

SUPREME COURT OF NIGERIA
FRIDAY 22ND MAY, 2015. SC. 152/2005
CORAM:- S. GALADIMA, O. ARIWOOLA,
M. D. MUHAMMAD, K. M. O. KEKERE-EKUN,
C. C. NWEZE, JJSC

1. LAFFERI NIGERIA LIMITED
2. STRADEC NIGERIA LIMITED APPELLANTS
AND
1. NAL MERCHANT BANK PLC & ANOR
2. JIMA PETROLEUM LIMITED RESPONDENTS
IN THE MATTER OF THE COMPANIES
AND ALLIED MATTERS ACT,
CAP 59 LFN 1990
AND
IN THE MATTER OF MENNOIL
PETROLEUM AND PETROCHEMICALS LTD

APPEALS - Extension of time - Conditions - For exercise of court's discretion - Applicant must disclose in the supporting affidavit - Good and substantial reason for delay - And an arguable ground (H1)

APPEALS - Extension of time - Reasons - Exception - Where grounds raise the issue of jurisdiction - Reasons for the delay in appealing within time cease to be relevant (H2)

APPEALS - Discretion - Interference - Appellate court will not interfere with discretion of lower court - Simply because if faced with a similar application - It would have exercised discretion differently (H3)

JURISDICTION - Absence of - Effect - Court either has jurisdiction to make certain orders or it does not - Where it lacks jurisdiction - Its pronouncement is of no legal effect (H4)

APPEALS - Right of - Extension of time - Having satisfied two pre-conditions for the grant of the order - Respondents ought not to be deprived of their constitutionally guaranteed right of appeal (H5)

FACTS

Before the Federal High Court Abuja, plaintiffs/appellants instituted this action against defendants/respondents, seeking for declaratory and injunctive reliefs against respondents and praying inter alia for the nullification of the appointment of Dr. Zayyad (originally one of the defendants) as the Receiver/Manager of the nominal party by 1st respondent, for failure to comply with a condition precedent under the Companies & Allied Matters Act Cap. 59 LFN 1990, requiring notice of such appointment to be given to the Corporate Affairs Commission. They also sought the nullification of all acts, deeds and transactions already concluded by the Receiver/Manager under the receivership. Unfortunately, Dr. Zayyad died during the pendency of the suit and his name was struck out as a party. The matter was heard solely on affidavit and documentary evidence alone.

In its judgment, the court granted five out of the six reliefs sought by appellants resulting in the nullification of the appointment of the Receiver/Manager and all acts undertaken by him. Respondents promptly appealed to the Court of Appeal. They also applied for stay of execution pending the determination of the appeal. On the instructions of 1st respondent, an application was filed seeking to strike out the appeal and application for stay of execution. The appeal was not struck out but deemed as withdrawn by the court. Application for stay of execution was struck out. Thereafter, 1st respondent in a sudden twist, instructed its counsel to pursue the appeal earlier discontinued. Equally, 2nd respondent upon being aware of the outcome of the suit gave separate instructions to pursue the appeal. Consequently, respondents applied for extension of time within which to appeal against the judgment of the trial court. Against all odds, the court exercised its discretion by granting the application. Aggrieved, appellants have appealed to Supreme Court.

ISSUE FOR DETERMINATION

Whether, having regard to the circumstances of this case, the lower Court was right in granting the respondents' application for extension of time within which to appeal against the judgment of the lower Court delivered on 4/3/2004.

HELD (Unanimously dismissing the appeal per **KEKERE-EKUN JSC**)

APPEALS - Extension of time - Conditions

1. From the above provisions, it is evident that an application for enlargement of time within which to appeal is not granted as a matter of course. It is within the discretionary powers of the court which, as with all discretionary powers, must be exercised judicially and judiciously. Thus the pre-conditions for the exercise of the court's discretion in an applicant's favour, which must be disclosed in a supporting affidavit, are:

- i. Good and substantial reasons for failing to appeal within the prescribed period; and**
- ii. Grounds of appeal which prima facie show good cause why the appeal should be heard.**

It is settled law that the two conditions must co-exist. It is not sufficient to satisfy one without the other. (p. 1470 E)

APPEALS - Extension of time - Reasons - Exception

2. One of the exceptions to the general rule that both pre-conditions must co-exist is that where the grounds of appeal raise the issue of jurisdiction, the reasons for the delay in appealing against the decision would cease to be a relevant factor to be taken into consideration. The reason, no doubt, is that the issue of jurisdiction being so fundamental, may be raised at any stage of the proceedings and even for the first time before the Supreme Court. (p. 1471 A)

APPEALS - Discretion - Interference

3. In an appeal against the exercise of discretion by a lower Court, an appellate court will not interfere with the decision simply because, if faced with a similar application it would have exercised the discretion differently. It is the duty of an appellant who appeals against the exercise of discretion by a lower Court to satisfy the appellate court that the lower Court did not exercise its discretion judicially and judiciously. It is not for the appellant to repeat the same argument before the

appellate court in the hope that it would exercise its discretion differently. (p. 1473 F)

JURISDICTION - Absence of - Effect

4. It is important at this stage to determine the effect of the proceedings of the trial court of 23rd June 2004. It is significant to note that the application before the trial court was for an order striking out the notice of appeal. It was however pointed out to the court by learned counsel for the respondents therein that it had no jurisdiction to strike out the appeal, as only the Court of Appeal was competent to do so. Apparently recognizing its want of jurisdiction, the court refrained from making any order in respect of prayer 1 for the striking out of the appeal. Rather it recorded that the notice of appeal “stands withdrawn”. The court either has jurisdiction to make certain orders or it does not. Where it lacks jurisdiction, as in this case, the pronouncement that the notice of appeal “stands withdrawn” is of no legal effect. The provisions of Order 3 Rule 18(5) could not be applied to such a pronouncement. (p. 1474 B)

APPEALS - Right of - Extension of time

5. I have examined the grounds of appeal, particularly Ground 7, which raises the issue of the competence of the judgment of the trial court delivered more than 90 days after the final addresses of counsel and agree entirely with the court below that the grounds of appeal prima facie show good cause why the appeal should be heard.

I agree with the lower Court that the respondents having satisfied the two preconditions for the grant of an order for extension of time within which to appeal against the judgment of the trial court ought not to be deprived of their constitutionally guaranteed right of appeal as provided in Sections 241, 242 and 243 of the 1999 Constitution (as amended). The sole issue for determination in this appeal is accordingly resolved against the appellants. The appeal fails and is hereby dismissed. The decision of the lower Court delivered on 6th July 2005 is hereby affirmed. The respondents are hereby

granted a further extension of 14 days from today within which to file their notice and grounds of appeal against the judgment of the Federal High Court Abuja in suit no. FHC/ABJ/CS/114/99 delivered on 4th March 2004. (p. 1477 C)

REPRESENTATION

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P. B. Daudu Esq. with H. M. Ibega Esq. & Joy Demide (Miss), , for the Appellants

S. Atung Esq., for the Respondents

CASES REFERRED TO

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Ezomo v. A.G. Bendel State (1986) 4 NWLR (pt. 36) 448

Edozien v. Ezozien (1991) 1 NWLR (pt. 272) 678

Y.S.G. Motors Ltd. v. Okonkwo (2002) 16 NWLR (pt. 794) 536

Akuneziri v. Okenwa (1998) 15 NWLR (pt. 691) 592

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Nkanu v. The State (1980) 3-4 SC 1

Oshodi v. Eyifunmi (2000) 13 NWLR (pt. 684) 298

Ike v. Ugboaja (1993) 6 NWLR (pt. 301) 539

Ayanboye v. Balogun (1990) 5 NWLR (pt. 151) 392

Govt. of Gongola State v. Tukur (1989) 4 NWLR (pt. 117) 592

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Mohammed v. Hussaini (1998) 14 NWLR 10 (pt. 584) 108

Adekanye v. Comptroller of Prisons (2000) 12 NWLR (pt. 682) 563

Adeniji v. Onagoruwa (1994) 6 NWLR (pt. 349) 225

Okereke v. N.D.I.C. (2003) 2 NWLR (pt. 804) 218

F

Ikeakwu v. Nwamkpa (1967) NMLR 224

Geosource Nig. Ltd. v. Biragbara (2000) 13 NWLR (pt. 684) 355

STATUTES & RULES REFERRED TO

Companies & Allied Matters Act (CAMA) Cap. 59 LFN 1990

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Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 318

Court of Appeal Act, s. 30

Court of Appeal Rules 2002, O. 3 rr. 4(1)(2), 18(1)(2)(5), O. 7 r. 10(2)

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LEAD JUDGMENT BY KEKERE-EKUN JSC

This is an appeal against the ruling of the Court of Appeal, Abuja Division delivered on 6th July, 2005 granting the respondents

herein an enlargement of time within which to appeal against the judgment of the Federal High Court, Abuja delivered on 4th March, 2004.

