

**SUPREME COURT OF NIGERIA**  
FRIDAY 18<sup>TH</sup> MARCH, 2016. SC. 80/14, 78/14 & 79/2014  
**CORAM:- M. MOHAMMED CJN, S. GALADIMA,**  
**O. RHODES-VIVOUR, N. S. NGWUTA,**  
**M. D. MUHAMMAD, JJSC**

ADEYEMO ABIODUN ..... APPELLANT  
V.

1. FEDERAL REPUBLIC OF NIGERIA  
2. EGBELE AUSTIN EROMOSELE ..... RESPONDENTS  
3. BAREWA PHARMACEUTICALS LIMITED

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APPEALS - Notice of - Filing - Notice of appeal is an initiating process  
- Which must be properly filed before there is a valid appeal - As an  
appeal is incompetent where notice is defective (H1)

APPEALS - Hearing - Condition - Appeal can only be heard on valid  
notice of appeal - Hence hearing of the appeal by CA on an abandon-  
ed notice - Amounted to a void act (H2)

SUPREME COURT - Appeals - Hearing - Power - The Court cannot  
review appeal that was heard on abandoned notice - As its power  
under SC Act s. 22 cannot override Constitution 1999 s. 233 (H3)

**FACTS**

Before the Federal High Court Lagos, 1<sup>st</sup> accused/appellant  
and two others were arraigned on six count charge for the offence of  
manufacturing an adulterated drug. They pleaded not guilty to the  
charges. At the commencement of the trial, prosecution/respondent  
called seven witnesses to prove its case against appellant and the  
others. Appellant gave evidence in person but did not call any witness.  
2<sup>nd</sup> and 3<sup>rd</sup> accused called one witness each in defence. Forty two  
exhibits were tendered and admitted in evidence.

At the end of the trial, the learned trial Judge acquitted the  
accused persons on counts 1, 2, 5 and 6. They were however found  
guilty on counts 3 and 4. Accordingly, they were sentenced to seven  
years imprisonment on each of counts 3 and 4. Not satisfied with the  
decision of the Court, appellant approached the Court of Appeal on

an appeal. The notice of Appeal filed on 26/06/13 was abandoned. A valid Notice of Appeal was subsequently filed on 03/07/13. However, the Court relied on the abandoned Notice of Appeal in affirming the decision of the trial Court. Still aggrieved, appellant appealed to the Supreme Court, contending that the judgment of the Court of Appeal based on the abandoned Notice of Appeal is a nullity.

**ISSUE FOR DETERMINATION**

*“Whether the learned Justices of the Court of Appeal acted within their jurisdiction in relying on a Notice of Appeal which had been abandoned instead of a Notice of Appeal upon which the parties had predicated their briefs.”*

**HELD** (Unanimously allowing the appeal per  
**RHODES-VIVOUR JSC**)

*APPEALS - Notice of - Filing*

**1. A writ of summons is an initiating process in the court of first instance, (The High Court) in the same way a Notice of Appeal is the initiating process in an appeal. The Notice of Appeal contains the complaint/s of the Appeal from the decision he is appealing from. A Notice of Appeal is no doubt a vital and very important process. It must be properly filed in court before there is a valid appeal. An appeal would be pronounced as incompetent and struck out where the Notice of Appeal is defective e.g. if there are no valid grounds of appeal raised therein.** (p. 2236 H)

*APPEALS - Hearing - Condition*

**2. If an act is void then it is in law a nullity. It is not only bad but incurably bad. Putting something on nothing and expecting it to stay there is wishful thinking. It will collapse. So, the appeal in the Court of Appeal should have collapsed. An appeal can only be heard on a valid Notice of Appeal. There can be no appeal if there is no Notice of Appeal.**

**The hearing of the appeal by the Court of Appeal on an abandoned Notice of Appeal filed on 26/6/2013 amounts to a void act, and the judgment of the Court of Appeal, a product**

***of the void act is also void and a nullity. The appeal in the Court of Appeal ought to have been heard on the valid Notice of Appeal filed on 3/7/2013. In the circumstances this appeal is hereby remitted to the Court of Appeal for urgent hearing on the Notice of Appeal filed on 3/7/2013.*** (p. 2237 B)

