

**SUPREME COURT OF NIGERIA**  
FRIDAY 27TH JUNE, 2014. SC. 183/2004  
**CORAM:- I. T. MUHAMMAD, M. S. MUNTAKA-**  
**COOMASSIE, S. N. NGWUTA, O. ARIWOOLA,**  
**C. B. OGUNBIYI, JJSC**

BEN ANACHEBE ESQ ..... APPELLANT  
AND  
1. KINGSLEY IJEOMA  
2. TONY MARIA OPIA ..... RESPONDENTS  
3. TONY ANTHONY HOLDINGS LTD

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APPEALS - Extension of time - Application - Reasons for - For the application to succeed - Applicant must adduce good and substantial reasons for delay - And good cause why the appeal should be heard (H1)

APPEALS - Leave - Right of appeal - Exercise of - Is permissible within limit as provided by law - Otherwise it can only be exercisable by leave of court (H2)

COURTS - Discretion - Exercise of - Must be judicial and judicious - As it entails application of legal principles to relevant facts - To arrive at equitable decision (H3)

APPEALS - Extension of time - Application - Jurisdiction - Where proposed grounds raise issues of jurisdiction - Same ought to be granted - Because jurisdiction is life wire of any adjudication (H4)

APPEALS - Extension of time - Application - Determination of - Duty of appellate court is limited to ensuring that grounds are arguable - And not deciding the merit of the grounds (H5)

JURISDICTION - Fundamentality of - Where trial court is bereft of jurisdiction - Appellate court would have no reason to entertain appeal - Since jurisdiction gives authority and competence (H6)

APPEALS - Extension of time - Trinity prayers - Usage - The prayers

must contain necessary reliefs - For the application to be competent - And it must relate to situations where leave is required - And time within which to appeal had also expired (H7)

APPEALS - Filing - Leave - Where leave is necessary before appeal is validly filed - It ought to be applied for and obtained - And notice of appeal filed within statutory period (H8)

APPEALS - Filing - Time limit - CA Act 1976 s. 25(2)(a) - For appeal in civil matter - 14 days is required for appeal against interlocutory decision - And 3 months where appeal is against final decision (H9)

APPEALS - Extension of time - Application - Final judgment - The appeal being predicated on final judgment of the HC - Need for trinity prayers did not arise - As only an extension of time is required (H10)

### **FACTS**

Before the Abia State High Court sitting at Aba, plaintiff/appellant (a private legal practitioner) commenced this action against defendants/respondents, claiming for a liquidated sum of money in settlement of his professional fees and agreed commission for services duly rendered at the instance of appellant/respondent for the benefit of respondents. Appellant specifically pleaded that 1<sup>st</sup> respondent had withheld the said fees/commission. Appellant contends that respondents refused to file their defence even long after they were duly served with the relevant processes in the matter.

Consequently, appellant alleged that he filed motion for judgment in default of pleadings. Appellant went further to contend that judgment was eventually entered for him without an objection. He stated that respondents did not appeal against the judgment but rather filed application for extension of time to appeal, two years thereafter at the Court of Appeal. Respondents contend contrarily that 1<sup>st</sup> respondent only knew of the default judgment when the bailiffs of the court came to execute same. The reason is that his former counsel had wrongly made him to believe that the matter was under control. To remedy the situation, another counsel took over by filing applications for extension of time. The Court of Appeal heard the matter,

granted the application and ordered that notice and grounds of appeal be filled within seven days. Aggrieved by this ruling, appellant appealed to Supreme Court.

### ***ISSUES FOR DETERMINATION***

*“(i) Whether the Court of Appeal exercised its discretion judicially and judiciously to grant Extension of Time within which to appeal etc, in the absence of cognizable reason for the delay/failure to appeal within the prescribed statutory period and thereafter until his application.*

*“(ii) Whether the Respondent’s appeal in the lower court is competent and maintainable in the absence of the mandatory tripartite prayers for leave to appeal, etc required to involve (sic) the court’s appellate jurisdiction.”*

**HELD** (Unanimously dismissing the appeal per  
**OGUNBIYI JSC**)

*APPEALS - Extension of time - Application - Reasons for*

**1. The trinity prayers before the lower court was seeking for an order to apply for leave, leave to appeal and extension of time within which to file notice and grounds of appeal out of time against the judgment of Aba High Court No.3 presided over by Honourable Justice S. F. Analaba delivered on the 9th day of April, 2002.**

**The motion which is pursuant to order 3 Rule 4(1) and (3) Court of Appeal Rules, 2002 was supported by a 13 paragraph affidavit deposed to by one Kingsley Ijeoma, the defendant/appellant therein. One of the exhibits, that is, Exhibit ‘B’ attached to the affidavit is the notice of Appeal. The relevant applicable rule predicated the application is order 3 rule 4(2) of the Court of Appeal Rules 2002 which provides that to succeed on an application of this nature, the applicant must satisfy the following two conditions:-**

