Under the Court of Appeal Rules 2007 it is the duty of the Registrar of the trial court on receipt of the Notice of Appeal filed by the appellants to compile and transmit the Record of Appeal to the Court of Appeal. If he fails to do so, the appellant shall compile the Record of Appeal. Where both fail to compile the Record of Appeal the respondent may by motion on Notice move the Court of appeal to dismiss the appeal. There is no role for the respondent under the 2007 Rules. When an appeal is struck out or dismissed under the 1981 or 2002 Court of Appeal Rules for non-compliance with conditions of appeal the only remedy is to apply to restore the appeal and not to appeal. C D

My lords, the appeal was struck out under the Court of Appeal Rules 2007, but under those rules the Registrar of the trial court has no power to issue notice of non-compliance with conditions of appeal and the Court of Appeal has no power to strike out the appeal without an inter-parties hearing. In the circumstances the order made on 3/3/09 striking out the appeal without hearing the parties is a nullity. This appeal is allowed so that the parties go back to the Court of Appeal to be heard properly. The effect of this judgment is that the appeal is still pending at the Court of Appeal. E F

For this and the more detailed reasoning in the leading judgment the appeal is allowed. The appellants appeal from the trial High Court is still pending in the Court of Appeal. G

There shall be no order on costs.

PETER-ODILI JSC, (CFR)

I am at one with the reasoning and judgment just delivered by my learned brother, Mahmud Mohammed, JSC. Just for emphasis, I shall make some comments.

This Appeal is against an Order of the Court of Appeal, Enugu Division made on the 3rd day of March, 2009 striking out the Appellants' Notice of Appeal filed in the case for non-compliance with the conditions of Appeal.

On the 12th November, 1999, trial judgment was delivered by the High Court of Anambra State in consolidated suits Nos. AA/53/75 and AA/11/77 dismissing the Appellants' claims of title, damages in trespass and injunction over a parcel of land in dispute. The respective counter claims of the 1st and 2nd sets of Respondents to the parcels of land in dispute were granted.

Being aggrieved, the Appellants filed their Notice of Appeal on the 18th November, 1999. They also brought an application for stay of execution pending appeal. The trial court granted the unconditional stay. The Registrar of the trial court issued to the Appellants a written demand dated 16th March, 2001 to deposit the sum of N5,000.00 for record of appeal. After exchange of correspondence between the Appellants' counsel and the Chief Registrar of the trial court over non-transmission of Record of Appeal, the appellants' counsel brought a Notice of Motion in CA/E/195M/2005 for an order of the Lower court to direct the Chief Judge of the trial court to assign the said consolidated suits to another competent Judge of the High Court of Anambra State for retrial or trial de novo.

The application was resisted by both sets of Respondents in the course of which the alleged disappearance of the record book was referred to a Judicial Commission of Inquiry by the Chief Judge of the trial court at the instigation of EFCC.

On the 13th January, 2009, the Lower court (Coram: Omenge, Tsamiya and Ariwoola, JJCA) struck out the Appellants' application in CA/E/195M/2005.

Being dissatisfied by the said decision of 13th January, 2009, the Appellants appealed to the Supreme Court. This appeal was entered as APPEAL NO: SC.115/2009.

On the 3rd March, 2009, the Lower court (Coram: Omenge, Alagoa and Bage, JJCA) acting on a certificate of non-compliance with conditions imposed on a would be appellant submitted by the Registrar of the court in respect of the said consolidated Suits AA/53/75 and AA/11/77 struck out the Appellants appeal in CA/E/30/2009.

The Appellants sought and obtained an order of this court on

their tripod prayers, and accordingly appealed as aforesaid.

On the 19th February, 2013, date of hearing, learned counsel for the Appellants adopted their Brief of Argument settled by Dr. Oladapo Olanipekun, filed on 1/8/2011. Only one issue was distilled from the three grounds of appeal as follows:-

Considering the antecedents of this appeal and the clear provisions of Order 8 and other relevant provisions of the Court of Appeal Rules as well as the Appellants' right to fair hearing, whether the lower court was not in grave error and acted without jurisdiction when it struck out the Appellants' appeal on 3rd March, 2009.

Appellants also filed a Reply Brief on 4/10/11.