*SUPREME COURT - Appeals - Hearing - Power*

**3. Section 22 of the Supreme Court Act confers on this Court power to make orders, etc that the trial Court, and not the Court of Appeal ought to have made, thereby avoiding remitting the case for retrial. The section supra is invoked only if proceedings justify it.**

***The powers of the Supreme Court under section 22 of the Supreme Court Act are indeed very wide but they cannot override the provisions of section 233 of the Constitution which exclusively limit the hearing of appeals from the Court of Appeal to the Supreme Court. The Supreme Court cannot review an appeal that was heard on an abandoned Notice of Appeal. It can only hear an appeal from the Court of Appeal by virtue of Section 233 of the Constitution. It becomes clear that this court has no jurisdiction to review the appeal as if it was the Court of Appeal.*** (p. 2238 H)

**REPRESENTATION**

O. Eghobamien SAN for the appellant

O. Eghobamien SAN, G. Adams, C. Onwe, P. Owhoarwodua

Chief M. Ozekhome SAN for the 1<sup>st</sup> Respondent

G. Iyinbor, J. Omogbemeh, H. Obi, O. E. L. Ideh, for the 2<sup>nd</sup> Respondent

A. Kuti for the 3<sup>rd</sup> Respondent

**CASES REFERRED TO**

Amadi v. Okoli (1977) 7 SC 57

Okotie v. Olughor (1995) 5 SCNJ 2171

Akinwunmi v. Sadig (2001) 2 NWLR (pt. 696) 101

Olarennwaju v. B. O. N. (1994) 8 NWLR (pt. 364) 622

Okoli v. Ajose (1994) 8 NWLR (pt. 362) 300

Union Beverages Ltd v. Pepsi Cola Int. Ltd (1994) 3 NWLR (pt. 330)

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Faleye v. Otapo (1995) 3 NWLR (pt. 381) 1

Inakoju v. Adeleke (2007) 4 NWLR (pt. 1025) 423

Dapialong v. Dariye (pt. 1036) 239

Wassah v. Kara (2014) 12 SCM (pt. 11-12) 250

B Obiyan v. Military Governor of Mid-West (1972) 1 All NLR 422

Harriman v. Harriman (1987) 3 NWLR (pt. 60) 244

Macfoy v. United Africa Co. Ltd (1962) AC 152

Adeleke v. Cole (1961) 1 All NLR 287

C Ajagunjeun v. Osho (1977) 5 SC 89

### **STATUTES REFERRED TO**

Counterfeit & Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap C. 34 LFN 2004, ss. 1(18), 3

D Supreme Court Act, s. 22

Constitution of the Federal Republic of Nigeria 1999, ss. 233, 240

### **LEAD JUDGMENT BY RHODES-VIVOUR JSC**

The Appellant and two others were charged on an amended

E charge which reads:

COUNT 1

That you Adeyemo Abiodun, Egbele Austin Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of this Honourable Court

F on or about October, 2008 manufactured an adulterated drug to wit: MY PIKIN BABY TEETHING MIXTURE and you thereby committed an offence contrary to section 1(18)(a) of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap C. 34 Laws of the Federation of Nigeria, 2004 and punishable under section 3 of the same Act.

G COUNT 2

That you Adeyemo Abiodun, Egbele Austin Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road

H Akowonjo, Lagos State within the jurisdiction of this Honourable Court on or about October, 2008 manufactured an adulterated drug to wit: MY PIKIN BABY TEETHING MIXTURE to Roca Pharmacy of 34 Balogun Road, Agege, Lagos and you thereby committed an offence contrary to section 1(a) of the counterfeit and Fake Drugs and Un-

wholesome Processed Foods (Miscellaneous Provisions) Act Cap C. 34 Laws of the Federation of Nigeria 2004 and punishable under section 3 of the same Act.

