

SUPREME COURT OF NIGERIA

FRIDAY 15TH MAY, 2015. SC. 115/2013

CORAM:- I. T. MUHAMMAD,

M. S. MUNTAKA-COOMASSIE, O. RHODES-VIVOUR,

N. S. NGWUTA, K. B. AKA'HS, JJSC

SEBASTIAN ADIGWE APPELLANT

V.

FEDERAL REPUBLIC OF NIGERIA RESPONDENT

FOREIGN TRIP - Appeals - Notice of - Filing - Applicant relying on absence due to foreign trip - Should inter alia show that he owns a valid passport - And a visa admitting him to the country of visit (H1)

COURTS - Discretion - Exercise of - Conditions - Where applicant prays for exercise of discretion - He must place before court sufficient materials - To be relied upon in granting his application (H2)

APPEALS - Extension of time - Reason - Applicant's delay in filing his notice of appeal - Due to absence of his lead counsel - Cannot be excused - Since another counsel can competently file the notice (H3)

APPEALS - Extension of time - Reasons - Exception - Where ground complains of absence of jurisdiction - Court would no longer consider the reasons adduced for the delay necessary (H4)

FACTS

Before the Supreme Court of Nigeria, applicant/appellant brought a Motion on Notice pursuant to section 233 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), section 27(2)(b) and (4) of the Supreme Court Act and Order 2 Rules 28, 31 and 32 of the Supreme Court Rules 1999 (as amended), seeking for extension of time within which to apply for leave to appeal, leave to appeal and extension of time within which to appeal to the court. In his affidavit in support, appellant averred that his lead counsel was outside the country when the judgment of the Court of Appeal was delivered.

Appellant further stated that his instruction to appeal the judg-

ment was sent to the lead counsel abroad and the grounds of appeal were finalized after the return of the said counsel at which time the 30 days grace period have lapsed. Beside, appellant averred that the grounds of appeal aforesaid involve substantial and arguable questions of law and mixed law and facts. Appellant argued that the delay was caused by the inadvertence of counsel. He therefore urged the court not to visit counsel's sin on the client. Respondent opposed the application and stated that appellant failed to satisfy the requirement of good and substantial reasons for the grant of leave to appeal out of time. Respondent urged the court to dismiss the application.

HELD (Unanimously granting the application per
MUHAMMAD JSC)

Appeals - Notice of - Filing

1. Although the mode of proof may differ from one case to another, where an applicant places reliance on absence of himself or his counsel from the country of origin, involving a trip to a foreign country, which necessarily involves traveling documents, especially by air, it is common knowledge, I think, that an applicant should show that:

- i. he owns a valid passport which entitles him to travel**
- ii. a valid VISA which admits him to the country of visit (within the life span of the visa)**
- iii. a return ticket of the travel agency**
- iv. all valid endorsements by the immigration/custom/ other security officials of the country of origin as well as the country of visit.**

These and other processes as may be required by countries/Transport Agencies involved, which may furnish good and reliable materials for the judicious exercise of the court's discretion. Such requirements are clearly missing and or where available, the copies tendered are unclear, unreadable and leaving the courts to a guess work or conjecture. (p. 1396 H)

COURTS - Discretion - Exercise of - Conditions

2. Courts of law do not embark on conjecture or guess work

as same can hardly produce a just and equitable decision. Where an applicant prays the court to exercise its discretion in his favour judicially and judiciously, it is his duty to place before the court sufficient materials upon which the court will rely in granting his application. This court has held in several authorities that the exercise of discretion is not based on the mere figment of the person doing so but upon facts or circumstances necessary for the proper exercise of that discretion. In other words, it is not an indulgence of a judicial whim, but the exercise of judicial judgment based on fact guided by the law or the equitable decision. (p. 1397 D)

APPEALS - Extension of time - Reason

3. The applicant stood answerable to some criminal charges at the trial court and the Court of Appeal. The above section entitles him to select a counsel of his choice to “defend” him or conduct his case for and on his behalf. That notwithstanding, however, I think it is too much a risk for a client to instruct and insist expressly that “no other person (counsel) except Chief Idigbe, SAN, as in this matter, should handle his matter (i.e. the intended appeal in this matter). It is to be remembered that as human beings, no one (single) person is indispensable in the scheme of things. Death is there; sickness or other incapacitating or debilitating factors are there. Does it therefore, mean that if the preferred counsel is not available to do the needful due to any or all of the possible debilitating factors, the case of the client must die a natural death? I do not think so. It is in evidence in the application on hand that the law firm of the applicant’s lead counsel, Punuka Attorneys & Solicitors has over twenty associate lawyers including counsel of sufficient seniority and experience who could prepare and file a Notice of Appeal or application for leave to appeal, etc in the absence of the lead counsel. After all, filing of Notice of Appeal even if it contains one valid ground of appeal e.g. the omnibus ground, would obviate the difficulties of running out of time. It is, in my view, a matter simple which can competently be handled even by a new wig if so desired.

In the application on hand, the applicant has failed to tell this court at what time did he exactly give instruction to Punuka Attorneys & Solicitors to appeal the judgment of the court below. Granted a date was given for the said instruction, he again failed to tell the court what happened between the date of judgment of the court below and the date he gave the said instruction.

It is foolhardy, today, in view of the modern scientific and technological development where communication has been made easy to assume that the preferred counsel of choice by the applicant could not be reached for a quick decision on filing of an appeal even if it is on the omnibus ground and then the finalization of other grounds of appeal and filing thereof could follow at a later date. It is thus, clear that the delay has not been satisfactorily explained. I decide the first leg of the requirements against the applicant. (pp. 1398 H/1400 B)

APPEALS - Extension of time - Reasons - Exception

4. Although the general requirement of the law is that the two conditions stipulated by the Supreme Court Rules that the applicant should satisfactorily, by an affidavit, explain away (sic why) the delay in failing to appeal within the prescribed period and to furnish arguable grounds of appeal must co-exist as held in many decided authorities, some exception is made to the general rule and that is where a ground of appeal complains of absence of jurisdiction. Where that appears to be the case and the proposed grounds do not appear spurious or frivolous, then the court would no longer consider the reasons adduced for the delay necessary. The issue of jurisdiction, fundamental as it is, would obviate any need to consider the delay occasioned.

Further, as a final court, this court has emphasized the point that where the ground(s) of appeal has challenged the jurisdiction of the court to entertain a suit, the court has to adopt a permissive approach in considering the reason for the delay in order not to shut out an appellant with arguable appeal.

