

**SUPREME COURT OF NIGERIA**  
FRIDAY 15TH MAY, 2015. SC. 64/2005  
**CORAM:- J. A. FABIYI, C. B. OGUNBIYI,**  
**K. M. O. KEKERE-EKUN, J. I. OKORO, C. C. NWEZE, JJSC**

1. FATAYI SULE DAKAN  
2. SUNDAY BANKOLE  
3. SIMEON OYEBI ..... APPELLANTS  
4. MOMODU AGBAJE  
5. SANUSI OPALEYE  
6. SAULA ANIBIRE  
7. GANYU SALAMI AGBAJE  
AND  
1. ALHAJI LASISI ASALU  
2. HASSAN TAIWO ANJORIN ..... RESPONDENTS  
3. MUSEDIKU AKINBOYEDE  
(For themselves and on behalf of  
Osolo Royal Family of Otta)

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APPEALS - Dismissal - Want of diligent prosecution - Appeal dismissed on failure to file appellant's brief is final - And the court has no jurisdiction to revive it (H1)

APPEALS - Dismissal - Subsequent order - Validity of - Having earlier dismissed respondents' appeal - CA became functus officio - And as such its latter order for extension of time - Was made in error (H2)

***FACTS***

Plaintiffs/respondents (in a representative capacity) commenced this action at the High Court of Ogun State Abeokuta against defendants/appellants, claiming for declaration of title, damages for trespass and order of an injunction. The court dismissed respondents' case which gave rise to their initiating an appeal before the Court of Appeal Ibadan Division. Upon an application brought by appellants, the appeal was dismissed by the court.

Thereafter, respondents brought application praying the court to set aside its ruling dismissing their appeal. The application was dismissed on the ground that the appeal was dismissed for want of

prosecution. Thereafter, respondents again approached the court, seeking for extension of time to file appellants' brief and for leave to file and argue additional grounds of appeal. Appellants filed objection against respondent's application for extension of time. The court in its ruling, overruled the objection. Dissatisfied, appellants appealed to Supreme Court.

**ISSUE FOR DETERMINATION**

Whether the Court of Appeal was in error in granting the respondents' application for leave to argue additional Grounds of Appeal and an order extending the time within which they may file a Brief of argument in these proceedings?

**HELD** (Unanimously allowing the appeal per **NWEZE JSC**)

*APPEALS - Dismissal - Want of diligent prosecution*

**1. An appeal dismissed on the ground of failure to file appellant's brief of argument is final. The appeal so dismissed cannot be revived.**

***Designed as a provision for the enhancement of case management, Order 6 Rule 10 (supra) imposed a tri-partite obligation: on the part of the appellant, the duty to get on with his appeal since it has, always, been the demand of public policy that the business of the court should be conducted with expedition and dispatch.***

***Against the background of the congestion of cases at the lower Court, the corresponding obligation on respondents, of ensuring that indolent appellants pursued their appeals expeditiously, was to ginger the court into exercising its power of purging its docket of stale appeals by their dismissal for want of diligent prosecution. The court, on the other hand, was empowered to dismiss such dead appeals as prayed under the above provision.***

***The answer to the question posed in this appeal, therefore, is that the lower Court erred in law when on December 3, 2002, it granted the respondents' application for leave to argue additional Grounds of Appeal. As noted above, since the appeal***

***had been dismissed, the original Notice of Appeal was interred with it. So, it was, thus, illogical to favour the respondents with an order to argue additional Grounds of Appeal since that court, having dismissed the appeal, lacked the jurisdiction to resuscitate or revive it by exhuming it in any guise.***  
(pp. 1702 D/1704 A)

*APPEALS - Dismissal - Subsequent order - Validity of*

***2. Having regard to all I have said above, the inevitable conclusion is that, having dismissed the respondents' appeal by its ruling of November 17, 1994, the lower Court became functus officio and, as such, its order of December 3, 2002, for extension of time in favour of the respondents, was made in grave error. In consequence, I enter an order setting aside the said order. I, accordingly, allow this appeal and set aside the ruling of the lower Court of December 3, 2002.*** (p. 1704 H)

