

SUPREME COURT OF NIGERIA
FRIDAY 22ND APRIL, 2016. SC. 36/2004
CORAM:- I. T. MUHAMMAD, M. U. PETER-ODILI, K. B.
AKA'HS, K. M. O. KEKERE-EKUN, J. I. OKORO, JJSC

1. MR. OLUMIDE BRAITHWAITE
(Substituted for Dr. Tunji Braithwaite by
order of court made on 13th April, 2016)
2. MR. JOSEPH LOPEZ TAPIA APPELLANTS
3. MARITIMA SPAIN AFRICA LINES
4. S.A. DOMACO HOLDINGS INC.
AND
ALHAJI BASHIR DALHATU RESPONDENT

APPEALS - Extension of time - Conditions - Court must be satisfied with applicant's explanation of failure to appeal within time - And the ground must show good cause why appeal should be heard (H1)

APPEALS - Extension of time - Conditions - Exception - Court will not inquire about reason for delay - Where ground raises issue of lack of jurisdiction (H2)

APPEALS - Grounds - Determination - In determining whether ground show good cause why appeal should be heard - Court must consider whether ground is substantial and reveals arguable ground (H3)

APPEALS - Discretion - Exercise of - Interference - Appellate court does not interfere - Save where the exercise of discretion was manifestly wrong (H4)

FACTS

This action was instituted at the High Court of Lagos State by plaintiff/1st appellant against defendant/respondent, seeking to recover the sum of \$125, 000.00 US dollars, being money withheld by respondent. The matter that led to the action is that 2nd – 4th appellants had in 1988, instructed 1st appellant to make a claim on their behalf against the Federal Government of Nigeria for the un-

lawful seizure and subsequent vandalism of their 40,000 ton vessel, MT Izara. In compliance with the instructions, 1st appellant wrote several letters to the then Military Head of State and the Minister of External Affairs and also met with other agents of the Government to press his clients' claims. While pursuing the claim, it came to 1st appellant's attention through a letter addressed to respondent but copied to him (1st appellant), that respondent had also been briefed to pursue the same claim and had indeed collected the sum of \$15 million US Dollars on 2nd – 4th appellants' behalf as compensation for the seizure and vandalism of the said vessel. At the instance of 1st appellant, a meeting was held, wherein respondent informed 1st appellant that there was an outstanding balance still due from the Federal Government to 2nd – 4th appellants. According to 1st appellant, respondent promised to pay him the sum of \$125, 000.00 US Dollars out of the said balance, but did not keep to his promise. The action was thus instituted to recover the said money.

2nd – 4th appellants were later joined in the suit following an application made by respondent in that respect. In the course of proceedings, pursuant to an application filed by 2nd – 4th appellants, the Court ordered respondent to render an account of the money received from the Federal Government on behalf of the said 2nd – 4th appellants. Respondent rendered the accounts and attached Exhibits KU1 and KU2 in support of his averment that he had remitted the entire compensation sum to 2nd – 4th appellants and as such was not in possession of monies belonging to any of the parties to the suit. At the end of the trial, the Court entered judgment in favour of appellants. Aggrieved, respondent appealed to the Court of Appeal Lagos Division. The appeal was struck out following an objection raised by 1st appellant that the notice of appeal was incompetent. Subsequently, respondent filed a fresh application for the trinity prayers to appeal against the decision of the trial Court. None of the appellants filed a counter affidavit in opposition to the application. However, 1st appellant filed a notice of preliminary objection challenging the competence of the proposed grounds of appeal. The preliminary objection was overruled and respondent's application was granted. Dissatisfied, appellants have appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in granting the

Respondent's application for an Order for extension of time to appeal, leave to appeal and extension of time within which to seek leave to appeal dated 12th June 2001."