It is my conviction, your Lordships, that from the affidavit evidence and the exhibit analyzed above, especially exhibit

P1, that there are, prima facie, arguable grounds of appeal upon which the applicant can be heard. As a matter which touches on the jurisdiction of the trial court, or any other court for that matter, it is never too late for the applicant (or an applicant) to seek redress from a higher court. The applicant has satisfied the second leg of the two concomitant requirements for extension of time to appeal or to seek leave to appeal as the case may be, provided by Rules of Court. B

Accordingly I hereby grant the application as prayed in the following terms:

1. Time is extended to today for the applicant within which to apply for leave to appeal the decision of Court of Appeal, Lagos Division, delivered on the 25th of January, 2013, in Appeal No. CA/L/146/12. C

2. Leave is granted to the applicant to so appeal. D

3. As there is no relief for deeming orders, time is extended by fourteen days from today within which the applicant may file his Notice and Grounds of Appeal.

(pp. 1403 B/1404 B)

E

NOTABLE POINTS OF INTEREST

MUHAMMAD JSC

1. Right of appeal

My noble lords, it is elementary to state that every citizen of this country F may approach a higher court on appeal against a decision(s) of a lower Court depending on the nature of the decision, or even as an interested party for a favourable relief(s). That is why the Constitution has categorized these decisions on which a citizen can exercise such Constitutional right of appeal as of right 241(1); 244(1); 245(1) G of the Constitution 1999 (as amended) and or where he can exercise such right by leave of Court (SS. 233(3); 241(2); 242(1); 243; 244(2), 245(2) of the same Constitution.

The exercise of such a right by the citizen is not, however, left H as a matter of course or unwieldy.

Thus, the exercise of such right is subject to what an Act of the National Assembly or Rules of Court may provide for the time being. Further, Section 236 of the Constitution empowers the Chief Justice

to make rules for regulating the practice and procedure of the Supreme Court (other corresponding sections of the constitution empower other heads of Courts to make such rules of practice and procedure for their respective courts). (p. 1390 A)

B 2. Extension of time to appeal – Conditions for

Order 6 of the Rules amplify the requirements for enlargement of time to appeal; for leave to appeal or for enlargement of time to seek leave to appeal to include the following:

- C a. the motion for the application
- b. the affidavit in support
- c. relevant documents referred to in, and exhibited with the said affidavit which must include true copies of the judgments with which the application is concerned, that is both of the court below
- D and the court of first instance verified by affidavit
- d. the proposed grounds of appeal from the said judgment;
- e. a statement of the questions which the applicant would like the court to consider, expressed in terms and circumstances of the case but without unnecessary detail
- E f. the constitutional provisions, enactments or subsidiary legislation, if any, which are relevant to the application
- g. a concise statement of the case containing the facts material to the consideration of the questions presented; and
- F h. a direct and concise argument amplifying the reasons relied upon.

Sub Rule (3) of Rule 2 of Order 6 cautions applicants that failure to present with accuracy, brevity and precision whatever is essential to the clear and adequate understanding of the questions which require consideration shall be sufficient reason for refusing the application.

Equally, the grant of such application for extension of time to appeal or seek leave to appeal is not as a mere matter of course. Order 2 Rule 31(2) of the Rules is emphatic that the two conditions:

H (1) an affidavit setting forth good and substantial reasons for failure to appeal or apply for leave to appeal within the prescribed period and (ii) grounds of appeal which PRIMA FACIE show good cause why the appeal should be heard, must be satisfied. Not only that, several decisions of this court state that the two conditions must as a

general rule, co-exist conjunctively. (p. 1391 F)

REPRESENTATION

Chief Anthony Idigbe, SAN with Gloria Abiagom (Miss.); Shirley Roseline Ekechi (Miss.); for the Appellant

Dr. K. Ekwueme with A. Okubote; for the Respondent

B

CASES REFERRED TO

Ibodo v. Enarofia (1988) 5-6 SC 43

Nigeria Laboratory Co. v. Pacific Merchant Bank Ltd. (2012) 6 SC (pt. 1) 1 C

Yiborku v. Republic (1968) SCNLR 470

Williams v. Hope Rising Voluntary Funds Society (1982) ANLR 1

Okere v. Nlem (1992) 4 NWLR (pt. 234) 132

UBA v. G.M.B.H. & Co. (1989) 3 NWLR (pt. 110) 174 D

CBN v. Okojie (2002) 3 SC 99

The Minister v. Expo-Shipping (2010) 4 SCNJ 155

Amadi v. Okoli (1977) 7 SC 57

Ukwu v. Biange (1977) 8 NWLR (pt. 518) 635

FHA v. Kalejaiye (2010) 19 NWLR (pt. 1226) 147 E

Bronik Motors Ltd v. WEMA Bank Ltd (1983) 1 SCNLR 296

Madukolu v. Nkemdilim (1962) 1 ANLR 587

Ibrahim v. Gbad (1996) 8 NWLR (pt. 467) 497

Unilag v. Aigoro (1985) 1 NWLR (pt. 1) 143 F

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 233, 241(2), 242(1), 243, 244(2), 245(2)

Supreme Court Act Cap S.15 LFN 2004, s. 27(2)(b), (4) G

Supreme Court Rules 1999, O. 2 rr. 28, 31, 3

LEAD JUDGMENT BY MUHAMMAD JSC

In a Motion on Notice brought pursuant to Section 233 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Section 27(2)(b) and (4) of the Supreme Court Act and Order 2 Rules 28, 31 and 32 of the Supreme Court Rules, 1999 (as amended), the applicant asked for the following reliefs:

1. *“AN ORDER of this Honourable Court granting extension*

of time to the Applicant within which to apply for leave to appeal to this Honourable Court from the decision of the Lower Court (Court of Appeal, Lagos Division) in APPEAL No. CA/L/146/12 delivered on the 25th of January, 2013.

B *2. AN ORDER of this Honourable Court granting leave to the applicant to appeal to this Honourable Court from the decision of the Lower Court (Court of Appeal, Lagos Division) in APPEAL NO. CA/L/146/12 delivered on the 25th of January, 2013.*

C *3. AN ORDER of this Honourable Court granting extension of time to the applicant within which to appeal to this Honourable Court from the decision of the Lower Court (Court of Appeal, Lagos Division) in APPEAL NO. CA/L/146/12 delivered on the 25th of January, 2013.*

D *AND for such further order or orders as this Court may deem fit to make in the circumstances.”*

The grounds upon which the application is premised read as follows:

E *i. “Section 27(2) of the Supreme Court Act provides 14 days to appeal an interlocutory decision of the Lower Court and three months to appeal against a final decision of the Lower Court in an appeal against a civil case but provide only 30 days to appeal in an appeal in a criminal case.*

ii. The applicant’s case at the Lower Court is a criminal case.