Dr. J. O. Ibik SAN adopted the 1st set of Respondents Brief which he had settled and filed on 6/9/11. He formulated three issues for determination, viz:-

- 1) Whether the decision of the Lower court was perverse?
- 2) Whether the Court misdirected itself in law by striking out non-pending appeal.
- 3) Whether the Lower court acted without jurisdiction by striking out Appellants' appeal.

For the 2nd set of Respondents, learned counsel on their behalf adopted their Brief of Arguments settled by J. N. Egwuonwu Esq. and filed on 26/9/11. Two issues for determination were distilled and they are thus:-

1. Whether the order of the Lower court striking out the appeal of the appellants on the 3rd March, 2009 was proper in the circumstances.
2. Whether this appeal is properly before this court.

From what I can see of the issues distilled, the sole issue of the Appellants, the 3rd issue of 1st set of Respondents and the 1st issue of the 2nd Respondent are substantially asking the same question though couched differently. However, an answer to any of those questions settles the appeal and so I shall utilize the issue one as raised by the 2nd set of respondents and that is as follows:-

Whether the order of the Lower court striking out the appeal of the appellants on the 3rd March, 2009 was proper in the circumstances.

For the appellants, it was contended that the Court of Appeal having held that there was nothing left in the case to be heard and

disposing of subsequent applications had foreclosed the possibility of filing any application for departure from the Rules or any application whatsoever as suggested in its decision of 3rd March, 2009.

That it is trite law that a court of law cannot approve and reprobate at the same time. He cited *Odutola Holdings Ltd v. Ladejobi* B (2006) 12 NWLR (Pt.994) 321 at 350; *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) 248; *Balonwu v. Ikpeazu* (2005) 13 NWLR (Pt. 942) 479 at 526.

It was also submitted for the appellants that having foreclosed C the possibility of subsequent applications by its decision of 13th January, 2009, the Lower court had become *functus officio* in respect of the issue and was therefore not competent to base its ruling of 3rd March, 2009 on the absence of an application for departure from the Rules or any other application whatsoever. He referred to order D 19, Rule 4 of the court of Appeal Rules, 2011 which is *impari material* with Order 18, Rule 4 of the Court of Appeal Rules 2007; Order 8, Rule 11 of the Supreme Court Rules.

It was further submitted that before the court below can strike out or dismiss an appeal for non-compliance, there must not only be E an application to that effect, but the court must also listen to arguments of counsel for both sides and study the affidavit evidence before it, both in support of and in opposition to the application. He cited *Oyegun v. Nzeribe* (2010) 7 NWLR (Pt. 1194) 577; Order 3 F Rule 20 of the Court of Appeal Rules 1981, which is *impari material* with Order 8, Rule 18 of the Court of Appeal Rules, 2011.

He said the order of the Lower court was with respect to a null/void act which cannot stand. He referred to *Sken Consult v. Ukey* (1981) 1 SC 6; *Okoye v. NCE & Co. Ltd* (1991) 5 NWLR (Pt. 199) G 501 at 538, etc.

Learned counsel for the Appellant said compliance with the provisions of Order 8, Rule 18 is a condition precedent to the jurisdiction of the Lower Court to make the decision of 3rd March, 2009. He relied on *Madukolu v. Nkemdilim* (1952) 2 SCNLR 341; *Tsokwa Motors (Nig.) Ltd. v. UBA* (2008) 2 NWLR (Pt. 1071) 347 at 367, etc. H

That the respondents did not file any application before the Lower court to dismiss or strike out the appeal hence the jurisdiction of the Lower court had not been initiated at the time it made its order

of 3rd March, 2010 which is akin to the court considering the issue suo motu raised by itself without a hearing being afforded the parties. He cited *Ojo-osagie v. Adonri* (1994) 6 NWLR (Pt. 349) 131; *Agbaje v. Adigun* (1993) 1 NWLR (Pt. 269) 251; *Onibudo v. Akibu* (1982) 7 SC 60 at 61 - 52; Section 35 of the 1999 Constitution.

Learned counsel went on to contend for the Appellant that the Notice of Non-Compliance which the Court below discovered outside of the court and upon which they based their decision to strike out the appellants' appeal was neither brought to the attention of the appellants nor were the appellants invited by that court to address it on the Notice of Non-Compliance. That the effect was a breach of the rules of natural justice and the appellants' constitutionally guaranteed right to fair hearing. He relied on *Mohammed v. Olawunmi* (1990) 2 NWIR (Pt. 113) 458 at 455.