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

APPEALS - Extension of time - Conditions

1. As rightly submitted by both learned counsel, an application of this nature calls for the exercise of discretion by the Court. As with all discretionary reliefs, the Court must act judicially and judiciously taking into account all the circumstances of the case and in accordance with the prescribed rules of law. In the case of *University of Lagos v. Olaniyan* (1985) 1 NWLR (pt. 1) 156 @ 175 A-E cited by learned counsel for the appellants, this Court held that in exercising its discretion in an application for the trinity prayers, the Court must be satisfied on two grounds:

a) with the plaintiffs'/applicants' explanation of their failure to appeal within the prescribed period; and

b) whether the grounds of appeal prima facie show good cause why the appeal should be heard.

Learned counsel was also correct when he submitted that the two conditions must be satisfied conjunctively.
(p. 2437 G)

APPEALS - Extension of time - Conditions - Exception

2. The only exception being where the grounds of appeal raise the issue of lack of jurisdiction and it prima facie appears to be so. Since jurisdiction is the live wire of any adjudication and the authorities are settled that an issue of jurisdiction may be raised at any stage of the proceedings or even for the first time on appeal to the Supreme Court, it might not be necessary to inquire into the reason for delay in bringing the application, as a challenge to the Court's jurisdiction is a good ground for hearing the appeal. (p. 2438 C)

APPEALS - Grounds - Determination

3. On what an appellate Court should consider in determining whether the grounds of appeal show good cause why the appeal should be heard, the decision of this Court in E.F.P. Co. Ltd. v. NDIC (2007) ALL FWLR (pt.367) 793 @ 812 D-E also found in (2002) 9 NWLR (Pt.1039) 216 @ 239 E -G, per Onnoghen, JSC seems to provide a complete answer. His Lordship held thus:

“It is settled that the duty of the appellate Court in the consideration of the grounds of appeal proposed by the applicant and filed in support of the application for leave to appeal is limited to whether the grounds of appeal are substantial and reveals arguable ground. It is therefore not the duty of the Court at that stage to decide the merit of such grounds as filed in support of the application for to do so would amount to deciding the substantive matter in an interlocutory application which the law frowns upon.”

In light of facts that gave rise to the dispute between the parties summarised earlier in this judgment, it is my considered view that the Court below was correct when it held that the grounds of appeal show good cause why the appeal should be heard. (pp. 2441 C/2442 C)

APPEALS - Discretion - Exercise of - Interference

4. On the attitude of appellate Courts to the exercise of discretion by lower Courts, this Court held further in E.F.P. Co. Ltd. v. NDIC (supra) at pages 239 - 240 H - A of the NWLR report:

“...There is another very important principle that guides an appellate Court when called upon to review, by way of appeal, the discretion exercised by the lower Court in granting or refusing to grant an application of that nature. The principle is that the attitude of appellate Courts to the exercise of discretion by lower Courts is not dissimilar to that adopted over the issue of findings of fact, which is that unless the exercise of discretion by a Court of first instance or by a lower Court is manifestly wrong, arbitrary, reckless or injudicious, an appellate Court would not interfere merely because faced

with similar circumstances it would have reacted differently.” I agree with the Court below that the respondent satisfied the two conditions for the grant of the Application. The grounds are arguable. Whether they will succeed is a matter for the hearing of the substantive appeal. The appellants have failed to show that the exercise of discretion by the lower Court was arbitrary, perverse, reckless or injudicious. I therefore resolve the sole issue for determination in this appeal against the appellants. (p. 2442 D)

NOTABLE POINT OF INTEREST

KEKERE-EKUN JSC

1. Counsel to avoid delay tactics in prosecution of appeal

Before concluding this judgment it is necessary to once again point out the needless delay in the determination of the substantive appeal before the Court below by this appeal. Had the respondent filed his notice of appeal when granted leave to do so, the objections to the competence of the grounds of appeal would have been heard along with the substantive appeal. By now the appeal would have been determined and any party dissatisfied with the final decision would have been able to appeal to this Court on all the issues in controversy between the parties. Even that appeal would probably have been determined by now and the parties would know, once and for all, where they stand. 14 years have been wasted on the current exercise! Whatever the merits or otherwise of the appeal, it is a disservice to both parties and to the administration of justice for learned counsel to engage in the type of delay tactics evident in the filing of this appeal. As an officer in the temple of justice it is the duty of learned counsel to aid and not hinder the smooth administration of justice. (p. 2443 A)

