

SUPREME COURT OF NIGERIA
FRIDAY 13TH FEBRUARY, 2015. SC. 214/2013
CORAM:- I. T. MUHAMMAD, J. A. FABIYI,
M. D. MUHAMMAD, C. B. OGUNBIYI,
K. M. O. KEKERE-EKUN, JJSC

1. CHUKWUMA OGWE

2. PIUS AGI

..... APPELLANTS

AND

1. INSPECTOR GENERAL OF POLICE

2. COMMISSIONER OF POLICE,

RIVERS STATE

..... RESPONDENTS

3. D.S.P. IREGBU BARASUA

APPEALS - Hearing notice - Fair hearing - CA rightly proceeded with the matter - Having established that appellant was duly served but chose to be absent - Hence he cannot complain of breach of fair hearing (H1)

APPEALS - Record - Binding nature of - Appellate court has no jurisdiction to read into record what it does not contain - As court must read and apply exact content of the record without more (H2)

APPEALS - Judicial precedent - Upholding of - CA ought to be bound by its previous decision and that of SC - In respect of the issue the appeal raises (H3)

APPEALS - Document - Filing - Document or process is deemed duly filed when it is taken to court registry - Assessed by officer assigned the responsibility and paid for (H4)

APPEALS - Filing - Payment of fees - Where inadequate fees are paid - Court can order for the short fall to be paid - As the omission does not rob the court of its jurisdiction (H5)

FACTS

Appellants as plaintiffs at the Rivers State High Court, sought to enforce their fundamental human right. At the end of the trial, the

court per Enebeli, J. held against appellants. Not satisfied with the judgment, appellants appealed to the Court of Appeal Port Harcourt Division. They tendered their notice and Grounds of Appeal to the Registry of the court and on their being assessed the sum of N3,100.00, paid same and filed their Notice of Appeal. Receipt of payment was thus issued to them.

The record of appeal was compiled and transmitted to the Court of Appeal. At the hearing of the appeal, the court suo motu raised the issue of the adequacy of the filing fees paid by appellants. The court found the fees inadequate and consequently struck out the appeal. Aggrieved, appellants appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether the Court of Appeal was right in holding that the payment of the sum of N3,100.00 (three thousand Naira) only which said sum of money was duly accessed by the Registrar of the Appeal Registry of the High Court of Rivers State in accordance with the provisions of the State's High Court Civil Procedure Rules as fees for the filing of the Notice of Appeal by the Appellants which is less than the sum of N5,000.00 (five thousand Naira) provided for in Order 12 Rule 1 of the Court of Appeal Rules 2007 robs the Court of Appeal the jurisdiction to entertain the Appeal and the Appeal accordingly struck out.

(ii) Whether the fault of a Registrar of Court in assessing inadequate filing fees for the filing of a Notice and Grounds of Appeal is that of an innocent litigant or his counsel.

(iii) Whether the Court of Appeal has the jurisdiction to strike out the Appellants' appeal on an issue raised suo motu by the court without first hearing parties to the appeal.

HELD (Unanimously allowing the appeal per **M. D.**

MUHAMMAD JSC)

APPEALS - Hearing notice - Fair hearing

1. From the record, it is glaring that in spite of the fact that the appellants had been served on the day the court raised the issue of the inadequacy of the filing fees they were neither present in the court nor represented. The law only directs that

where the court raises an issue suo motu, it hears the parties before reaching a decision on the issue as raised.

The appellants who in spite of their being served chose not to attend court proceedings wherein the issue was raised suo motu cannot complain that their right to fair hearing has been compromised. In the appellants' brief, a desperate bid has been made to show that their counsel was in court up till 10.00am on the day the ruling appealed against was delivered and that because of the Jusun strike the court's gate remained sealed. It is appellants' suggestion that the court did not sit on the particular day. This court cannot rely on these suggestions.

On the cold facts of the Lower Court's proceedings reproduced supra, the Lower Court is right to have proceeded with the day's business having established the fact that the appellants though absent and not represented had been duly served. (p. 508 D/H)

APPEALS - Record - Binding nature of

2. An appellate court has no jurisdiction to read into the Record what it does not contain or to read out of the Record what it contains. It must read, interpret and apply the exact content of the record without more. (p. 508 H)

Judicial precedent - Upholding of

3. I agree with learned appellant counsel that the issue the instant appeal raises has long been settled by the Lower Court itself and this court in a plethora of their decisions. The Lower Court by its decision instantly appealed against failed to appreciate the place of the doctrine of stare decisis or precedent in the adjudication process. By the doctrine, judges are enjoined to stand by their decisions and the decisions of their predecessors. The doctrine does not allow for the exercise of discretion in an issue the court previously decided when that same issue subsequently surfaces before the court for determination. It is this age old rule of practice that gives law its certainty and equilibrium in the society.

In the case at hand, the Lower Court's refusal to be bound by

its own decision and indeed the decisions of this court, on this issue is manifestly perverse. For the foregoing reasons appellants' 2nd issue is resolved in their favour. Their appeal accordingly succeeds. Consequently, the Lower Court's perverse ruling striking out the appellants appeal is hereby set aside.

B Appeal No.CA/PH/407/2009 is hereby restored to the court's list for same to be determined by a panel of Justices other than those whose decision has just been set aside and expeditiously too. I make no order as to cost. (pp. 509 C/511 F)

C Document - Filing

4. Firstly, a document or process is deemed duly filed when it is taken to the court registry, assessed by the officer assigned the responsibility and paid for. The appellant cannot be made to suffer for any shortfall. To do otherwise is to hold him to account for another person's lapses.