The facts that led to this appeal are briefly stated as follows:

The appellants herein were plaintiffs at the Federal High Court, Abuja in suit no. FHC/ABJ/CS/114/99 while the respondents and one Dr. Hamza Zayyad (now deceased) were the defendants. The appellants are shareholders and contributories in Mennoil Petroleum and Petrochemicals Ltd. (the nominal party) which was a customer of the 1st respondent bank. They sought declaratory and injunctive reliefs against the respondents and prayed inter alia for the nullification of the appointment, out of court, of Dr. Zayyad as the Receiver/Manager of the nominal party by the 1st respondent, for failure to comply with a condition precedent under the Companies and Allied Matters Act (CAMA) Cap. 59 LFN 1990 requiring notice of such appointment to be given to the Corporate Affairs Commission. They also sought the nullification of all acts, deeds and transactions already concluded by the Receiver/Manager under the receivership. Unfortunately, Dr. Zayyad died during the pendency of the suit and his name was struck out as a party.

By consent of the parties, the trial was conducted on the basis of affidavit and documentary evidence alone. No oral evidence was led. The suit was heard and concluded by Hon. Justice Okechukwu J. Okeke, who then adjourned for judgment. The judgment could not be delivered on the scheduled date, as the learned trial Judge had been transferred from the Abuja division of the court to the Yenagoa division of the court in Bayelsa State. The judgment written by Okeke, J. and dated 14/4/2003 was eventually delivered by Hon. Justice Binta Nyako on 4/3/2004 almost a year later. The court granted five out of the six reliefs sought by the appellants resulting in the nullification of the appointment of the Receiver/Manager and all acts undertaken by him.

An appeal was promptly filed against the judgment by the respondents' solicitors, Emmanuel Toro & Co. They also filed an application for stay of execution pending the determination of the appeal. They wrote to inform the 1st respondent of the outcome of the suit and the steps taken in order to obtain formal approval. The 1st respondent however instructed them to discontinue the appeal along

with the application for stay of execution as they had been overtaken by events. In compliance with their instructions, a motion on notice was filed before the trial court on 27/5/2004 for an order striking out the notice of appeal and the application for stay of execution. The court did not strike out the appeal but deemed it withdrawn. It nevertheless struck out the application for stay of execution. Subsequently however, the appellants took steps to execute the judgment against the respondents. The 1st respondent had a rethink and instructed its solicitors to pursue the appeal. The 2nd respondent, who had not been notified by learned counsel of the outcome of the suit, upon becoming aware, gave separate instructions to pursue the appeal. This gave rise to an application filed on 16/7/2004 for extension of time within which to appeal against the judgment of 4/3/2004. Despite stiff opposition from the appellants, the lower Court granted the application on 6/7/2005. The appellants are dissatisfied with the decision and have filed a notice of appeal before this court containing 3 grounds of appeal.

The parties have duly filed and exchanged briefs of argument in compliance with the rules of this court. At the hearing of the appeal on 2/3/2015, P.B. DAUDU Esq., leading H.M. IBEGA ESQ. and MISS JOY DEMIDE adopted and relied on the appellants' brief settled by J.B. DAUDU, SAN filed on 12/10/2005 and urged the court to allow the appeal. S. ATUNG ESQ. adopted and relied on the respondent's brief settled by EMMANUEL J.J. TORO, SAN, which was deemed filed on 8/11/2006 and urged the court to dismiss the appeal.

Learned counsel for the appellants formulated the following two issues for the determination of the appeal:

1. Whether as affirmed by the Court of Appeal, the respondents herein (appellants in the court below) could treat the withdrawal of their appeal done in the Federal High Court as ineffectual and be allowed to re-file the appeal upon extension of time being granted?

2. Whether the Court of Appeal has jurisdiction to grant extension of time within which to file notice of appeal in the face of an existing decision of the lower Court not appealed against or set aside affirming the voluntary withdrawal of a bona fide filed appeal against the same judgment?

On his part, learned counsel for the respondent distilled a single issue for determination thus:

Whether having regard to the fact that the respondents in this appeal who had earlier applied before the trial Federal High Court for their previous notice of appeal to be merely struck out, as opposed to a withdrawal of the appeal effected pursuant to the provisions of Order 3 Rule 18(1), (2) & (5) of the Court of Appeal Rules, 2002, thereby precluded the Court of Appeal from granting the respondents' subsequent application for enlargement of time to enable them to exercise their Constitutional right to appeal to the Court of Appeal against the judgment of the trial Federal High Court delivered against them in this case.

I am of the humble opinion that the sole issue for determination in this appeal is:

Whether, having regard to the circumstances of this case, the lower Court was right in granting the respondents' application for extension of time within which to appeal against the judgment of the lower Court delivered on 4/3/2004.

The submissions of both learned counsel shall be considered under this sole issue.

The main contention of the appellants in support of this appeal is that the lower Court was wrong to have granted the prayers of the respondents for extension of time to appeal because they had willingly withdrawn their notice of appeal at the trial court. Learned senior counsel for the appellants argued that the lower Court ought to have treated the withdrawal of the appeal by the respondents as final and as determining the appeal. He submitted that the attempt by the respondents to argue that the withdrawal was of no effect because the appeal had not been entered at the Court of Appeal and drawing a distinction between when an appeal is 'brought' and when it is 'entered' is not relevant in the circumstances of this case. He submitted that the decided cases on the issue are to the effect that the withdrawal of an appeal at any stage is conclusive and that the consequences of a withdrawal are the same whether the withdrawal is done at the trial court or at the Court of Appeal. He referred to: *Ezomo v. A.G. Bendel State* (1986) 4 NWLR (Pt.36) 448 @ 460. He submitted that the operative phrase in Order 3 Rule 18(1) of the Court of Appeal Rules 2002 concerning when an appeal may be withdrawn

is: 'at any time before the appeal is called on for hearing', which has been judicially interpreted in the case of *Edozien Vs Ezozien* (1991) 1 NWLR (Pt.272) 678 @ 700 per Karibi-Whyte, JSC. He submitted that what is important where an appellant seeks to withdraw his appeal is not the venue of the withdrawal but whether at the point of withdrawal, his actions show a clear and manifest intention to discontinue the appeal. He argued that there was a clear intention to withdraw the appeal in this case. He submitted further that the trial court having ruled that the notice of appeal stands withdrawn, that was the end of the matter. He contended that the submission of learned Senior Counsel for the appellants at the trial court to the effect that only the Court of Appeal could strike out the appeal ought not to have been construed by the court below as amounting to a concession that an appeal could not be withdrawn at the trial court. He submitted that the effect of an oral application for withdrawal of an appeal or the filing of a notice of withdrawal is a dismissal of the appeal. He referred to: *Y.S.G. Motors Ltd. Vs Okonkwo* (2002) 16 NWLR (Pt.794) 536 @ 575/581; *Akuneziri Vs Okenwa* (1998) 15 NWLR (Pt.691) 592; *Nkanu Vs The State* (1980) 3-4 SC 1.

Learned senior counsel argued that the respondents could not validly seek an extension of time within which to appeal without first setting aside the ruling in which the earlier withdrawal of the appeal was acknowledged. He submitted that the declaration by the court that the notice of appeal stands withdrawn is a decision within the meaning of Section 318 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and cannot be glossed over and ignored. He referred to: *Re: Shyllon* (1994) 6 NWLR (Pt.353) 735 @ 751. He submitted that the decision of the trial court determining that the appeal had been withdrawn constitutes *res judicata* as between the parties, as it finally resolved the issue of the pendency or otherwise of the appeal. He submitted that *res judicata* is a jurisdictional issue whose object is to oust the jurisdiction of the court from reopening an issue that has been dealt with between the same parties to finality. He relied on: *Oshodi & Ors. Vs Eyifunmi & Ors.* (2000) 13 NWLR (684) 298 @ 325 E-F; *Ike & Ors. Vs Ugboaja & Ors.* (1993) 6 NWLR (Pt.301) 539 @ 560 G. He submitted that in the circumstances the lower Court lacked jurisdiction to extend time for the respondents to appeal.