COUNT 3

That you Adeyemo Abiodun, Egbele Austin Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of this Honourable Court on or about October 2008 did conspire among yourselves to sell dangerous drug to wit: MY PIKIN BABY TEETHING MIXTURE to Roca Pharmacy of 34 Balogun Road, Agege, Lagos and you thereby committed an offence contrary of section 1(18) (a) (ii), of the Miscellaneous Offences Act Cap M 17 Laws of the Federation of Nigeria, 2004 and punishable under section 1(18) (a) (ii), 1(18) (b) (ii) and 3 of the same Act.

COUNT 4

That you Adeyemo Abiodun, Egbele Austin Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of this Honourable Court on or about October, 2008 did conspire among yourselves to sell dangerous drug to wit: MY PIKIN BABY TEETHING MIXTURE to Roca Pharmacy of 34 Balogun Road, Agege, Lagos and you thereby committed an offence contrary of section 1(18) (a) (ii), of the Miscellaneous Offences Act Cap M 17 Laws of the Federation of Nigeria, 2004 and punishable under section 1(18) (a) (ii), 1(18) (b) (ii) and 3 of the same Act.

COUNT 5

That you Adeyemo Abiodun, Egbele Austin Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of this Honourable Court on or about October, 2008 did conspire among yourselves to adulterate a drug to wit: MY PIKIN BABY TEETHING MIXTURE to Roca Pharmacy of 34 Balogun Road, Agege, Lagos and you thereby committed an offence contrary of section 3(6) of the Miscellaneous Offences Act Cap M 17 Laws of the Federation of Nigeria, 2004 and punishable under section 1(18) (a) (ii) and 3 of the same Act.

COUNT 6

That you Adeyemo Abiodun, Egbele Austin Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road

Akowonjo, Lagos State within the jurisdiction of this Honourable Court on or about October, 2008 manufactured an adulterated drug to wit: MY PIKIN BABY TEETHING MIXTURE so as to change materially the quality or efficacy of the same without notice to the purchasers knowing that same will be sold as a drug and you thereby committed an offence contrary of section 1(18) (a) (i), of the Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria, 2004 and punishable under section 1(18) (a) (i) and 3 of the same Act.

Trial commenced in a Federal High Court, Lagos Division. The prosecution called seven witnesses. The 1<sup>st</sup> accused person gave evidence but did not call any witness, while the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons called one witness each. There were forty-two exhibits. The learned trial judge acquitted the accused persons on counts 1, 2, 5 and 6 but found them guilty on counts 3 and 4. They were sentenced to seven years imprisonment on each of counts 3 and 4, terms of imprisonment to run concurrently. Dissatisfied with the judgment, the 1<sup>st</sup> accused person filed an appeal. It was heard by the Court of Appeal, Lagos Division. That court affirmed the sentence of seven years by the trial court. This appeal is against that judgment. Briefs of argument were filed and exchanged.

Learned counsel for the Appellant Mr. O. Eghobamien SAN filed the Appellant's brief on 6/2/15, while Chief A. A. Ozekhome SAN learned Counsel for the 1<sup>st</sup> respondent filed the 1<sup>st</sup> respondent brief on 29/4/15, but was deemed duly filed on 19/11/15. Mr. O. E. L. Ideh and Mr. A. Kuti learned counsel for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file briefs. They filed appeals Nos. SC. 79/2014 and SC. 78/2014, in which they filed briefs.

Mr. O. Eghobamien SAN, learned counsel for the appellant formulated eight issues for determination.

They are:  
ISSUE 1

Whether the failure of one of the Justices of the Court of Appeal to express and deliver his opinion in writing on or prior to the day the judgment of the lower court was delivered, renders same null, void and unconstitutional.

ISSUE 2

Whether the learned justices of the Court of Appeal acted within their jurisdiction in relying on a Notice of Appeal which had been

abandoned, instead of a Notice of Appeal upon which the parties had predicated their briefs.

