

**SUPREME COURT OF NIGERIA**  
FRIDAY 15TH MAY, 2015. SC. 3/2014  
**CORAM:- J. A. FABIYI, C. B. OGUNBIYI,**  
**K. M. O. KEKERE-EKUN, J. I. OKORO, C. C. NWEZE, JJSC**

ENAYE SISAMI RICHARD ABAH ..... APPELLANT  
AND  
1. ERIBO MONDAY  
2. NATIONAL YOUTH SERVICE CORPS  
3. PEOPLES DEMOCRATIC PARTY  
4. BAYELSA STATE INDEPENDENT  
ELECTORAL COMMISSION ..... RESPONDENTS

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ADJOURNMENTS - Application - Hearing & ruling - Every of such application whether in writing or orally - Must be heard on the merits - And decided upon before proceeding further with the case (H1)

APPEALS - Justice - Dismissal - Legal practitioner - Mistake of - Dismissal of appellant's appeal based on the inadvertence of his counsel - Is a denial of right to be heard on the merit (H2)

LEGAL PRACTITIONERS - Signature - Brief - Conduct of - When counsel is briefed by a party - He is empowered to do those things which the party is supposed to do - Except where the law demands otherwise (H3)

APPEALS - Dismissal - Validity - Respondent's oral application for dismissal is in order - And court has jurisdiction to strike out or dismiss appeal - Where appellant failed to prosecute same diligently - Save for the exception in this case (H4)

APPEALS - Striking out - SC Act ss. 22 & 26 - Where an appeal has been struck out - There is nothing upon which to invoke the sections - To hear and determine the appeal by SC (H5)

**FACTS**

This matter originated from the Federal High Court sitting in Lagos. Record of appeal was transmitted from the trial court to the

Court of Appeal. Appellant filed his brief of argument followed by reply brief. Thereafter, it came to the knowledge of appellant's counsel of the existence of then recent Court of Appeal Practice Direction 2013. Consequently, appellant filed an application to regularize the said processes which were transmitted and/or filed outside the time prescribed by the recent Practice Direction of 2013. On the same footing, counsel to 1<sup>st</sup> respondent also being unaware of the new Practice Direction, applied to regularize his brief of argument which had been filed in accordance with the Court of Appeal Rules 2011.

At the hearing before the Court of Appeal, it was observed by the court that the motion was defective as there was no indication of suit number of the matter in the trial court with respect to prayer No. 1 dealing with the Record of appeal. In the circumstance, appellant sought for leave to withdraw the said motion and also for an adjournment to enable him regularize the said process. 1<sup>st</sup> respondent's counsel opposed the application for adjournment and orally applied for the dismissal of the appeal. The appeal was eventually dismissed for failure of appellant to transmit record of appeal within the prescribed time. Dissatisfied, appellant appealed to Supreme Court.

#### **ISSUES FOR DETERMINATION**

1. Whether the Lower Court infringed on the appellant's fundamental human right to fair hearing.

2. Whether in the peculiar circumstances of this case, the Lower Court had the jurisdiction to have dismissed the appellant's appeal.

**HELD** (Unanimously allowing the appeal in part per **OKORO JSC**)

*ADJOURNMENTS - Application - Hearing & ruling*

***1. I have perused the entire gamut of the record and I am unable to find where the court below ruled whether to grant or refuse the adjournment. It is trite that every application for an adjournment whether made in writing or orally which is properly submitted before the court must be heard on the merits and decided upon before proceeding further with the case. It is never in dispute that the granting or refusal of an application for adjournment rests completely with the court or tribu-***

*nal before which the application is made. It is at the discretion of the court to grant an adjournment. But there must be a ruling on the application and not as was done in this case. Although there is an application for adjournment and an opposition to it, there is no ruling on the face of the record of appeal. The court below ought to have decided it one way or the other before taking further steps in the matter.*

*Again, in an application for an adjournment, the court must balance the discretionary power to grant or refuse an adjournment and endeavor to give an appellant the opportunity of obtaining substantial justice in the shape of his appeal being granted a fair hearing on its merits provided always that no injustice is thereby caused to the other party and where the court erred in its balancing exercise, an appellate court is at liberty to interfere. (p. 1577 G)*

*APPEALS - Dismissal - Legal practitioner - Mistake of*

*2. It has been held in quite a number of cases in this court that a court should not punish a litigant based on the mistake or inadvertence of his counsel. In this country which we at this time are trying to transit from analog processes to digital, it is not unlikely that the Practice Direction did not receive wide circulation as at the time it was published. That is why both the learned counsel for the appellant and respondent were unaware of its existence and that was why they filed their processes as governed by the Court of Appeal Rules, 2011. Both counsel also filed motions to regularize these processes filed on the wrong rules to buttress the fact that the said Practice Direction may not have been widely publicized. I am aware that ignorance of the law is not an excuse but in circumstance such as availed itself in this case, the court below ought to have exercised its discretion and lean towards doing substantial justice. The dismissal of the appellant's appeal by the court below was therefore rash and did in fact deny the appellant the right to be heard on the merit.*