F *iii. The Lower Court decision was delivered on the 25th January, 2013 and the applicant’s lead counsel (Chief Anthony Idigbe, SAN) was abroad when the judgment was delivered.*

G *iv. The applicant’s instruction to appeal the Lower Court’s decision was sent to applicant’s lead counsel abroad and the grounds of appeal were finalized after the return of the applicant’s lead counsel at which time the 30 days have lapsed.*

v. The grounds of appeal aforesaid involve substantial and arguable questions of law and mixed law and facts.

vi. The reason for the delay is inadvertence of counsel.”

H Arguing the Motion, learned senior counsel for the applicant stated that the motion was accompanied by a supporting affidavit of six paragraphs sworn to by one Ada Okoroafor (AD), some exhibits; further affidavit and second further affidavit. He also filed additional list of authorities. Learned senior counsel placed reliance on the affi-

davits and the exhibits. He adopted the written address in support of the motion on Notice which is attached to the Motion on Notice.

Learned senior counsel for the applicant referred the court to the depositions made in paragraphs 4 of the affidavit in support and 5 of the further and better affidavit on the fact that his client, the applicant, contacted him almost a week after the court below delivered judgment that he (learned senior counsel) should specifically handle the client's appeal personally at the Supreme Court. Learned SAN said that he was abroad then. He said he left Nigeria on 14/01/13 and returned on 16/3/13 and tendered his International Passport as evidence. Learned SAN urged the court to accept the explanation for the failure to file the appeal in time and not to visit the counsel's sin on the client.

On his second ground, the learned SAN for the applicant submitted that there are good and arguable grounds for hearing the appeal. He exhibited the Notice of Appeal as Exhibit C-E1. He urged the court to grant his application.

Learned Counsel for the respondent is opposed to the grant of the motion. He said we filed a counter affidavit on 23/7/13. The counter affidavit is of 11 paragraphs sworn to by one Aderinmola Adegbesam (AA). It is accompanied by some exhibits and a written address. He submitted that the applicant failed to satisfy the requirement of good and substantial reasons for the grant of leave to appeal out of time. Further, there is nothing to show from the affidavit in support of 28/3/13, the time of instruction that it is only the learned counsel, Chief Idigbe, SAN who could personally represent the applicant. Learned counsel argued further that the failure by the applicant to secure the certified true copy of the judgment of the court below is not a reason for appealing out of time. Learned counsel referred this court to the deposition in paragraph 7 of his counter-affidavit which he said it is taken as admitted by the applicant. He also referred to paragraph 4(x) (inadvertence of counsel) of the affidavit in support which is in conflict with the factual deposition in paragraph 5(h) of further and better affidavit of 8/12/14. Learned counsel argued that the submission of the learned SAN that there are good grounds on abuse of court process as cogent reason for appealing out of time should be disregarded. He finally urged the court to dismiss the application.

My noble lords, it is elementary to state that every citizen of this country may approach a higher court on appeal against a decision(s) of a lower Court depending on the nature of the decision, or even as an interested party for a favourable relief(s). That is why the Constitution has categorized these decisions on which a citizen
 B can exercise such Constitutional right of appeal as of right 241(1); 244(1); 245(1) of the Constitution 1999 (as amended) and or where he can exercise such right by leave of Court (SS. 233(3); 241(2); 242(1); 243; 244(2), 245(2) of the same Constitution.

C The exercise of such a right by the citizen is not, however, left as a matter of course or unwieldy. Section 233(6) and other corresponding Sections of the same Constitution provides as follows:

*“Any right of appeal to the Supreme Court from the decisions of the Court of Appeal conferred by this Section shall, subject to
 D Section 236 of this Constitution, be exercised in accordance with any Act of the National Assembly and rules of Court for the time being in force regulating the powers, practice and procedure of the Supreme Court.”*

Thus, the exercise of such right is subject to what an Act of the
 E National Assembly or Rules of Court may provide for the time being. Further, Section 236 of the Constitution empowers the Chief Justice to make rules for regulating the practice and procedure of the Supreme Court (other corresponding sections of the constitution empower other heads of Courts to make such rules of practice and
 F procedure for their respective courts).

In compliance with such Constitutional provisions and in addition thereto, the Supreme Court has always been guided by the Supreme Court Act (Cap S.15 LFN, 2004) referred to herein as the Act
 G and the Supreme Court Rules, 1985 as amended. “the Rules”).

In relation to right of appeal, the Act made the following provisions:

*“27(1) where a person desires to appeal to the Supreme Court he shall give notice of appeal or notice of his application for leave to
 H appeal in such manner as may be directed by Rules of Court within the period prescribed by subsection (2) of this Section that is applicable to the case.*

(2) the periods prescribed for giving of notice of appeal or notice of application for leave to appeal are -

(a) in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.

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

(3) Where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to the period prescribed by subsection (2) of this section, be allowed a further period of fifteen days from the date of the hearing of the application by the court below, to make an application to the Supreme Court.

(4) The Supreme Court may extend the periods prescribed in subsection (2) of this section.”

In the Rules of Court, Order 2 Rule 31(2) provides as follows:

“Every application for enlargement of time in which to appeal or in which to apply for leave shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period. There shall be exhibited or annexed to such affidavit -

(a) A copy of the judgment from which it is intended to appeal;

(b) A copy of other proceedings necessary to support the complaints against the judgment; and

(c) Grounds of appeal which prima facie show good cause why the appeal should be heard.”

Order 6 of the Rules amplify the requirements for enlargement of time to appeal; for leave to appeal or for enlargement of time to seek leave to appeal to include the following:

a. the motion for the application

b. the affidavit in support

c. relevant documents referred to in, and exhibited with the said affidavit which must include true copies of the judgments with which the application is concerned, that is both of the court below and the court of first instance verified by affidavit

d. the proposed grounds of appeal from the said judgment;

e. a statement of the questions which the applicant would like the court to consider, expressed in terms and circumstances of the case but without unnecessary detail

f. the constitutional provisions, enactments or subsidiary legislation, if any, which are relevant to the application

g. a concise statement of the case containing the facts material to the consideration of the questions presented; and

h. a direct and concise argument amplifying the reasons relied upon.

Sub Rule (3) of Rule 2 of Order 6 cautions applicants that failure to present with accuracy, brevity and precision whatever is essential to the clear and adequate understanding of the questions which require consideration shall be sufficient reason for refusing the application.

Equally, the grant of such application for extension of time to appeal or seek leave to appeal is not as a mere matter of course. *Ibodo v. Enarofia* (1988) 5-6 SC 43; *Nigeria Laboratory Co. v. Pacific Merchant Bank Ltd.* (2012) 6 SC (Pt. 1) 1. Order 2 Rule 31(2) of the Rules is emphatic that the two conditions: (1) an affidavit setting forth good and substantial reasons for failure to appeal or apply for leave to appeal within the prescribed period and (ii) grounds of appeal which *PRIMA FACIE* show good cause why the appeal should be heard, must be satisfied. Not only that, several decisions of this court state that the two conditions must as a general rule, co-exist conjunctively. See: *Yiborku v. Republic* (1968) SCNLR 470.