## **REPRESENTATION**

Chief O. T. Adebisi; for the Appellants

O. J. Bamgbose; for the Respondents

## **CASES REFERRED TO**

UBA Plc v. Ajileye [1999] 13 NWLR (pt. 633) 116  
 Kraus Thompson Org v N.I.P.S.S. [2004] 5 SC (pt. 1) 16  
 Babayagi v. Bida [1998] 1-2 SC 108  
 Chukwuka v. Ezulike [1986] 2 NSCC 1347  
 Afonja v. Afonja (1971) UILR 105  
 Koku v. Koku [1999] 8 NWLR (pt. 616) 672  
 Folorunsho v. Folorunsho [1996] 5 NWLR (pt. 450) 612  
 Nzegwu v. Nzegwu [2005] 12 WRN 120  
 Obiorah v. Osele [1989] 1 NWLR (pt. 97) 279  
 State v Nnolim (1994) LPELR - 3222 (SC) 20  
 Tsokwa v. U.T.C. (Nig.) Ltd [2000] 7 NWLR (pt. 666) 654  
 Orobator v. Amata [1981] 5 SC 276  
 Nwaora v. Nwaukoku [1985] 2 SC 86  
 Yonwuren v. Modern Sign Ltd [1985] NWLR (pt. 2) 244  
 Chukwuka v. Ezulike [1986] 5 NWLR (pt. 45) 892

**RULES REFERRED TO**

Court of Appeal Rules 2002, O. 3 rr. 3 & 4, O. 5 r. 3

**LEAD JUDGMENT BY NWEZE JSC**

The respondents in this appeal [as plaintiffs], on behalf of themselves and the Osolo Royal Family, took out a Writ of Summons against the appellants herein [as defendants] at the High Court of Justice, Ogun State, holden at Abeokuta. They [the respondents, as plaintiffs] claimed against them [appellants, as defendants], jointly and severally, as follows:

1. Declaration that the plaintiffs are entitled to Certificate of Occupancy in respect of the land situate, lying and being at Osi Quarters, Otta, Egba Division, Ogun State;
2. N100,000 (One Hundred Thousand Naira) damages from each of the defendants for trespass committed on the said land by clearing and constructing building thereon without the consent of the plaintiffs;
3. An injunction against the defendants jointly and severally restraining them from entering the said land and doing anything thereon without the consent of the plaintiffs.

Issues were, duly, joined in the settled pleadings. At the conclusion of the hearing, the said court hereinafter referred to as “the trial court”), in a considered judgment delivered on November 6, 1985, dismissed the respondents’ case [as shown above, they were the plaintiffs at the trial court], Dissatisfied with the judgment, they appealed to the Court of Appeal, Ibadan Division (subsequently in this judgment to be referred to, simply, as “the lower Court”).

Sequel to an application by the appellants [as applicants], the lower Court, in a ruling of November 17, 1994, dismissed the said appeal. Subsequently, they [the respondents], beseeched the lower Court with an application to set aside its ruling which, as shown above, dismissed the appeal. The lower Court dismissed the said application in its ruling of November 23, 2000, holding that, as the appeal was dismissed for want of prosecution, the respondents [as applicants] were not entitled to the relief provided in Order 3 Rule 20 (4) of the Rules of the lower Court [in force at the material time]. Finding no merit in the application, the lower Court dismissed it with costs in favour of the appellants [as respondents to the application].

What prompted the present appeal was a later ruling by the lower Court dated December 3, 2002. By their application of June 28, 2002, the respondents, again, approached the lower Court for:

i. An order extending the time within which the plaintiffs/appellants/applicants may file the appellants' brief of argument in these proceedings; B

ii. An order granting leave to the plaintiffs/appellants/applicants herein to file and argue additional grounds of appeal.

Instructively, as at June 28, 2002, when the said application was filed, there were no pending proceedings before the lower Court between the parties, the said court having, as shown above, dismissed the respondents' application to set aside the earlier ruling of the said court which dismissed the appeal of the respondents for want of diligent prosecution. C

Expectedly, the appellants, stridently, contested the said application. However, by a ruling of December 3, 2002, the lower Court overruled the appellants' objection to the application for extension of time to file the respondents' [then appellants'] brief on the ground that it was premature. According to the court:

He [counsel for the appellants/objectors] is at liberty to raise his objection at a later stage. The appellants/applicants' motion filed on 28/6/2002 is therefore granted as prayed; time is extended by seven days from today [December 3, 2002] within which the applicants are to file the appellants' brief; leave is also granted to the applicants to file and argue the four additional Grounds of Appeal attached to the motion in addition to the three original Grounds... [Page 50 of the record] E F

Aggrieved by the above ruling of the lower Court, the appellants [respondents to the motion] appealed to this court, urging it to resolve their two issues set out for the determination of this appeal, namely: G

1. Whether the Court of Appeal was right to extend the time to file brief and to argue additional Grounds of Appeal in respect of an appeal which had been dismissed? H

2. When is the appropriate time to oppose an application for extension of time to file appellants' brief and for leave to argue additional Grounds of Appeal in respect of an appeal that has been dismissed?