In reply to the above submissions, learned senior counsel for the respondents submitted that the trial court was bound by the reliefs sought in the application filed on 26/5/2004 to wit: to strike out the notice of appeal and the application for stay of execution. Relying on the cases of: *Ayanboye Vs Balogun* (1990) 5 NWLR (Pt.151) 392; *Government of Gongola State Vs Tukur* (1989) 4 NWLR (Pt.117) 592 @ 603; and *Christ the King Seventh Day Mission Vs Njuku* (2005) ALL FWLR (Pt.287) 938 @ 948 D-E, he submitted that the court has no jurisdiction to grant a relief not sought by a party. He submitted that it was learned counsel for the appellant who suggested to the court that the prayer for an order striking out the notice of appeal should be treated as a prayer for the withdrawal of the said notice because in his view “an order striking out the appeal ... determines the appeal,” which power is vested in the Court of Appeal. He argued that the trial court ought to have declined to grant the first prayer if it was of the opinion that it lacked jurisdiction to grant it. He contended further that it was not open to the appellants to vary a prayer not sought by them. He referred to: *Construzioni Genarali Fasura Cogefar -S.P.A. Vs Nigerian Ports Authority & Anor.* (1972) E ALL NLR (Reprint) 947 @ 951 paras. 2 & 3.

Learned senior counsel submitted that the earlier notice of appeal had merely been brought in the Federal High Court pursuant to the provisions of Order 3 Rule 5 of the Court of Appeal Rules 2002. He argued that when the Federal High Court ruled that the notice of appeal had been withdrawn, such withdrawal could not be the same as the withdrawal of an appeal effected through a notice of withdrawal filed with the registrar of the Court of Appeal after an appeal has been entered, “at any time before the appeal is called for hearing” in the Court of Appeal under Order 3 Rule 18 for it to be visited with the terminal consequences of a dismissal under Order 3 Rule 18(5) of the Rules. He contended that by virtue of Order 1 Rule 2, the Registrar with whom a notice of withdrawal is to be filed is the Registrar of the Court of Appeal and not of any court below (i.e. trial court). Relying on *Mohammed Vs Hussaini* (1998) 14 NWLR 10 (Pt.584) 108 @ 139 E-G & 141-142 H-A; *Adekanye Vs Comptroller of Prisons* (2000) 12 NWLR (Pt.682) 563 @ 571-572 A-A; and *Adeniji Vs Onagoruwa* (1994) 6 NWLR (Pt.349) 225 @ 235-237 G-G, he submitted that the law is well settled as to when an appeal has

been brought and when an appeal has been entered for the purpose of determining the respective or concurrent jurisdiction of the trial courts and the Court of Appeal. He submitted that the provisions of Order 3 Rule 18 of the Court of Appeal Rules 2002 are clear and unambiguous and contended that it could not be within the contemplation of its provisions that the application filed before the trial court had been brought in the Court of Appeal so as to warrant a dismissal of the appeal under Order 3 Rule 18(5) of the Rules. He submitted that since the earlier appeal had not been entered in the Court of Appeal, its discontinuance could not have been affected by the provisions of Order 3 Rule 18 so as to be visited with the adverse consequences of the provisions of sub rule 18(5). B
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Learned senior counsel submitted that there was never an application for the withdrawal of the appeal under Order 3 Rule 18 of the Court of Appeal Rules 2002 and that the authorities of *Ezomo Vs A.G. Bendel State* (supra) and *Edozien Vs Edozien* (supra) relied upon by learned senior counsel for the appellants are inapplicable in the circumstances of this case. He submitted further that the decisions relied upon were based upon a consideration of Order 8 Rule 6(1) of the Supreme Court Rules 1985 (as amended), which provisions are virtually on all fours with the provisions of Order 3 Rule 18(1) & (5) of the Court of Appeal Rules 1981 (as amended) and Order 3 Rule 18(1) & (5) of the Court of Appeal Rules 2002. He submitted that for an appeal to be validly withdrawn under Order 3 Rule 18(1) of the Court of Appeal Rules 2002, certain conditions precedent must be fulfilled as stated in the case of: *Okereke Vs N.D.I.C.* (2003) 2 NWLR (Pt.804) 218 @ 236 C-H & 239-240 A-C. D
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He also referred to: *Ikeakwu Vs Nwamkpa* (1967) NMLR 224 @ 227, wherein it was held that where an appeal has been struck out it is still possible to appeal against the judgment by means of an application to relist or the filing of a fresh notice of appeal, with an enlargement of time, if necessary. He submitted that the Court of Appeal in *Geosource Nig. Ltd. Vs Biragbara & Ors.* (2000) 13 NWLR (Pt.684) 355 @ 358-359 H-E, granted an application for enlargement of time to file notice of appeal after striking out the original notice of appeal on the strength of the decision in *Ikeakwu Vs Nwamkpa* (supra). He submitted further that by virtue of Sections 241, 242 and 243 of the 1999 Constitution (as amended), the re- G
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spondents have a constitutional right of appeal. He submitted that unless an appeal has been duly and properly withdrawn and thereby deemed dismissed pursuant to Order 3 Rule 18(5) of the Court of Appeal Rules 2002, the constitutionally enshrined right of appeal should not be regarded as foreclosed. On a citizen's constitutionally guaranteed right of appeal, he referred to: *Deen Mark Co. Ltd. Vs Abiola* (2002) 3 NWLR (Pt.754) 418 @ 440 E-F & 450 F-H; *Okereke Vs N.D.I.C* (supra) @ 233-238 C-G & 239-240 A-F; *Y.S.G. Motors Ltd. Vs Okonkwo* (supra) @ 561-562 F-E; 568-569 C-E & 577-578 G-A. He urged the court to dismiss the appeal.

Order 3 Rule 4(1) and (2) of the Court of Appeal Rules 2002 provides:

4(1) The court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply.

(2) Every application for an enlargement of time within which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged, a copy of the order granting such enlargement shall be annexed to the notice of appeal.

From the above provisions, it is evident that an application for enlargement of time within which to appeal is not granted as a matter of course. It is within the discretionary powers of the court which, as with all discretionary powers, must be exercised judicially and judiciously. Thus the pre-conditions for the exercise of the court's discretion in an applicant's favour, which must be disclosed in a supporting affidavit, are:

i. Good and substantial reasons for failing to appeal within the prescribed period; and

ii. Grounds of appeal which prima facie show good cause why the appeal should be heard.

It is settled law that the two conditions must co-exist. It is not sufficient to satisfy one without the other. See: *Ibodo Vs Enarofia* (1980) 5-6 SC 42; *Shittu Vs Osinbajo* (1988) 7 SC (Pt.III) 1; *Holman Bros. (Nig.) Ltd. Vs Kigo* (1980) 8-11 SC 43; *Iroegbu Vs Okwordu* (1990) 6 NWLR (Pt.159) 643; *Kotoye Vs Saraki* (1995) 5

NWLR (Pt.395) 256; Minister of Petroleum & Mineral Resources & Anr. Vs Expo-Shipping Line (Nig.) Ltd. (2010) 12 NWLR (Pt.1208) 261. **One of the exceptions to the general rule that both pre-conditions must co-exist is that where the grounds of appeal raise the issue of jurisdiction, the reasons for the delay in appealing against the decision would cease to be a relevant factor to be taken into consideration. The reason, no doubt, is that the issue of jurisdiction being so fundamental, may be raised at any stage of the proceedings and even for the first time before the Supreme Court.** See: Ukwu Vs Bunge (1997) 8 NWLR (Pt.518) 527; Kpema Vs The State (1986) 1 NWLR (Pt.17) 396; F.C.E. Okene Vs Ogbonna (2006) 7 NWLR (Pt.979) 282 @ 299 A-C.