The applicant, in his affidavit in support of the application, through “AO” a Litigation Executive in the Chambers of Chief Anthony Idigbe, SAN, of counsel, deposed to the following facts among others:

- “4. iii. *That the applicant’s case at the lower court is a criminal case.*
- vii. *That lower court decision was delivered on the 25th of January, 2013 and the applicant’s lead counsel (Chief Anthony Idigbe, SAN) was abroad when the judgment was delivered.*
- viii. *That applicant’s instruction to appeal the lower court’s decision was sent to applicant’s lead counsel abroad and the grounds of appeal were finalized after the return of the applicant’s lead counsel on the 18th of March, 2013 at which time the 30 days had lapsed.*
- ix. *That he believes grounds of appeal aforesaid involve substantial and arguable questions of law and mixed law and facts.*
- x. *That he also believes reason for the delay is inadvertence of*

counsel.”

The above depositions were sworn to on the 28th of March, 2013.

On the 23rd of July, 2013, the respondent’s counsel (who was given a fiat by the Attorney General of the Federation), filed a counter-affidavit deposing to the following facts through “AA”. B

“7. I visited the website of the firm of the applicant’s counsel, Punuka Attorneys & Solicitors <http://www.punuka.com/firm.php>, where it is stated that there are four partners and twenty other associate lawyers in the said firm. Now shown to me, attached and marked Exhibit FRN is a printout of the relevant page of the aforesaid website, stating the number of counsel in Punuka Attorneys & Solicitors. C

8. On 29/11/2012 when the appeal that gave rise to the decision of the Court of Appeal sought to be appealed came up for hearing, the applicant was represented, inter alia, by Nnamdi Oragwu D Esq., who argued the appeal on behalf of the applicant.

9. In a strategy session held on 19/07/13 in our offices, we agreed to challenge the applicant’s motion on notice dated 28/03/2013 on the grounds that:

9.1 the averments contained in the AO affidavit do not show any cogent reason for the applicant’s failure to appeal the decision of the Court of Appeal delivered on 25/01/2013 within time: and E

9.2 the grounds of appeal in the proposed Notice of Appeal annexed to the AO affidavit do not prima facie show good and arguable issues of law and mixed law and facts.” F

On the 8th of December, 2014, the applicant filed a further and better affidavit to furnish more facts as follows:

“5. That I am informed by Nnamdi Oragwu counsel in chambers during office meeting held at 2p.m. on the 4th day of December, 2014 and I verily believe him as follows: G

a. That the delay in applying for leave to appeal to this Honourable Court was caused as a result of the lead counsel’s trip abroad which spanned from January 14, 2013 to March 16, 2014. Copies of the lead counsel’s passport showing the time of his trip abroad and the time of his return are attached hereto and marked as Exhibit A. H

b. That the applicant specifically instructed that only Chief Anthony Idigbe, SAN being the lead counsel at the lower court should

represent him at all Supreme Court proceedings.

c. That although the applicant's instruction to appeal the court's decision was sent to the applicant's lead counsel and specific counsel of choice, whilst he was abroad, the grounds of appeal were however finalized upon his return, during which time the 30 days had
B effluxed.

d. That the applicant's application for a Certified True Copy of the lower Court's judgment proved abortive until the 7th day of February, 2013 during which a period of 14 days had lapsed out of the
C 30 day period provided by the Rules. A copy of the said judgment is already before your Lordships.

e. That the applicant was invariably left with 16 days within which to study, review, prepare and finalize the judgment of the lower court.

D f. That it took a speedy review of the lower court's judgment by applicant's lead counsel to finalize the Notice of Appeal and the grounds therein.

g. That the lead counsel, Chief Anthony Idigbe, SAN was only able to finalize work on the Appeal for filing few days outside the
E period stipulated by the rules of this Honourable Court.

h. That the failure to file the proposed appeal within time is not deliberate but rather due circumstance of the case and the need to be very careful, being a sensitive criminal matter."

F On 29th of January, 2015, the applicant filed a second further affidavit exhibiting a Notice of Appeal which was separately filed (Exh. P1).

Permit me my lords to now examine the veracity of the depositions made in favour of the applicant and the sufficiency of the
G materials placed before this court. From the affidavit in support, it was averred that the applicant could not appeal the decision of the court below within the prescribed period of 30 days because the applicant's counsel of choice (lead counsel Chief Idigbe, SAN) traveled abroad at the time the instruction to appeal was given by the
H applicant. In a further and better affidavit, it was averred that the lead counsel's trip abroad spanned from January 14th, 2013 to March 16th, 2013. To that effect, copies of the lead counsel's passport were attached as Exhibit "A". From the affidavit evidence of "AO" in support of the Motion on Notice, it is stated that the applicant gave in-

struction to appeal against the judgment of the court below. Presumably, that instruction was given to the chambers of Punuka Attorneys & Solicitors, where Chief Anthony Idigbe, SAN, is the leading counsel (paragraph 1 of the affidavit in support). It is to be noted that the deponent (who swore to the averments on behalf of the applicant) did not give the exact time of the said instruction by the applicant even though the court below delivered its judgment on the 25th of January, 2013. Further, the dates which the said instruction was sent to the lead counsel abroad and when he received same were never mentioned. B

Was there any response from the lead counsel abroad to the sender(s) of the said instruction if he was at all in receipt thereof? There is nothing to guide the court on that. C

Secondly, the same "AO" deposed to the fact (further and better affidavit) that the delay in applying for leave to appeal to this court was caused as a result of the lead counsel's trip abroad which spanned from January 14th, 2013 to March 16th, 2013 and copies of the lead counsel's passport were exhibited. D

In another document titled "*Applicant's Reply on Point(s) of Law to Respondents' Counter Affidavit dated 23/07/13*" the learned senior counsel for the applicant supported the assertions that the applicant in his further affidavit has attached all necessary documents, particularly Chief Anthony Idigbe, SAN's International Passport. E

It is to be noted as well, that the depositions in the Further and Better Affidavit were sworn to on behalf of the applicant on the 8th of December, 2014. F

The learned counsel for the respondent, Dr. K. U. K. Ekwueme (on the written address in opposition to the applicant's Motion dated 15th March, 2013), filed along with the counter affidavit on 23/7/ 2013, made the following submission: G

"The respondent submits that the absence of the applicant's lead counsel from the country which is the kernel of the AO affidavit is a matter of fact that should be proved by documentary evidence. In this regard, documentary evidence (such as air tickets/receipts and passport pages) showing that Chief Anthony Idigbe indeed traveled out of Nigeria during the relevant time is necessary." H

It is in response to the above prompting that the applicant exhibited same pages of passport(s) carrying the name of the lead

senior counsel. But can the facts contained on the pages of the said passport(s) support the contention of the applicant? I do not think so.