On their part, the respondents formulated a sole issue which, in their view, would be adequate to dispose of this appeal. They framed it thus:

Whether the Court of Appeal was in error in granting the respondents' application for leave to argue additional Grounds of Appeal and an order extending the time within which they may file a Brief of argument in these proceedings?

The sole issue which the respondents set out for the determination of this appeal appears more apposite having regard to the main grouse of the appellants, as evidenced from the two Grounds of Appeal. I, therefore, adopt it as the issue for determination in this appeal.

#### ARGUMENTS OF COUNSEL APPELLANTS' SUBMISSIONS

When this appeal came up for hearing on February 24, 2015, Chief O.T. Adebisi, for the appellant, adopted the appellant's brief of argument filed on February 17, 2007 although deemed, properly, filed on February 27, 2008. He argued that once an appeal has been dismissed for want of prosecution for non-filing of the appellant's brief, it operates as a dismissal on the merit. Such an order, in his view, cannot be set aside by the lower Court, *UBA Plc v. Ajileye* [1999] 13 NWLR (Pt.633) 116, 126; *Olowu v. Abolore* [1993] (sic) NWLR (Pt.283) 255; *Kraus Thompson Org v N.I.P.S.S.* [2004] 5 SC (Pt.1) 16; *Babayagi v. Bida* [1998] 1-2 SC.108; *Chukwuka and Ors v. Ezulike and Ors* [1986] 2 NSCC 1347, 1351.

He further canvassed the view that, having dismissed the appeal because of the absence of the appellant's brief, the lower Court became functus officio. He maintained that, having earlier refused to set aside its decision dismissing the appeal, the lower Court was wrong in treating the appeal as if it were still extant. In his view, the orders for extension of time within which the appellants' brief could be filed and for leave to file additional Grounds of Appeal were, equally, made in error. He submitted that, since the appeal had ceased to exist, there was no appeal pursuant to which the appellant's brief could be filed and further Grounds of Appeal could be argued.

He explained that the appellant [as respondent in the application before the lower Court] placed all the necessary materials at its disposal, citing pages 46-47 and 50 of the record. As such, the lower

Court should have discountenanced the said application for extension of time, Chukwuka and Ors v Ezulike and Ors (supra). He cited Order 5 Rule 3 of the Court of Appeal Rules, 2002 as a statutory ouster of the court's jurisdiction to set aside or review its own decision. He contended that the lower Court's earlier ruling dismissing the appeal was unimpeachable. He pointed out that, since there was no complaint that the said decision was vitiated by any mistake, the lower Court's ruling, the subject of this appeal, amounted to that court's review of its own judgment. He urged the court to hold that the lower Court erred in so doing.

Next, he observed that the appellants, vehemently, opposed the respondents' motion at the lower Court, citing page 50 of the record. He drew attention to the lower Court's position that the said objection was premature and ought to be raised at a later stage. He maintained that Order 3 Rules 3 and 4 of the Court of Appeal, 2002 [which dealt with applications in proceedings at the material time] only provided for the form of applications and did not stipulate how and when they could be opposed. He, however, submitted that the appropriate time and stage for opposing such an application was, immediately, after it had been argued and before the court's decision on it.

#### RESPONDENTS' CONTENTION

On his part, O. J. Bamgbose, for the respondents, adopted their brief filed on January 13, 2009 and deemed, properly, filed on July 8, 2009. In the main, he contended that the lower Court was right in its ruling under appeal. He explained that the respondents entreated the lower Court for two reliefs, namely, for an order for extension of time within which they [respondents] could file their brief of argument and for leave to argue additional Grounds of Appeal.

He canvassed the view that, by virtue of Section 15 of the Court of Appeal Act, the lower Court was vested with the discretion to grant such an application. He explained that, being satisfied with the said application, the said court, graciously, granted the application. In his view, all the above submissions of the appellants are misconceived.

Citing Section 25 of the Court of Appeal Act and Order 3 Rule 9 of the Court of Appeal Rules, 1981, he maintained that a major

feature by which an appeal could be identified is the Notice of Appeal which shows the nature of the appellant's grievance against the judgment of a lower Court. According to him, the present appellants did not exhibit the Notice of Appeal which the lower Court, allegedly, dismissed earlier. He noted that, as a superior court of record, the lower Court had to deal only with the processes, duly, filed at its Registry and brought before it, *Afonja v. Afonja* (1971) UILR 105; *Koku v Koku* [1999] 8 NWLR (Pt.616) 672.