Dr. Olanipekun of counsel for the Appellant said that there was a failure to give hearing notice of the proceedings which led to the striking out of the appeal of the appeal on 3rd March, 2009 rendering that order of the court of Appeal a nullity. He cited *Iyoho v. Effiong & Anor* (2007) 4 SC (pt. 111) 90 at 109; *A.G. Rivers State v. Ude & 2 Ors* (2006) 6 - 7 SC 131 at 143; *Oke v. Aiyedun* (1986) 2 NWLR (Pt. 23) 548 at 558.

Dr. Ibik SAN contended for the 1st Respondent that the principle enunciated in the several authorities relied upon by the learned counsel for the Appellants are radically qualified by an important caveat namely, "failure to serve Hearing Notice when required." That it is so because it is the nature of the initiating process and the applicable rules of procedure governing the proceeding which determine the need vel non of serving hearing notice like an ex-parte application where no service on the other party is required. That in the instant case on appeal, the process in question was not taken out by a party to the appeal and was not intended for service on any of the parties. That no address for service on any of the parties was inserted on certificate of Non-Compliance issued from the trial court. He said the Appeal No. CA/E/30/09 hand-written on top of the said instrument clearly suggests the hand work of the Registrar of the Court of Appeal entering the instrument as an appeal for disposal by that Court in special judicial proceeding.

Further contended for the 1st Respondent is that since the Lower

Court did not direct in its proceedings that service of the instrument be effected on the parties, it means that the instrument was not required nor ordered to be served on the parties let alone the appellants. He said some of the grounds of appeal are complaints against the Lower court for not ordering that the instrument be served on the Appellants. Rather, learned Senior Counsel said the complaints in the grounds of appeal are based on the erroneous assumption that the Certificate of Non-compliance was a process requiring service on the parties.

Dr. Ibik of counsel stated on that grounds of appeal which do not arise from the decision or proceedings complained about ought to be discountenanced and ignored by the appellate court and arguments to issues arising therefrom go to no issue and should be rejected. That it is trite that a right of appeal is not absolute since its exercise is predicated on observance and compliance with rules of court laid down in the constitution or statute or Rules of Court. That in such a situation an appellant who fails to adhere to the necessary rules or conditions and does not apply for departure from the Rules but insists on prosecuting his appeal is clearly engaging in abuse of process. In the circumstance, learned senior Advocate submits the court lacks jurisdiction to hear and determine such an appeal, which appeal should be struck out. He referred to *Ikechukwu v. UBA* (2005) 18 NWLR (Pt. 956) 1; *Anyaeibunam v. A. G. Anambra State* (2001) 6 NWLR (Pt. 710) 532; *Mohammed v. Hussein* (1993) 14 NWLR (Pt. 584) 108.

It was submitted further for the 1st Respondent that the compass of SC.115/2009 is entirely different from the compass of SC.418/2010. That the Court below was not called upon to review, reopen or revisit its decision in CA/E/195M/2005 which gave rise to SC.115/2009 and so the question of *functus officio* did not arise.

In the Brief of the 2nd Respondent, Mr. Egwuonwu submitted that the conditions of appeal were given to the appellants in 2001 which they failed to fulfill and the applicable Court of Appeal Rules then was those of 1981, Order 3, Rule 10 thereof. That it was on the basis of those provisions that the appellants were required to deposit the sum of five thousand naira for the compilation of the record which they failed to do. He said the consequence of that failure to obey the rules and pay the sum of five thousand naira was that the

appeal should be struck out or dismissed. He cited *Oyesun v. Nzeribe* (2010) 7 NWLR (Pt. 1194) 577 at 500; *Maiwada v First Bank of Nigeria Plc.* (1997) 4 NWLR (Pt. 500) 497 at 509; Order 8, Rule 20 of the Court of Appeal Rules, 2007 *impari materia* with Order 20, Rule 4 of the 1981 Rules of the Court below.

For the 2nd Respondent was submitted that the application of the appellants without fulfilling the conditions of appeal will not stand and so the Lower Court was right to hold that there was nothing before it to hear. He cited *Mcfoy v. UAC Ltd* (2000) 15 WRN 185; (1961) 3 All ER 1169.