*Thus the 1st respondent's counsel's argument that the mistake or inadvertence of counsel does not avail the appellant did not fly at all. Accordingly, I resolve the first issue in favour*

**of the appellant.** (pp. 1579 C/1580 A)

*LEGAL PRACTITIONERS - Brief - Conduct of*

**3. The argument of the 1st respondent's counsel that it was the appellant who was expected to transmit record and not his counsel is of no moment. When a party briefs counsel to conduct his case for him, counsel is empowered to do those things which the party is supposed to do except where the law demands that a party has to personally sign a document. It is only then that counsel will not be permitted to sign on behalf of his client. The rules did not say that appellant must transmit the record personally. The process of the transmission of the record conducted by his counsel cannot be said to be against the rules.** (p. 1579 G)

*D APPEALS - Dismissal - Validity*

**4. The use of the word "may" in the above provision seems to give the respondent a discretion whether to apply orally or by way of Notice of motion. This is so because it is opposed to the use of the word "shall" which connotes mandatoriness. Apart from this application by the 1st respondent, the court has an unfettered inherent jurisdiction to strike out or dismiss an appeal where an appellant has failed to prosecute same diligently. This has been the position of this court in quite a number of its pronouncements.**

**I have quoted the above judgment in extenso to underscore the position I have taken on the two pronged issues making up issue No. 2 to wit: whether the oral application made by 1st respondent was proper and whether the court has inherent power to strike out or dismiss an appeal for want of diligent prosecution. By the rules of stare decisis and precedent, I am bound to follow this decision.**

**The learned counsel had argued that the court below lacked the jurisdiction to make the order. That is not correct in view of the position of this court in Nigerian Navy V. Navy Capt. D. O. Labinjo (supra) and other cases cited in that respect. As it turns out, this issue does not avail the appellant.**

**Be that as it may, in view, of the position I have already**

***taken in issue one in this appeal and having regard to the peculiar facts and circumstances of this case, this appeal succeeds in part. Accordingly, the order of dismissal of the appeal entered by the Lower Court on 12/12/13 is hereby set aside. In its place, I hereby make an order striking out the said appeal.*** (pp. 1581 G/1582 G) B

*APPEALS - Striking out*

***5. The appellant's counsel has prayed this court to invoke Sections 22 and 26 of the Supreme Court Act to hear and determine this appeal. This request or prayer cannot be granted. The reason is that the appeal has just been struck out. I do not know what the appellant intends to do hereafter. The appeal is yet to be revived or relisted. As at now, there is nothing upon which to invoke Sections 22 or 26 of the Supreme Court Act. The request is accordingly refused. I make no order as to costs.*** (p. 1583 D) C  
D

**REPRESENTATION**

Samuel Brisibe Esq., with Tare Anyankpele, Esq., and Goodness Jim-Odoi, Esq., for the Appellant E

O. P. Odia, Esq. with him Elizabeth Otuokpai-Khim (Miss), Iraya Emmanuel, Esq. and J. E. T. Amokaha, Esq., for the 1st Respondents

Somina Johnbull, Esq. with Ebiboye Erebi, Esq., for the 4th Respondent F

The 2nd and 3rd Respondents were duly served with hearing notice, but not in the court and not represented

**CASES REFERRED TO** G

Ceekay Traders Ltd v. G. M. Co. Ltd. (1992) 2 NWLR (pt. 222) 132

Obombense v. Evhamson (1993) 7 NWLR (pt. 303) 22

Etim v. Registered Trustees (2004) 11 NWLR (pt. 883) 79

Bamawo v. Garrick (1995) 6 NWLR (pt. 401) 356 H

Olumesan v. Ogundepo (1996) 2 NWLR (pt. 433) 625

General Electric Co. v. Akande (2012) 16 NWLR (pt. 1327) 593

Ogunyemi v. Ejide (2008) 7 WRN 192

Zakari v. Alhassan (2002) 14 NWLR (pt. 786) 52

Kuusu v. Udom (1990) 1 NWLR (pt. 127) 421

Evans v. Bartham (1937) AC 473

Inajoku v. Adeleke (2007) 4 NWLR (pt. 1025) 427

Kayode v. State (2008) 1 NWLR (pt. 1068) 281

Okereke v. Yar'adua (2008) 12 NWLR (pt. 1100) 95

B Chinwe v. Ude (1996) 7 NWLR (pt. 461) 379

Akujinwa v. Nwaonuma (1998) 13 NWLR (pt. 583) 632

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

C Constitution of the Federal Republic of Nigeria 1999, ss. 36(6)

Court of Appeal Rules 2011, O. 8 rr. 4, 5, 18

Court of Appeal Practice Direction 2013, O. 2, 3, 9

### **LEAD JUDGMENT BY OKORO JSC**

D This is an appeal against the ruling of the Court of Appeal sitting in Abuja wherein the Lower Court dismissed the Appellant's appeal No.CA/A/370/2013 on the 12th day of December, 2013. The facts leading to this appeal are as summarized below:-

E Record of appeal in the dismissed appeal was transmitted from the trial Federal High Court to the Lower Court on the 10th day of July, 2013. Appellant's brief of argument and Reply brief were filed on 31st July, 2013 and 13th September, 2013 respectively.