REPRESENTATION

O.O. AJOSE-ADEOGUN ESQ., for the Appellants

AARON ONYEBUCHI ESQ. with OLADIRAN FALORE ESQ., for the Respondent

CASES REFERRED TO

Bwai v. U.B.A. Plc (2002) FWLR (pt. 119) 1538

University of Lagos v. Olaniyan (2001) FWLR (pt. 56) 778

Iroegbu v. Okwordu (1990) 6 NWLR (pt. 159) 643

Ibodo v. Enarofia (1980) 5-7 SC 42

Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 718

Egbe v. Alhaji (1990) 1 NWLR (pt. 128) 546

B Babalola v. State (1980) 4 NWLR (pt. 115) 264

Okafor v. Bendel Newspapers Corp. (1991) 9 - 10 SCNJ 107

Obikoya v. Wema Bank Ltd. (1989) 1 NWLR (pt. 96) 157

Akinyemi v. Odua Invest. Co. Ltd. (2012) 1 SC (pt. IV) 1

C N.D.I.C. v. C.B.N. (2002) 7 NWLR (pt. 766) 272

Ikenta Best Nig. Ltd. v. A.G. Rivers State (2008) 6 NWLR (pt. 1084) 612

UAC v. McFoy (1962) AC 152

In Re Adewumi v. Osibanjo (1988) 3 NWLR (pt. 83) 483

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RULES REFERRED TO

Court of Appeal Rules 2002, O. 3 r. 4(2)

High Court of Lagos State (Civil Procedure) Rules, O. 14 r. 22

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LEAD JUDGMENT BY KEKERE-EKUN JSC

This is an appeal against the ruling of Court of Appeal, Lagos Division, delivered on 18/11/2002 which granted the respondent's application for extension of time to seek leave to appeal, leave to appeal and extension of time to appeal against the ruling of the High

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Court of Lagos State sitting at Lagos, delivered on 15/9/2000, commonly referred to as the trinity prayers. The application included a prayer for stay of execution. The 1st Appellant (then 1st respondent) had filed a notice of preliminary objection to the application on the

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following grounds:

"1. That the application for stay of execution is incompetent not having been first made and determined by the trial Court.

2. That the application is an abuse of process because:

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a) The Court had considered and struck out a similar application.

b) The proposed grounds of appeal are as incompetent as those struck out on 11/6/2001.

3. The proposed grounds of appeal are incompetent because:

a) Grounds 1 and 3 complain of misdirection in law without

giving particulars of the misdirection in law.

b) Ground 2 is vague and did not arise from the decision sought to be appealed (sic).

4. The Appellant has overreached himself by the issues raised in the further affidavit of Jimmy Ufor sworn to on 18/6/2001 which are totally false.”

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He urged the Court to dismiss the application.

In its ruling delivered on 18/11/2002, the Court below held that the applicant (now respondent) had satisfied the twin requirements of Order 3 Rule 4 (2) of the Court of Appeal Rules 2002 by satisfactorily explaining the reason for the delay in bringing the application and that the proposed grounds of appeal show good cause why the appeal should be heard. The Court also held that the complaints concerning the competence or otherwise of the proposed grounds of appeal were not relevant at that stage. The preliminary objection was accordingly overruled and the application granted, hence the instant appeal.