### ISSUE 3

Whether the learned justices of the Court of Appeal acted within their jurisdiction in relying on grounds within their jurisdiction in relying on grounds other than those contained within the judgment of the trial court, in affirming the conviction of the Appellant. B

### ISSUE 4

Whether the learned Justices of the Court of Appeal were right in reaching a conclusion that the accused persons put forward a defence that amounts to an afterthought. C

### ISSUE 5

Whether the learned Justice of the Court of Appeal were right in failing to consider the issue of conspiracy, as being an academic question notwithstanding the fact that the Appellant is currently serving a 7 years jail sentence for conspiracy. D

### ISSUE 6

Whether the learned Justices of the Court of Appeal failed to consider the issues properly canvassed before them, and thereby occasioned a miscarriage of justice. E

### ISSUE 7

Whether the learned Justices of the Court of Appeal were right in failing to consider the excessive nature of the sentence.

### ISSUE 8

Whether the learned Justices of the lower court were right in failing to consider the defence of mistake pursuant to the relevant provisions of the Miscellaneous Offences Act. F

Chief M. A. A. Ozekhome SAN, learned counsel for the 1<sup>st</sup> respondent adopted the eight issues formulated by the Mr. O. G Ogbhobamien SAN. G

At the hearing of the appeal on 14/1/16 learned counsel for the Appellant, O. Eghobamien SAN adopted the Appellant's brief filed on 6/2/15 and reply brief deemed duly filed and served on 19/11/15. He urged the court to declare the judgment of the Court of Appeal null and void. H

Learned counsel for the 1<sup>st</sup> Respondent, Chief M. Ozekhome SAN adopted the 1<sup>st</sup> Respondent's brief deemed duly filed and served on 19/11/15 and urged this court to dismiss the appeal.

Learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file briefs.

A very careful consideration of the eight issues formulated by Mr. O. Eghobamien SAN, and adopted by Chief M. A. A. Ozeckhome SAN, reveals that issue 2 is fundamental and crucial, in that if it turns out to be true the entire proceeding and judgment of the Court of Appeal will be declared a nullity and it would be unnecessary to consider other issues.

*“Whether the learned Justices of the Court of Appeal acted within their jurisdiction in relying on a Notice of Appeal which had been abandoned instead of a Notice of Appeal upon which the parties had predicated their briefs.”*

Learned counsel for the appellant observed that the Court of Appeal relied on an abandoned Notice of Appeal filed on 26/6/13 instead of the valid Notice of Appeal filed on 3/7/13. Reference was made to pages 666,668 of the Record of Appeal. Relying on *Amadi v. Okoli* (1977) 7 SC p.57, *Okotie v Olughor* (1995) 5 SCNJ p. 2171.

He submitted that the judgment of the Court of Appeal founded on abandoned Notice of Appeal filed on 26/6/13 as a nullity.

Learned counsel for the 1<sup>st</sup> respondent conceded that the Court of Appeal inadvertently relied on the abandoned Notice of Appeal filed on 26/6/13. He argued that the Appellant has to prove that he suffered miscarriage of justice since appeals are heard on issues formulated and not grounds of appeal. Reliance was place on *Akinwunmi v. Sadig* (2001) 2 NWLR (pt. 696) p.101.

Concluding he submitted that the argument that the Court of Appeal relied on a wrong notice of appeal is baseless and amounts to red hearings.

It is clear that both sides in this appeal agree that the appeal was heard in the Court of Appeal on an abandoned Notice of Appeal filed on 26/6/13 instead of an the valid Notice of Appeal filed on 3/7/2013. The correct Notice of Appeal is the Notice of Appeal filed on 3/7/2013.

***A writ of summons is an initiating process in the court of first instance, (The High Court) in the same way a Notice of Appeal is the initiating process in an appeal. The Notice of Appeal contains the complaint/s of the Appeal from the deci-***



**sion he is appealing from. A Notice of Appeal is no doubt a vital and very important process. It must be properly filed in court before there is a valid appeal. An appeal would be pronounced as incompetent and struck out where the Notice of Appeal is defective e.g. if there are no valid grounds of appeal raised therein.** See Olarennwaju v. B. O. N. (1994) 8 NWLR (Pt. B 364) p. 622, Okoli v Ajose (1994) 8 NWLR (Pt. 362) p. 300.