F After the transmission of the Record of Appeal and the filing of briefs aforesaid, the Appellant's counsel became aware of the then recent Court of Appeal Practice Direction 2013 and hence filed an application on 4/11/13 inter alia, seeking to regularize the said processes which were transmitted and/or filed outside the time prescribed by the said Court of Appeal Practice Direction 2013. The Appellant's G counsel in paragraphs 10 and 11 of the affidavit in support of the said motion on notice stated that the said lapses occurred due to his inadvertence as he was not aware of the said Practice Direction. The 1st Respondent's counsel who was also then not aware of the said Practice Direction followed suit by filling an application to regularize H his brief of argument which had been filed in accordance with the Court of Appeal Rules 2011.

On 12th December, 2013 when the matter came up for hearing before the Lower Court, the said court observed that the motion was defective as the appellant failed to indicate the suit number of

the matter in the trial Federal High Court with respect to prayer No. 1 dealing with the Record of appeal and hence, the appellant's counsel sought for the leave of the court to withdraw the said motion. Appellant's counsel applied for an adjournment to enable him take steps to regularize the said processes.

The 1st respondent's counsel opposed the appellant's application for adjournment and instead applied for the dismissal of the appeal under Order 8 Rule 18 of the Court of Appeal Rules, 2011. The 1st respondent's counsel made the application orally. At this time there was pending in the Lower Court an application for stay of further proceedings of the matter at the trial Federal High Court filed by the appellant. B  
C

The Lower Court nevertheless dismissed the Appellant's appeal for failure to transmit record of appeal within the prescribed time pursuant to Order 8 Rules 4 and 5 of the Court of Appeal Rules, 2011. The Lower Court also dismissed all the pending applications. D

The appellant being dissatisfied with the ruling of the Lower Court, filed an appeal against same to this court. The Notice of appeal was filed on 24/12/13 and contains three grounds of appeal, out of which the appellant has distilled two issues for determination. The two issues are as follows:- E

1. Whether the Lower Court infringed on the appellant's fundamental human right to fair hearing.

2. Whether in the peculiar circumstances of this case, the Lower Court had the jurisdiction to have dismissed the appellant's appeal. F

In this appeal, the learned counsel for the 1st respondent has adopted the two issues nominated by the appellant for the determination of this appeal. The other respondents did not file any brief in this appeal. G

Arguing the 1st issue, the learned counsel for the appellant submitted that in view of the fact that it was the inadvertence of counsel which led to the dismissal of the appeal, such inadvertence should not be visited on the appellant. That by the premature dismissal of the appeal, the Lower Court visited the mistake of counsel on the appellant and deprived him of his right to fair hearing preserved by Section 36(6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). He argued that the failure of the court below to invite the appellant to argue his pending motion before striking them H

out amounted to denial of fair hearing. He cited and relied on the following cases: Ceekay Traders Ltd V. G. M. Coy. Ltd. (1992) 2 NWLR (Pt.222) 132 at 147 - 148, Obombense V. Evhamson (1993) 7 NWLR (Pt.303) 22, Etim V. Registered Trustees (2004) 11 NWLR (Pt.883) 79.

B Learned counsel also complained that his application for adjournment was never ruled upon before the Lower Court dismissed the appeal. This, he submitted breached the appellant's right to fair hearing, relying on the cases of Bamawo V. Garrick (1995) 6 NWLR (Pt.401) 356 and Olumesan V. Ogundepo (1996) 2 NWLR (Pt.433) 625.

C It is also counsel's submission that failure to determine all pending applications before dismissing the appeal was a breach of appellant's right to fair hearing citing the cases of FAAN V. WES Nig. Ltd (2011) D 8 NWLR (Pt.1249) 219 at 237, General Electric Co. V. Akande (2012) 16 NWLR (Pt.1327) 593 at 611 amongst other authorities. He urged the court to resolve this issue in favour of the appellant.

E In response, the learned counsel for the 1st respondent submitted that the ratio decidendi of the ruling of the court below was not on the mistake or inadvertence of counsel but on the failure of the appellant (himself) to comply with Order 8 Rules 4 and 5 of the Court of Appeal Rules, 2011. It is his submission that the appellant's counsel cannot assume the responsibility of the appellant as stated in the said Rule of Court and be heard to argue that the sins or inadvertence of counsel was being visited on the appellant. On the motions struck out, learned counsel submitted that having dismissed the appeal, all pending motions could not stand alone as you cannot put something on nothing and expect it to stand. It is his contention that F as at the time the appellant withdrew his application to regularize his processes, there was nothing left for the court to adjudicate upon or G adjourn.

H Learned counsel further argued that the appellant, who had an opportunity to be heard by the Lower Court, but deliberately or inadvertently refused to present his case, cannot be allowed to cry wolf or denial of fair hearing. He cited the cases of Ogunyemi v. Ejide (2008) 7 WRN 192 at 196, Zakari V. Alhassan (2002) 14 NWLR (Pt.786) 52 and Kuusu V. Udom (1990) 1 NWLR (Pt.127) 421 at 445.