He pointed out that while the appellants' position was that the lower Court had dismissed the present respondents' appeal [CA/108/84], the respondents, at pages 7-24 of the record, showed that the appeal that was dismissed on April 9, 1992 was CA/108/90 in which the parties were, *Alhaji Lasisi Otapo and Ors v. Zachaeus Faleye and Ors*. He took the view that the appellants [as respondents at the lower Court] ought to have exhibited a certified true copy of the Notice of Appeal that was, allegedly, dismissed. In the alternative, they should have obtained letters from the Registrars of either the trial court or the lower Court to explain the relationship between all the appeals.

He noted that the appellants did not exhibit the Notice of Appeal which the lower Court, allegedly, dismissed to assist this court in forming an opinion as to whether that court had earlier dismissed appeal no CA/1/145/96. He cited *Folorunsho v Folorunsho* [1996] 5 NWLR (Pt.450) 612; *Nzegwu v Nzegwu and Ors* [2005] 12 WRN 120 as authorities for the proposition that the fact that an appellate court would have reasoned differently from the way a lower Court did would not lead the appellate court to dismiss the said lower Court's reasons or decision. He urged the court to dismiss the appeal and affirm the ruling of the lower Court.

#### RESOLUTION OF THE ISSUE AN APPEAL AND ITS CHEQUERED HISTORY

It would, perhaps, be more appropriate, at this point, to chart the forensic trajectory of this appeal so as to underscore its chequered movement from one judicial forum to the other. As indicated at the outset of this judgment, the respondents in this appeal [as plaintiffs], on behalf of themselves and the Osolo Royal Family, took out a Writ of Summons against the appellants herein [as defendants] at the High Court of Justice, Ogun State, holden at Abeokuta. The appellants herein cross appealed. On November 6, 1985, that court dismissed



the respondents' claim and the appellants' counter claim.

Aggrieved by the outcome of the case, the respondents appealed to the Court of Appeal, Ibadan Division. They perfected all the conditions of appeal given at the Registry of the trial court where the Notice and Grounds of appeal were filed, However, they failed, refused or neglected to file their brief of arguments. It was this apparent lethargy on the part of the respondents [as appellants at the lower Court] that prompted the Motion on notice of October 14, 1994, by which the present appellants [respondents in the said appeal at the lower Court] entreated the lower Court to dismiss the appellant's appeal for want of prosecution.

That was about nine years after the trial court had delivered its judgment dismissing the respondents' claims; over eight years after the settlement of the record at the High Court Registry, Abeokuta; and four years after the respondents had obtained their copy of the record of appeal, [page 30 of the record]. The application was heard and determined by the lower Court on November 17, 1994. Due to their bearing on the subsequent proceedings, the proceedings of that day are set out here-under:

*"Adeosun: This is an application for an order dismissing this appeal for want of prosecution... Up till now no brief of argument has been filed, only a Counter Affidavit which has not debunked our deposition that record of appeal was settled on April 3, 1986.*

*Ogunsokan: I rely on all the paragraphs in our Counter Affidavit.*

*Court: Application is granted. This is an appeal against a judgment delivered in 1985. The appellants have since filing the Notice of Appeal and settling of record of Appeal in 1986 not bothered to file the appellants' brief of argument, The depositions in the supporting affidavit have not been debunked by the appellants [the present respondents] in their Counter Affidavit. I believe this is an appeal that should be properly dismissed as prayed by the applicants/respondents."*[Page 25 of the record]

It is noteworthy that the respondents did not appeal against this ruling dismissing their appeal, see per Mohammed JSC (as he then was) in *Asalu and Ors v Dakan and Ors* (2006) LPELR-573 (SC). Rather, they, first, moved the lower Court to set aside its ruling of November 17, 1994. They, however, withdrew the application

which was, accordingly, struck out. Two years later, precisely, on February 2, 1996, they re-filed the motion [this time, it was dated February 1, 1996], praying the lower Court for:

1. An order setting aside the ruling of this Honourable Court dated 17th November, 1994 in these proceedings;

B 2. An order restoring and/or validating the appeal in Suit No.HCL/27/80 between the parties herein, that is, Alhaji Lasisi Asalu and Ors v. Fatai Sule Dakan and Ors.

C In its ruling of November 23, 2000, the lower Court held that, since the respondents' appeal was dismissed for want of prosecution, their application to set aside the court's ruling [that is, the lower Court's ruling of November 17, 1994, dismissing the respondents' appeal for want of diligent prosecution] was devoid of merit. It, accordingly, dismissed the said application, [page 35 of the record].