D The practice that has evolved over the years is for an appellant whose appeal is within the time prescribed under Section 24 of the Court of Appeal Act to file his appeal to the Lower Court at the registry of the court against which decision the appeal is being filed. And this is what the appellant herein did. It is at that registry that he paid the fees the officer of court assigned for the purpose assessed and requested him to pay. Having paid the fees and left his Notice of appeal at the Registry with the officer responsible, the appeal on the authorities is deemed properly filed. (pp. 509 G/510 G)

APPEALS - Filing - Payment of fees

G 5. Secondly, where inadequate fees are paid, I agree with learned appellants' counsel, the usual remedy is an order of court for the short fall to be paid. Non-payment of adequate fees, it has been held, does not ordinarily rob the court its jurisdiction. (p. 510 B)

H

NOTABLE POINTS OF INTEREST

M. D. MUHAMMAD JSC

1. Record of Appeal – Regularity of

The law, it must be stated and this fact has been alluded to by learned appellant counsel, presumes the regularity of the foregoing record of the Lower Court's judgment until the contrary is proved in this case by the appellant. (p. 508 D)

2. Appeals – Definition of

It is worthwhile to note that Section 30 of the Court of Appeal Act defines an appeal to include an application for leave to appeal and an appellant to include the person who makes such application. (p. 511 C)

FABIYI JSC

3. Court to do substantial justice

Let me also reiterate it that rules of court are but hand maid to justice. Same cannot stand in the face of doing substantial justice to the parties. If need be, as in this matter, the court should employ the dictates of the sixth sense to avoid technicality and tow the path of doing substantial justice. The court should aim at doing substantial justice and avoid undue crass technicality. (p. 514 H)

REPRESENTATION

C. I. Enweluzo, for the Appellants

F. I. Igwe for the 1st-3rd Respondent

Dr. Innocent Ekwu, Anthony Njoku, Maureen Apali Eze (Mrs.), Ogaranya Imegi, Godwin Owoicho, Ojika Adamma for the 4th Respondent

CASES REFERRED TO

Akpaji v. Udemba (2009) 6 NWLR (pt. 1138) 545

ACB Ltd v. Henshaw (1990) 1 NWLR (pt. 129) 646

Sonuga v. Anadein (1967) NMLR 77

Ezomo v. Oyakhile (1985) 1 NWLR (pt. 2) 195

Noibi v. Fikolati (1987) 1 NWLR (pt. 116) 387

Lawal v. Odejimi (1963) All NLR 569

State v. Ugbor (1979) 1 MSLR 521

Dike v. Okorie (1990) 5 NWLR (pt. 151) 418

Ifezue v. Mbadugha (1984) NSCC (Vol. 15) 314

Ogbunyinga v. Akudo (No 2) (1990) 4 NWLR (pt. 146) 551

Alawode v. Semoh (1959) 4 FSC 27

Duke v. Akpabuyo LG (2005) 19 NWLR (pt. 959) 130

Bello v. A-G Oyo State (1985) 12 SC 1

Okere v. Amadi (2005) 14 NWLR (pt. 945) 545

B STATUTES & RULES REFERRED TO

Court of Appeal Act, s. 24

Constitution of the Federal Republic of Nigeria 1999, ss. 36(1), 248

Court of Appeal Rules 2007, O. 12 rr. 1, 3

C BOOK REFERRED TO

Halsbury Laws of England 4th Ed. vol. 1 Article 25

LEAD JUDGMENT BY M. D. MUHAMMAD JSC

D The appellant commenced suit no. PHC/1325/2006 at the Rivers State High Court hereinafter referred to as the trial court, seeking to enforce their fundamental human right. At the end of the trial, the court in its decision delivered on 13th February, 2009 found against the appellants.

E Dissatisfied with the judgment of the trial court, appellants appealed to the court below, the Court of Appeal sitting at Port Harcourt. They tendered their Notice and Grounds of Appeal to the Registry of the court and on their being assessed the sum of (N3,100.00) three thousand one hundred naira, paid same and filed
F their Notice of Appeal, The receipt evidencing payment of the fees assessed by the trial court's Registry is reflected at page 46 of the supplementary record of Appeal.

With their record of appeal compiled and transmitted to the
G court below, parties thereto filed and exchanged their briefs of argument as required by the Lower Court's rules. On 11th March 2015 the Lower Court in the absence of the appellants and their counsel suo motu raised the issue of the adequacy of the filing fees paid by the appellants and having found the fees inadequate struck out the
H appeal.

Aggrieved by the aforesaid ruling the appellants have appealed to this court on four grounds from which they distilled three issues in their brief for the determination of the appeal thus:-

“3.0. ISSUES FOR DETERMINATION

3.1 My, lords, the following issues call for determination in this Appeal:-

(i) Whether the Court of Appeal was right in holding that the payment of the sum of N3,100.00 (three thousand Naira) only which said sum of money was duly accessed by the Registrar of the Appeal Registry of the High Court of Rivers State in accordance with the provisions of the State’s High Court Civil Procedure Rules as fees for the filing of the Notice of Appeal by the Appellants which is less than the sum of N5,000.00 (five thousand Naira) provided for in Order 12 Rule 1 of the Court of Appeal Rules 2007 robs the Court of Appeal the jurisdiction to entertain the Appeal and the Appeal accordingly struck out. This is distilled from ground A & B of the Notice and grounds of Appeal.