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The background facts to this appeal are as follows: Sometime in 1988, the 2nd, 3rd and 4th parties/Appellants (hereinafter referred to as the Third Parties) instructed the 1st appellant to make a claim on their behalf against the Federal Government of Nigeria for the unlawful seizure and subsequent vandalism of their 40,000 ton vessel, MT Izara. In compliance with the instructions the 1st appellant wrote several letters to the then Military Head of State and the Minister of External Affairs and also met with other agents of the Government to press his clients' claims. While pursuing the claim, it came to the 1st appellant's attention through a letter addressed to the respondent but copied to him, that the respondent had also been briefed to pursue the same claim and had indeed collected the sum of \$15 million US Dollars on the Third Parties' behalf as compensation for the seizure and vandalism of their vessel. At the instance of Dr. Tunji Braithwaite (the 1st appellant), a meeting was held between him and the respondent. The respondent informed him that there was an outstanding balance still due from the Federal Government to the Third Parties arising from the difference in the rate of exchange. According to the 1st appellant, the respondent promised to pay him the sum of \$125,000.00 US Dollars out of the said balance, but did not keep his promise. The 1st appellant instituted an

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action at the High Court of Lagos State (the trial Court) to recover the sum being “money had and withheld” by the respondent.

The respondent applied for the Third Parties to be joined in the suit, which application was duly granted. Chief Adegboyega Awomolo, SAN represented both the original defendant and the Third parties. The 1st appellant raised an objection. Consequently, the Third parties had to brief another counsel to represent them in the person of Chief Mike Okoye. He filed a statement of defence on their behalf, which included a counter claim.

In the course of proceedings, pursuant to an application filed by the Third Parties, the trial Court ordered the respondent to render an account of the money received from the Federal Government on their behalf. The respondent accordingly rendered accounts vide an affidavit deposed to by one Kunle Uthman, a legal practitioner, on 7th February, 2000 to which were attached Exhibits KU1 and KU2 in support of his averment that the respondent had remitted the entire compensation sum to the Third Parties and as such was not in possession of monies belonging to any of the parties to the suit.

In a ruling delivered on 15/9/2000, the trial Court per Akinsanya J., entered judgment in the sum of \$125,000.00 with interest at the rate of 4% per annum from 1st November 1993 in favour of the 1st appellant against the respondent and a further sum of \$625,000.00 with interest at the rate of 4% per annum in favour of the third parties also against the respondent. The respondent was dissatisfied with the ruling and immediately filed a notice of appeal the same day at the Court below. Upon a notice of preliminary objection filed by the 1st appellant, the Court below struck out the notice of appeal for being incompetent.

On 12th June 2001, the respondent filed a fresh application for the trinity prayers to appeal against the decision of the trial Court. Neither the 1st appellant nor the Third parties filed a counter affidavit in opposition to the application. However, the 1st appellant filed a notice of preliminary objection challenging the competence of the proposed grounds of appeal. The preliminary objection was overruled and the application was granted on 18/11/2002. It is this ruling that has given rise to the instant appeal.

In compliance with the Rules of this Court the parties filed and exchanged their respective briefs of argument. At the hearing of the

appeal on 25th January 2016, O.O. AJOSE-ADEOGUN ESQ, for the appellants, adopted and relied on the appellants' brief filed on 24/3/2004 and the reply brief deemed filed on 25/1/2016. The appellants' brief was settled by Dr. Tunji Braithwaite (the 1st appellant) while the reply brief was settled by OLAOTAN AJOSE-ADEOGUN ESQ. Judgment was thereafter reserved till today, 22/4/2016. B

Unfortunately the 1st appellant, Dr. Tunji Braithwaite, was reported to have died on 28th March 2016. By a motion on notice dated 31/3/2016 and filed on 5/4/2016, one Mr. OLUMIDE BRAITHWAITE, a son of the deceased sought leave to be substituted for him as the 1st appellant in this appeal. Upon being satisfied that the respondents had been duly served with the application through their counsel, STRACHAN PARTNERS, on 7th April 2016, the application was granted in chambers on Wednesday, 13th April 2016 with an Order that the processes in the appeal be amended accordingly. D MR. OLUMDE BRAITHWAITE is now substituted for Dr. Tunji Braithwaite as the 1st appellant in this appeal. C