**(a) Depose to an affidavit setting forth good and substantial reasons why he had failed to appeal within the time prescribed by law.**

**(b) The grounds of appeal must prima facie show good**

**cause why the appeal should be heard.**

**The two conditions must as a general rule co-exist conjunctively; hence the granting of the application is not done as a matter of course.**

**While the Constitutional right cannot be extended if the applicant fails to adduce good and substantial reason for obliging the application, the court will not also hesitate to exercise its discretion in favour thereof provided sufficient materials and reason are contained in the affidavit to justify the exercise.**

**The applicant must depose to facts on the affidavit which ought to state sufficient reasons explaining the delay. The relevant materials supporting such application must include the judgment/ruling of the court seeking to appeal and the proposed grounds of appeal. (p. 2374 H/2375 G)**

**APPEALS - Leave - Right of appeal - Exercise of**  
**2. It is well settled that a right of appeal is Constitutional as is provided in the Constitution. The right being Constitutional therefore, it stands to override most other negative principles aimed at its fore closing. The rider also stands clear that the exercise of this right is only permissible within limit as provided by law. In otherwords, the right is lost outside the prescribed statutory period allowed but will only be exercisable by leave of court; hence the reason seeking an order for leave and extending the time within which to appeal. (p. 2375 E)**

**COURTS - Discretion - Exercise of**  
**3. The law is also trite and well settled that the discretion vested in a court is required to be exercised judicially and judiciously as it entails application of legal principles to relevant facts/materials to arrive at a just/equitable decision as rightly submitted by the learned counsel for the appellant. (p. 2376 A)**

**APPEALS - Extension of time - Application - Jurisdiction**  
**4. The issue of jurisdiction appears central and dominates the entire notice of appeal.**

**The law is further settled that in an application of this nature, where the proposed grounds of appeal raise substan-**

**tial and arguable issues of jurisdiction, same ought to be granted because jurisdiction is the life wire of any adjudication.**

**The totality of the foregoing authorities serves an exception to the general rule which states that an exercise of discretion should be predicated on the applicant advancing good and substantial reasons for failure to appeal within time. The reasoning behind this conclusion is obvious with the issue of jurisdiction being very fundamental and the absence which automatically renders any proceeding of no effect but null and void.**

**In summary therefore, where the grounds of appeal challenge the jurisdiction of the lower court to entertain a matter, the form becomes immaterial and negating the need to satisfy the phrase, “good and substantial reason”. The question of jurisdiction suffices as it calls for explanation.**

**With the prominence given to the question of jurisdiction, it must have worked as the overriding consideration and guided the lower court’s decision when it granted the application. Therefore, it is my view that the lower court cannot be faulted when it held that the proposed grounds of appeal, which questioned the jurisdiction of the High Court to enter judgment against the respondent, are arguable. The learned counsel for the appellant had in my view totally misconceived the effect of raising issue of jurisdiction. The 1st issue raised is, in the circumstance, resolved against the appellant.**  
(pp. 2377A/E/2379 B)

**APPEALS - Extension of time - Application - Determination of**  
**5. Furthermore, in such application, the duty of an appellate court is limited to ensuring whether the grounds of appeal are arguable. This is not however extended to deciding the merit of the grounds.**

**The decision whether or not to exercise discretion in favour of the application was not dependant on the likelihood of the appeal succeeding. This is because, at this stage of the proceeding, the merit of the appeal is not the issue; rather the question is whether the proposed grounds of appeal are ar-**

**guable.** (pp. 2377 C/2379 A)

*JURISDICTION - Fundamentality of*

**6. Without prejudice to the merit of the appeal, I wish to state that where a trial court is bereft of any jurisdiction, the appellate court would have no reason to entertain the appeal. It is jurisdiction that gives the authority and competence.**  
(p. 2378 D)

*APPEALS - Extension of time - Trinity prayers - Usage*

**7. As rightly submitted by the learned counsel for the appellant, the provisions of Section 25 of the Court of Appeal Act and Section 243(b) of the 1999 Constitution are explicit that tripartite prayers must contain the necessary reliefs before the application could be competent.**

**In otherwords, an application requiring trinity prayers for extension of time within which to apply for leave; leave to appeal; and extension of time within which to appeal must relate to situations where an appeal requires leave of court and time within which to lodge the appeal had also expired.**  
(p. 2380 B)

*APPEALS - Filing - Leave*

**8. It is also trite and held by this court in plethora of cases that where leave is necessary before an appeal can be validly filed, it ought to be applied for and obtained and notice of appeal filed within the statutory period.** (p. 2381 A)