The reasons for the failure of the respondents to appeal against the judgment within the prescribed time were comprehensively stated in paragraph 3(h) to (p) of the affidavit in support of the application. Sub paragraphs (k), (l), (m), (n), (o) and (p) are of particular relevance and are reproduced hereunder:

“3(k) That by their letter dated 14th April, 2004 in response to the letters Exhibits ‘PA.5’ and ‘PA.6’ hereof the 1st Defendant/Applicant informed their Solicitors that because they had since disposed of the assets of Mennoil Petroleum and Petrochemicals Ltd, the Nominal Party in this suit to recover its indebtedness to the 1st Defendant/Applicant Bank and having effected transfer of ownership of the said assets to the purchasers thereof, the appeal and Motion for Stay of execution pending appeal had been overtaken by events and therefore that Counsel should discontinue the appeal and motion for stay of execution. A copy of the said letter dated 14th April, 2004 is hereto annexed and marked Exhibit ‘PA.7’.

(l) That in response to the said instructions to discontinue the appeal process he [Mr. Emmanuel Toro, SAN] prepared a motion on notice dated 26th May, 2004 and filed on 27th May, 2004 praying the Federal High Court, Abuja, to strike out both the notice of appeal and the motion for stay of execution both of which were accordingly struck out by the Federal High Court, Abuja on the 23rd of June, 2004. A copy of the said motion on notice which the court granted is annexed hereto and marked Exhibit ‘PA.8’.

(m) That soon after the occurrence of the facts stated in sub-

paragraphs (k) and (l) above, the Plaintiffs/Respondents took steps to execute the judgment by seizing or forcefully invading and taking possession of the premises of the Nominal Party in this suit already purchased by Zest Oil Ltd from a Receiver/Manager appointed by 1st Defendant/Applicant and those of the 1st Defendant/Applicant which were also purchased from late Dr. Hamza Zayyad another Receiver/Manager of the Nominal Party appointed by the 1st Defendant/Applicant

(n) That because of the execution or attempt to execute the judgment on the various assets of the Nominal Party already purchased by various people from the Receiver/Managers appointed by the 1st Defendant/Applicant Bank, the purchasers thereof in turn besieged the 1st Defendant/Applicant which was constrained to quickly rescind its earlier decision not to appeal against the judgment of the Federal High Court, Abuja. Consequently, by its letter dated 13th July, 2004 the 1st Defendant/Applicant Bank instructed their Solicitors to resuscitate or revive the appeal processes to enable the Bank to still appeal against the said judgment of the Federal High Court to the Court of Appeal. A copy of the said letter is annexed hereto and marked Exhibit 'AP9'.

(o) That the earlier decision of the 1st Defendant/Applicant was based on the erroneous premise that having sold off the assets of the debtor MINAL PARTY under powers contained in the relevant Deed of Mortgage Debenture, the judgment of the trial Court in this suit could no longer adversely affect the interest of the 1st Defendant/Applicant Bank but it had to reverse such stand when attention was drawn to the various Deeds of Indemnity the 1st Defendant/Applicant Bank had given to each purchaser of the assets of the Nominal Party.

(p) That by the time the 1st Defendant/Applicant instructed Counsel to discontinue the earlier appeal processes, the 3 months within which to appeal to the Court of Appeal against the judgment of the trial Federal High Court had lapsed and the jurisdiction of the Federal High Court over the matter had thereby also ceased hence it became necessary to bring this application direct to the Court of Appeal to seek for extension of time within which to so appeal." The appellants countered the averments in their counter affidavit filed on 29/11/04, particularly in paragraph 3(c), (d) and (e) wherein they

averred thus:

“3(c) That the applicants on their own, willingly instructed Mr. Toro SAN by their letter of 14th April 2004 to discontinue on the 24th of March 2004.

(d) That paragraph 3(i) of the affidavit in support is only correct to the extent that although Mr. Toro SAN filed a motion to strike out the notice of appeal and application for stay of execution. Hon. Nyako J. who heard the application did not strike out the notice of appeal but only treated it as having been withdrawn and in consequence struck out the motion on notice for stay of execution. A certified copy of the ruling of Nyako J. and proceedings of 23rd June 2004 are annexed herewith and marked as Exhibit R1 and R2.

(e) That it is a matter of fact and common knowledge that once an appeal has been withdrawn it cannot be heard again under any guise.”

After careful consideration of the averments for and against the application, the lower Court at page 180 of the record held:

“In this affidavit in support of his application the applicant has shown that after the withdrawal of the appeal on the 23/6/04, execution of the judgment was being levied, the 2nd applicant who had not been informed of the judgment by a letter dated 8/7/04 instructed his solicitors to appeal against the said judgment.

This application was filed on the 16/7/05 on the instruction of the 2nd applicant who was unaware of the judgment. In such circumstances, the 2nd applicant in particular cannot be shut out and deprived of his constitutional right to appeal. The delay in bringing the application to my mind has been satisfactorily satisfied.”

In an appeal against the exercise of discretion by a lower Court, an appellate court will not interfere with the decision simply because, if faced with a similar application it would have exercised the discretion differently. It is the duty of an appellant who appeals against the exercise of discretion by a lower Court to satisfy the appellate court that the lower Court did not exercise its discretion judicially and judiciously. It is not for the appellant to repeat the same argument before the appellate court in the hope that it would exercise its discretion differently. See: Minister of Petroleum & Mineral Resources & Anr. Vs Expo-Shipping Line (Nig.) Ltd. (supra) at 291-292 H-C; R.

Lauwers Import-Export Vs Jozebson Industries Co. Ltd. (1988) 7 SC (Pt.III) 26 @ 44-45.

Learned senior counsel for the appellants argued quite forcefully that the original appeal having been withdrawn, it cannot be revived by an application for extension of time.

It is important at this stage to determine the effect of the proceedings of the trial court of 23rd June 2004. It is significant to note that the application before the trial court was for an order striking out the notice of appeal. It was however pointed out to the court by learned counsel for the respondents therein that it had no jurisdiction to strike out the appeal, as only the Court of Appeal was competent to do so. Apparently recognizing its want of jurisdiction, the court refrained from making any order in respect of prayer 1 for the striking out of the appeal. Rather it recorded that the notice of appeal “stands withdrawn”. The court either has jurisdiction to make certain orders or it does not. Where it lacks jurisdiction, as in this case, the pronouncement that the notice of appeal “stands withdrawn” is of no legal effect. The provisions of Order 3 Rule 18(5) could not be applied to such a pronouncement. See Madukolu Vs Nkemdilim (1962) 1 SCNLR 341; (1962) 1 ALL NLR 587.

I venture to say that the cases of Ezomo Vs A.G. Bendel State (supra) and Edozien Vs Edozien (supra) relied upon by learned counsel for the appellants are distinguishable from the facts of this case because in those cases, the appellants had filed notices of withdrawal of appeal. The issue in contention in Ezomo’s case was whether the filing of a notice of withdrawal of appeal at the trial court renders such notice a nullity and the effect of the filing of a notice of withdrawal. This court held that the filing of a notice of withdrawal of appeal in the lower Court whose judgment is being appealed against does not render the notice a nullity. The reasoning behind it being that under Order 1 Rule 22 of the Court of Appeal Rules 1981, an application may be filed in the court below for transmission to the Court of Appeal and therefore a notice of withdrawal of appeal could be validly filed in the lower Court. The court held further that the effect of a notice of withdrawal is that Order 3 Rule 18 of the Court of Appeal Rules automatically takes effect and that under Order 3

Rule 18(5) an appeal validly withdrawn under the Rule, with or without an order of court shall be deemed to have been dismissed. In *Edozien Vs Edozien* (supra) a notice of withdrawal of appeal was filed not by lead counsel but by a junior counsel in the team of solicitors representing the appellants. By a subsequent motion, the appellants sought to withdraw the notice of withdrawal filed. It was averred inter alia that learned counsel who signed the notice of withdrawal signed it alone and that neither his client nor leading counsel was involved in signing and filing the notice. This court held that while the number of counsel that appear in a case may depend on the complexity of the case, all those briefed have the right to conduct, settle or compromise in so far as their actions are within the ethics of the profession. The court also held that where a notice of withdrawal is signed by either a legal practitioner acting for the appellant or by the appellant himself there has been due compliance with Order 8 Rule 6(1) of the Rules of the Supreme Court.

Order 3 Rule 18(1) and (5) of the Court of Appeal Rules, 2002 provides:

“18(1) An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend to further prosecute the appeal.

(5) An appeal which has been withdrawn under this rule, whether with or without an order of the court shall be deemed to have been dismissed.” (Emphasis mine)

The relevant form for a notice of withdrawal of appeal is Civil Form 14, which states:

“NOTICE OF WITHDRAWAL OF APPEAL

Order 3 Rule 18(1)

TAKE NOTICE that the Appellant(s) herein intend(s) and doth hereby wholly withdraw(s) his/her appeal against (all) the Respondent(s) in the above mentioned appeal.