(ii) Whether the fault of a Registrar of Court in assessing inadequate filing fees for the filing of a Notice and Grounds of Appeal is that of an innocent litigant or his counsel. This is distilled from ground C of the Notice and Grounds of Appeal.

(iii) Whether the Court of Appeal has the jurisdiction to strike out the Appellants’ appeal on an issue raised suo motu by the court without first hearing parties to the appeal. This issue is distilled from ground D of the Notice and Grounds of Appeal.”

It must be recalled that on the day this appeal was heard the 1st - 3rd respondents conceded the appeal. Also, following counsel’s application to that effect, the name of the 4th respondent who had since died was struck out. Accordingly, the appeal was argued on the appellants’ brief alone.

In the appellant’s brief arguments in respect of their 1st and 2nd issues are jointly canvassed. It is submitted that the appellants did pay the sum of three thousand one hundred naira filing fees in respect of their Notice of Appeal against the judgment of the Rivers State High court Enebeli J presiding in Suit No. PHC/1325/2006 to file Appeal No.CA/PH/407/2009 after they were assessed at the Registry of the trial court. Payment of the sum evidenced by the receipt issued to the appellants as shown on page 46 of the supplementary record of Appeal.

It is further submitted that the issue of the payment of inadequate filing fees was raised by the court below suo motu.

The Lower Court, it is contended, failed to distinguish the difference in effect between the non-payment of filing fees at all and the payment of inadequate filing fees. Learned appellant counsel contends that failure to pay adequate filing fees is a mere irregularity and affects proceedings only if objection is taken timeously. Learned counsel submits that the usual remedy for inadequate payment of filing fees is for the court to order that the short fall be paid. Thus, non-payment of adequate fees, it is argued, does not affect the court's jurisdiction. Learned counsel relied inter-alia on *Akpaji V. Udemba* (2009) 6 NWLR (Pt.1138) 545 at 561-562; *ACB Ltd v. Henshaw* (1990) 1 NWLR (Pt.129) 646; *Sonuga V. Anadein* (1967) NMLR 77; *Ezomo V. Oyakhile* (1985) 1 NWLR (Pt.2) 195; *Noibi V. Fikolati* (1987) 1 NWLR (Pt.116) 387; *Lawal V. Odejimi* (1963) ALL NLR 569 and *State V. Ugbor* (1979) 1 MSLR 521.

Further relying on *Dike V. Okorie* (1990) 5 NWLR (Pt 151) 418 at 428-429 and *Mohammed V. Musawa* (1985) 3 NWLR (Pt.11) 89. Learned appellant counsel submits that a document deemed to have been properly filed when same is deposited in court with the proper officer assigned with the responsibility. Though the payment of filing fees is a condition precedent necessary to the exercise of jurisdiction, it only affects the court's jurisdiction if either the failure to pay the adequate fees or any fees at all is the fault of the plaintiff.

In further argument, learned appellants' counsel insists that by item 7 the 2nd schedule of the High Court (civil procedure) Rules of Rivers State, to enter an appeal to the court of Appeal against the decision of the High Court, the appellant must pay the fees the High Court Registry assessed and required him to pay. In the case at hand, counsel submits, the appellants had done exactly so.

Order 12(1) and (3) of the Court of Appeal Rules under which the court below struck out appellants' appeal does not apply to the appellant's appeal before that court. The President of the Court of Appeal, contends learned counsel, lacks the vires to make rules which bind the trial court. Were Order 12(1) and (3) of the Court of Appeal Rules to apply to the trial court, learned counsel submits, the rules not being mandatory but merely directory cannot rob the Lower Court of its jurisdiction in respect of the appeal in the event of not being complied with. Learned Counsel relies on *Ifezue V. Mbadugha* (1984) NSCC (Vol. 15) 314 at 331-332; *Halsbury Laws of England*

4th Edition in Vol. 1 Article 25; Ogbunyinya V. Akudo (No 2) (1990) 4 NWLR (Pt.146) 551 at 571 and Alawode V. Semoh (1959) 4 FSC 27 at 29-30.

Concluding his arguments in respect of their first two issues, learned counsel submits that to allow the decision of the Lower Court to remain is to allow the triumph of technicality over the substance of the matter. And this, counsel further submits, has been avoided by courts for a very long time. He refers in support to *Duke v. Akpabuyo LG* (2005) 19 NWLR (Pt.959) 130; *Ajuwa V. SPDC* 12 SC (Pt.IV) 118 at 160-161 and *Bello V. AG Oyo State* (1985) 12 SC 1 and urges that the two issues be resolved in appellants' favour.