Finally on this issue learned counsel submitted that the cases of Ceekay Traders Ltd. V. GM Coy. Ltd (supra), FBN PLC V. Assom (supra) are not applicable in this case. He urged this court to resolve this issue against the appellant.

In his reply brief, learned counsel responded that whenever the law expects a party to do an act, it is expected that counsel employed by the party is equally in a position to perform that act. He urged the court to ignore the argument of the 1st respondent on that aspect of the issue.

Both the appellant and the 1st respondent to this appeal agree that all necessary process in this appeal, i.e. transmission of record, appellant's brief, respondents' brief and appellant's reply brief were filed at the Lower Court within time based on the Court of Appeal Rules, 2011 in the erroneous belief that the said rules of court governed the proceedings. It is also agreed that on becoming aware of the Practice Direction for Election Appeals at the Lower Court, which had abridged time for the filing of processes, both the appellant's and respondents' counsel filed applications to regularize the processes. Unfortunately, the appellant's counsel failed to state the suit number of the suit at the Federal High Court appealed against in the first prayer of the motion which made the Lower Court to adjudge the said motion incompetent. An application to withdraw same was granted. Having struck out the said motion, I agree with the learned counsel for the 1st respondent that all the pending processes i.e. the record and briefs of both parties were irregular. The record of proceedings show that the appellant's counsel applied for an adjournment to enable him regularize those processes. The learned counsel for the 1st respondent opposed the application.

***I have perused the entire gamut of the record and I am unable to find where the court below ruled whether to grant or refuse the adjournment. It is trite that every application for an adjournment whether made in writing or orally which is properly submitted before the court must be heard on the merits and decided upon before proceeding further with the case. It is never in dispute that the granting or refusal of an application for adjournment rests completely with the court or tribunal before which the application is made. It is at the discretion of the court to grant an adjournment. But there must be a***

**ruling on the application and not as was done in this case. Although there is an application for adjournment and an opposition to it, there is no ruling on the face of the record of appeal. The court below ought to have decided it one way or the other before taking further steps in the matter.** See FBN PLC V. Assom (2011) LPELR, Bamawo V. Garrick (supra) and Olumesan V. Ogundepo (supra).

**Again, in an application for an adjournment, the court must balance the discretionary power to grant or refuse an adjournment and endeavor to give an appellant the opportunity of obtaining substantial justice in the shape of his appeal being granted a fair hearing on its merits provided always that no injustice is thereby caused to the other party and where the court erred in its balancing exercise, an appellate court is at liberty to interfere.** See University of Lagos & Anor. v. M. I. Aigoro (1985) 1 SC 295.

In Abiodun Adenike Odusote V. Olaitan Olaniji Odusote (1971) ALL NLR 221 at 225-226, Udo Udoma, JSC (of blessed memory) sermonized on this issue as follows:-

*“On the question of the exercise of discretion in granting application for adjournment, it is pertinent to quote a passage in the judgment of Lord Wright L. J. in Evans V. Bartham (supra) to which our attention was drawn by the learned counsel for the appellant. In his judgment, Lord Wright said at page 487:*

*“A judge’s order fixing the date of trial or refusing to grant an adjournment is a typical exercise of purely discretionary powers, and would be interfered with by the Court of Appeal only in exceptional cases, yet it may be reviewed by the Court of Appeal. Thus in Maxwell V. Keun (1928) 1 KB 645, the Court of Appeal reversed the trial judge’s order refusing to the plaintiff an adjournment. That was a pure matter of discretion on the facts.”* Atkin L. J. said at page 653:

*“I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so but on the other hand, if it appears that the result of the order made below is to defeat the right of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an*

*order and it is, to my mind, its duty to do so.*" See Evans V. Bartham (1937) A. C. 473.

In this case, the refusal to grant the adjournment, apart from the fact that the court below failed to rule on the application for adjournment, it had the effect of terminating the appellant's appeal completely without offering them the opportunity of being heard on the merit. This is more so when the processes were filed, though out of time. It is my view that the Lower Court ought to have ruled on the application before taking further steps in the matter. Unfortunately, the further step taken was to dismiss the Appeal. By this singular act, the appellant was denied his right to be heard in his appeal before the court.

***It has been held in quite a number of cases in this court that a court should not punish a litigant based on the mistake or inadvertence of his counsel. In this country which we at this time are trying to transit from analog processes to digital, it is not unlikely that the Practice Direction did not receive wide circulation as at the time it was published. That is why both the learned counsel for the appellant and respondent were unaware of its existence and that was why they filed their processes as governed by the Court of Appeal Rules, 2011. Both counsel also filed motions to regularize these processes filed on the wrong rules to buttress the fact that the said Practice Direction may not have been widely publicized. I am aware that ignorance of the law is not an excuse but in circumstance such as availed itself in this case, the court below ought to have exercised its discretion and lean towards doing substantial justice. The dismissal of the appellant's appeal by the court below was therefore rash and did in fact deny the appellant the right to be heard on the merit. The argument of the 1st respondent's counsel that it was the appellant who was expected to transmit record and not his counsel is of no moment. When a party briefs counsel to conduct his case for him, counsel is empowered to do those things which the party is supposed to do except where the law demands that a party has to personally sign a document. It is only then that counsel will not be permitted to sign on behalf of his client. The rules did not say that appellant must transmit the record person-***