Dated atthis.....day of 20

Appellant(s)”

In the instant case, as observed earlier, the application before the court was for an order striking out the appeal. It was brought pursuant to Order 54 Rule 8 and Order 30 Rule 2(1) of the Federal High Court (Civil Procedure) Rules 2000 and under the inherent

jurisdiction of the court. It was not a notice of withdrawal of appeal as in Civil Form 14 above. In moving the application, learned counsel prayed the court to strike out the notice of appeal. The trial court by its conduct conceded that it had no jurisdiction to grant the prayer. By applying for the appeal to be struck out rather than filing a notice of withdrawal, it would appear that learned senior counsel was mindful of the effect of a withdrawal under Order 3 Rule 18(1) and (5) of the Court of Appeal Rules and wanted to keep the respondents' options open.

In *Ikeakwu & Ors vs. Nwamkpa* (1966) Vol.4 N.S.C.C. 83 @ 86 this court held as follows:

"...Although an order striking out an appeal has for some purposes much the same effect as an order dismissing it. It does not thereby become a decision on the merits and does not necessarily preclude a subsequent decision on the merits if the matter can be reopened by an appropriate procedure. When an appeal is struck out the position is as it would have been if no appeal had been brought, that is to say the effective judgment is that appealed against, not a judgment of the appeal court, and there seems to be nothing contrary to general principles in holding that it is still possible to appeal against the effective judgment if a proper procedure is followed and if the limits of time for taking any particular step are not exceeded. Either an application to relist or a fresh notice of appeal, with an enlargement of time if necessary would be a form of procedure known to the law..."

There was nothing in the circumstances of this case to activate the provisions of Order 3 Rule 18(1) and (5) of the Court of Appeal Rules 2002. It follows therefore that what the lower Court had to consider was whether from the averments before it, the respondents had shown good and substantial reasons for their failure to appeal within the prescribed period. I agree with the lower Court that the respondents had fulfilled this requirement by explaining fully the circumstances that led to the delay.

On the second requirement, the lower Court had this to say at page 180 of the record:

"The proposed Notice and Grounds of Appeal annexed contained 7 grounds of appeal. Grounds 1, 2, 3, 4 and 6 relate to the decision of the trial court in its interpretation of the provisions of

the Companies and Allied Matters Act (CAMA). Ground 5 relates to the reliefs granted by the trial court in spite of the death of the 2nd respondent (Receiver/Manager) whose name had earlier been struck out in the matter. Ground 7 touches on the competence of the judgment which was delivered outside the 90 days as provided by Section 294(1) of the 1999 Constitution. B

These grounds raise weighty and substantial issues of law and prima facie shows good cause why the appeal should be heard. The applicant has satisfied the requirements for extension of time within which to appeal.”

I have examined the grounds of appeal, particularly Ground 7, which raises the issue of the competence of the judgment of the trial court delivered more than 90 days after the final addresses of counsel and agree entirely with the court below that the grounds of appeal prima facie show good cause why the appeal should be heard. C D

I agree with the lower Court that the respondents having satisfied the two preconditions for the grant of an order for extension of time within which to appeal against the judgment of the trial court ought not to be deprived of their constitutionally guaranteed right of appeal as provided in Sections 241, 242 and 243 of the 1999 Constitution (as amended). The sole issue for determination in this appeal is accordingly resolved against the appellants. The appeal fails and is hereby dismissed. The decision of the lower Court delivered on 6th July 2005 is hereby affirmed. The respondents are hereby granted a further extension of 14 days from today within which to file their notice and grounds of appeal against the judgment of the Federal High Court Abuja in suit no. FHC/ABJ/CS/114/99 delivered on 4th March 2004. E F G

I make no order for costs.

GALADIMA JSC

I have had the privilege of reading in advance the judgment of my learned brother K. M. O. KEKERE-EKUN JSC, just delivered. I entirely agree that this appeal lacks merit and must be dismissed.

The facts leading to this appeal are comprehensively set out in

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the lead judgment. It is needless for me to repeat those facts.

This appeal is against the Ruling of the Court of Appeal, Abuja Division, delivered on the 6th day of July, 2005, granting the Respondents, herein, an enlargement of time within which to appeal against the Judgment of the Federal High Court Abuja on the 4th day of March, 2014. The Notice of Appeal contains 3 Grounds of Appeal.

In the briefs of argument filed and exchanged by the parties, the Appellants formulated two issues for determination. The Respondents set out a sole issue for determination.

Respondent's sole issue, verbose and repetitive as it is, captures their complaint, but it can better be couched as neatly done in the lead judgment thus:

"Whether, having regard to the Circumstances of this case, the lower Court was right in the respondent's Application for extension of time within which to appeal against the Judgment of the lower Court, delivered on 4/3/2014."

The main argument of the Appellants in this appeal is that the lower Court erred when it granted the Respondent's prayers for extension of time to Appeal after they had willingly withdrawn their Notice of Appeal at the trial Federal High Court in suit No: FHC/ABJ/CS/114/99.

That the withdrawal of the Appeal by the Respondents herein ought to have been treated as clear intention to finally discontinue the appeal.

Relying on the case of *EZOMO v. A-G. BENDEL STATE* (1986) 4 NWLR (Pt.36) 448 at 460, he stated that this other decided cases on the issue, settle the issue of withdrawal of an appeal at any stage as conclusive, and that the consequences of such withdrawal are the same whether the withdrawal is done at the trial Court or at the Court of Appeal. Learned Senior Silk submitted that the operative phrase in Order 3 rule 18(1) of the Court of Appeal Rules 2002 dealing with when an appeal may be withdrawn, states thus:

"at any time before the appeal is called on for hearing."

Supporting his argument on the interpretation given by *KARIBI-WHITE JSC* in the case of *EDOZIEN V. EDOZIEN* (1991) NWLR (Pt.272) 678, 70, he submitted that the effect of an oral application for withdrawal of an appeal or the filing of a Notice of withdrawal is a

“dismissal” of the appeal. He placed reliance on the case of NKANU V. THE STATE (1980) 15 NWLR (Pt.691) 592, Y.S.G. MOTORS LIMITED V. OKONKWO (2002) 16 NWLR (Pt.794) 536 at 575 and 581.

It is submitted that the decision of the trial Court determining that the appeal had been withdrawn constitutes *res judicata* as between the parties because it finally resolved the issue of the pendency or otherwise of the appeal. That the declaration by the Court that the Notice of Appeal was withdrawn is a decision within the meaning of Section 318 of the 1999 Constitution (as amended). It is argued that the Respondents could not validly seek an extension of time to appeal now, without first taking step to set aside the Ruling on which the earlier withdrawal of the appeal was acknowledged.

Replying on behalf of the Respondents, their learned Counsel submitted that the trial Court was bound by the reliefs sought in the application filed on 26/5/2004, that is, to strike out the Notice of appeal and the application for staying of execution. He argued that the trial Court ought to have declined granting the first prayer if it was of the opinion that it lacked jurisdiction to grant it. He argued that the appellant cannot vary a prayer not sought by them.

Order 3 Rule 4(1) and (2) of the Court of Appeal Rules 2002 provides:

“4(1) The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply.

(2) Every application for an enlargement of time within which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged, a copy of the order granting such enlargement shall be annexed to the notice of appeal.”

The above provisions are clearly indicative of the fact that an application for enlargement of time within which to appeal is granted upon the fulfillment of two main preconditions by the applicant thus:

(i). Good and substantial reasons for failing to appeal within the provided period, and

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

The two conditions must co-exist and must be satisfied, see HOLMAN BROS (NIGERIA) LIMITED v. KIGO (1981) 8-11 SC 43, KOTOYE V. SARAKI (1995) 5 NWLR (Pt.395) 256 etc, etc. However, there is an exception to this general rule on the need for existence of both pre-conditions. It is that where the grounds of appeal raise the issue of jurisdiction, the reasons for the delay in appealing against the decision would cease to be of any moment or relevant factor to be taken into consideration, the reason is that the issue of jurisdiction of the Court is fundamental and may be raised at any stage of the proceedings, even for the first time before the Supreme Court. See: KPEMA V. THE STATE (1986) 1 NWLR (Pt.17) 396, OKENE V. OGOBONNA (2006) 7 NWLR (Pt.979) 282 at 299.