In the appellants' brief two issues were distilled for the determination of the appeal as follows:

1. Whether the Court of Appeal was right when it held that the matters raised in the Notice of preliminary objection are not relevant at this stage. E

2. Whether the respondent satisfied the requirements for the success of his application as contained in Order 3 Rules 4 (2), 2 (3) and 2 (a) of the Court of Appeal Rules having regard to the incompetence of the defendant's/respondent's proposed Grounds of Appeal. F

AARON ONYEBUCHI ESQ., leading OLADIRAN FALORE ESQ for the respondent, adopted and relied on the respondent's brief settled by C.A. CANDIDE-JOHNSON, SAN, which was deemed properly filed on 25/1/2016. The respondent formulated a single issue thus: G

"Whether the Court of Appeal was right in granting the Respondent's application for an Order for extension of time to appeal, leave to appeal and extension of time within which to seek leave to appeal dated 12th June 2001." H

The single issue formulated by the respondent appears to me to be concise and to the point and would adequately resolve the

issues in controversy between the parties. I therefore adopt it as the sole issue for the determination of this appeal.

It was submitted on behalf of the appellants that it is the responsibility of counsel who has spotted any anomaly in a process of proceeding that might result in an exercise in futility in the process of adjudication, to raise it at the earliest opportunity. It was submitted that once such an issue is raised, it is incumbent upon the Court to determine it immediately and that the Court below was wrong when it held that the issue of the competence of the proposed grounds of appeal was not relevant at the stage of determining whether or not to grant the application for the trinity prayers. He relied on the case of: *Bwai v. U.B.A. Plc.* (2002) FWLR (pt.119) 1538 @ 1557 E - F.

It was further contended that the respondent did not satisfy the minimum requirements for the grant of an application for the trinity prayers, viz: a satisfactory explanation for the failure to appeal within the prescribed period and grounds of appeal, which prima facie, show good cause why the appeal should be heard. The provisions of Order 3 Rules 3 (6) & (7) and Rule 4 (2) of the Court of Appeal Rules, 2002 were reproduced and reliance was placed on the authorities of *University of Lagos v. Olaniyan* (2001) FWLR (pt.56) 778 @ 806 - 807 and *Iroegbu v. Okwordu* (1990) 6 NWLR (pt.159) 643 @ 658 - 659 H-D. It was submitted that the task of the Court called upon to exercise discretion to grant leave to appeal is to determine the efficacy and substantiality of the grounds of appeal. The case of: *Ibodo v. Enarofia* (1980) 5-7 SC 42 was cited for the materials which the applicant should place before the Court for the exercise of its discretion.

It is to be noted that Learned counsel's submissions are mainly in respect of the competence of the grounds of appeal. The complaints are as follows:

1. There is inconsistency in the reliefs sought in the Notice of Appeal because while Paragraph 1 refers to the decision of 15th September 2000, Paragraph 5 thereof seeks to set aside a decision of 25th December 2000. The alleged inconsistency in his view is a violation of the provision of Order 3 Rule 2 (1) of the Court of Appeal Rules.

2. In Ground 1, the appellant failed to furnish the particulars of the alleged misdirection in law by failing to state the law that was

misapplied. On what constitutes a misdirection in law, he referred to: *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 718 @ 774 - 775.

3. Ground 1 does not challenge the validity of the ratio of the decision appealed against. He relied on: *Egbe v. Alhaji* (1990) 1 NWLR (pt.128) 546 @ 590.