On appellant's 3rd issue, learned appellants' counsel contends that the Lower Court though empowered to raise the issue of inadequate payment of fees suo motu, lacks the vires of deciding the matter without hearing the parties to the appeal before it. It is submitted that on the 11th March 2013 when the matter came up at the court for hearing, appellant counsel arrived at the court's premises around 8.35am only to find the gate locked and a notice pasted to the effect that the Judiciary Staff Union of Nigeria was on strike. The court for that reason would not sit. Unable to gain access to the court, it is further submitted, appellant counsel left the premises by 10.00am. The court sat subsequently and struck out appellants' appeal for appellants' failure to pay adequate filing fees. This came about despite the fact that appellant and his counsel had never failed to attend to court but for the strike of the Judiciary Staff Union of Nigeria that disabled the court from sitting. The court's failure to allow the appellants address it before it ruled on the issue it suo motu raised, being a breach of Section 36 (6)(a) of the 1999 Constitution, renders the court's decision thereon a nullity. Relying inter-alia on the decisions in *Kraus Thompson Organisation Ltd v. University of Calabar* (2004) 9 NWLR (Pt.879) 631 at 651, *Enekwe V. International Merchant Bank of Nigeria Ltd* (2006) 19 NWLR (Pt.1013) 147 at 173, *Okere V. Amadi* (2005) 14 NWLR (Pt.945) 545 at 559, *Sterling Civil Eng. (Nig) Ltd V. Yahaya* (2005) 11 NWLR (Pt 935) 181 and *Adeleke V. Raji* (2002) 13 NWLR (Pt.783) 142, learned counsel prays that resolving all their three issues in their favour to also allow the appeal.

Now, even though this appeal has not been contested, the question that must still be answered is whether the law is on appel-

lants' side to enable us allow the appeal.

Page 89 of the record of Appeal contains the Lower Court's proceedings including its decision that form the basis of this appeal. The relevant part of the court's proceedings is herein under reproduced for ease of reference.

B *"CT - Registrar say the appellant (sic) was served on 18/1/2013 but absent and unrepresented. The appeal is fixed for hearing today and having all the briefs, the appeal ought to have been deemed as fully argued but in the present circumstances where the appropriate filing fee had not been paid, we cannot deemed (sic) the appeal as having been argued.*

C *Congruently on the non-payment of appropriate filing fee the appeal is incompetent and is hereby struck out for being in competent."*

D The law, it must be stated and this fact has been alluded to by learned appellant counsel, presumes the regularity of the foregoing record of the Lower Court's judgment until the contrary is proved in this case by the appellant. See *Eyisi V. State* (2000) 12 SCNJ. ***From the record, it is glaring that in spite of the fact that the appellants had been served on the day the court raised the issue of the inadequacy of the filing fees they were neither present in the court nor represented. The law only directs that where the court raises an issue suo it hears the parties before reaching a decision on the issue as raised.***

F ***The appellants who in spite of their being served chose not to attend court proceedings wherein the issue was raised suo motu cannot complain that their right to fair hearing has been compromised. In the appellants' brief, a desperate bid has been made to show that their counsel was in court up till 10.00am on the day the ruling appealed against was delivered and that because of the Jusun strike the court's gate remained sealed. It is appellants' suggestion that the court did not sit on the particular day. This court cannot rely on these suggestions.***

H ***An appellate court has no jurisdiction to read into the Record what it does not contain or to read out of the Record what it contains. It must read, interpret and apply the exact content of the record without more. On the cold facts of the***

Lower Court's proceedings reproduced supra, the Lower Court is right to have proceeded with the day's business having established the fact that the appellants though absent and not represented had been duly served. See Tim Orugbo & anor V. Bukra UNA & ors (2002) 13 SCM 153, Alhaji Bani Yaa Nuhu V. Alhaji Isola Are Ogue Ogele (2003) 12 SCM 209 and Otunba B Adesesan Oguntayo v. Fatai Adelaja (2009) 6-7 SC (Pt 111) 91.

The fact that the Lower Court is empowered by law to proceed on the issue it raised suo motu, in spite of the absence of the appellants because they had been served, does not necessarily mean that the court's decision striking out appellant's appeal is correct in law. C

I agree with learned appellant counsel that the issue the instant appeal raises has long been settled by the Lower Court itself and this court in a plethora of their decisions. The Lower Court by its decision instantly appealed against failed to appreciate the place of the doctrine of stare decisis or precedent in the adjudication process. By the doctrine, judges are enjoined to stand by their decisions and the decisions of their predecessors. The doctrine does not allow for the exercise of discretion in an issue the court previously decided when that same issue subsequently surfaces before the court for determination. It is this age old rule of practice that gives law its certainty and equilibrium in the society. See Rossek V. ACB Ltd F (1993) 8 NWLR (pt. 312) 382, Cyril O. Osakwe v. Federal College of Education Asaba & Ors (201) 10 NWLR (Pt.1201) 1 at 16, Shetima and Ors V. Goni & Ors v. Goni & Ors (2011) NWLR (Pt.1279) 413 at 425 and Amaechi V. INEC (2007) 18 NWLR (Pt.1065) 42. Over the years, learned appellant counsel is correct, this court has stuck to some principal principles in relation to the issue under reference. G

Firstly, a document or process is deemed duly filed when it is taken to the court registry, assessed by the officer assigned the responsibility and paid for. The appellant cannot be made to suffer for any shortfall. To do otherwise is to hold him to account for another person's lapses. In C.C.B (Nig) Plc V. A-G Anambra State and Anor (1992) 8 NWLR (Pt.201) 528 this court per Olatawura JSC held at page as follows:-

"...The court will not visit the 'sins' of the court Registry on a

litigant or his counsel unless it was shown that the litigant and/or his counsel was a party therefore or had full knowledge of the sin or mistake and encouraged or condoned the act. Therefore, on the authorities, justice equity, fairness and good conscience must persuade me to hold further that this appeal deserves to succeed and it in fact does." See also *Dike V. Okorie* (1990) 5 NWLR (Pt.151) 418 and *Mohammed V. Musawa* (supra) and *Ede & Anor V. Mba* (2011) 18 NWLR (Pt.1278) 236 at 266.