The following pages (in photo copy) were exhibited:

- i. a page carrying personal information of one Idigbe, Anthony Ikemefuna and
- B ii. adjacent to it is a page carrying a No. i.e. A03763966. (This number tallies with the name and number ascribed at the end of the page first referred to above).
- iii. The next page is one which carries different stamps and dates: (a) 17 April, 2013 (Murtala Mohammed International Airport Nigeria) (b) 16 March, 2013 (all other inscriptions therein, unclear)
- C (c) 14 January, 2013 (all other inscription therein unclear) (d) 04/11/12 (34) (FIUMIGNO SODA) (VISA) (e) 05 January, 2013 (24) GHANA IMMIGRATION OFFICE (EMBARKED) KOTOKA INTERNATIONAL AIRPORT. (d) at the bottom of that page is a punched
- D inscription of the said passport's number 03763966.

My noble lords, a comparative analysis of the affidavit evidence and the documents exhibited therewith, shows clearly the following:

- i. Passport No. A03763966 appears to be a cancelled passport
- E as endorsed at the top of the passport, "CANCELLED WITHOUT PREJUDICE." Thus, although there is no exact date when the cancellation became effective, it leaves one in doubt as to whether the page carrying the dates as in (iii) above forms part of passport No. A03763966.
- F ii. Paragraph 4(iii) of the affidavit in support (deposed to, earlier in time), shows that the lead counsel for the applicant who was abroad, returned to the country on the 18th of March, 2013. Paragraph 5(a) of the Further Affidavit dated, filed and sworn to on the
- G 8th of December, 2014 later in time), shows that the lead counsel's trip abroad "spanned from January 14, 2013 to March 16, 2013." The latest return date of the lead counsel to the country must be assumed to be the 16th of March, 2013. A conflict in the affidavit evidence seems to have arisen. This conflict was never resolved and it
- H leaves this court to speculation.

Although the mode of proof may differ from one case to another, where an applicant places reliance on absence of himself or his counsel from the country of origin, involving a trip to a foreign country, which necessarily involves traveling

documents, especially by air, it is common knowledge, I think, that an applicant should show that:

- i. he owns a valid passport which entitles him to travel**
- ii. a valid VISA which admits him to the country of visit (within the life span of the visa)**
- iii. a return ticket of the travel agency**
- iv. all valid endorsements by the immigration/custom/other security officials of the country of origin as well as the country of visit.**

These and other processes as may be required by countries/Transport Agencies involved, which may furnish good and reliable materials for the judicious exercise of the court's discretion. Such requirements are clearly missing and or where available, the copies tendered are unclear, unreadable and leaving the courts to a guess work or conjecture.

Courts of law do not embark on conjecture or guess work as same can hardly produce a just and equitable decision. Where an applicant prays the court to exercise its discretion in his favour judicially and judiciously, it is his duty to place before the court sufficient materials upon which the court will rely in granting his application. This court has held in several authorities that the exercise of discretion is not based on the mere figment of the person doing so but upon facts or circumstances necessary for the proper exercise of that discretion. In other words, it is not an indulgence of a judicial whim, but the exercise of judicial judgment based on fact guided by the law or the equitable decision. See: Williams v. Hope Rising Voluntary Funds Society (1982) ANLR 1; Okere v. Nlem (1992) 4 NWLR (Pt. 234) 132; UBA v. G.M.B.H. & Co. (1989) 3 NWLR (Pt. 110) 174; CBN v. Okojie (2002) 3 SC 99.

Just quite recently, this court refused to grant an application brought on same principle: Nigerian Laboratory Company Ltd. v. Pacific Merchant Bank Ltd. (2012) 6 SC (Pt. 1). The court held, inter alia:

"If at all, the company secretary of the 1st appellant had an accident which lasted him about five months in hospital, supporting evidence such as the picture(s) of the scene of the accident, picture of the position of the broken legs; bills of medication, medical report et

cetera will have furnished more convincing evidence.... Thus, the bare making of whimsical statements which do not supply convincing, satisfactory, concrete and cogent reasons in explaining away the delay or tardiness caused by an applicant himself can hardly be acceptable to a reasonable court or tribunal in complete disregard to the requirement of the law."

Another important issue raised by the applicant and which has been put in evidence (paragraph 5(b) of the Further and Better Affidavit) is that the applicant specifically instructed that only Chief Anthony Idigbe, SAN, being the lead counsel at the lower court should represent him at all Supreme Court proceedings. Making his submission on this issue, the lead senior counsel stated, inter alia, as follows:

"My Lords, we most humbly submit that the inability of the learned senior Advocate to file his appeal due to his absence from jurisdiction is a good reason for this delay considering the fact that the applicant expressly stated that no other person except him should handle this appeal having considered the sensitivity and the risk of losing his liberty in the event that such matter is not properly handled... It is therefore our most humble submission that the insistence of the applicant to be represented by Chief Idigbe, SAN so as to be sure that his appeal will be properly prosecuted and the unfortunate inability of Chief Idigbe to quickly commence work on the applicant case at the relevant time which occasioned the delay is a good reason for bringing this appeal out of time."

Learned counsel for the respondent, in his address which supported his counter affidavit referred to paragraphs 7 and 8 of the counter-affidavit and submitted that the law firm of the applicant's lead counsel is peopled with counsel of sufficient seniority and experience to prepare and file a notice of appeal or application for leave to appeal in the absence of lead counsel. The applicant no doubt, is entitled to exercise his constitutional right. The Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides as follows:

"36 (6) Every person who is charged with a criminal offence shall be entitled to -

(c) defend himself in person or by legal practitioners of his own choice."

The applicant stood answerable to some criminal charges at the trial court and the Court of Appeal. The above

section entitles him to select a counsel of his choice to “defend” him or conduct his case for and on his behalf. That notwithstanding, however, I think it is too much a risk for a client to instruct and insist expressly that “no other person (counsel) except Chief Idigbe, SAN, as in this matter, should handle his matter (i.e. the intended appeal in this matter). It is to be remembered that as human beings, no one (single) person is indispensable in the scheme of things. Death is there; sickness or other incapacitating or debilitating factors are there. Does it therefore, mean that if the preferred counsel is not available to do the needful due to any or all of the possible debilitating factors, the case of the client must die a natural death? I do not think so. It is in evidence in the application on hand that the law firm of the applicant’s lead counsel, Punuka Attorneys & Solicitors has over twenty associate lawyers including counsel of sufficient seniority and experience who could prepare and file a Notice of Appeal or application for leave to appeal, etc in the absence of the lead counsel. After all, filing of Notice of Appeal even if it contains one valid ground of appeal e.g. the omnibus ground, would obviate the difficulties of running out of time. It is, in my view, a matter simple which can competently be handled even by a new wig if so desired.