***ally. The process of the transmission of the record conducted by his counsel cannot be said to be against the rules. Thus the 1st respondent's counsel's argument that the mistake or inadvertence of counsel does not avail the appellant did not fly at all. Accordingly, I resolve the first issue in favour of the appellant.***

On the second issue, the learned counsel for the appellant submitted that there was no valid application for the dismissal of the appeal by the 1st respondent as the 1st respondent did not file any motion on notice seeking to dismiss the appeal for the appellant's failure to compile and transmit the record of appeal within the prescribed time. It is his view that Order 8 Rule 18 of the Court of Appeal Rules, 2011 relied upon by the 1st respondent stipulates that such an application must be made by Notice of Motion. He contends that where the law stipulates that an act be done in a particular manner, that manner and no other can be followed in the doing of such act. He cited the following cases: *Ajuta II V. Ngene* (2002) 1 NWLR (Pt.748) 278, *Inajoku V. Adeleke* (2007) 4 NWLR (Pt.1025) 427, *Kayode V. State* (2008) 1 NWLR (Pt.1068) 281 and *Okereke V. Yar'adua* (2008) 12 NWLR (Pt. 1100) 95.

Learned counsel for the appellant also submitted that the fact that the Lower Court held that it has inherent jurisdiction under Order 8 Rules 4 and 5 of the Court of Appeal Rules, 2011 to strike out an appeal for non-compliance with the requirements of compilation of record, this cannot save the situation. According to him, this is because the Lower Court did not strike out the appeal but rather it dismissed it. Also, that Order 8 Rules 4 & 5 of the Court of Appeal Rules, 2011 have no application to the appeal before the Lower Court because it was an appeal against interlocutory decision which is regulated by the Court of Appeal Practice Direction, 2013.

Learned counsel further opined that even if the court below had inherent power to strike out an appeal under Order 8 Rules 4 and 5 of the Court of Appeal Rules, 2011, such inherent power cannot be converted to an order dismissing the appeal. He urged the court to resolve this issue in favour of the appellant.

In response, the learned counsel for the 1st respondent submitted that a community reading of the provisions of Section 15 of the Court of Appeal Act, Section 6(6) of the Constitution of the Fed-

eral Republic of Nigeria, 1999 (as amended), Orders 2, 3 and 9 of the Court of Appeal Practice Direction, 2013, Order 8 Rules 4, 5 & 18 and Order 18 Rule 10 of the Court of Appeal Rules 2011, show that the Lower Court rightly exercised jurisdiction when it dismissed the appeal.

It was further submitted on behalf of the 1st respondent that the court below dismissed the appeal in exercise of its inherent powers. He urged the court to resolve this matter against the appellant. B

In its ruling in this matter which has given birth to this appeal, the Lower Court states as follows:

*“Court: In this matter, it is clear that the appellant failed to compile Record of Appeal and transmit same within the period stipulated by this court’s Rules. By Order 8 Rule 4 & 5, this court has inherent jurisdiction to strike out an appeal for non-compliance with compilation of Record of Appeal.”* C

*This appeal deserve to be dismissed for such non-compliance and it is hereby so dismissed.* D

*All pending motions in this appeal are similarly hereby dismissed.”*

It is quite clear from the record of appeal that before the court below made its ruling dismissing the appeal, the learned counsel for the 1st respondent had made an oral application for the appeal to be struck out. The contention of the appellant is that the application ought to have been made by Notice of Motion and in writing. Order 8 Rule 18 of the Court of Appeal Rules 2011 under which the application was made states: E

*“18. If the Registrar has failed to compile the records under Rule 1 and the appellant has also failed to compile and transmit the records in accordance with Rule 4, the respondent may by notice of motion move the court to dismiss the appeal.”* F

***The use of the word “may” in the above provision seems to give the respondent a discretion whether to apply orally or by way of Notice of motion. This is so because it is opposed to the use of the word “shall” which connotes mandatoriness. Apart from this application by the 1st respondent, the court has an unfettered inherent jurisdiction to strike out or dismiss an appeal where an appellant has failed to prosecute same diligently. This has been the position of this court in quite a*** H

**number of its pronouncements.** Thus, in *The Nigerian Navy & Ors V. Navy Captain D. O. Labinjo* (2012) LPELR 7868 (SC) on pages 16 - 19, per Onnoghen JSC, this court held as follows:

B *“Apart from there being a motion on notice calling for the striking out of the appeal for want of prosecution which was duly served on the appellants, Order 8 Rules 18 of the Court of Appeal Rules 2007 on which the learned counsel relied in submitting that the filing of a notice of motion for the striking out of an appeal for want of prosecution is mandatory does not support that contention. The rule provides as follows:-*