**If an act is void then it is in law a nullity. It is not only bad but incurably bad. Putting something on nothing and expecting it to stay there is wishful thinking. It will collapse. So, the appeal in the Court of Appeal should have collapsed. An appeal can only be heard on a valid Notice of Appeal. There can be no appeal if there is no Notice of Appeal.**

**The hearing of the appeal by the Court of Appeal on an abandoned Notice of Appeal filed on 26/6/2013 amounts to a void act, and the judgment of the Court of Appeal, a product of the void act is also void and a nullity. The appeal in the Court of Appeal ought to have been heard on the valid Notice of Appeal filed on 3/7/2013. In the circumstances this appeal is hereby remitted to the Court of Appeal for urgent hearing on the Notice of Appeal filed on 3/7/2013.**

In view of this finding it would no longer be necessary to consider the other issues in this appeal.

Before I conclude this judgment I must comment on learned counsel for the Appellant's submissions that this court should invoke section 22 of the Supreme Court Act. Mr. O. Eghobamein SAN, learned for the Appellant observed that the judgment of the Court of Appeal delivered on 31/12/2013 is not complete since the judgment of the third member of the panel, Ikyegh JCA, was not expressed in writing or pronounced upon in accordance with section 294(2) of the constitution. He submitted that the incomplete judgment is null and void. He observed that if the matter is sent back to the Court of Appeal, the Appellant is likely to have completed his term before the matter is heard. He argued that this Court should put itself in the position of the Court of Appeal and review the appeal pursuant to the powers conferred on this court by section 22 of the Supreme Court Act. Reliance was placed on Union Beverages Ltd v. Pepsi Cola Int. Ltd (1994) 3 NWLR (Pt. 330) p. 1, Faleye & Ors. v Otapo (1995)

3 NWLR (pt. 381) p. 1, Inakoju v Adeleke (2007) 4 NWLR (Pt. 1025) p. 423 Dapialong & ors v Dariye (pt. 1036) p. 239.

Section 22 of the Supreme Court Act provides:

*“22. The Supreme Court, may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquires or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may rehear the case in whole or in part or may remit it to the court below for the purpose of such rehearing of may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of the court.”*

The issue for determination is:

Whether the Supreme Court can in exercise of its wide powers under section 22 of the Supreme Court Act put itself in the position of the Court of Appeal and review an appeal filed on an abandoned Notice of Appeal?

In Wassah 7 ors v Kara & Ors (2014) 12 SCM (Pt. 11-12) p. 250 I said that:

*“This court can put itself in the shoes of the trial court and do what the trial court ought to have done. This is done by invoking section 22 of the Supreme Court Act. Under the section supra this court is empowered to make any order necessary for the determination of the real question in controversy in an appeal as if the matter is prosecuted in the Supreme Court as a Court of first instance. See Inakoju v Adeleke (2007) 1 SC (Pt. 1) p. 128; I. Imonike v. A.G. Bendel State (1992) 7 SCNJ (Pt. 1) p. 197; Ucha v Elechi (2012) All FWLR (Pt. 625) p. 237.”*

**Section 22 of the Supreme Court Act confers on this Court power to make orders, etc that the trial Court, and not the Court of Appeal ought to have made, thereby avoiding remitting the case for retrial. The section supra is invoked only**

**if proceedings justify it.**

**The powers of the Supreme Court under section 22 of the Supreme Court Act are indeed very wide but they cannot override the provisions of section 233 of the Constitution which exclusively limit the hearing of appeals from the Court of Appeal to the Supreme Court. The Supreme Court cannot review an appeal that was heard on an abandoned Notice of Appeal. It can only hear an appeal from the Court of Appeal by virtue of Section 233 of the Constitution. It becomes clear that this court has no jurisdiction to review the appeal as if it was the Court of Appeal.**

The cases relied on by learned counsel for the Appellant to wit: Union Beverages Ltd v Pepsi Cola Int. Ltd (Supra); Faleye & ors v Otapo (Supra); Inakoku v Adeleke (Supra); Dapianlong & ors Dariye (Supra) are irrelevant since they do not say that the Supreme Court can put itself in the position of the Court of Appeal and review the appeal.