It should not be the monopoly, or at the whims and caprices of a lead counsel. It should also be noted that filing of an appeal within the prescribed period for it, or an application for leave to appeal, is fundamentally different from prosecuting the appeal or the application to finality. It is my belief that the former can be done by any qualified legal practitioner in order to obviate lapse of time, whereas the latter can be conducted by an experienced counsel. That of course was what happened even in the matter on hand where the applicant was represented by another counsel; the instant application too, was prepared and signed by another counsel both from the same law firm with Chief Idigbe, SAN. Thus, the filing of the Notice of Appeal if not because of the apathy of the applicant, could have promptly been done by any of the counsel in Punuka Attorneys & Solicitors’ Law Firm. I think it stands to reason that where an applicant wants to rely on the ‘sin of a counsel’ as a reason in explaining away the delay

or tardiness in doing what the law requires him to do within a prescribed period, such as filing of an action, appeal, or application for extension of time to appeal or leave to appeal, the applicant should not be found wanting or contributory to the factors that give rise to the delay.

In the application on hand, the applicant has failed to tell this court at what time did he exactly give instruction to Punuka Attorneys & Solicitors to appeal the judgment of the court below. Granted a date was given for the said instruction, he again failed to tell the court what happened between the date of judgment of the court below and the date he gave the said instruction.

It is foolhardy, today, in view of the modern scientific and technological development where communication has been made easy to assume that the preferred counsel of choice by the applicant could not be reached for a quick decision on filing of an appeal even if it is on the omnibus ground and then the finalization of other grounds of appeal and filing thereof could follow at a later date. It is thus, clear that the delay has not been satisfactorily explained. I decide the first leg of the requirements against the applicant.

Secondly, in his submission, the learned SAN for the applicant stated that the applicant in his proposed Notice of Appeal has raised a recondite issue which affects the jurisdiction of the trial court e.g. in the question as to indispensability of Attorney General's fiat in addition, the applicant's proposed notice of appeal raises the issue of fair hearing which affects the applicant's constitutional rights. He cited grounds 3 and 6 of the proposed notice of appeal. Grounds 3 and 6 as couched in the proposed Notice and Grounds of Appeal (Exhibit D1) read as follows:

“GROUND THREE

Error of Law

3. The Learned Justices of the Court of Appeal erred in law in holding that the complainant/respondent did not require the fiat of the Attorney-General of Lagos State to prosecute the appellant.

PARTICULARS OF ERROR

i. Section 211 and 174 of the Constitution of the Federal Republic of Nigeria, 1999 delineated the powers of the Attorney-Gen-

eral of a State and the Attorney-General of the Federation.

ii. Decisions of appellate courts to the effect that an Attorney General of a state cannot prosecute offences in statutes enacted by the National Assembly and vice versa were cited to the court but were not considered in the judgment of the court.

GROUND SIX

Error of Law

6. The learned Justices of the Court of Appeal erred in law in their failure to consider the entire issues raised by the appellant and all documents filed thereto.

PARTICULARS OF ERROR

iii. Part of the Appellants contentions before the lower court was predicated on the issue that having chosen to prosecute him under special laws; the complainant/respondent cannot turn round to prosecute him under the general laws.

iv. No pronouncement was made on the issue whether the proof of evidence disclosed a prima facie case against the appellant.

v. Section 264(2) of the Administration of Criminal Justice Law of Lagos State relied upon by the Lagos High Court to refuse to make pronouncements on this issue of the absence of a prima facie case was subordinate to Section 36 of the Constitution and the Court of Appeal did not consider this issue.

vi. The Court of Appeal did not consider the reply brief and the arguments contained thereto in its judgment instead it relied extensively on the brief of the respondent in extensor.

vii. Appellants right to fair hearing includes a right to be heard on every contention he may have to charges brought against him and a just determination reached on each one by the court."

Although, the learned SAN for the applicant did not specifically mention Ground of Appeal No. 4, I think it carries equal weight as the previous two mentioned. It states as follows:

"GROUND FOUR

Error of Law

4. The learned Justices of the Court of Appeal erred in law in holding that the Economic and Financial Crimes Commission has power to prosecute an offence before the Lagos State High Court with or without a fiat.

PARTICULARS OF ERROR

i. Section 211 of the Constitution of the Federal Republic of Nigeria 1999 does not provide an authority for the Economic Financial Crimes Commission to prosecute offences before the State High Court without fiat first having been obtained.

ii. The 'fiat' relied on by the respondent was issued on 12th May, 2014 based on the repealed Criminal Procedure Law in operation at that time.

iii. The Criminal Procedure Law has been repealed and replaced following the enactment of the Administration of Criminal Justice Law of Lagos State.

iv. The learned Justices of the Court of Appeal failed to properly define persons allowed to act under Section 211 of the Constitution of the Federal Republic of Nigeria, 1999.

v. The fiat was not signed by the appropriate authority.

vi. Based on the information before the lower court, appellant was to be prosecuted based on the provisions of the Administration of Criminal Justice Law of Lagos State which came into force in 2007."

My Lords, a summary of the points in contention raised by the proposed Grounds of Appeal set out above, though not limited to them alone, is:

a. Abuse of court process and duplicity of charges against the applicant

b. Whether a fiat from the Lagos State Attorney General to the Attorney General of the Federation and the EFCC for the latter to prosecute the applicant before Lagos State High Court is indispensable.

c. Interpretation of Sections 174 and 211 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

d. Whether an Attorney-General of a State can prosecute offences in statutes enacted by the National Assembly and vice versa.

e. Whether the court below is bound to consider the entire issues raised by the appellant (applicant) and all the documents filed thereto.

f. Whether the applicant was denied fair hearing by the court below.

It is my humble view that the points summarized above appear to be weighty. Both the court of trial and the court below expressed their views, on such points. Learned counsel for the respec-

tive parties, though poles apart, made copious submissions, supported by several decided cases and some enactments. These points, I think, deserve to be considered by this court. They are purely issues of law and relate to the competence of the trial court and, afortiori, the court below.