*APPEALS - Filing - Time limit*

**9. With reference made to Section 25 of the Court of Appeal Act 1976 it provides for the periods within which to appeal to the Court of Appeal and it is in pari materia with Section 24 of the Court of Appeal Act Cap. C. 36 the Laws of the Federation of Nigeria 2004. Section 25 subsection (2) of the 1976 Act is most appropriate and states thus:-**

**“25(1)...**

**(2) The period for the giving of notice of appeal or notice of application for leave to appeal are -**

***(a) in an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision.”***

(p. 2381 B)

*APPEALS - Extension of time - Application - Final judgment* B

**10. On the combined effects of the facts contained in the record before us, especially that at the trial High Court Aba, the judgment subject of the application before the lower court was final in nature and in respect of which Section 241(1)(a) of the Constitution applies and appeal is of right as it is a final decision and appealable within a period of three months as provided by the second half of Section 25(1)(a) of the Court of Appeal Act 1976 (supra).** C

**As rightly submitted by the learned counsel for the respondent, the need for trinity prayers did not arise in the application before the lower court. The appeal is predicated on a final judgment of the High Court. The use of the word “leave” in the relief sought for in the application before the lower court should not have confused the appellant’s counsel in making the heavy weather as he did. All that was required of the application was to seek for an extension of time and no more. The use of the word “leave” in the relief did not negatively affect the competence of the entire application as rightly submitted by the respondent’s counsel. The said issue is also hereby resolved against the appellant and in favour of the respondent.** D  
E  
F  
(p. 2381 H)

### **REPRESENTATION**

Mr. Nwokeukwu, C. A., for the Appellant  
C. U. C. Eduzor, for the Respondents G

### **CASES REFERRED TO**

Metal Construction (W.A) Ltd. v. Migliore (1990) 1 NWLR (pt. 126) H  
N.S.C.C. v. E.S.V. (1990) 7 NWLR (pt. 164) 526  
Williams v. Hope Rise Voluntary Society 1982 ANLR 1  
Okere v. Nlem (1992) 4 NWLR (pt. 234) 132  
United Bank for Africa v. GMBH & Co. (1989) 3 NWLR (pt. 110)

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Oyeyemi v. Irewole Local Govt. (1993) 1 NWLR (pt. 270) 462

Ikenna v. Bosah (1997) 3 NWLR (pt. 495) 503

Oruche v. C.O.P (1997) 4 NWLR (pt. 497) 1

Odey v. Ovat Edim of Akam (1940) 6 WACA 63

B Nalsa & Team Asso. v. NNPC (1991) 8 NWLR (pt. 212) 652

Kwahan v. Elias (1960) SCNLR 224

Consortium MC. v. NEPA (1992) 6 NWLR (pt. 246) 132

Abiegbe v. Ugbodume (1983) NSCC 26

C Yiborku v. The Republic (1963) ANLR 333

Ibodo v. Enarofia (1980) 5 - 7 SC 42

### **STATUTES & RULES REFERRED TO**

Court of Appeal Act 1976, s. 25

D Constitution of the Federal Republic of Nigeria 1999, ss. 241(1)(a), 243(b)

Court of Appeal Rules 2002, O. 3 r. 4(1)(2)(3)

### **LEAD JUDGMENT BY OGUNBIYI JSC**

E By a Writ of Summons filed on 15th June, 2000 and issued on 18th July, 2000, the appellant, a private Legal Practitioner initially sued all the three Respondents jointly and severally for a liquidated sum of money in settlement of his professional fees and agreed commission for services duly rendered at the instance of the appellant/  
F respondent for the benefit of all the Respondents. It was specifically pleaded in the statement of claim that the 1st Respondent (now before us as the only respondent to be so designated) had withheld the said fees/commission.

G It is the appellant's contention that the writ of summons and statement of claim were duly served on the Respondents in July 2000 and that for over 18 months thereafter, the latter failed or refused to file their joint or several defence, though they and their counsel occasionally attended or appeared in court. In further contention, the  
H appellant alleged that he subsequently filed a motion for judgment in default of pleadings which same was served on the respondents who were duly represented in court by their staff on 9th April, 2002, the day the said motion was moved and judgment entered without objection; that the respondent did not appeal against the judgment for



over two years and only woke up from his slumber in March 2004 and filed an application at the lower court praying for leave to appeal and extension of time within which to appeal.