That there was no evidence as to when the record of appeal was transmitted from the Lower court to this court in order to ascertain when the appeal was entered in the Supreme Court. That there is therefore no basis for the exercise of the Court's discretion in favour of the Appellants. He relied on *Ilonze v. Ilonze* (1995) 7 NWLR (Pt. 408) 495 at 507; *Williams v. Hope Rising Voluntary Funds Society* (1982) SC.

It was submitted that the appellants did not need to wait until they were served with the process by the respondents before they would pursue their appeal as they ought to monitor the progress of their appeal, failing which they are taken to have abdicated their responsibility and had only themselves to blame. He cited *University of Lagos v. Aigoro* (1984) 11 SC 152 at 185.

From the above, what is before this court representing the contest may be briefly stated to be, that the Appellants as plaintiffs in consolidated suits before an Anambra High Court wherein judgment was given against them and they appealed by Notice dated 17th November, 1999. Funds were made available for the compilation and transaction of record to the Court of Appeal and the Registry of the trial court failed to compile and transmit the record as provided for in the Rules. After some efforts to get the Record of Appeal failed the appellant sought by motion for the Registry to be compelled to comply and the prayer was granted by order to the Chief Registrar High Court, still no result on the basis that the record book of the trial court could not be found. Again, the appellant filed a Motion on Notice at the Court of Appeal for the Chief Judge of the Anambra High Court to reassign the matter to another judge for a trial *de novo* and accelerated hearing. When the motion came up for hearing on

13th January, 2009, the Court of Appeal struck out the application without considering the said application and written addresses already filed and exchanged by the contending counsel. Not happy with this striking out order of the Lower Court, the appellants appealed to this court by Notice of Appeal dated 23rd January, 2009 and in the course of this appeal proceedings before this court in SC.115/09 that the second set of respondents filed a supplementary Record of Appeal dated 7th January, 2009 and through this supplementary Record, appellants became aware for the first time of a “*CERTIFICATE AS TO NON-COMPLIANCE WITH CONDITIONS IMPOSED UPON A WOULD-BE APPELLANT*.” This certificate was signed by an assistant Chief Litigation Officer of the High Court dated 27th January, 2009, pursuant to Order 8, Rule 1 of the Court of Appeal Rules, 2007.

This said supplementary Record of Appeal shows that upon the issuance of the Certificate of Non-Compliance, the Court of Appeal on 3rd March, 2009 without a Hearing Notice issued and without a formal application for striking out, the Lower court struck out the appeal based on the certificate of Non-Compliance. Becoming aware of this striking out the appellant has come to the Supreme Court seeking its intervention.

Those facts have naturally thrown up the question whether that striking out of the appeal was proper in the circumstances. The Order of the Court of Appeal is stated hereunder, viz:-

“*The Registrar has issue (sic), a notice of Non-Compliance with the Rules and there is no pending application for departure from the rules. The appeal is therefore struck out...*”

The Certificate of Non-Compliance which is the ground for the striking out of the appeal was said to have emanated from Order 8, Rules 1, 2, 3 & 4 of the Court of Appeal Rules, 2007.

Order 8, Rule 1 provides that:

“*That Registrar of the Court below shall within sixty days after the filling of a Notice of Appeal compile and transmit the Record of Appeal to the Court.*”

Order 8, Rule 4 also provides that:

“*Where at the expiration of 60 days after the filling of the Notice of Appeal the registrar has failed and or neglected to compile and transmit the records of Appeal in accordance with the preceding provisions of this rule, it shall become mandatory for the Appellant to*

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

Order 8, Rule 18 provides thus:

"If the Registrar has failed to compile and transmit the Records under Rule 1 and the Appellant has also failed to compile and transmit the Records in accordance with Rule 4, the Respondent may by notice of motion move the Court to dismiss the Appeal."

For a fact this appeal provides a Kaleidoscope of colours or a rainbow even if strange features taking the order of the court below on what it says. See Balonwu v. Ikpeazu (2005) 13 NWLR (pt. 942) 479 at 526; Ajide v. Kelani (1985) 3 NWLR (pt. 12) 248; Shanu v. Afribank Nig. Plc (2003) FWLR (pt. 136) 823 at 850 - 852.