C *If the registrar has failed to compile and transmit the records under Rule 1 and the appellant has also failed to compile and transmit the records in accordance with Rule 4, the respondent may by notice of motion move the court to dismiss the appeal.*

D *From the above, it is clear and I hereby hold that the filing of a motion on notice as provided supra is permissive not mandatory as the word “may” is used. It is a general principle of interpretation of statute that the use of the word “may” generally connotes permissive action though in exceptional circumstances it may mean mandatory*  
E *or compulsory action.*

*However, in the context in which it is used in the rule under reference, it can mean but one thing, that is, permissive action...*

F *In fact I hold the considered view that an appellate court, in a situation like the one under consideration in this appeal, has inherent jurisdiction to suo motu list the appeal and summarily dismiss same for want of prosecution without waiting for the respondent to make the application either orally or by way of a motion on notice as the court has the inherent power to do away with frivolous or vexatious*  
G *appeals so as to decongest its cause list particularly where the appeal is intended to overreach or deny the respondent the enjoyment of the fruits of the judgment in his favour by the Lower Court.”*

H **I have quoted the above judgment in extenso to underscore the position I have taken on the two pronged issues making up issue No. 2 to wit: whether the oral application made by 1st respondent was proper and whether the court has inherent power to strike out or dismiss an appeal for want of diligent prosecution. By the rules of stare decisis and precedent, I am bound to follow this decision.** See also *Enwezor V.*

Onyejakwe (1964) 1 All NLR 14, Chinwe V. Ude (1996) 7 NWLR (Pt.461) 379, Akujinwa V. Nwaonuma (1998) 13 NWLR (Pt.583) 632.

***The learned counsel had argued that the court below lacked the jurisdiction to make the order. That is not correct in view of the position of this court in Nigerian Navy V. Navy Capt. D. O. Labinjo (supra) and other cases cited in that respect. As it turns out, this issue does not avail the appellant.***

***Be that as it may, in view, of the position I have already taken in issue one in this appeal and having regard to the peculiar facts and circumstances of this case, this appeal succeeds in part. Accordingly, the order of dismissal of the appeal entered by the Lower Court on 12/12/13 is hereby set aside. In its place, I hereby make an order striking out the said appeal.***

***The appellant's counsel has prayed this court to invoke Sections 22 and 26 of the Supreme Court Act to hear and determine this appeal. This request or prayer cannot be granted. The reason is that the appeal has just been struck out. I do not know what the appellant intends to do hereafter. The appeal is yet to be revived or relisted. As at now, there is nothing upon which to invoke Sections 22 or 26 of the Supreme Court Act. The request is accordingly refused. I make no order as to costs.***

Appeal allowed in part.

### **FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother - John Inyang Okoro, JSC. I agree with the reasons therein contained to arrive at the conclusion that the appeal should be allowed in part.

The court below, in its ruling states as follows:-

*"In this matter, it is clear that the appellant failed to compile Record of Appeal and transmit same within the period stipulated by this court's Rules. By Order 8 Rule 4 and 5, this court has inherent jurisdiction to strike out an appeal for non-compliance with compilation of Record of Appeal."*

After finding as above, one wonders how and why the Lower Court ended with an order dismissing the appeal. The Lower Court ought to have balanced its discretionary power to grant the appellant the opportunity of obtaining justice with a view to attaining fair hearing on its merit. After all, rules of court constitute a hand-maid for the attainment of justice. Those who employ the rules should not turn same to be the master of the court. It is a stand that I shall continue to maintain that due discretion should be properly exercised so as not to create absurd situation; in the main. See *University of Lagos v. Aigoro* (1985) 1 SC 295.

For the above remarks and the detailed reasons adumbrated in the lead judgment, I too feel that the appeal should be allowed in part. I join in substituting the order of dismissal of the appeal made by the court below with the order striking out same in the prevailing circumstance with no order as to costs.

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### **OGUNBIYI JSC**

I read in draft the lead judgment of my brother Okoro, JSC. I agree that the appeal should be allowed in part.

Consequent upon the withdrawal of a defective motion filed on behalf of the appellant which was accordingly struck out, his counsel applied for an adjournment to enable him take steps to regularize the said process. The 1st respondent's counsel opposed the appellant's application for adjournment and instead applied orally for the dismissal of the appeal under Order 8 Rule 18 of the Court of Appeal Rules, 2011.

At the material time, there was also pending in the Lower Court an application for stay of further proceedings of the matter in the trial Federal High Court filed by the appellant.

The Lower Court nevertheless dismissed the appellant's appeal for failure to transmit the record of Appeal within the prescribed time pursuant to Order 8 Rules 4 and 5 of the said Court of Appeal Rules, 2011. The Lower Court then also dismissed all the pending applications including the appellant's said application for stay of further proceedings. Hence the appeal now before us on two issues for determination which have been set out in the lead judgment.