On the side of the respondents it was argued that the 1st respondent only knew of the default judgment when the bailiffs of the court came to execute same; that this was because his former counsel had wrongly made him to believe that the matter was under control. Consequently he therefore engaged services of a new counsel to remedy the situation by filing two motions on his behalf. B

In a ruling delivered on 13th September, 2004, the Court of Appeal granted the application sought and made an order that the notice and grounds of appeal be filed within 7 days. C

The appellant was dissatisfied with the ruling and hence has appealed on four grounds to this court inclusive of the additional ground for which leave was sought and obtained. D

In accordance with the rules of court, both parties filed their respective briefs of arguments. The appellant's amended brief and cross respondents' brief were prepared by A. Ben Anachebe, SAN and C.A.N. Nwokeukwu, Esq. and both were filed on 14th February, 2009 and 28th November, 2013 respectively. The respondents' brief and also the cross appellants' brief were both filed on 14th June, 2010 and deemed properly filed on 27th September, 2010. E

By an order of court sought and obtained on the 28th November, 2013, the appellant discontinued against the 2nd and 3rd respondents through a motion filed on 20th January, 2013. The names of the said respondents were struck out accordingly and the only subsisting respondent is in the person of Kingsley Ijeoma now before us. F

On 31st March, 2014 at the hearing of the appeal, both counsel adopted and relied on their respective briefs of arguments. On the one hand, the learned appellant's counsel urged that the cross appeal be dismissed and the appeal be allowed; on the other hand however, Mr. Udazor, Esq on behalf of the respondent applied to abandon the notice of preliminary objection filed on 14th June, 2014 and same is hereby struck out. The counsel proceeded to adopt the respondent's briefs and urged that the appeal be dismissed while the cross appeal should be allowed. It is the counsel's further submission that the cross respondent's brief should be discountenanced as it is G H

not an answer to the cross appellant's brief.

The two issues formulated by the appellant are:-

“(i) *Whether the Court of Appeal exercised its discretion judicially and judiciously to grant Extension of Time within which to appeal etc, in the absence of cognizable reason for the delay/failure to appeal within the prescribed statutory period and thereafter until his application.*

“(ii) *Whether the Respondent's appeal in the lower court is competent and maintainable in the absence of the mandatory tripartite prayers for leave to appeal, etc required to involve (sic) the court's appellate jurisdiction.*”

The respondent's issues are a replication of those of the appellant's; reproduction of same will only be a repetition. I will adopt the formulation by the appellant and take them serially for the determination of this appeal.

The 1st issue questions the exercise of discretion by the lower court. In otherwords, whether the court acted judicially and judiciously when it granted the extension of time within which to appeal? It is the contention of the appellant's counsel that the application of this nature entails exercise of discretion, which is either a matter of law, as in the instant case, or mixed law and fact. Counsel cites the decision of this court in *Metal Construction (W.A) Ltd. V. Migliore* (1990) 1 NWLR (Pt.126) P.299; also the case of *N.S.C.C. V. E.S.V.* (1990) 7 NWLR (Pt.164) P.526; that the discretion vested in the court is required to be exercised judicially and judiciously. Such exercise, counsel submits must entail the application of legal principles to relevant facts/materials in order to arrive at a just and equitable decision, otherwise this court would rightfully interfere. Several authorities by this court in support of the foregoing proposition include *Williams V. Hope Rise Voluntary Society* 1982 ANLR P.1; *Okere V. Nlem* (1992) 4 NWLR (Pt.234) P.132; *United Bank for Africa V. GMBH & Co.* (1989) 3 NWLR (Pt. 110) P.374 also *Oyeyemi V. Irewole Local Govt.* (1993) 1 NWLR (Pt.270) P.462.

It is also the counsel's contention that despite the applicant/respondent's averment in his affidavit in support at paragraphs 9, 10 and 11, it is not shown that he was relying on the alleged “*inability to procure copy of judgment*” as his reason for delay/failure to appeal within time; that there was no averment in the affidavit as to (1)

when and how the applicant applied for copy of the judgment; (2) what efforts he made to procure same; (3) what inhibited its procurement; or (4) why he could not appeal throughout the duration of the three months prescribed period and until two years thereafter. Counsel's point of reference is Ikenna V. Bosah (1997) 3 NWLR (Pt. 495) P.503 per Ogwuegbu, JSC; that a diligent applicant would have at least filed an omnibus ground of appeal while awaiting the judgment or record of proceedings. See Ikenna V. Bosah (supra) and Oruche V. C.O.P (1997) 4 NWLR (Pt.497) P1. B

It is the counsel's further submission that a critical perusal of the applicant's affidavit in support will reveal a total lack of any convincing reason for his failure to appeal or any effort to categorically latch on any reason to excuse his default. Learned counsel found it even more confounding that despite the adjudged inadequacy, the lower court nevertheless exercised its discretion as it did. The decision of the Court of Appeal, counsel submitted, was patently arbitrary and injudicious; that even though the applicant failed to satisfy the first arm of Order 3 rule 4(2), the lower court, though bereft of any evaluation, still proceeded ahead to grant the extension of time within which to appeal; that the court in the circumstance abdicated its primary judicial responsibility of expounding and upholding justice in its ruling. C D E