Secondly, where inadequate fees are paid, I agree with learned appellants' counsel, the usual remedy is an order of court for the short fall to be paid. Non-payment of adequate fees, it has been held, does not ordinarily rob the court its jurisdiction. In *ACB Ltd v. Henshaw* (1990) 1 NWLR (pt 129) 646, a decision this court cited with approval in reiterating the principle, *Oguntade JCA* (as he then was) at page 651 of the report puts the position succinctly thus:-

"Even if the Defendant/Respondent had not paid the requisite court fees, this was a matter to be settled before the Lower Court the usual remedy being on order by the Lower Court that the appropriate fees or any short fall be paid. It certainly has nothing to do with the jurisdiction of the Lower Court to entertain the suit." This Court in *Onwugbufor & 2 Ors v. Okoye & 3 Ors* (1996) 1 NWLR (Pt 424) 252 at 291-292 also states per Iguh JSC thus:-

"If the default in payment is that of the plaintiff, the claim in respect of which such prescribed fees have not been paid cannot be said to be properly before the court and should be struck out in the absence of an appropriate remedial action or application to regularize such anomaly."

It is mandatory for the Lower Court to be governed by the foregoing decisions.

The practice that has evolved over the years is for an appellant whose appeal is within the time prescribed under Section 24 of the Court of Appeal Act to file his appeal to the Lower Court at the registry of the court against which decision the appeal is being filed. And this is what the appellant herein did. It is at that registry that he paid the fees the officer of court assigned for the purpose assessed and requested him to pay. Having paid the fees and left his Notice of appeal at

the Registry with the officer responsible, the appeal on the authorities is deemed properly filed.

It does appear to me that Order 12(1) of the Court of Appeal Rules alluded to by the learned appellants' counsel will only apply to an appeal being filed following the Lower Court's order for extension of time to appeal and or leave to appeal. In that event, even though the appeal must still be filed at the trial Court's Registry, the filing fees payable would then be as prescribed in the third schedule to the Court of Appeal Rules. After all, the Court of Appeal Rules enacted by the President of the court pursuant to Section 248 of the 1999 Constitution (as amended) only regulates practice and procedure of the Court of Appeal.

It is worthwhile to note that Section 30 of the Court of Appeal Act defines an appeal to include an application for leave to appeal and an appellant to include the person who makes such application. In any event once it is shown that the appellant has paid the filing fees as assessed by the officer whose responsibility it is to do so, whether at the trial court or the Court of Appeal as the case may be, the appeal is, on the authorities, duly filed and same cannot be legally struck out. Otherwise the appellants would be made to suffer for the fault, negligence or inadvertence of another. Where the fault of the payment of inadequate filing fees in respect of the appeal is traceable to the officer who assessed the fees it would be unfair not to place the blame where it truly is. See *Iyalabani Co Ltd V. Bank of Baroda* (1995) 44 NWLR (Pt.387) 20, *Bowaje V. Adediwura* (1976) 6 SC 143, *Doherty V. Doherty* (1964) 1 NLR 299 and *Ahmadu V. Salawu* (1974) NLR (Pt.11) 318.

In the case at hand, the Lower Court's refusal to be bound by its own decision and indeed the decisions of this court, on this issue is manifestly perverse. For the foregoing reasons appellants' 2nd issue is resolved in their favour. Their appeal accordingly succeeds. Consequently, the Lower Court's perverse ruling striking out the appellants appeal is hereby set aside. Appeal No.CA/PH/407/2009 is hereby restored to the court's list for same to be determined by a panel of Justices other than those whose decision has just been set aside and expeditiously too. I make no order as to cost.

I. T. MUHAMMAD JSC

I read in advance the judgment just delivered by my learned brother, M. D. Muhammad, JSC. I agree with my lord's reasoning and conclusion which I adopt. I abide by all orders made in the lead judgment.

B

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - M. D. Muhammad, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is no doubt meritorious and should be allowed.

I desire to chip in a few words of my own for the sake of emphasis and to demonstrate plausible steps for obviating unwholesome clog to the wheel of progress in the administration of justice.

This is an appeal against the decision of the Court of Appeal, Port Harcourt Division (the court below) contained in its ruling delivered on the 11th day of March, 2013. Therein, the appeal filed by the appellants against the judgment of Enebeli, J. delivered on 13th February, 2009 was struck out suo motu by the court below on the sole ground that the fees assessed by the Registrar of the trial High Court and paid by the appellants while filing their Notice and grounds of Appeal was an inadequate filing fees.

The filing fees of N3,100.00 assessed by the Registrar of the trial court as extant on page 51 of the record was duly paid by the appellants as can be seen on page 46 of the record.

The appellants felt irked with the step taken by the court below and appealed to this court. Briefs of argument were filed and exchanged by the parties. On 17th November, 2014, when the appeal was heard, based on the application by the learned counsel for the 4th respondent, the name of his client was struck out on the ground that he passed on while the appeal was heard by the court below.