D Dissatisfied with the above ruling of the lower Court, they [the respondents] appealed to this court. While their appeal was still pending before this court, they returned to the lower Court [that was their third outing before the said court] with an application dated June 28, 2002 praying for:

E i. An order extending the time within which the plaintiffs/appellants/applicants may file the appellant's brief of argument in these proceedings;

F ii. An order granting leave to the plaintiffs/appellants/applicants herein to file and argue additional Grounds of appeal. [Page 1 of the record]

G It is noteworthy that in the above ruling of November 23, 2000, the lower Court acknowledged that the "position of the law, therefore, is that this court lacks the power to review any of its judgment (sic), ruling (sic) or order (sic)," [page 34 of the record]. In effect, by that acknowledgement that it lacked the power to review any of its judgments or rulings, its ruling of November 17, 1994, dismissing the respondents' appeal for want of diligent prosecution, was extant and subsisting.

H In effect, as at June 28, 2002, when the said application ["for an order extending the time within which the plaintiff/appellants/applicants may file the appellants' brief of argument in these proceedings; an order granting leave to the plaintiffs/appellants/applicants to file and argue additional Grounds of Appeal"] was filed, there were,

actually, no pending proceedings between the parties before the lower Court, the said court having, as shown above, dismissed the respondents' application to set aside the earlier ruling of the said court which dismissed the appeal of the respondents for want of diligent prosecution. That notwithstanding, and despite the vehement opposition of the present appellants [who were respondents to the application before the lower Court], the said lower Court, in its ruling of December 3, 2002, granted the applicant as prayed. It made the following orders:

1. Time is extended by seven days from today within which the applicants are to file the applicants' (sic, their) brief;

2. Leave is also granted to the applicants to file and argue the four additional Grounds of Appeal attached to the Motion in addition to the three original Grounds. The four additional Grounds are to be numbered four to seven, respectively. [page 50 of the record]

It was this ruling that prompted the present appeal. As indicated earlier in this judgment, the respondents' sole issue appears more apposite having regard to the main grouse of the appellants, as evidenced from the two Grounds of Appeal. That sole issue was framed thus:

Whether the Court of Appeal was in error in granting the respondents' application for leave to argue additional Grounds of Appeal and an order extending the time within which they may file a Brief of argument in these proceedings?

Earlier in this judgment, attention had been drawn to the fact that, dissatisfied with the above ruling of the lower Court dated November 23, 2000 which declined the respondents' invitation to set aside its ruling of November 17, 1994 dismissing their appeal for want of diligent prosecution and to restore or validate the appeal between the parties, they [the respondents] appealed to this court. In its judgment of May 26, 2006, this court dismissed the said appeal for "*being devoid of any merit*", Asalu and Ors v Dakan and Ors (2006) LPELR -573 (SC). In the instructive words of Mohammed JSC (as he then was, now CJN): [with regard to] the instant appeal which is also against the refusal of the court below to set aside its own decision to give life to the appellants' appeal dismissed on 17th November, 1994 - *I entirely agree with that court that it lacked jurisdiction to grant the reliefs sought in the application of the appellants to*

*restore their appeal to the cause list of the court, because the order of dismissal of the appeal under Order 6 Rule 10 of the Court of Appeal Rules, cannot be revisited under any guise to revive the appeal.* [Italics supplied for emphasis]

#### RESOLUTION OF THE ARGUMENTS

B Counsel for the appellants, in paragraph 3.01 of the brief, canvassed the view that once an appeal has been dismissed for want of prosecution for non-filing of the appellants' brief, it operates as a dismissal on the merit. This is unanswerable. In the words of Order 6 Rule 10 of the Court of Appeal Rules, 1981:

C 10. Where an appellant fails to file his brief within the time provided for in rule 2 of his Order, or within the time extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution...

D ***An appeal dismissed on the ground of failure to file appellant's brief of argument is final. The appeal so dismissed cannot be revived.***

***Designed as a provision for the enhancement of case management, Order 6 Rule 10 (supra) imposed a tri-partite obligation: on the part of the appellant, the duty to get on with his appeal since it has, always, been the demand of public policy that the business of the court should be conducted with expedition and dispatch.*** Olowu and Ors. v. Abolore and Anor (supra) at 270, citing Obiorah v. Osele [1989] 1 NWLR (Pt.97) 279; also, F Governor of Anambra State v. Orji [1990] 5 NWLR (Pt.150) 349, 350.

***Against the background of the congestion of cases at the lower Court, the corresponding obligation on respondents, of ensuring that indolent appellants pursued their appeals expeditiously, was to ginger the court into exercising its power of purging its docket of stale appeals by their dismissal for want of diligent prosecution.*** Obiora v. Osele (1989) LPELR - 2189 (SC) 28, A-D; Babayagi v Bida (1989) LPELR-688 (SC) 19-20, G-A; Akujinwa and Ors v Nwaunuma and Ors (1998) LPELR-391 (SC) 26, B-C; Chime v. Ude [1996] 7 NWLR (Pt 461) 379. ***The court, on the other hand, was empowered to dismiss such dead appeals as prayed under the above provision.*** Akujinwa and Ors v. Nwaunuma and Ors (supra); State v Nnolim and Ors (1994)

LPELR - 3222 (SC) 20, A-C so as to bring relief to, and decongest, its Cause List, Obiora v Osele (supra).