On the second arm of order 3 rule 4(2) supra, it is also the counsel's contention that the affidavit in support of the applicant's application is obviously bereft of any fact, complain or necessary documents (including statement of claim mentioned in the grounds of appeal); that the Court of Appeal had no material or basis upon which to conclude/determine, as it did in finding that an arguable appeal had been disclosed. It is the counsel's further submission that a painstaking evaluation of the grounds of appeal vis-à-vis the affidavit facts, will lead to an irresistible conclusion that the applicant/respondent took the second arm of the said order for granted and was unduly indulged. The learned counsel has therefore called on this court to appropriately interfere with and set aside the exercise of discretion by the lower court, which process was deprived of any basis warranting the decision reached. F G H

The respondent's 2nd issue is a response to the appellant's 1st issue wherein both parties are totally in agreement that the applica-

tion at hand is not granted as a matter of course. However, and that notwithstanding, the counsel for the respondent submitted as erroneous and a misrepresentation of the law, the view held by the learned appellant's counsel when he argued that by the use of the phrase "less than adequate", the lower court ought to have refused the application thereof. In other words, it is the counsel's submission that the justice of hearing the appeal on its merit should be the overriding consideration. See the cases of Ofem Odey V. Ovat Edim of Akam (1940) 6 WACA 63 at 64; Nalsa & Team Associates Vs. NNPC (1991) 8 NWLR (Pt.212) 652 SC; Kwahan Vs. Elias (1960) SCNLR 224 and Consortium MC. Vs. NEPA (1992) 6 NWLR (Pt. 246) 132; Owunari Long John Vs. Chief Crawford N. Blakk (1998) 5 SCNJ 52 and Abiegbe & Ors. Vs. Ugbdume 7 Ors. (1983) NSCC 26; that the lower court in the circumstance rightly granted the application when it held that the respondent's grounds of appeal were, prima facie arguable. To have held otherwise, counsel argues, would have meant clinging unto technical justice rather than leaning on the side of doing substantial justice; that order 3 Rule 4 requires the applicant, for extension of time, to show grounds of appeal which are prima facie arguable. This is not to say however that the grounds of appeal are likely to succeed at the end of the day.

The notice of appeal, counsel submits is questioning, the jurisdiction of the High Court to enter judgment against the appellant therein when from the statement of claim there was no cause of action against him.

On the totality, it is submitted on behalf of the respondent that:-

a) The learned justices of the Court of Appeal exercised their discretion judicially and judiciously in granting the respondent's application for extension of time to appeal as his grounds of appeal are predicated on jurisdiction.

b) The decision of the lower court accords with the need to do substantial rather than technical justice.

c) The appellant was compensated with N2,000 cost and has not shown how any injustice has resulted by the grant of the said application.

***The trinity prayers before the lower court was seeking for an order to apply for leave, leave to appeal and extension***

*of time within which to file notice and grounds of appeal out of time against the judgment of Aba High Court No.3 presided over by Honourable Justice S. F. Analaba delivered on the 9th day of April, 2002.*

*The motion which is pursuant to order 3 Rule 4(1) and (3) Court of Appeal Rules, 2002 was supported by a 13 paragraph affidavit deposed to by one Kingsley Ijeoma, the defendant/appellant therein. One of the exhibits, that is, Exhibit 'B' attached to the affidavit is the notice of Appeal. The relevant applicable rule predicating the application is order 3 rule 4(2) of the Court of Appeal Rules 2002 which provides that to succeed on an application of this nature, the applicant must satisfy the following two conditions:-*

*(a) Depose to an affidavit setting forth good and substantial reasons why he had failed to appeal within the time prescribed by law.*

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

*The two conditions must as a general rule co-exist conjunctively; hence the granting of the application is not done as a matter of course. See Yiborku V. The Republic 1963 ANLR P. 333.*

*It is well settled that a right of appeal is Constitutional as is provided in the Constitution. The right being Constitutional therefore, it stands to override most other negative principles aimed at its fore closing. The rider also stands clear that the exercise of this right is only permissible within limit as provided by law. In otherwords, the right is lost outside the prescribed statutory period allowed but will only be exercisable by leave of court; hence the reason seeking an order for leave and extending the time within which to appeal. While the Constitutional right cannot be extended if the applicant fails to adduce good and substantial reason for obliging the application, the court will not also hesitate to exercise its discretion in favour thereof provided sufficient materials and reason are contained in the affidavit to justify the exercise.*

*The applicant must depose to facts on the affidavit which ought to state sufficient reasons explaining the delay. The rel-*