Although the general requirement of the law is that the two conditions stipulated by the Supreme Court Rules that the applicant should satisfactorily, by an affidavit, explain away the delay in failing to appeal within the prescribed period and to furnish arguable grounds of appeal must co-exist as held in many decided authorities such as: *Ibodo v. Enarofia* (1980) 5-7 SC 42; *Kotoye v. Saraki* (1995) 5 NWLR (Pt. 395) 256; *Mobil Oil Ltd. v. Agodaigho* (1988) 2 NWLR (Pt. 77) 383; *Williams v. Hope Rising Voluntary Funds Society* (1982) 1-2 SC 45; *Osinupebi v. Saibu* (1982) 7 SC 104, ***some exception is made to the general rule and that is where a ground of appeal complains of absence of jurisdiction. Where that appears to be the case and the proposed grounds do not appear spurious or frivolous, then the court would no longer consider the reasons adduced for the delay necessary. The issue of jurisdiction, fundamental as it is, would obviate any need to consider the delay occasioned.*** See *The Minister v. Expo-Shipping* (2010) 4 SCNJ, 155. Another important issue raised is that of the substantiality of the issues of law and interpretation of some provisions of the Constitution and some other statutes such as the EFCC Act; the Lagos State Administration of Criminal Justice Law, 2007; Criminal Procedure Act etc. In the case of the *Minister v. Expo-Shipping* (supra), my learned brother, Chukwuma-Eneh, JSC, observed:

“There is no doubt that there are sound judicial pronouncements of this court to the effect that where proposed grounds of appeal show good cause of appeal, for example, on issue of jurisdiction or strong points of law as in the case of statutory interpretation it may not be necessary to satisfy the first arm of Order 3 Rule 2, on inordinate delay in an application to appeal out of time. Such exceptional circumstances are therefore a common place in our jurisprudence.”

In *Onashile v. Idowo* (1961) SCNL 16, this court held, much earlier, dealing with almost similar issue:

“In the present case, there are one or more points of law and of statutory interpretation, the appeal does not look frivolous and to shut it out, without hearing on the merit, on the ground that the appellant was four days late in carrying out the conditions laid down by the Registrar... would be too drastic a penalty.”

B Further, as a final court, this court has emphasized the point that where the ground(s) of appeal has challenged the jurisdiction of the court to entertain a suit, the court has to adopt a permissive approach in considering the reason for the delay in order not to shut out an appellant with arguable appeal. See: Amadi v. Okoli (1977) 7 SC 57; Ukwu v. Biange (1977) 8 NWLR (Pt. 518) 635.

D It is my conviction, your Lordships, that from the affidavit evidence and the exhibit analyzed above, especially exhibit P1, that there are, prima facie, arguable grounds of appeal upon which the applicant can be heard. As a matter which touches on the jurisdiction of the trial court, or any other court for that matter, it is never too late for the applicant (or an applicant) to seek redress from a higher court. The applicant has satisfied the second leg of the two concomitant requirements for extension of time to appeal or to seek leave to appeal as the case may be, provided by Rules of Court.

E Accordingly I hereby grant the application as prayed in the following terms:

F 1. Time is extended to today for the applicant within which to apply for leave to appeal the decision of Court of Appeal, Lagos Division, delivered on the 25th of January, 2013, in Appeal No. CA/L/146/12.

G 2. Leave is granted to the applicant to so appeal.

3. As there is no relief for deeming orders, time is extended by fourteen days from today within which the applicant may file his Notice and Grounds of Appeal.

I make no order as to costs.

H

MUNTAKA-COOMASSIE JSC

The applicant, Sebastian Adigwe, filed an application requesting for the following three reliefs namely:-

1) Granting of extension of time to apply for leave to appeal against the decision of the Court of Appeal, Lagos Division.....

2) Leave to appeal to the Supreme Court from the decision of Court of Appeal Lagos Division in appeal No. CA/L/146/12 delivered on the 25/7/2013.

3) Extension of time within which to appeal to this court from the said decision of the lower court. B

The grounds upon which the application is premised are six (6) in number. The learned presiding Justice has stated them in his lead ruling. There is no pressing need for me to reproduce them here. C

Both counsel argued and submitted on behalf of their respective clients. Applicant's counsel urged this court to grant the application while the respondent's counsel opposed the granting of this application. D

I quite agree with his lordship Tanko Muhammad, JSC that, in this application, there are prima facie arguable grounds of appeal upon which the applicant can be heard. To refuse the applicant will definitely amount to shutting out the appellant which is the denial of fair hearing I therefore agree entirely with the position taken by my learned brother. E

Application is therefore granted as prayed.

Time is extended by fourteen days from today 15/5/2015, within which the applicant, herein may file his notice and grounds of appeal. No order as to costs. F

RHODES-VIVOUR JSC

The appellant was at a time the Managing Director of Afribank PLC. He was removed from office by the Governor of the Central Bank of Nigeria and charged on an information before a Lagos High Court for stealing, receiving stolen property, and conspiracy to commit offences contrary to the Criminal Code. He quickly filed a Preliminary objection wherein he asked the trial court to decline jurisdiction to hear the charge/s filed against him. The trial court overruled the Preliminary objection and ruled that it had jurisdiction to hear all the charges. Dissatisfied with the Ruling of the trial court, the appellant filed an appeal. The Court of Appeal affirmed the Ruling of the G
H

High Court. Dissatisfied with concurrent findings by the two courts below that the proper venue to hear the charges against him is a Lagos High Court he decided to appeal to this court but he was out of time. That explains the necessity for this application. Section 241 of the Constitution provides that an applicant has a right of appeal to this court from final decisions of the Court of Appeal, but the right of appeal must be exercised within laid down periods. Section 27(2) of the Supreme Court Act stipulates that anyone who wishes to appeal from an interlocutory decision of the Court of Appeal must do so within 14 days and in the case of a final decision of the Court of Appeal within 30 days. That is to say appeal must be filed within the stipulated time after judgment is delivered.

The Ruling of the Court of Appeal was delivered on the 25th day of January, 2013. The applicant is out of time and so no longer has a right of appeal. Rules of courts are of tremendous help to litigants who are out of time to appeal. Order 2 Rule 31 of the Supreme Court Rules provides that:

“The court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interest of justice.”

Now, all applications for an extension/enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and grounds of appeal which prima facie show good cause why the appeal should be heard.

This explains the applicant’s motion on notice in line with Order 2 Rule 31(2) of the Supreme Court Rules:

The applicant quite rightly asks for the following:

1. An order of this Honourable court granting extension of time to the applicant within which to apply for leave to appeal to this Honourable court from the decision of the Court of Appeal Lagos Division in Appeal No: CA/L/146/12 delivered on 25th day of January, 2013.

2. An Order of this Honourable court granting leave to the applicant to appeal to this Honourable court from the decision of the Court of Appeal Lagos Division in Appeal No: CA/L/146/12 delivered on the 25th day of January, 2013.

3. An Order of this Honourable court granting extension of time to the applicant within which to appeal to this Honourable court from the decision of the lower court in appeal No: CA/L/146/12 delivered on the 25th of January, 2013.

The grant of an application for extension of time to appeal is entirely at the discretion of the court. Discretion must be exercised judicially. B

That is with sufficient, correct and convincing reasons. See *Ekwunife v. Wayne W/A Ltd* (1989) 5 NWLR (Pt. 122) p.429.