That was the rationale for the above rule for the dismissal of an appeal inter alia where an appellant failed to file his brief of argument within the time prescribed or as extended by the court, Akande, Olowu and Ors v. Amudatu Abolore and Anor (supra), page 272. Such a dismissal order terminated the life of the appeal, which was, in consequence, delisted from the cause list. No court had the jurisdiction to resuscitate or revive it, Kraus Thompson Organisation v. N.I.P.S.S. [2004] 5 SC (Pt.1) 16 because such an appeal dismissed on the ground of the failure to file an appellant's brief of argument was final and thus could not be revived. Tsokwa v. U.T.C. (Nig.) Ltd [2000] 7 NWLR (Pt.666) 654, 661.

Indeed, in 2006, in an appeal involving the same parties - Asalu and Ors v. Dakan and Ors (2006) LPELR -573 (SC) 19, C-D — this court had intoned magisterially that: “...an appeal dismissed by the Court of Appeal for failure to file appellants’ Brief of Arguments is final and such appeal cannot be revived by the Court of Appeal,” [italics supplied for emphasis]; Olowu v. Abolore [1993] 5 NWLR (Pt.293) 255; Babayagi v. Alhaji Bida [1998] 1-2 SC 108; [1998] 7 NWLR (Pt.538) 367. Put simply, it amounted to a dismissal on the merits, UBA Plc v Ajileye [1999] 13 NWLR (Pt.633) 116, 126; Olowu v. Abolore (supra); Kraus Thompson Org v N.I.P.S.S. (supra); Babayagi v. Bida (supra). On its part, the court, upon making such a dismissal order, became functus officio, Orobator v. Amata [1981] 5 SC 276; Nwaora v. Nwaukoku [1985] 2 SC 86, 167; Yonwuren v. Modern Sign Ltd [1985] NWLR (Pt.2) 244, 245; Chukwuka v. Ezulike [1986] 5 NWLR (Pt.45) 892.

Accordingly, it lacked the jurisdiction either under the Constitution; its constitutive Act [the Court of Appeal Act] or under its inherent jurisdiction to entertain such an appeal any longer, Chukwuka v. Ezulike (supra); Ogbu v Urum [1981] 4 SC 1; Yonwuren v Modern Signs (Nig) Ltd [1985] 2 SC 86; [1985] 1 NWLR (Pt.110) 483. The net effect was that an appeal dismissed on the ground of the failure to file appellants’ brief of argument under the said Rule was final. Tsokwa v. U.T.C. (Nig.) Ltd (supra); Asalu and Ors v. Dakan and Ors (supra).

As such, the court could not conjure any juridical powers un-

der its inherent jurisdiction to set aside such an order of dismissal properly made in the valid exercise of its jurisdiction and re-enter the appeal. Olowu v. Abolore (supra); Babayagi v. Alhaji Bida (supra).

***The answer to the question posed in this appeal, therefore, is that the lower Court erred in law when on December 3, 2002, it granted the respondents' application for leave to argue additional Grounds of Appeal. As noted above, since the appeal had been dismissed, the original Notice of Appeal was interred with it. So, it was, thus, illogical to favour the respondents with an order to argue additional Grounds of Appeal since that court, having dismissed the appeal, lacked the jurisdiction to resuscitate or revive it by exhuming it in any guise.***  
 Kraus Thompson Organisation v. N.I.P.S.S. (supra).

A fortiori, having become functus officio, Orobator v. Amata (supra); Nwaora v. Nwaukoku (supra); Yonwuren v. Modern Sign Ltd (supra); Chukwuka v. Ezulike (supra), the lower Court was, equally, in grave error when it purported to enter an order extending the time within which the respondents could "file a Brief of argument in these proceedings." By its dismissal order of November 17, 1994, which snuffed life out of the respondents' appeal and interred it [the said appeal] in the said proceedings of November 17, 1994, there were no more proceedings in respect of which the respondents could "file a Brief" because of the finality of the order, Tsokwa v. U.T.C. (Nig.) Ltd (supra); Asalu and Ors v. Dakan and Ors (supra).