The three issues decoded by the appellants in their brief read as follows:-

"1. Whether the Court of Appeal was right in holding that payment of the sum of N3,100 (Three Thousand, One Hundred Naira) only which said sum of money was duly assessed by the Registrar of the High Court of Rivers State in accordance with the provisions of

the State High Court Civil Procedure Rules as fees for the filing of the Notice of Appeal by the appellants which is less than the sum of N5,000.00 (Five Thousand Naira) provided for in Order 12 Rule 1 of the Court of Appeal Rules 2007 robs the Court of Appeal the jurisdiction to entertain the appeal and the appeal accordingly struck out. (Grounds A and B) B

2. Whether the fault of a Registrar of Court in assessing inadequate filing fees for the filing of a Notice and Grounds of Appeal is that of an innocent litigant or his counsel. (Ground C)

3. Whether the Court of Appeal has the jurisdiction to strike out appellants' appeal on the issue raised suo motu by the court without first hearing parties to the appeal. (Ground D)." C

Perhaps, it is apt to state it that the 1st-3rd respondents, who ordinarily ought to defend the step taken by the court below, adopted the three issues raised by the appellants in their joint brief of argument. In paragraph 4.0 of same, they stated as follows:- D

"4.0 The 1st-3rd respondents would not be contesting the Appeal based on the facts and circumstances of the case and shall therefore adopt the argument as postulated by the appellant."

In the main, the 1st-3rd respondents conceded the appeal. E
In short, the court below carried out an unsolicited and thankless job; in the extreme. The learned counsel for the appellants in the brief settled by him had a field day in demolishing the step taken by the court below. Same deserves to be demonstrated, albeit briefly, anon. F

It was submitted that the learned justices of the court below erred in law by striking out the appellants' appeal merely on the reason of inadequate filing fees, instead of ordering the appellants to pay the short fall and proceed to hear the matter on merit. In support, the case of Akpaji v. Udemba (2009) 6 NWLR (Pt.1135) 545 at G 561-562 was cited.

It is basic to say it without any form of hesitation that based on the position of this court in the case of Akpaji v. Udemba (supra), payment of inadequate filing fees is a mere irregularity. The usual remedy should be an order that the appropriate filing fees or its short fall be paid. Such a short fall has nothing to do with the jurisdiction to hear the appeal as in the instant appeal and ought not to be a basis for the court to strike out the appeal. H

The court below cannot claim to be unaware or ignorant of

the position of this court in *Akpaji v. Udemba* (supra). But it failed to tow the line, as it were, and resultantly flouted the Rule of stare decisis which is to the effect that a point of law that has been settled by a superior court should be followed by a Lower Court. There is sense in it so as to avoid confusion or unwarranted mistake. See *Royal Exchange Assurance Nig. Ltd. v. Aswani Textiles Ind. Ltd.* (1991) 2 NWLR (Pt.176) 639 at 672. It is not proper to refuse to follow the decision of a superior court as same can be counter-productive as manifest in the order of the court below. A Lower Court should tow the line on a very clear and well pronounced point of law by a superior court; I repeat. See *Atolagbe v. Awuni & Ors.* (1997) 7 SCNJ 1 at paragraphs 20, 24 and 35.

It should be further reiterated that payment of inadequate filing fees cannot rob a court of jurisdiction to entertain a suit or appeal as herein. This is so, as it is an irregularity that can be remedied by an order for the payment of the short fall. See *Ezomo v. Oyakhile* (1985) 1 NWLR (Pt 2) 185 and *Noibi v. Fikolati* (1987) 1 NWLR (Pt.116) 387.

It is not in dispute that the appellants herein paid the sum of N3,100.00 as assessed by the official of the trial High Court Registry. It is basic that where an intending appellant has done all that is required of him in law to activate his appeal, he cannot be held responsible for any failure attributable to official inaction or negligence. See *Alowode v. Semoh* (1959) 4 FSC 27 at 29; *Ogbunyiya v. Okudo* (no.2) (1990) 4 NWLR (Pt.146) 551 at 571; *Adedeji v. Military Administrator, Ekiti State* (2008) 1 FWLR (Pt.1104) 11 at 19.

This matter is made worse in that the court below raised the issue of payment of inadequate fees by the appellants suo motu. That ought not to be so as it led to denial of fair hearing contrary to the dictate of section 36(1) of the Constitution of the Federal Republic of Nigeria 1999; since the appellants were not heard on same to their disadvantage. This is the position of this court as laid down in the case of *Okere v. Amadi* (2005) 14 NWLR (Pt. 945) 545.

Let me also reiterate it that rules of court are but hand maid to justice. Same cannot stand in the face of doing substantial justice to the parties. If need be, as in this matter, the court should employ the dictates of the sixth sense to avoid technicality and tow the path of doing substantial justice. The court should aim at doing substantial

justice and avoid undue crass technicality. See *Aliu Bello & Ors. v. Attorney-General Oyo State* (1956) 5 NWLR (Pt.45) 828. There is no doubt about it that the court below seriously erred by striking out the appeal at the point it so acted for no justifiable reason.

Let me draw the curtain here. For the above reasons and more especially those carefully adumbrated in the lead judgment, I too, find the appeal to be clearly meritorious. I hereby allow it and endorse the consequential orders therein made; that relating to costs inclusive.

OGUNBIYI JSC

I read in draft the lead judgment of my learned brother Musa Dattijo Muhammad, JSC. I agree that the appeal has merit and should be allowed.

Just for purpose of emphasis, I wish to state in support of the judgment that inadequate payment of fees is not one and the same as none payment of fees. While the former is a mere irregularity and which should not affect the validity of the process, the latter is so fundamental and affects the legal existence of a process. In other words the court can make an order for the payment of the shortfall as it is not a jurisdictional issue. In law and in the case at hand, the document brought to the Registrar is deemed assessed, paid for and filed. It no longer lies within the control of the party who filed it but is seized by and taken possession of by the Registrar/Court. It is relevant to state also that the assessment of fees to be paid is a duty of the Registry of the Court and not the party concerned, who should not be blamed for any wrong doing occasioned outside its control, Where the Registrar charges inadequate fees, the failure is not to be visited on a party/litigant concerned who is, in this case innocent. The Rules of Court invoking payment should operate and do justice and not inflict hardship.