**evant materials supporting such application must include the judgment/ruling of the court seeking to appeal and the proposed grounds of appeal.** See *E.F.P. Co. Ltd. v. NDIC* (2007) 9 NWLR (pt. 1039) p. 216

**The law is also trite and well settled that the discretion vested in a court is required to be exercised judicially and judiciously as it entails application of legal principles to relevant facts/materials to arrive at a just/equitable decision as rightly submitted by the learned counsel for the appellant.** See the cases of *Williams V. Hope Rise Voluntary Society*, *Okere V. Nlem* and *United Bank for Africa V. G.M.B.H & Co*, also *supra* and where Oputa , JSC (of blessed memory) in his contribution at p.409 held thus:-

*“Discretion is thus not an indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by the law or the equitable decision.”*

It is the appellant’s contention that the applicant’s affidavit reveals a total lack of any convincing reason for his failure to appeal and that the lower court acted in vacuo, devoid of cogent materials upon which to exercise its discretion and thus injudicious. The respondent is in total disagreement with the foregoing view held by the appellant, especially where he projected the idea that the nature of the grounds of appeal ought not to have weighed in their Lordships’ minds in granting the said application.

With reference drawn to the affidavit in support of the application at the lower court, the notice and grounds of appeal annexed is marked Exhibit ‘B’. A careful perusal of the said notice of appeal will reveal that the appellant therein, now respondent before us in grounds 1, 2 and 3 was questioning the jurisdiction of the trial High Court to enter judgment against him, when the statement of claim did not disclose any cause of action against him. Specifically, ground two of the said notice of appeal is in point and states thus:-

*“Error in law*  
*The learned trial judge erred in law when he entered judgment against all the defendants jointly and severally when there was no cause of action against the 1st defendant/appellant.*

#### **PARTICULARS OF ERROR**

*(a) The 1st defendant/appellant was an agent of a disclosed*

*principal.*

*(b) The appellant was not a necessary party to the proceedings.”*

**The issue of jurisdiction appears central and dominates the entire notice of appeal.**

**The law is further settled that in an application of this nature, where the proposed grounds of appeal raise substantial and arguable issues of jurisdiction, same ought to be granted because jurisdiction is the life wire of any adjudication.** See E.F.P. Co Ltd. V. N.D.I.C. (supra) per Onnoghen, JSC at p.244.

**Furthermore, in such application, the duty of an appellate court is limited to ensuring whether the grounds of appeal are arguable. This is not however extended to deciding the merit of the grounds.** See Ibodo V. Enarofia (1980) 5 - 7 SC 42; University of Lagos V. Olaniyan (1985) 1 NWLR (Pt. 1) 156; Obikoya V. Wema Bank Ltd (1989) 1 NWLR (Pt.96) 187; Egbe V. Onogun (1972) 1 All NLR (Pt. 1) 95 and Ojukwu V. Gov. of Lagos State (No. 1) (1985) 2 NWLR (Pt. 10) 806.

**The totality of the foregoing authorities serves an exception to the general rule which states that an exercise of discretion should be predicated on the applicant advancing good and substantial reasons for failure to appeal within time. The reasoning behind this conclusion is obvious with the issue of jurisdiction being very fundamental and the absence which automatically renders any proceeding of no effect but null and void.**

**In summary therefore, where the grounds of appeal challenge the jurisdiction of the lower court to entertain a matter, the form becomes immaterial and negating the need to satisfy the phrase, “good and substantial reason”. The question of jurisdiction suffices as it calls for explanation.** See the case of Nuhu V. Ogele (2003) 12 SCNJ 209 where this court at page 227 held and said:-

*“...where a challenge to the decision of a court is founded on lack of jurisdiction, the court is bound to consider such challenge. A party to litigation cannot be shut out and the court inhibited from entertaining a matter on technical ground particularly where the is-*

*sue of jurisdiction is concerned.”*

The case of *Ukwu V. Bunge* (1997) 7 S.C.N.J. P.262 is also an authority wherein this court lent lenience towards delays on the reason that the proposed ground of appeal complains of lack of jurisdiction. In such situation, it will not be necessary to enquire into the reason for the delay; a complaint of an absence of jurisdiction is sufficient, good and substantial reason why an appeal should be heard. At page 273 of the foregoing report for instance, Agbaje, JSC, observed and said:-

“*I am prepared to hold that when an application for an extension of time within which to appeal a proposed ground of appeal complains about lack of jurisdiction and it prima facie appears so, it may not be necessary to inquire whether there were good and substantial grounds for failure to appeal within the prescribed time.*”

The grounds of appeal in the instant case are arguable, especially where they are hinged on the jurisdictional competence of the trial court.