The main reasons given by the Respondents for their failure to appeal against the judgment of the Court below within the period prescribed by Law, were stated in paragraphs 3(h) to (p), particularly paragraphs (k), (l), (m), (n), (o), (p), reproduced as follows:

“3(k) That by their letter dated 14th April, 2004 in response to the letters exhibits (P5) and (P6) hereof the 1st Defendant/Applicant informed their Solicitors that because they had since disposed of the assets of Mennoil Petroleum and Petrochemicals Ltd, the Normal Party in this Suit to recover its indebtedness to the 1st Defendant/Applicant Bank and having effected transfer of ownership of the said assets to the purchasers thereof, the appeal and Motion for Stay of execution pending had been overtaken by events and therefore that Counsel should discontinue the appeal and motion for stay of execution. A copy of the letter dated 14th April, 2014 is hereto annexed and marked Exhibit ‘PA.7’.

(l) That in response to the said instructions to discontinue the appeal he (Mr. Emmanuel Toro, SAN) prepared a motion on notice dated 26th May, 2004 and filed on 27th May, 2004 praying the Federal High Court, Abuja, to strike out both the notice of appeal and the motion for stay of execution both of which were accordingly struck out by the Federal High Court, Abuja on the 23rd of June, 2004.

A copy of the said motion on notice which the Court granted is annexed hereto and marked Exhibit ‘PA.8’.

(m) That soon after the occurrence of the facts stated in subparagraphs (k) and (l) above, the Plaintiffs/Respondents took steps

to Execute the judgment by seizing or forcefully invading and taking possession of the premises of Nominal Party in this suit already purchased by Zest Oil Ltd from a Receiver/Manager appointed by 1st Defendant/Applicant and those of the 2nd Defendant/Applicant which were also purchased from late Dr. Hamza Zayyad another Receiver/Manager of the Nominal Party appointed by the 1st Defendant/Applicant. ^B

(n) That because of the execution or attempt to Execute the judgment on the various assets of the Nominal Party already purchased by various people from the Receiver/Managers Appointed by the 1st Defendant/Applicant Bank, the purchasers thereof in turn besieged the 1st Defendant/Applicant which was constrained to quickly rescind its earlier decision not to appeal against the judgment of the Federal High Court, Abuja. Consequently, by its letter dated 13th July, 2004 the 1st Defendant/Applicant Bank instructed their Solicitors to resuscitate or revive the appeal processes to enable the Bank to still appeal against the said judgment of the Federal High Court to the Court of Appeal. A copy of the said letter is annexed hereto and marked Exhibit 'AP9'. ^C

(o) That the earlier decision of the 1st Defendant/Applicant was based on the erroneous premise that having sold off the assets of the debtor NOMINAL PARTY under powers contained in the relevant Deed of Mortgage Debenture, the judgment of the trial Court in this suit could no longer adversely affect the interest of the 1st Defendant/Applicant Bank but it had to reserve such stand when attention was drawn to the various Deeds of Indemnity the 1st Defendant/Applicant Bank had given to each purchaser of the assets of the Nominal Party. ^E

(p) That by the time 1st Defendant/Applicant instructed Counsel to discontinue the earlier appeal processes, the 3 months within which to appeal to the Court of Appeal against the judgment of the Federal High Court had lapsed and the jurisdiction of the Federal High Court over the matter had thereby also ceased hence it became necessary to bring this application direct to the Court of Appeal to seek for extension of time within which to so appeal." ^F

In their counter affidavit these averments were countered by the appellants, particularly in paragraphs 3(c), (d) and (e).

"3(c) That the applicants on their own, willingly instructed Mr. Toro SAN by their Letter of 14th April, 2004 to discontinue on the ^H

24th of March, 2004.

(d) That paragraph 3(i) of the affidavit in support is only to correct to the extent that although Mr. Toro SAN filed a motion to strike out the notice of appeal and application for stay of execution, Hon. Nyako J. who heard the application did not strike out the notice of appeal but only treated it as having been withdrawn and in consequence struck out the motion on notice for stay of execution. A certified copy of the ruling of Nyako J. and proceedings of 23rd June, 2004 are annexed herewith and marked as Exhibits R1 and R2.

(e) That it is a matter of common knowledge that once an appeal has been withdrawn it cannot be heard again under any guise.”

After careful consideration of the averments for and against the application, the lower Court at page 180 of the record held:

“In this affidavit in support of this application the applicant has shown that after the withdrawal of the appeal on the 23/6/2004, execution of the judgment was being levied, the 2nd applicant who had not been informed of the judgment by a letter dated 8/7/2004 instructed his Solicitors to appeal against the said judgment.”

The Court further held inter-alia that:

“...This application was filed on the 16/7/05 on the instruction of the 2nd applicant who was unaware of the judgment. In such circumstances the 2nd applicant in particular cannot be shut out and deprived of his constitutional right to appeal. The delay in bringing the application to my mind has been satisfactorily satisfied.”

To my mind, the Court below indeed exercised its discretion judicially and judiciously too. The appellant in this appeal has not been able to demonstrate otherwise. Learned Senior Counsel’s argument is to the effect that the original appeal having been withdrawn cannot be reviewed again under any guise. This is to lose sight of the fact that the peculiar circumstances of this case have not been taken into consideration. Is it not fact that the application before the trial Court was for an order striking out the notice of appeal? Learned Counsel for the Appellants pointed out to the court that it lacked jurisdiction to strike out the appeal, as at that time only the Court of Appeal was competent to do so. Therefore, the pronouncement of the trial Court that the notice of appeal “stands withdrawn” is of no moment, it is of no legal consequence.

I agree with the learned counsel for the Respondents that Order

3 Rule 18(5) of the Court of Appeal Rules, 2002, could not be applied to such a pronouncement. I agree too that the cases of EZOMO V. A-G. BENDEL STATE (Supra) and EDOZIEN V. EDOZIEN (Supra), relied upon by the learned counsel for the appellants are distinguishable from the facts of this case. In both cases, the appellants had filed Notices of Withdrawal of appeal. B

The issues in contention in the cases are not similar. However, it should be noted that the decisions in the two Cases were based upon a consideration of Order 8 Rule 6(1) of the Supreme Court Rules 1985 (as amended) which Provisions are virtually on all fours with the provisions of Order 3 Rule 8(1) and 5 of the Court of Appeal Rules 1981 (as amended) and Order 3 Rule 18(1) of the Court of Appeal Rules 2002. C

In EZOMO'S case (supra) the issue in contention was whether the filing of a Notice of Withdrawal of Appeal at the trial Court renders such a Notice a nullity and what was the effect of the filing of such Notice of Withdrawal. D

This Court decided that the filing of a Notice of Withdrawal of appeal in the lower Court whose judgment is being appealed against does not render the Notice a nullity, because under Order 1 Rule 22 of the Court of Appeal Rules of 1981 an application may be filed in the Court below for transmission to the Court of Appeal and therefore a Notice of Withdrawal of appeal can validly be filed in the lower Court. E

This Court per KARIBI WHYTE, JSC in this case had this to say: F

“What therefore is the effect of a valid withdrawal of a notice of appeal in the Court below? There seems to be two ways in which the matter could be approached. G

The Notice of withdrawal could be regarded simply as an intention to discontinue the appeal which has not been entered and there the matter ends. On the other hand, it may be regarded as part of the record of appeal to be compiled for the Court of Appeal. In this latter case, the Court of Appeal on the appeal being entered will act on the information and will under the provisions of Order 3 Rule 18(1), (5) dismiss the appeal. The former view is preferable. H

It saves costs, time and is more in accordance with the principles of justice.”

EDOZIEN’S case (supra) concerns the interpretation of Order 8 rule 6(1) of the Supreme Court Rules, 1985. A notice of withdrawal of appellants was filed by a junior counsel not the Leading Counsel in the team of Solicitors representing the appeals and that neither his client nor leading counsel was involved in signing the Notice of Withdrawal. This Court per OLATAWURA JSC held:

“...Once a Notice of withdrawal of appeal has been filed by a legal practitioner retained by the appellants, the notice is just as effective and binding on the appellants themselves. Similarly a notice signed by one of the legal practitioners retained by an appellant is as good as if all of them signed the Notice of withdrawal.”