4. Grounds 1 and 3 are neither substantial nor arguable, Furthermore the grounds are vague and argumentative and therefore violate the provisions of Order 3 Rule 2 (3) and (4) of the Court of Appeal Rules. B

5. Ground 2 does not challenge the ratio of the decision and does not arise from the decision appealed against. In his view it is not an arguable ground. He referred to: *Babalola v. The State* (1980) 4 NWLR (Pt. 115) 264. C

6. The Court below erred in not being guided by the provisions of Order 14 Rule 22 of the High Court of Lagos State (Civil Procedure) Rules and failing to hold that the respondent's complaint is not substantial. He relied on: *Provost, Alvan Ikoku College of Education v. Amuneke* (1991) 9 NWLR (pt. 213) 49 @ 58 - 59. D

He maintained that the lower Court was not painstaking in its consideration of the efficacy and substantiality of the proposed grounds of appeal. He urged this Court to hold that the Court below wrongly exercised its discretion in the respondent's favour and ought not to have granted the application. E

Learned counsel for the respondent, in reaction to the above submissions referred to the case of: *Okafor v. Bendel Newspapers Corporation & Anor.* (1991) 9 - 10 SCNJ 107 @ 114 - 115, where this Court interpreted the provisions of Order 3 Rule 4 (2) of the Old Court of Appeal Rules, which are in *pari materia* with Order 7 Rules 7 and 10 of the 2011 Court of Appeal Rules and submitted that in the absence of any challenge to the averments in the affidavit in support of the application, the lower Court was right to have accepted the respondent's explanation for his failure to file the application within the prescribed period as being good, substantial and sufficient for the exercise of its discretion. He submitted further that the Court gave proper consideration to the proposed grounds of appeal before concluding that they show good cause why the appeal should be heard. He observed that learned counsel for the appellants appeared to have confused the requirements for the grant of a stay of execution F G H

with the requirements for seeking the trinity prayers. He agreed with the Court below that the issues raised in the preliminary objection were not relevant at the stage of seeking the trinity prayers. He submitted that having failed to join issues with the respondent on the averments in the supporting affidavit, the appellants were deemed to
B have admitted them.

He submitted that the appellants' notice of preliminary objection would only have become ripe for hearing after the respondent had been given leave to file his notice of appeal and not before. He
C submitted further that it is trite that a Court must be cautious when deciding interlocutory applications in order to avoid making a decision that touches on the substantive issue in the appeal. He referred to: *Obikoya v. Wema Bank Ltd. (1989) 1 NWLR (Pt. 96) 157.*

Learned counsel contended that the exercise of discretion by
D the Court must be done judicially and judiciously and must be based on what is just and fair in the circumstances of the case. He referred to: *Akin Akinyemi v. Odua Investments Co. Ltd. (2012) 1 SC (Pt. IV) 1; Minister, P.M.R. v. EL (Nig.) Ltd. (2010) 12 NWLR (Pt. 1208) 261.* He submitted that the lower Court gave due consideration to the
E reasons given for not filing the application within the prescribed period and rightly, in his view, concluded that the respondent ought not to be made to suffer for the mistakes of his counsel. He submitted that the case of *Iroegbu v. Okwordu (supra)* relied upon by learned
F counsel for the appellants, in fact supports the respondent's case. With regard to the proposed grounds of appeal, he submitted that the Court of Appeal is not required to determine the merits of the grounds of appeal but to decide whether they are arguable. He referred to: *E.F.P. Co. Ltd. v. NDIC (2007) ALL FWLR (Pt. 367) 793 @*
G *812 D-F.* He submitted that the lower Court properly exercised its discretion in this regard and that the grant of the application was proper in the circumstances.

In the appellants' reply brief, it is contended that the issue raised in the notice of preliminary objection on the competence of the proposed grounds of appeal is an issue of jurisdiction, which must be
H determined at the earliest opportunity and thus ought to have been resolved by the Court below at the time it was raised. Learned counsel relied on the case of *N.D.I.C. v. C.B.N. (2002) 7 NWLR (Pt. 766) 272.* Citing the case of *Ikenta Best Nig. Ltd. v. A.G. Rivers State (2008)*