***Without prejudice to the merit of the appeal, I wish to state that where a trial court is bereft of any jurisdiction, the appellate court would have no reason to entertain the appeal. It is jurisdiction that gives the authority and competence.*** The importance of the point has been well enunciated by this court in *Ukwu V. Bunge* (supra) where it was held that:-

“*When a challenge is made to the jurisdiction of the court, as in this case, that issue should be settled one way or another before the hearing of the suit. Jurisdiction is fundamental and crucial, for if jurisdiction is lacking the proceedings thereafter would be a nullity however well conducted they might otherwise be.*”

The celebrated case of *Madukolu & Ors. V. Nkemdilim* (1962) 2 All NLR 581 and *Ishola V. Ajiboye* (1994) 6 NWLR (Pt.352) 506 are both also in support.

At page 14 of the record of appeal for instance, the Court of Appeal in its considered ruling had this to say:-

“*The reason for delay in bring (sic) the application to file the notice of appeal in this application is less than adequate but the application (sic) also seeks the leave of the court within which to file the application that leave will be granted in this application. Having showed the proposed grounds of appeal and having satisfied that they show*



*arguable issues to right of the applicant to appeal will not be denied.”*

***The decision whether or not to exercise discretion in favour of the application was not dependant on the likelihood of the appeal succeeding. This is because, at this stage of the proceeding, the merit of the appeal is not the issue; rather the question is whether the proposed grounds of appeal are arguable. With the prominence given to the question of jurisdiction, it must have worked as the overriding consideration and guided the lower court’s decision when it granted the application. Therefore, it is my view that the lower court cannot be faulted when it held that the proposed grounds of appeal, which questioned the jurisdiction of the High Court to enter judgment against the respondent, are arguable. The learned counsel for the appellant had in my view totally misconceived the effect of raising issue of jurisdiction. The 1st issue raised is, in the circumstance, resolved against the appellant.***

The appellant’s 2nd issue questions whether the Respondent’s appeal in the lower court is competent and maintainable in the absence of the mandatory tripartite prayers for leave to appeal, etc required to invoke the court’s appellate jurisdiction.

In submission to portray the incompetence of the respondent’s application the learned counsel for the appellant related to the provisions of Sections 25 of the Court of Appeal Act and 243(b) of the 1999 Constitution. In otherwords, it is the contention of counsel that the respondent’s application had omitted the foremost prayer for extension of time within which to seek leave to appeal, while the other two prayers in his said motion are repetitive and/or muddled up. See the case of - Odojin V. Agu (1992) 3 NWLR (Pt.229) P.350; also C.C.B (Nig.) Ltd. V. Ogwuru (1993) 3 NWLR (Pt.284) P.630.

On the totality, the learned counsel has called on us to dismiss the respondent’s application dated 17-3-2004 as well as his purported appeal predicated thereon, for want of competence and jurisdiction on the part of the lower court.

The respondent’s response to the appellant’s foregoing issue is contained in his issue one where his learned counsel graphically referred to the record of proceedings before us and contends that the decision sought to appeal is final for the present appellant and ought to be governed by Section 241(1)(a) of the 1999 Constitution.

It is the counsel's argument that the respondent did not need the trinity prayers as his appeal is predicated on a final judgment of the High Court. That the use of the word "*leave*" in the relief was very unnecessary and a surplusage which did not negatively affect the competence of the entire application. Counsel urged that the issue be resolved in favour of the respondent.

The reliefs sought at the lower court and culminating into this appeal have all been reproduced earlier in the course of this judgment.

***As rightly submitted by the learned counsel for the appellant, the provisions of Section 25 of the Court of Appeal Act and Section 243(b) of the 1999 Constitution are explicit that tripartite prayers must contain the necessary reliefs before the application could be competent.***

***In other words, an application requiring trinity prayers for extension of time within which to apply for leave; leave to appeal; and extension of time within which to appeal must relate to situations where an appeal requires leave of court and time within which to lodge the appeal had also expired.*** In the case of *Odojin V. Agu* (supra) his Lordship, Nnaemeka-Agu, (JSC) of (Blessed memory), had this to say at page 371:-

*"...a person who wishes to seek leave on any ground to appeal after the expiration of the statutory period to appeal under Section 25 of the Court of Appeal Act (No. 43) of 1976 (No. 12) of 1960 requires three substantive prayers, namely for -*

*(i) extension of time to seek leave to appeal;*

*(ii) leave to appeal; and*

*(iii) extension of time within which to appeal.*

*That any such application must contain these three prayers is not a matter of mere cosmetic importance which could be waved off with levity or waived. Rather, it is a matter which goes to the serious issue of the jurisdiction of court."*

This is obvious for the reason that the periods within which a party can appeal in our courts are prescriptions of statutes; leave to appeal also where necessary, is a requirement of the Constitution. A party if desirous, ought to lodge his appeal within the statutory period allowed and an exception is unless the time to do so has been extended. See *Owoniboy Technical Services Ltd V. John Holt Ltd*

(1991) 6 NWLR (Pt.198) 550 at 557 - 558.