In the case at hand, the application brought before the trial Federal High Court, pursuant to Order 54 Rule 8 and Order 30 Rule 2(1) of the Federal High Court (Civil Procedure) Rules, 2000, was for an order striking out the appeal. It was not a Notice of withdrawal of appeal as provided in Civil Form 14. Headed:

“NOTICE OF WITHDRAWAL OF APPEAL Order 3 Rule 18(1)”

It is clear from the prayers of the leading counsel when he was moving his motion of 27/5/2014 was that of striking out of the Notice of Appeal and the application for Stay of Execution of the judgment against the Respondents. For an appeal to be validly withdrawn under Order 3 Rule 18(i) of the Court of Appeal Rules 2002, conditions precedent must be complied with as set out in the case of OKEKE V. NDTC (Supra).

However, in *IKEAKWU V. NWAMKPA* (1966) Vol. 4 N.S.C.C. 83 at 86, (1967) NMLR 224 at 227, it was held that where an appeal has been struck out, it is possible to appeal against the decision by means of an application to relist or filing of a fresh Notice of Appeal, with a prayer for an enlargement of time, if deemed necessary, in the circumstance. The court further held as follows:

“... Although an order striking out an appeal has for some purposes much the same effect as an order dismissing it, it does not thereby become a decision on the merits and does not necessarily preclude a subsequent decision on the merits of, if the matter can be reopened by an appropriate procedure. When an appeal is struck out, the position is, as it would have been, if no appeal had been brought, that is to say the effective judgment is that appealed against not a judgment of the appeal court, and there seems to be nothing

contrary to general principles in holding that it is still possible to appeal against the effective judgment if a proper procedure is followed and if the limits of time for taking any particular step are not exceeded.

Either an application to relist or a fresh notice of appeal, with an enlargement of time if necessary would be a form of procedure known to the law...” B

From the facts and circumstances of this case there is nothing to suggest the application of the provisions of Court or Rule 18(1) and (5) of the Court of Appeal Rules 2002. The lower Court, had duty to consider the averments before it so as to decide whether the Respondent had shown good and substantial reasons for the delay in appealing within the time prescribed. The respondents fulfilled the conditions in their averments by explaining satisfactorily, the circumstances that led to the delay. C

On the second requirement that the notice of appeal should D contain grounds of appeal, showing good cause why the appeal should be heard, the lower Court stated at page 180 of the record as follows:

“The proposed Notice and Grounds of Appeal annexed contained 7 grounds of appeal. Grounds 1, 2, 3, 4 and 6 relate to the decisions of the trial Court in its interpretation of the provisions of the Companies and Allied Matters Act (CAMA). Ground 5 relates, to the reliefs granted by the trial Court in spite of the death of the 2nd Respondent (Receiver/Manager) whose name had earlier been struck out in the matter. E

Ground 7, touches on the competence of the judgment which was delivered outside 90 days as provided by Section 294(1) of the 1999 Constitution. These grounds raise weighty and substantial issues of law and prima facie shows good cause why the appeal should be heard an application will be granted.” F

The Court cannot, at this stage, consider whether the appeal will succeed. That has to come at the hearing of the appeal. The Respondents ought not to be deprived of their constitutionally guaranteed right of appeal as provided in Sections 241, 242, and 243 of the 1999 Constitution (as amended). G H

In view of the foregoing reasons and those reached thereat in detail in the lead judgment, this appeal which is lacking in merit fails and it is dismissed. The decision of the Court below delivered on 6/7/2005 is hereby affirmed. I abide by other consequential orders,

including order as to costs.

ARIWOOLA JSC

B I had the opportunity of reading in draft the lead judgment of my learned brother Kekere-Ekun, JSC, just delivered.

In view of the peculiarity of this case my learned brother properly couched the sole issue for determination of the appeal. The said issue is:-

C *“Whether, having regard to the circumstances of this case, the lower Court was right in granting the respondents’ application for extension of time within which to appeal against the judgment of the lower Court delivered on 4th March, 2004.”*

D I am in total agreement with the reasoning and conclusion of my learned brother on the issue of the withdrawal of the earlier Notice of Appeal and the comment of the trial court. Indeed, it is trite law that where a court lacks competence or jurisdiction to make an order, whatever order that is made in such circumstance is certainly of no moment. It is a nullity ab initio, as if no order was made at all. It is no longer, in the eye of the law, an effective adjudication on the rights of the parties. It remains the opinion of the court or Judge that delivered the judgment for whatever it is worth. See: Osofile & Anor Vs Paul Odi & Anor (1990) 2 NWLR (Pt.137) 130; (1990) 5 SC (Pt.11) 1.
F Therefore, the order of the trial court on the original Notice of Appeal cannot stand. The court was not competent to make the order.

When an application is filed for extension of time within which to appeal, it presupposes that the time prescribed for filing such an appeal against a judgment has expired or lapsed. Therefore, one of the principles upon which the court will allow any such application for enlargement of time to file grounds of appeal or substitute new grounds for those already filed is that the court must satisfy itself that there is indeed an arguable appeal, that is, after studying the grounds of appeal against the judgment which the appeal seeks to challenge.
H See: Osinupebi Vs Saibu & Ors (1982) 7 SC 79, per Idigbe, JSC.

However, the governing rule of procedure for the grant by the court below of extension of time to appeal or extension of time to apply for leave to appeal or leave to appeal states as follows:

“Every application for an enlargement of time within which to

appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged, a copy of the order granting such enlargement shall be annexed to the Notice of Appeal." See: Order 7 rule 10(2) Court of Appeal Rules. B

It is now well settled, that for an application for extension of time within which to appeal to succeed, the following circumstances must coexist:

(a) Good and substantial reasons for the failure to appeal within the period prescribed by the appropriate rule of court, and C

(b) Grounds of appeal which, prima facie, show good cause why the appeal should be heard. See: *Ukpo Ibodo & Ors Vs Iguasi Enarofia* (1980) 5 & 6 SC 42 at 51; *University of Lagos Vs. Olaniyan* (1985) 1 NWLR 156; *Mobil Oil (Nig) Ltd Vs Chief Agadaigbo* (1988) 2 NWLR 383; *Yinusa Shittu & Anor Vs. Bisi Osibanjo & Anor* (1988) 7 SC (Pt.111) 1; *Holman Bros. (Nig) Ltd Vs. Kigo* (1980) 8-11 SC 43; *Kotoye Vs Saraki* (1995) 5 NWLR (Pt. 395) 256. D

In the instant case, the applicants have adequately explained in their copious affidavit in support of their application, the reasons for their delay and they have shown that they have arguable grounds of appeal against the judgment they appealed, in particular, their ground 7 which raises the issue of the competence of the judgment of the trial court which was delivered more than 90 days after the final addresses of counsel. In my view, the court below was right to have granted extension of time to enable the respondents appeal out of time. That is the justice of this case, and anything to the contrary would have amounted to injustice on the respondent. E F

For the above reason and the fuller and detailed reasoning of my learned brother in the lead judgment, I consider this appeal devoid of merit and liable to dismissal. Accordingly, I also dismiss same. G

I abide by the consequential orders in the lead judgment including the order on costs. H

MUHAMMAD JSC

I had the privilege of reading in draft, the lead judgment of my learned brother Kekere-Ekun, JSC just delivered. I agree with his

lordship's reasoning and conclusion that the appeal lacks merit and that same be dismissed.

The facts of the case that brought about the appeal are as lucidly captured in the lead judgment. Suffice it to recount, though, that the court below had in the exercise of its discretionary powers granted the respondents herein extension of time to file an appeal against the judgment of the trial court delivered on 4th March, 2004. The sole issue that has arisen for the determination of the appeal is whether in the circumstances of their case, the lower Court is right to have extended time for the respondents to appeal.

Appellants contend that the lower Court is wrong to have extended time for the respondents as an earlier appeal against the very judgment by the 1st respondent had been withdrawn and struck out. The withdrawn appeal, it is argued, stands dismissed and is incapable of being revived. The very fact of the withdrawal of the appeal filed by the 1st respondent, it is further contended, also bars the respondents from filing a fresh appeal against the same judgment of the trial court. Learned counsel inter-alia relies on Order 3 rule 18(i) of the 2002 Court of Appeal Rules, *Ezomo v. A. G Bendel* (1986) 4 NWLR (Pt 36) 448; *Edozien v. Edozien* (1991) 1 NWLR (Pt.272) 679 and 700.