The bone of complaint by the appellant relates principally to



infringement on his right to fair hearing as preserved in Section 36(6) of the Constitution of the Federal Republic of Nigeria, 1999 as amended. It is pertinent to note that there is nowhere on the record where the Court ruled on the appellant's application for an adjournment before taking the further steps which led to the dismissal of the appeal. I seek to refer to the record of appeal on the proceedings of the 12th day of December, 2013 which same is revealing, explicit and clearly spelt out. It is also clear on the record that the failure to compile and transmit the said record of appeal, subject of the application which was withdrawn was attributable to the inadvertence of the appellant's counsel, who then was unaware of the Practice Direction which abridged the time for the transmission of the record of appeal and the filing of briefs in this appeal. It was the inadvertence that led to the application for adjournment and the subsequent dismissal of the said appeal by the Lower Court.

The process for regularizing the defect affecting the record was filed out of time and the Lower Court did not consider it appropriate to oblige the appellant any hearing on the applications for the adjournment sought or even on the pending applications before it. The drastic step taken in dismissing the appeal did not, in my view occasion proper exercise of discretion judicially and judiciously. The order of dismissal made by the Court was, I hold, without due consideration in the circumstance. See the case of Ceekay Traders Ltd v. G. M. Co. Limited (1992) 2 NWLR (Pt.222) 132 at 147-148 where this Court said thus:

*"Finally, was the trial judge right in proceeding to dismiss the appellant's case after refusing his application for adjournment without inviting counsel to proceed with the case? I think not. In my view, after he had refused to grant the application for adjournment, the learned trial judge should have called upon the appellant's counsel to proceed with the case, and if counsel then refused to do so, or was unwilling or unable to do so, the case could then be properly dismissed.*

*In this case it is clear on the record that the appellant's counsel was never called upon by the learned trial judge to proceed with his case after the refusal of his application for adjournment and in my view, failure to do so on the part of the trial court has occasioned a miscarriage of justice. In my view, it is not enough to assume that in*

*the circumstances of a particular case, even if counsel was called upon to proceed he would not be in a position to do so. That in my view, would be nothing but mere speculation. It is only right and proper that before a party's claim in a court of law is dismissed, that party should be given an opportunity of being heard. The appellant was,*  
 B *in this case denied this important right, and that being the case, the decisions of both the trial court and the Court of Appeal cannot be allowed to stand. In the circumstance, on this point, the appeal succeeds and it is accordingly allowed. The decisions of both the trial*  
 C *court and the Court of Appeal are hereby set aside. The case is remitted to the Federal High Court, Lagos Division for trial before another Judge of that Court. The appellant is entitled to costs assessed at N1000.00 in this Court and N500.00 in the Court below."*

See also the case of Obomhense V. Erhanon (1993) 7 NWLR  
 D (Pt.303) 22 and Etim V. Reg. Trustees (2004) 11 NWLR (Pt.883) 79.

There is bounden duty on the court to hear all applications pending before it whether they be frivolous or even an outright abuse of the process of Court. It is by hearing the parties that the court will be in position to determine the nature of application in question. It is  
 E not within the jurisdiction, discretion or competence of a Court to refuse to take a pending process before it. See also the case of Elike Nwankwoala (1984) 12 SC 301, and General Electric Co. V. Akande (2012) 16 NWLR (Pt.1327) 593 at 611. Further related authorities  
 F are:- Nalsat Team Associates V. NNPC (1991) 8 NWLR (Pt.212) 652 and Akpan V. Bob (2010) 17 NWLR (Pt.1223) 421.

*"A hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard ....."* See Offordile V. Egwuatu (2006) 1 NWLR (Pt.961) P421 at 433.

G I have said earlier that an exercise of discretion is within a court's competence and purview. The rider is however also pertinent that any exercise of such discretion must be with caution taking into consideration all materials placed before the court. In otherwords it must be judicious and judicial for purpose maintaining the balance or equi-  
 H librium of justice.

My brother Okoro, JSC has considered the two issues raised very comprehensively. I also adopt his judgment as mine and allow the appeal in part, in the same terms as the lead judgment.

**KEKERE-EKUN JSC**

I had the benefit of reading in advance the judgment of my learned brother, JOHN INYANG OKORO, JSC, just delivered, I agree with the reasoning and conclusion that the appeal should be allowed in part.

The constitutional right to fair hearing guaranteed by Section 36 (1) of the 1999 Constitution of Nigeria (as amended) is founded upon the twin pillars of natural justice: i.e. *audi alteram partem* (hear the other side) and *nemo iudex in causa sua* (no one should be a judge in his own cause). See: 7-UP Bottling Co. Ltd. Vs Abiola & Sons Ltd. (1995) 3 SCNJ 37; Deduwa Vs Okorodudu (1976) 1 NMLR 237 @ 246. It is also well settled that any proceedings conducted in breach of a party's right to fair hearing, no matter how well conducted would be rendered a nullity. See: Tsokwa Motors (Nig.) Ltd. Vs U.B.A. Plc. (2008) All FWLR (Pt.403) 1240 @ 1255 A - B; Adigun Vs A.G. Oyo State (1987) 1 NWLR (Pt.53) 674; Okafor Vs A.G. Anambra State (1991) 3 NWLR (Pt.200) 59; Leaders & Co. Ltd. Vs Bamaiyi (2010) 18 NWLR (Pt.1225) 329.