Indeed, the lower Court's said order of December 3, 2002, for extension of time, was a futile attempt to exhume the bones of the appeal which "underwent ceremonial interment," Chukwuka and Ors v. Ezulike and Ors (supra) at 1351, in the earlier proceedings of November 17, 1994. The latter proceedings [of November 17, 1994], having effectively, delisted the respondents' appeal from its Cause List, that court could no longer resuscitate the same appeal by its order of December 3, 2002 for extension of time within which to file the respondents' brief and leave to file and argue additional Grounds of Appeal, Kraus Thompson Organisation v. N.I.P.S.S. (supra); Tsokwa v. U.T.C. (supra); Asalu and Ors v. Dakan and Ors (supra); Olowu v. Abolore (supra); Babayagi v. Alhaji Bida (supra).

***Having regard to all I have said above, the inevitable conclusion is that, having dismissed the respondents' appeal***

**by its ruling of November 17, 1994, the lower Court became functus officio and, as such, its order of December 3, 2002, for extension of time in favour of the respondents, was made in grave error. In consequence, I enter an order setting aside the said order. I, accordingly, allow this appeal and set aside the ruling of the lower Court of December 3, 2002.** Appeal B allowed with N50,000 costs in favour of the appellants.

### **FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother - Nweze, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is meritorious and should be allowed. C

The facts of the matter leading to this appeal have been well set out in the leading judgment. Put briefly, the plaintiffs/respondents' suit was dismissed by the trial court on November 6th, 1985. They appealed to the Court of Appeal, Ibadan Division (the court below). Thereat, they failed to file their brief of argument. Consequently, the defendants/appellants moved the court to dismiss the appeal for failure to file their brief of argument. The court below dismissed the appeal for the stated reason on November 17th, 1994. The plaintiffs/respondents attempted to set same aside. The court below dismissed their application which hit the rock, as it were, on November, 23rd, 2000. D E F

By an application filed on June 28th, 2002, the plaintiffs/respondents, again, surreptitiously approached the court below for an order to file their brief of argument out of time; inter alia. Surprising, on December 3rd, 2002, the same court granted the application, G after overruling the appellants' objection on the ground that it was premature to so do at that stage.

The above stance of the court below has precipitated the appeal to this court. As usual, briefs of argument were filed and exchanged by the parties. The two issues decided by the appellants H before this court read as follows:-

*"1. Whether the Court of Appeal was right to extend the time to file brief and to argue additional Grounds of Appeal in respect of an appeal that has been dismissed.*

2. *When is the appropriate time to oppose an application for extension of time to file appellants' brief and for leave to argue additional Grounds of Appeal in respect of an appeal that had been dismissed?"*

B On behalf of the respondent, the sole issue formulated for the determination of the appeal reads as follows:-

*"Whether the Court of Appeal was in error in granting the respondents' application for leave to argue additional Grounds of Appeal and an order extending the time within which they may file a brief of argument in these proceedings."*

C In support, I wish to briefly reiterate the law that once an appeal has been dismissed, for want of prosecution for non-filing of the appellant's brief as herein, it operates as a dismissal on the merit. As observed by the learned counsel for the appellants, the dismissal order cannot be set aside by the court below itself. See: *Olowu v. Abolore* (1993) NWLR (Pt.288) 255; *Babayagi v. Bida* (1998) 1-2 SC.108; *Chukwuka & Ors. v. Ezulike & Ors.* (1986) 2 NSCC 1347 at 1351 cited in support by learned counsel to the appellants.

E In *Chukwuka & Ors. v. Ezulike & Ors.* (supra), this court, in a similar scenario, dismissed a similar application and held that it was an abuse of court process and that the decision to dismiss the appeal for want of brief of argument was a final decision on the merit and as such, this court was functus officio. The court below, should have followed the decision of this court as same is relevant and binding on it. This is a matter in which the court below should have appreciated that the doctrine of judicial precedent, otherwise referred to as stare decisis is well rooted in our jurisprudence. It ought to be strictly followed by all lower courts. There is sense in it to avoid confusion. See: *Royal Exchange Assurance Nig Ltd. v. Aswani Textiles Ind. Ltd.* (1991) 2 NWLR (Pt.176) 639 at 672. It is not proper to refuse to follow the decision of a superior court. A lower Court should toe the line; as it were. See: *Atolagbe v. Awuni & Ors.* (1997) 7 SCNJ 1.

H For the above reasons and the fuller ones adumbrated in the lead judgment, I too, feel that the court below erred in granting the order made by it on December 3rd, 2002. I also join in setting aside the said order as this appeal is allowed. I abide by the consequential orders contained in the lead judgment; that relating to costs inclusive.



**OGUNBIYI JSC**

I read in draft the judgment of my learned brother Nweze, JSC and I agree fully that the appeal herein has merit and should be allowed.