Not surprisingly, learned respondents' counsel submits differently. Order 3 rule 18(3) the Court of Appeal Rules 2002, he argues, only affects appeals which are withdrawn after they had been entered at the court below. Since the 1st respondent's withdrawal of his appeal was neither at the court below nor after the appeal had been entered thereat, Order 3 rule 18(5) does not apply to make the revival of the appeal or the filing of a fresh appeal against the trial court's judgment impossible.

It appears to me that the appellants have ignored the fact that the two respondents herein being two individuals are constitutionally guaranteed separate and distinct rights of appeal against the judgment of the trial court. This is the fact the lower Court considered overriding in finding merit in the application of the respondents.

The facts on the basis of which the court exercised its discretion are, inter alia, paragraph 3(h) to (p) of the affidavit in support of the application and the very feeble and clearly unhelpful bid in paragraph 3(c)-(e) of the appellants' counter affidavit in opposition to

respondents' application at the lower Court. The averments have been reproduced in the lead judgment. It is in relation to these averments that the lower Court at page 180 of the record of appeal resolved as follows:-

"...The applicant has shown that after the withdrawal of the appeal on 23rd June 2004, the execution of the judgment was being levied, the 2nd appellant who had not been informed of the judgment by a letter dated 8th July 2004 instructed his solicitors to appeal against the said judgment. This application was filed on 16th July 2005 on the instruction of the 2nd applicant who was unaware of the judgment.

In the circumstances, the 2nd applicant in particular cannot be shut out and deprived of his constitutional right of appeal. The delay in bringing the application to my mind has been satisfactorily satisfied."

I cannot agree more with the lower Court in its foregoing resolve of particularly ensuring that the 2nd respondent, having explained the delay in activating his right of appeal, is not unlawfully denied his constitutionally guaranteed right of appeal.

Appellants' cheap argument is that the respondents should have jointly been denied their right of appeal given the fact of the appeal filed and purportedly withdrawn by the 1st respondent pursuant to Order 3 rule 18(5) of the Court of Appeal Rules 2002. Learned appellants' counsel relies on *Madukolu v. Nkemdilim* (1962) 1 SCNLR 341, *Ezomo v. AG Bendel State* (1986) 4 NWLR (Pt 36) 448 at 460 and *Edozien v. Edozien* (1991) 1 NWLR (pt.272) 678 at 700.

I am unable to agree with learned appellants' counsel.

Firstly, the record of the instant appeal clearly shows that 1st respondent's withdrawal of his appeal was effected at the trial court registry ostensibly pursuant to Orders 30 rule 2(1) and 54 rule 8 of the Federal High Court Rules 2000 and not at the lower Court's registry under Order 3 rule 18(1) and (5) of the Court of Appeal Rules 2002. It is clear to me that whereas Order 30 rule 2(1) provides for the procedure available to the defendant who wishes to forestall the execution of any decree of the Federal High Court against his property; Order 54 rule 8 of the Federal High Court Rules 2000, on the other hand, govern withdrawal of appeals before the Federal High Court when the court sits in the exercise of its appellate jurisdic-

tion. The rules do not apply to appeals at the Court of Appeal from the decisions of the Federal High Court. Appellants must accept the principle that only the withdrawal of an appeal at the Court of Appeal registry pursuant to Order 3 rule 18(1) may, given the provision of sub-rule 5, constitute a bar to the appellant's subsequent desire to pursue his appeal. It also remains my considered view that 1st respondent's appeal which was not so withdrawn and, not being an appeal before the Federal High Court in the exercise of its appellate jurisdiction, could not have been withdrawn at the registry of the Federal High Court. For all these, 1st respondent's appeal must be held to remain alive.

For ease of reference, Order 3 rule 18(1) and (5) of the Court of Appeal Rules 2002 are hereinunder reproduced and read:-

"18(1) An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend to further prosecute the appeal.

(5) An appeal which has been withdrawn with or without an order of the court shall be deemed to have been dismissed."

The inapplicability of the foregoing rules in relation to the purported withdrawal of the 1st respondent's appeal takes the subsequent desire of both respondents to pursue their respective rights of appeal outside the claws of the judicial authorities appellants contend should have informed the lower Court's decision in respect of their application.

Finally, the appellants seem to be oblivious of the overwhelming powers the lower Court wields by virtue of the combined effect of Section 30 of the Court of Appeal Act (as amended) and Order 19 rules 2 and 3 of its rules.

An appeal, by Section 30 of the Court of Appeal Act, includes an application for leave to appeal; an appellant means any person who desires to appeal or appeals from the decision of the trial court; a cause as including any proceeding between an applicant and a respondent; a proceeding to include any proceeding in a court not in a cause and a Registrar under the Act to mean the Chief Registrar, any senior Registrar or any officer of the Court of Appeal by whatever title called exercising functions analogous to those of a Registrar of the Court of Appeal.

Order 19 rules 2 and 3(1) and (2) of the Court of Appeal Rules are hereinunder reproduced for ease of reference.

“2. The Court may direct a departure from these Rules in any way this is required in the interest of justice.

3.(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.”

My lords, it is a sane pick to state that the foregoing vest very wide and tremendous powers in the lower Court including the grant to the respondents of the reliefs they canvassed thereat.

The court is visibly empowered by the provision to depart from Order 3 rule 18(5) of its rules should that apply to the appeal purportedly filed and withdrawn by the 1st respondent and allow the latter to commence a fresh appeal which would have otherwise been impossible.

It is the execution of the judgment of the trial court that exposed the extent to which the fortunes of the two respondents became interwoven and inseparable. This fact alone necessitates that justice be the overriding factor in the grant or refusal of the application by the lower Court. It is that same necessity that justifies the lower Court’s apparent resort and invocation of Order 19(2) and (3) supra to extend time for both respondents to appeal against the trial court judgment in suit No.FHC/ABJ/CS/114/99 delivered on 4th March 2004.

It is for the foregoing and the more detailed reasons outlined in the lead judgment that I also dismiss the appeal. I abide by the consequential orders made in the lead judgment including the order on costs.

NWEZE JSC

My lord, Kekere-Ekun JSC, obliged me with the draft of the leading judgment just delivered now. I, entirely, agree with His Lord-

ship that this appeal is not only frivolous; it is, actually, vexatious.

The Federal High Court [trial court] delivered its judgment in this matter in 2004, that is, over a decade ago! The ruling of the Court of Appeal [lower Court], which prompted this appeal, was handed down about ten years ago. In effect, from 2005 till now, the parties have been consigned to the Limbo of anxiety, all because of the unwholesome penchant for contesting every decision of the Lower Court, even on matters relating to well-settled principles of law, *UBN Plc v Astra Builders W/A Ltd* [2010] 5 NWLR (Pt.1186) 1, 34; *Owners of the MV "Arabella" v NAIC* [2008] 11 NWLR (Pt.1097) 182.

Now, this court has explained the twin, conjunctive pre-conditions consecrated in Order 3 Rule 4(1) and (2) of the Court of Appeal Rules, 2002 [in force at the material time], in several decisions, *Alagbe v Abimbola* (1978) 2 SC 89; *Ibodo v. Enarofia* (1980) 5-7 SC 43; *Williams v Hope Rising Voluntary Funds Society* (1982) 1 All NLR (Pt.1) 1; *Doherty v. Doherty* (1964) 1 All NLR 299; *Yonwuren v Modern Signs Ltd* (1985) 1 NWLR (Pt.1) 143; *Mobil Oil (Nig) Ltd v Agadaigho* (1988) 2 NWLR (Pt.77) 385; *Okere v Nkem* (1992) 4 NWLR (Pt.234) 132; *Kotoye v Saraki* (1995) 5 NWLR (Pt.395) 256; *Balogun v Afokilu* (1994) 7 NWLR (Pt.355) 206; *F.H.A. v Abosede* (1998) 2 NWLR (Pt.537) 177; *Shanu v Afribank Nig Plc* (2000) 13 NWLR (Pt.684) 392; *Oloko v Ube* (2001) 13 NWLR (Pt.729) 161.

Having satisfied the said conditions, the respondents are, eminently, entitled to leverage the window of opportunity which Sections 241, 242 and 243 of the Constitution of the Federal Republic of Nigeria (as amended) present to them for the agitation of their grievance(s) against the judgment of the trial court.

For these, and the more detailed, reasons in the leading judgment, I have no hesitation in dismissing this appeal. I abide by the consequential orders in the said leading judgment.