The grant or refusal of an application for adjournment is at the court's discretion. In the exercise of such discretion the court must act judicially and judiciously taking all the prevailing circumstances into account. In an attempt to ensure the expeditious disposal of matters before it the court must not lose sight of its constitutional duty to give all the parties before it a fair hearing, an opportunity to present their respective cases without let or hindrance. Where an application is made to court, whether oral or in writing, it must be determined one way or the other before further steps are taken in the proceeding.

In the instant case, as rightly pointed out by my learned brother, Okoro, JSC in the lead judgment, the Lower Court failed to rule on the appellant's application for a short adjournment after he had withdrawn his application to file the record of appeal out of time for being defective. Without ruling on the application for adjournment, the court proceeded to dismiss the appeal for failure to compile the record within the time stipulated by the Court of Appeal Rules even though the record had already been filed and only required an order of court to validate it. In failing to rule on the application for adjournment and proceeding directly to dismiss the appeal, the appellant suffered a miscarriage of justice, as his right of appeal was unceremo-

niously cut dead in its tracks. The dismissal of the appeal meant that the appellant's right to ventilate his grievance against the judgment of the trial court was lost forever, I agree with my learned brother that the Lower Court was wrong in failing to rule on the application for adjournment before taking further steps in the proceedings. Further-  
 B more, having regard to the facts of the case, the proper order to make in the circumstances was one striking out the appeal and not an order for dismissal.

For these and the more detailed reasons advanced by my  
 C learned brother, Okoro, JSC in the lead judgment, I also allow the appeal in part. The order of the Lower Court made on 12/12/2013 dismissing the appeal is hereby set aside. The said appeal is hereby struck out. I make no order for costs.

D

### **NWEZE JSC**

I had the advantage of reading the draft of the leading judgment which my noble Lord, Okoro, JSC, just delivered now. I agree with the reasoning and conclusion.

E The question whether or not to grant an adjournment is a matter within the discretion of a court, *Ilona and Anor v Olise* (1971) LPELR - 1495 (SC) 9, B-C. However, it has a duty to state clearly whether it grants or refuses the said application for adjournment and  
 F its reason for doing so. Above all, it should be apparent, from the record, that it gave careful consideration to its decision. *A. G. Rivers State v Ude and Ors* [2007] All FWLR (Pt.347) 598, 617-618; *Udo v. State* [1988] 3 NWLR (Pt.82) 316.

Where, in the exercise of that discretion either to grant or refuse  
 G such an application, the court does so judicially and judiciously in tandem with settled principles, even though a higher court would have exercised its discretion differently, it [the higher court] would seldom interfere with that exercise, *Odusote v. Odusote* (1971) 1 All NLR 219; *Ariori v Elemo* [1993] 1 SC 12. It would be otherwise, if  
 H that discretion was not exercised both judicially and judiciously, *Ilona v. Olise* (supra); *Ononuju v Ononuju* [1991] 5 NWLR (Pt.192) 479.

What is more, although the exercise of discretion in favour or refusal of an application for an adjournment is, usually, dictated by the circumstances of each case, *Salu v. Egeibon* [1994] 6 NWLR

(Pt.348) 23, 45; also, (1994) LPELR -2997 (SC); *Odusote v Odusote* (supra), an application for adjournment should, always, be favoured where it presents the only Hobson's choice of determining a cause or matter on its merits. As it is well-known, the truncation of matters midstream, before its merit is fully known, almost always, defeats the ends of justice. In such situations, the defaulting party is, invariably, denied the right of marshalling all the materials in support of this case, *Salu v. Egeibon* (supra). B

In the instant case, upon coming to the realization that his application to regularize his record of appeal was defective, counsel for the appellant withdrew it and applied for an adjournment. Instead of ruling on the said application in the exercise of its undoubted discretion, *Ilona and Anor v Olise* (supra) and offering reasons which demonstrably show that due consideration was given to it, *A. G. Rivers State v Ude and Ors* (supra); *Udo v. State* (supra), the Lower Court, invoking Order 8 Rules 4 and 5 of its Rules, dismissed the appeal on the ground of failure to compile the record within time. However, as pointed out in the leading judgment, the record had, actually, been filed and only required an order of court to validate it. C

In the circumstance, I am persuaded that this is a situation where this court ought to interfere for as held in *Salu v Egeibon* (supra) at 17, A-D, where an application for an adjournment is made to a court, it should bear in mind the requirement that justice should be done to both parties and that it is also in the interest of justice that the hearing of a case should not be unduly delayed. All the same, confronted with a situation, it should grant such an application if its refusal is most likely to defeat the rights of the parties altogether or will occasion injustice to one or both of them unless there is a good or sufficient cause for such refusal. Where this is not done, an appellate court will not only have the power but will be under a duty to review the ruling refusing the application. E

It is for these, and the more detailed reasons in the leading judgment that I, too, shall allow this appeal in part. Accordingly, the Lower Court's order of Dec. 12, 2013, dismissing the appeal, is hereby set aside. In substitution thereof, I enter an order striking out the appeal. I abide by the consequential orders in the leading judgment. F