Another point that I need to touch on is the fact that order 8, Rule 1 of the court of Appeal Rules 2007 on which the Assistant Registrar based his certificate of Non-compliance made no such provision. That coming on the heels of the Non-compliance process emanating from the same office that wrote a letter of 14th April, 2005 explaining the reasons behind its failure to compile and transmit the record thereby exonerating the appellant from blame. The situation was certainly a back and forth manoeuvre of the right of a litigant left helpless on the fancies of officials of court utilizing facilities of court and in this instance the court of Appeal fell into grave error in clothing itself with jurisdiction it lacked since there was no application to dismiss or strike out the appeal before it made the Order of 3rd March, 2010. In the same course of this wrong venture is the fundamental fact that the appellant was not put on notice thereby having his right of being heard compromised. The infractions in this matter are so numerous and no redeeming feature in sight with the gravity of a court acting without the necessary vires. There is a surfeit of judicial authorities on situations like the present, I shall mention just a few such as:- Agbaje v. Adigun (1993) 1 NWLR (Pt. 259) 251; Onibudo v. Akibu (1982) 7 SC 60 at 51 - 62: Section 36 of the 1999 Constitution.

This matter is to be heard on the merits since it is evident the Rules of the Court precisely Order 8, Rules 1, 2, 3, 4, and 18 had been wrongly interpreted and applied.

For the above and the fuller reasons of my learned brother in

the lead judgment, I too allow the appeal.

I abide by the consequential orders in the lead as delivered including the issue of costs.

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AKA'AHS JSC

I had the privilege of reading in draft the judgment of my leaned brother, MAHMUD MOHAMMED JSC and I entirely agree with his reasoning and conclusion. In the said judgment he took pains to explain the marked difference between the 1981 and 2007 Court of Appeal Rules.

This is one of those cases where the Record Book containing the proceedings and judgment of the consolidated suits nos. AA/53/75 and AA/11/77 has not been found and although a Notice of Appeal dated 17th day of November, 1999 was timeously filed on 18th November, 1999, against the judgment delivered by the Anambra State High Court, Awka on 12th November, 1999, the records were yet to be compiled ten years on after the Notice was filed. This was the state of affairs when the registrar of the trial court issued a certificate of non -compliance leading to the striking out of the appeal. At the time the appeal was filed, it was the 1981 Court of Appeal Rules that were in operation. These rules were replaced by the 2002 Rules which had a similar provision for striking out the appeal for non-compilation and transmission of the records. The 2002 Rules were also repealed when the 2007 Rules were enacted.

The 2007 Rules clearly set out a time limit of 60 days within which the registrar of the lower court is required to compile and transmit the records after the Notice of Appeal has been filed. Where the registrar fails to compile the records, the appellant has a duty to compile the records within 30 days after the 60 days given to the registrar have lapsed. Where the registrar and appellant fail to compile the records, the respondent can bring an application seeking to dismiss the appeal. All these steps are spelt out in Order 8 Rules 1, 4 and 18 of the Court of Appeal Rules, 2007.

It is better to set them out as follows:-

“Order 8 - Rules 1: The Registrar of the Court below shall within sixty days after the filing of the notice of appeal compile and transmit the record of appeal to the Court.

(4) Where at the expiration of 60 days after filing the notice of appeal the registrar has failed or neglected to compile and transmit the records of appeal in accordance with the preceding provisions of this Rule it shall become mandatory for the appellant to compile the records of all documents and exhibits necessary for his appeal and transmit to the Court within 30 days after the registrar's failure or neglect.

(18) If the registrar has failed to compile and transmit the records under Rule 1 and the appellant has also failed to compile and transmit the records in accordance with Rule 4, the respondent may by notice move the Court to dismiss the appeal”

Thus under the 2007 Rules, there is no room for the issuance of a certificate of non-compliance by the registrar. The introduction of filing a motion on notice to dismiss the appeal has therefore introduced the provision of fair hearing which was absent in the 1981 and 2002 Rules. Regrettably the striking out of the appeal based on the certificate of non - compliance was done pursuant to the repealed Rules. Consequently the action taken is a nullity since the jurisdiction of the lower court was not properly invoked. The appeal is therefore meritorious and it is hereby allowed. The order striking out the appeal being a nullity is hereby set aside. The Notice of Appeal is still extant. I also make no order on costs.

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