An application for extension of time within which to appeal C would succeed if the applicant can show by affidavit evidence:

(a) good and substantial reasons for failure of the applicant to appeal within the prescribed period; and

(b) grounds of appeal which prima facie show good cause why the appeal should be heard. See *Ukwu v. Bunge* (1997) 8 NWLR D (Pt. 518) p.527, *FHA & Anor v. Kalejaiye* (2010) 19 NWLR (Pt. 1226) p.147.

Both (a) and (b) must co-exist before a judge hearing the application can grant it.

On (a) the applicant must show by affidavit evidence why he E was unable to appeal within the stated period after judgment was delivered. The affidavit must be detailed on the reasons for the delay, for example, mistake or inadvertence of counsel are good reasons for delay.

On (b) the applicant only needs to show that the grounds are F arguable and not that they would succeed. See

FHA & Anor v. Kalejaiye (supra), *Ibodo v. Enarofia* (1980) 5-7 SC p.42, *Kotoye v. Saraki* (1995) 5 NWLR (Pt. 395) p.256.

Where a ground of appeal complains of lack of jurisdiction G and it appears so it would no longer be necessary to enquire into the reasons for the delay in bringing the application. This is the position of the law since jurisdiction is so fundamental in all proceedings. Proceedings conducted without jurisdiction are a waste of judicial time. Such proceedings are a nullity no matter how well decided. See *Bronik Motors Ltd & Anor v. WEMA Bank Ltd* (1983) 1 SCNLR p.296, *Madukolu v. Nkemdilim* (1962) 1 ANLR p.587. H

So, once jurisdiction is made an issue in a ground of appeal and it appears to be so the application should be granted on that

point alone. See *FHA & Anor v. Kalejaiye* (supra)

My learned brother, Muhammad, JSC quite rightly in my view found that the applicant was unable to show good and substantial reasons for failure to file his appeal within time but still granted the application because the issue of jurisdiction is formidable. I agree completely with the leading Ruling.

It is for these reasons and the more detailed reasoning in the leading Ruling that I agree with the orders made by Hon. Justice I. T. Muhammad, JSC.

C _____

NGWUTA JSC

I read in advance the lead ruling just delivered by my learned brother, Muhammad, JSC and I agree entirely with the comprehensive reasoning therein for granting the application.

I desire to add a few words of my own.

Order 2 Rule 31 (1) and (2) of the Supreme Court Rules 1985 (as amended) provides:

“Ord. 2 Rule 31:

(1) The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when that is required in the interest of justice.

(2) Every application for an enlargement of time in which to appeal or in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period. There shall be exhibited or annexed to such affidavit:

(a) a copy of the judgment from which it is intended to appeal;
(b) a copy of other proceedings necessary to support the complaints against the judgment; and

(c) grounds of appeal which prima facie show good cause why the appeal should be heard.”

The two conditions stipulated in the order reproduced above must co-exist to warrant the grant of the appeal. In other words, the order must be read and interpreted conjunctively and not disjunctively. See *Major Shehu Ibrahim & Anor v. Nathaniel Gbad* (1996) 8 NWLR (Pt. 467) 497, *Unilag v. Aigoro* (1985) 1 NWLR (Pt. 1) 143.

However, the requirement of the duality of good and substantial reasons for the delay and grounds of appeal which prima facie show good cause why the appeal should be heard is subject to an exception: when an issue of jurisdiction is raised in the ground of appeal the requirement of good and substantial reason for the delay may be disposed with. B

This is so because the issue of jurisdiction is so radical in nature and at the foundation of adjudication that it cannot be defeated by the provision of Rules of Court. See *S. O. Akegbejo & 3 Ors v. Dr. D. O. Ataga & 3 Ors* (1998) 1 NWLR (Pt. 534) 459 at 469. Proceedings C conducted without jurisdiction will be declared a nullity.

As demonstrated in the lead judgment the applicant has raised the issue of jurisdiction of the trial Court in view of which whether or not the applicant has good and substantial reasons for the delay in bringing his application takes a second place in the consideration of D the application.

For the above and the fuller reasons in the lead ruling, I also grant the application as sought.

E

AKA'AHS JSC

I was privileged to have read in advance the Ruling just delivered by my learned brother, Ibrahim Tanko Muhammad JSC. In the application filed by Chief Anthony Idigbe, SAN seeking for extension F of time within which to apply for leave to appeal against the decision of the Court of Appeal, Lagos in Appeal No. CA/L/146/2012 delivered on 25/1/2013, leave to appeal and extension of time to appeal against the said decision, he stated in ground (iv) that the applicant's instruction to appeal the lower Court's decision was sent to the G applicant's lead counsel abroad and by the time he finalized preparing the Notice and grounds of appeal after his return, the 30 days period within which to file it had expired. In the respondent's counter-affidavit in opposition to the application, it was deposed by Aderinmola H Adegbesan in paragraphs 7, 8, and 9 as follows:-

"7. I visited the website of the firm of the applicant's counsel, Punuka Attorneys and Solicitors; <http://www.com/firm.php>, where it is stated that there are four partners and twenty other associate lawyers in the said firm. Now shown to me, attached and marked Ex-

hibit FRN is a printout of the relevant page of the aforesaid website, stating the number of counsel in Punuka Attorneys and Solicitors.

8. On 29/11/2012 when the appeal that gave rise to the decision of the Court of Appeal sought to be appealed came up for hearing, the applicant was represented, *inter alia*, by Nnamdi Oragwu Esq., who argued the appeal on behalf of the applicant.

9. In a strategy session held on 19/7/2013 in our office, we agreed to challenge the applicant's motion on notice dated 25/3/2013 on the grounds that:-

9.1 the averments contained in the AO affidavit do not show any cogent reasons for the applicant's failure to appeal the decision of the Court of Appeal delivered on 25/1/2013 within time; and

9.2 the grounds of appeal in the proposed Notice of Appeal annexed to the AO affidavit do not *prima facie* show good and arguable issues of law and mixed law and facts".

Contrary to the averments in paragraphs 9.1 and 9.2 of the counter-affidavit, grounds 3 and 6 of the proposed Notice of Appeal raise issues of jurisdiction and lack of fair hearing. The grounds are arguable and this alone *prima facie* is a good cause why the appeal should be heard. See: *Ukwu v. Bunge* (1997) 8 NWLR (Pt. 518) 527, *Federal Housing Authority v. Kalejaiye* (2010) 19 NWLR (Pt. 1226) 147. This dispensed with the requirement on the applicant to show good and substantial reasons for failure to appeal within the prescribed period. There is therefore a compelling reason why this Court should exercise its discretion in favour of the applicant. It is for this reason and the fuller reasons contained in the leading ruling of my Lord, Muhammad JSC that I grant the application on the same terms as contained in the leading Ruling.

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