Furthermore and on the power of Court to raise issues suo motu, the law is trite and also well settled in plethora of decided cases that parties in the circumstance must be given a hearing on the issue so raised. To do otherwise will certainly amount to a denial of fair hearing as is enshrined in Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999. The Court is duty bound to give

parties a hearing even if there is no likelihood of a miscarriage of justice. The consequential effect of failure to comply with this provision would warrant that the decision be set aside on the ground of a nullity.

B With the foregoing few words of mine and particularly on the well reasoned judgment of my brother Musa Dattijo Muhammad, JSC, I also allow the appeal in terms of the lead judgment inclusive of the order made as to costs.

C

KEKERE-EKUN JSC

This is an appeal against the Ruling of court of Appeal, Port Harcourt Division delivered on 11/3/2013 striking out the appellant's appeal against the judgment of the Rivers state High court delivered D on 13/2/2009 on the ground that the fees assessed by the Registrar of court and paid by the appellants for the filing of their notice and grounds of appeal is inadequate. I have had the benefit of reading in draft the judgment of my learned brother, M. D. Muhammad, JSC just delivered. I agree with his reasoning and conclusion that there is E merit in this appeal and it should be allowed. Having regard to the importance of the subject matter to the administration of justice in general, I consider it necessary to add a few words of my own in support of the lead judgment for emphasis.

F The appellants, as plaintiffs, filed an action before the trial court for the enforcement of their fundamental rights, Judgment was entered against them. They filed a Notice of Appeal dated 6/5/2009. It was assessed by the Registry of the trial court and the fee payable was N3,100.00. The endorsement of the filing fee by the registry of G the trial court can be found at page 51 of the record. The bank teller evidencing payment of the fee is at page 46 of the record.

The record of appeal was compiled and transmitted to the court below, Briefs were filed and exchanged between the appellant and the 4th respondent. The appeal was fixed for hearing on 11/3/ H 2012 but could not go on due to the nationwide Judiciary staff Union of Nigeria (JUSUN) strike. It is contended on behalf of the appellants that their counsel met the gate to the court locked on that day when he arrived at about 8.35 am and that he remained at the gate until about 9.17 am when he left. It was further contended that the gates

of the court were also locked the next day, 12th March, 2013. Pursuant to an announcement on NTA Network news that the strike had been called off, learned counsel returned to the court on Wednesday 13/3/2013 only to find that the court eventually sat later in the day on Monday 11/3/2013 and suo motu struck out the appeal on grounds of insufficient filing fees. Aggrieved by the decision, appellants filed a notice of appeal on 4/4/2013 containing 4 grounds of appeal. B

In the appellant's brief settled by Sir C. I. ENWELUZO and filed on 22/5/2013 three issues were distilled for determination thus: C

1. Whether the court of Appeal was right in holding that the payment of the sum of N3,100.00 (three thousand, one hundred Naira) only which said sum of money was duly assessed by the Registrar of the Appeal Registry of the High court of Rivers State in accordance with the provisions of the State's High Court Civil Procedure Rules as fees for the filing of the Notice of Appeal by the appellants which is less than the sum of N5,000.00 (five thousand Naira) provided for in order 12 Rule 1 of the court of Appeal Rules 2007 robs the court of Appeal the jurisdiction to entertain the appeal and the appeal accordingly struck out. (Grounds A & B) D E

2. Whether the fault of a Registrar of court in assessing inadequate filing fees for the filing of a Notice and Grounds of Appeal is that of an innocent litigant or his counsel. (Ground C)

3. Whether the court of Appeal has the jurisdiction to strike out the appellants' appeal on an issue raised suo motu by the court without first hearing parties to the appeal. (Ground D) F

It is noteworthy that the 1st - 3rd respondents are not contesting the appeal. The 4th respondent was reported dead and his name struck out on 17/11/2014. The brief of argument filed on his behalf was accordingly struck out. The appeal is therefore being considered on the basis of the appellant's brief alone. G

This appeal raises an important issue regarding the assessment and payment of fees for court processes, Firstly it is pertinent to note that there is a distinction between inadequate or insufficient filing fees and non-payment of filing fees. However, the end result in either case, is that the party in default would not be entirely shut out. H

In *Onwugbufor vs. Okoye* (1996) 1 NWLR (Pt.424) 252, one of the issues in contention was failure to pay filing fees in respect of

specific reliefs claimed. It was held that the payment of filing fees is a condition precedent to the court's assumption of jurisdiction and that where filing fees were not paid the court would have no jurisdiction to entertain the matter before it. The court at page 292 A - C (supra) held as follows:

B *"It is the responsibility of the plaintiff inter alia to pay the requisite fees in respect of each and every relief claimed as prescribed by the rules to enable the court's judicial functions to commence. A court shall not entertain a relief claimed without payment of the prescribed requisite fees unless such fees have been waived or remitted*
 C *by the court or such fees are payable by any Government Ministry or Non-Ministerial Government Department or Local Government pursuant to the provisions of the High Court Rules of Anambra State. If the default in payment is that of the plaintiff, the claim in respect of*
 D *such prescribed fees have not been paid and cannot be said to be proper before the court and should be struck out in the absence of an appropriate remedial action or application to regularise such anomaly."*

E It is significant to note that the court held that even where no filing fees have been paid at all, the claim would only be struck out *"in the absence of remedial action or application to regularise such anomaly."* This case was cited with approval by this court in: Okolo vs UBN Plc (2004) 3 NWLR (Pt.859) 87; (2004) 1 SC (Pt.1) 1 @ 9.