Appeal remitted to the Court of Appeal for hearing de novo on the Notice of Appeal filed on 3/7/2013.

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### MOHAMMED CJN

I have been privileged before today of reading the lead Judgment of my learned brother Rhodes-Vivour, JSC, which has just been delivered. I am in complete agreement with him that this appeal can be determined on the resolution of the second issue for determination alone without going into the remaining 6 issues for determination formulated by the learned Senior Counsel for the Appellant in the Appellant's brief of argument. The issue which relates to the proceedings of the Court of Appeal in the course of the hearing of the Appellant's appeal in that Court, is fundamental because it affected the root of the proceedings and the Judgment of the Court now on appeal.

It is quite clear from the Judgment of the Court of Appeal at page 673 of the record that the Court relied entirely on the contents of the Notice of appeal filed by the Appellant in that Court on 26<sup>th</sup> June, 2013, which had been abandoned by the Appellant. The record of this appeal at page 660, shows that both the learned Senior Coun-

sel for the Appellant and the learned Senior Counsel for the 1<sup>st</sup> Respondent based their respective briefs of argument and oral submissions before the Court disregarded and relied on the abandoned Notice and Grounds of appeal below on the grounds of appeal contained in the Notice of Appeal filed by the Appellant on 3<sup>rd</sup> July, 2013, which the Court below unfortunately filed on 26<sup>th</sup> June, 2013, in the determination of the appeal. The result of course is obvious that the Judgment of the Court of Appeal now on appeal in this Court is a complete nullity having been based or predicated on an abandoned Notice of Appeal. See AMADI VS OKOLI (1977) 7 S.C. 57.

As for the argument of the learned senior Counsel for the Appellant urging this Court to use its powers under Section 22 of the Supreme Court Act 1960, to hear this appeal on the correct Notice and grounds of appeal filed on 3<sup>rd</sup> July, 2013, and the issues arising therefrom, I am of the view that to do so will amount to usurping the exclusive powers jurisdiction of the Court of Appeal to hear appeals from the decisions of the Federal High Court under Section 240 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which states-

*“240. Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction, to the exclusion of any other Court of law in Nigeria, to hear and determine appeals from the Federal High Court, the National Industrial Court, the High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of the Federal Capital Territory, Abuja, Customary Court of Appeal of a State and from decisions of a Court Martial or other tribunals as may be prescribed by an Act of the National Assembly.”*

It is quite clear from the above provisions of the Constitution that this Court under no circumstances can it be dragged into entertaining any appeal directly from the Federal High Court which the learned senior Counsel is urging us to do. Section 22 of the Supreme Court Act CAP S 15 Laws of the Federation of Nigeria 2004, reads -

*“22. The Supreme Court may, from time to time, make any order necessary for determining the real question in controversy in the appeal and may amend any defect or error in the record of ap-*

*peal, and, may direct the court below to inquire into and satisfy its findings on any question which the Supreme Court thinks fit to determine before final Judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court as a court of first instance and may re-hear the case in whole or in part or may remit it to the Court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of the Court.”*

These powers are indeed very wide and have been exercised by this Court in many cases including - ADELEKE & ORS VS COLE (1961) 1 ALL NLR 287 at 289, OBIYAN VS MILITARY GOVERNOR OF MID-WEST & ORS (1972) 1 ALL NLR 422 at- 429, CHIEF AJAGUNJEUN & ORS VS SOBO OSHO & ORS (1977) 5 S.C. 89 at 112 and METAL CONSTRUCTION (W.A.) LTD & ORS VS MR. D.A. MIGHONE & ANOR (1979) 6-9 S.C. 163. From the above decisions of this Court, the exercise by this Court of the powers under Section 22 of the Supreme Court Act was restricted to either doing substantial justice between the parties or avoiding delay in determining interlocutory matters, or what consequential order was to be made where the appeal was allowed. I must observe that none of such matters concerned the hearing of a substantive appeal from the High Court of a State or Federal High Court pending at the Court of Appeal. See HARRIMAN VS HARRIMAN (1987) 3 NWLR (Pt. 60) 244 at 257 where Uwais JSC (as he then was) faced with the similar situation as in the present case said -