I only wish to say briefly that the respondent's appeal having been dismissed by the lower Court for want of Brief of argument have ceased to exist. The order made is final and conclusive and the court has become functus officio of its decision dismissing the appeal. It is also pertinent to say that the earlier application for extension of time to file appellant's brief and additional grounds of appeal which gave an impression as if the appeal was subsisting was in fact an error which did not give any legal effect. The lower Court, I hold, greatly erred when it granted the respondent's application for leave to file additional grounds of appeal. The appeal is dead and no further process can survive thereon as anything built on nothing will surely crumble.

The appeal is set on a sound footing and I hereby allow same in terms of the lead judgment of my brother Nweze, JSC inclusive of the order made as to costs.

E

**KEKERE-EKUN JSC**

I have read in draft before now, the judgment of my learned brother, C.C. Nweze, JSC just delivered. His Lordship has meticulously considered and ably resolved the sole issue in contention in this appeal. I adopt the reasoning and conclusion that the appeal is meritorious and should be allowed, as mine. I agree that having dismissed the respondents' appeal on 17th November, 1994 for failure to file their appellants' brief, the lower Court became functus officio and had no jurisdiction to grant the orders made on 3rd December, 2002 to essentially place something on nothing. To all intents and purposes, the appeal ceased to exist with effect from 17th November, 1994. The respondents have no option but to allow it to rest in peace.

H

I also allow the appeal and set aside the ruling of the lower Court delivered on 3/12/2002. I abide by the order for costs as contained in the lead judgment.

**OKORO JSC**

I have had the privilege of reading in draft the judgment of my learned brother C.C. Nweze, JSC just delivered with which I agree completely that this appeal has merit and deserves an order that it be allowed. I shall make a few comments in support of the judgment.

B This matter started at the High Court of Ogun State wherein the respondents were the plaintiffs. It was a claim for declaration of title. The respondents lost the case at the High Court. They appealed to the Court of Appeal. The appeal number was CA/I/108/90. On C 17th November, 1994, the said appeal was dismissed by the lower Court for failure to file appellants' brief many years after settlement and transmission of record. This was on application of the appellants. An application to set aside the dismissal order was refused on 23rd November, 2000. Then on 3rd December, 2002, the lower Court D granted an application for extension of time to file brief in the same appeal which had been dismissed. The issue before this court is whether this can be possible.

The appellant states in his first issue as follows:-

E *"Whether the Court of Appeal was right to extend the time to file brief and to argue additional grounds of appeal in respect of an appeal which had been dismissed."*

The respondents have a similar issue though couched differently. This sole issue is enough to determine this appeal.

F Apart from the arguments in the brief of both parties in this appeal, I have done an extensive reading of the record of appeal hoping to discover from where the court below gathered strength to grant the application for the respondents (as appellants therein) to file their brief of argument. This is so because the appeal for which G the brief was to be filed was no more in existence, same having been dismissed since 17th November, 1994; an attempt to revive same having been refused.

Order 6 Rule 10 of the Court of Appeal Rules, 2011 under which the appeal was dismissed states:

H *"10. Where an appellant fails to file his brief within the time provided for in Rule 2 of this Order, or within the time extended by the court, the respondent may apply to the court for the appeal to be dismissed for want of prosecution."*

*An appeal dismissed on the ground of failure to file appellant's*

*brief of argument is final. The appeal so dismissed cannot be revived."*

The above provision gives vent to the argument by the appellant that the dismissal of the appeal on 17th November, 1994 was final and the refusal to revive it on 23rd November, 2000 was in accordance with the said rule of court. In other words, the appeal had died a natural death. See Asalu & Ors v. Dakan & Ors (2006) 5 SC (Pt.3) 120, Chukwuka v. Ezulike (1986) 5 NWLR (Pt.45) 892. B

The truth of the matter is that as at 3rd December, 2002 when the Lower Court made an order extending time for the respondents (as appellants) to file their brief and argue additional grounds of appeal, there was no appeal pending. The order was thus made in vacuum. I think it was a void act. It was the revered Lord Denning MR who stated in Mcfoy V. UAC (1961) 3 ALL ER 1169 at 1172 that: C

*"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado; though it is sometimes convenient to have the court to declare it to be so. D*

*And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."* E

That order made by the lower Court on 3/12/2002 was an order made on nothing. As the learned jurist mentioned above, it cannot stay. It will collapse as there is no appeal upon which the order can operate. F

It is on the above reasons and the more elaborate ones in the lead judgment that I agree that this appeal has merit. I allow the appeal and set aside the order of the lower Court made on 3rd December, 2002, I abide by the order as to costs. G