***It is also trite and held by this court in plethora of cases that where leave is necessary before an appeal can be validly filed, it ought to be applied for and obtained and notice of appeal filed within the statutory period.*** See Amudipe V. Arijodi (1978) 2 L.R.N. 128; Atanda V. Olarewaju (1988) 4 NWLR (Pt.89) B 394; and Lamai V. Orbi (1980) 5 - 7 SC 28.

***With reference made to Section 25 of the Court of Appeal Act 1976 it provides for the periods within which to appeal to the Court of Appeal and it is in pari materia with Section 24 of the Court of Appeal Act Cap. C. 36 the Laws of the Federation of Nigeria 2004. Section 25 subsection (2) of the 1976 Act is most appropriate and states thus:-***

***“25(1)...***

***(2) The period for the giving of notice of appeal or notice of application for leave to appeal are -***

***(a) in an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision.”***

I have carefully perused the record of proceedings of the trial High Court Aba and specifically at page 4 of same, it is obvious that the plaintiff's counsel had applied and urged the court to give judgment in their favour in default of statement of defence filed by the defendants. This is evidenced at the last two lines of the said page. In other words, the application on notice as spelt out at the beginning of the court's proceeding was introduced by counsel as “*a motion on Notice for final judgment.*” It was pursuant to the said motion therefore that the court proceeded to enter a final judgment for the present appellant. Section 241(1) of the 1999 Constitution, states as follows:-

***“(1) an appeal shall lie from decisions of the Federal High Court to the Court of Appeal as of right in the following cases: final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance;...”***

***On the combined effects of the facts contained in the record before us, especially that at the trial High Court Aba, the judgment subject of the application before the lower court was final in nature and in respect of which Section 241(1)(a) of the Constitution applies and appeal is of right as it is a final***

***decision and appealable within a period of three months as provided by the second half of Section 25(1)(a) of the Court of Appeal Act 1976 (supra).***

***As rightly submitted by the learned counsel for the respondent, the need for trinity prayers did not arise in the application before the lower court. The appeal is predicated on a final judgment of the High Court. The use of the word “leave” in the relief sought for in the application before the lower court should not have confused the appellant’s counsel in making the heavy weather as he did. All that was required of the application was to seek for an extension of time and no more. The use of the word “leave” in the relief did not negatively affect the competence of the entire application as rightly submitted by the respondent’s counsel. The said issue is also hereby resolved against the appellant and in favour of the respondent.***

On the totality of this appeal and with both issues resolved against the appellant, the appeal lacks merit and is dismissed. There shall be costs of N100,000.00 against the appellant in favour of the respondent.

Appeal is dismissed with costs of N100,000.00k.

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### **MUHAMMAD JSC**

I read in advance the judgment just delivered by my learned brother, Ogunbiyi, JSC. I agree with my lord’s reasoning and conclusion which I adopt. I, too, dismiss the appeal for lacking in merit. I abide by all orders made in the lead judgment.

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### **MUNTAKA-COOMASSIE JSC**

I was privileged to have read in a draft form the lead judgment rendered by my learned lord Clara Ogunbiyi JSC. I have closely read the reasoning why my lord has arrived in dismissing this appeal. I beg to adopt the reasoning which I accept as the true position of this appeal. I adopt them as mine. I too agree that this appeal is devoid of merits and it is hereby dismissed. I endorse the orders as to costs.

**NGWUTA JSC**

My noble Lords, I have read in draft the lead judgment just read by my learned brother, Ogunbiyi, JSC and I agree with the reasoning and conclusion reached therein. I would therefore also dismiss the appeal as bereft of merit.

I think this appeal should not have been filed in view of the issue of non-service of Court process and, ipso facto, the issue of jurisdiction of the trial Court in the matter raised by the respondent. The lower Court could not have rightly denied the application in the circumstance. The appeal has only delayed the disposal of the main appeal. Counsel ought to consider their options in matters such as this appeal wherein the potential loss in terms of time and resources outweigh the expected gain.

May I also add that leave to appeal is required only when the judgment sought to be appealed is not a final judgment or the appeal is on grounds other than law. If the appeal is one that can be filed as of right, then if the applicant is not out of time, he has to seek for extension of time to appeal, and not leave to appeal.

I abide by order for costs made in the lead judgment.

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**ARIWOOLA JSC**

I have had the opportunity of reading in draft, the lead judgment of my learned brother, Clara Ogunbiyi, JSC just delivered. I am in agreement with the reasoning and conclusion that the appeal is devoid of any merit. It deserves to be dismissed. Accordingly, I too dismiss the appeal.

I abide by the consequential orders including the order on costs.