*“The Appellate jurisdiction of this Court is conferred by Section 213 Subsection (1) of the 1979 Constitution which states - “213(1) The Supreme Court shall have jurisdiction to the exclusion of any other Court of Law in Nigeria to hear and determine appeals from the Court of Appeal.”*

*“While the jurisdiction to hear appeal from the High Court of a State or the Federal High Court rests with the Court of Appeal, and the power is exclusive to the Court of Appeal... There can be no doubt from the foregoing therefore, that this Court can not usurp*

*the jurisdiction of the Court of Appeal to hear a substantive appeal that is pending before that Court... Accordingly, no matter the exigencies or the frivolities or the vexatious nature of the substantive appeal, this Court cannot hear the substantive appeal from the ruling of the High Court which is now pending at the Court of Appeal and such usurpation will certainly amount to the violation of the Constitution and will therefore be null and void. This Court will not do anything of the sort."*

We are bound by this decision having regard to the Appellate jurisdiction of this Court under Section 233(1) of the 1999 Constitution as amended and the Appellate jurisdiction of the Court of Appeal under Section 240 of the 1999 Constitution as amended. The Law is trite that Section 22 of the Supreme Court Act cannot override the provisions of the 1999 Constitution as to the clear jurisdiction of the Supreme Court and the jurisdiction of the Court of Appeal.

Consequently, I also allow this appeal and remit the Appellant's appeal to the Court below to be heard again on the correct Notice of Appeal filed by the Appellant on 3<sup>rd</sup> July, 2013.

### ***GALADIMA JSC***

I have before now the lead judgment of my learned brother RHODES-VIVOUR, JSC just delivered.

I entirely agree with him that this appeal is not lacking in merit, I too allow it. My reason for arriving at this conclusion is because the judgment of the court below, now on appeal is completely a nullity as it is on an abandoned Notice of Appeal.

We cannot hear this appeal on the correct Notice and Grounds of Appeal filed on 3/7/2013, as being urged by the Learned Senior Counsel for the Appellant exercising, the power conferred on this court under Section 22 of the (Supreme Court Act, 1990 Cap. S. 15 Laws of Federation, 2004) as to do so will amount to usurping the powers of the Court of Appeal to hear appeals from the decisions of the Federal High Court, and other such superior courts. See Section 240 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). See further Section 233 (1) of the said Constitution; Obiyan v Military Governor of Mid-West & Ors (1972) 1 All NLR 422 at 429;

Harriman v Harriman (1987) 3 NWLR (Pt. 60) 244 at 257.

Having agreed that this appeal should be allowed, I too shall remit the Appellant's Appeal to the Court below for expeditious hearing on the Notice of Appeal filed by the Appellant on 3<sup>rd</sup> July, 2013. I make no order as costs.

B

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**NGWUTA JSC**

I read in advance the lead judgment just delivered by my learned brother, Rhodes-Vivour, JSC and I agree that the appeal be remitted to the Court below for hearing on the appropriate Notice of Appeal filed on 3/7/2013. C

The Notice of Appeal is the originating process, the base of the appeal. The appeal was heard on an abandoned notice of appeal. That is the same as building without foundation. There was no Notice of Appeal and so there could have been no appeal properly so called as something cannot be placed on nothing. What is placed on nothing would collapse. See *Macfoy v. United Africa Co. Ltd* (1962) AC 152. D

For the above and the fuller reasons in the lead judgment, I E also remit the appeal to the Court of Appeal, Lagos for hearing on the Notice of Appeal filed on 3/7/2013.

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**MUHAMMAD JSC**

F

I read in draft the lead judgment of my learned brother Rhodes-Vivour JSC, in the three appeals and agree with his lordship that they are meritorious. I allow the appeal on the basis of the reasoning and conclusions proffered by his lordship in the judgments and abide by G the consequential orders made therein also.

H