F In another recent decision of this court in: Akpaji Vs Udemba 828 - 829 G - D, it was held that failure to pay adequate filing fees is an irregularity, which does not rob the court of jurisdiction, His Lordship, Ogbuagu JSC held inter alia:

G *"...it is now firmly settled that even failure to pay, does not raise issue of jurisdiction and that the failure to fulfil the provisions of the High Court Rules in that regard is a mere irregularity which when not taken timeously or when acquiesced in, becomes incapable of affecting the proceedings in any way.*

H *...The usual remedy, it is also settled, is an order by the Lower Court that the appropriate fees or any short fall be paid. It has nothing to do with the jurisdiction of the Lower Court to entertain the counter-claim."*

His Lordship cited with approval the dictum of Oguntade, JCA (as he then was) in A.C.B. Ltd v. Henshaw (1990) 1 NWLR (Pt.129)

646 @ 651. See also: God's Little Tannnery vs. Nwaigbo (2005) 7 NWLR (Pt.924) 298 @ 315 - 316 H - D; Lawal & Anor v. Odejimi (1963) WNLR 23; (1963) ALL NLR 569 @ 570. Based on the authorities referred to above, it is clear that payment of inadequate filing fees is not an incurable defect that robs the court of jurisdiction to entertain the claim. It is an irregularity, which, if not taken up tim- B eously, is incapable of affecting the proceedings.

By Order 7 Rule 11 of the Court of Appeal Rules 2007, "*an appeal shall be deemed to have been brought when the notice of appeal has been filed in the registry of the court below.*" A document C is deemed duly filed when it is brought to the Registry of the court and is assessed and paid for, except where there is a dispensation under the Rules of court that the document can be filed without payment. See Akpaji vs Udemba (supra). In the instant case, appel- D lant paid the fees assessed by the High court in accordance with its rules. If there was any error in the assessment, such error ought not to be visited on the litigant. This court, per Olatawura, JSC, stated in: C.C.B. Nig. Plc. vs A.G. Anambra State (1992) 8 NWLR (Pt.261) 528:

"It will be contrary to all principles to allow litigants to suffer E the mistake of the court Registry. In other words, the Court will not visit the "sins" of the Court's Registry on a litigant or his counsel unless it was shown that the litigant and/or his counsel was a party thereto or had full knowledge of the "sin" or mistake and encouraged or F condoned the act, Therefore, on the authorities, justice, equity, fairness and good conscience must persuade me to hold further that this appeal deserves to succeed and it in fact does."

See also: Famfa Oil Ltd v. A.G. Federation & Anor (2003) 18 NWLR (Pt.852) 453; (2003) 9 - 10 SC 31; Ede v. Mba (2011) 18 G NWLR (Pt.1278) 236 @ 266 F - H.

In any event, it seems to me that where the Court of Appeal Rules provide that the notice of appeal should be filed in the court below, the fees applicable must be the fees prescribed by the court in which the process is filed. It may be necessary for the court of Appeal H Rules to specify that the schedule of fees for the filing of a notice of appeal in the Court of Appeal relates to any notice of appeal filed in that court, for instance, pursuant to an order for extension of time to appeal or to seek leave to appeal, or where a notice of appeal to the

Supreme Court is filed in the Registry of the Court of Appeal pursuant to Order 2 Rule 30 of the Supreme Court Rules 2008.

Section 248 of the 1999 constitution (as amended) provides as follows:

“248. Subject to the provisions of any Act of the National Assembly, the president of the Court of Appeal may make rules for regulating the practice of the Court of Appeal.”

It follows, in my humble view, that the Court of Appeal cannot regulate the filing fees in respect of processes filed in the High court. Furthermore, Order 20 Rule 3 (1) and (2) of the Court of Appeal Rules provides as follows:

(1) The court may, in an exceptional circumstance, and where it considers it in the interest of justice so to do, waive compliance by the parties with these Rules or any part thereof.

(2) Where there is such waiver of compliance with the Rules, the court may, in such manner as it thinks right, direct the Appellant or the Respondent as the case may be, to remedy such non-compliance or may, notwithstanding, order the appeal to proceed or give such directions as it considers necessary in the circumstance.

I am of the considered view that, even if the fees paid were insufficient, this case is one of such circumstances where this provision should have been invoked. All courts of law have a responsibility to do substantial justice. The Rules of court are to be used as hand-maids of justice and should not become a clog in the wheel of justice. See *Banna vs. Telepower (Nig) Ltd.* (2006) 15 NWLR (Pt.1001) 198 @ 217 D - F; *Willoughby vs. I.M.B. (Nig.) Ltd* (1987) 1 NWLR (Pt.48) 105 @ 131 H.

It was a grave miscarriage of justice for the appeal to have been struck out on the grounds of insufficient filing fees when the appellants had paid the amount assessed by the High Court Registry and in a situation where the court raised the issue suo motu without affording the parties a hearing.

It is for these and the more comprehensive reasons advanced in the lead judgment that I also find merit in the appeal, I hereby allow it. I abide by the consequential orders including the order as to costs.