6 NWLR (Pt.1084) 612, he submitted that the requirements for the grant of the trinity prayers are conjunctive and not disjunctive. He contended that the lower Court determined the application disjunctively and therefore reached a wrong decision. Responding to respondent's contention that the Court below was entitled to deem unchallenged averments as having been admitted, he submitted that there was no need to file a counter affidavit as the issues raised in the preliminary objection related to the jurisdiction of the Court to grant the application where the proposed grounds of appeal are incompetent or invalid, in which case there would be nothing upon which to anchor the relief sought. He relied on: UAC v. McFoy (1962) AC 152. B
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I deem it appropriate to start with the relevant provisions of the Court of Appeal Rules governing an application for enlargement of time to seek leave to appeal, leave to appeal and extension of time within which to appeal against the decision of a lower Court, otherwise known as the trinity prayers. The application in question was brought, inter alia pursuant to Order 3 Rule 3 (3) and Rule 4 (1) and (2) of the Court of Appeal Rules 1981 (as amended) and under the inherent jurisdiction of the Court. The relevant provisions for the purpose of this appeal are contained in Order 3 Rule 4 (1) and (2) which provide as follows: D
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"4 (1) The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply.

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

As rightly submitted by both learned counsel, an application of this nature calls for the exercise of discretion by the Court. As with all discretionary reliefs, the Court must act judicially and judiciously taking into account all the circumstances of the case and in accordance with the prescribed rules of law. In the case of University of Lagos v. Olaniyan (1985) 1 NWLR (pt. 1) 156 @ 175 A-E cited by learned coun- H

sel for the appellants, this Court held that in exercising its discretion in an application for the trinity prayers, the Court must be satisfied on two grounds:

a) with the plaintiffs'/applicants' explanation of their failure to appeal within the prescribed period; and

B b) whether the grounds of appeal prima facie show good cause why the appeal should be heard.

Learned counsel was also correct when he submitted that the two conditions must be satisfied conjunctively. See:

C Ikenta Best (Nig.) Ltd. v. A.G. Rivers State (2008) 6 NWLR (Pt.1084) 612; Williams v. Hope Rising Voluntary Funds Society (1982) 1- 2

SC (Reprint) 70. The only exception being where the grounds of appeal raise the issue of lack of jurisdiction and it prima facie appears to be so. Since jurisdiction is the live wire of

D any adjudication and the authorities are settled that an issue of jurisdiction may be raised at any stage of the proceedings or even for the first time on appeal to the Supreme Court, it

might not be necessary to inquire into the reason for delay in bringing the application, as a challenge to the Court's juris-

E diction is a good ground for hearing the appeal. See: Ukwu v. Bunge (1997) 8 NWLR (Pt.518) 527 @ 541-542 H-A & 543; In Re

Adewumi & Ors. v. Osibanjo & Ors, (1988) 3 NWLR (Pt.83) 483 @ 497 A - D & 506 C: Co.-Operative and Commerce Bank v. Ogwuru (1993) 3 NWLR (Pt.284) 630.

F In considering the reasons for the delay in bringing the application, the lower Court reproduced and considered Paragraph 3 (i) -

(ix) of the supporting affidavit wherein it was averred that the respondent initially filed a notice of appeal against the judgment of the

G trial Court delivered on 15/9/2000 within time but that the said notice of appeal was struck out by the lower Court for containing incompetent grounds of appeal. This was sequel to a preliminary objection raised by Dr. Tunji Braithwaite. The Court below per Oguntade,

JCA (as he then was) at pages 107 - 108 of the record held thus:

H “The above depositions were unchallenged as the respondent did not file any counter affidavit. I accept the explanation given for

the failure to appeal within time as true. When taken in its correct perspective, applicant's reasons for failure to appeal within time arose from a failure of counsel to bring the right application earlier. The

one earlier brought was struck out. A Court should not visit the mistake of counsel on the litigant... I accordingly accept that the appellant has shown good and substantial reasons for the failure to appeal within the prescribed period."

In the instant appeal, the appellants have not challenged the above finding of the Court. They are deemed to have accepted it. It follows that the first requirement has been satisfied. Their complaint, essentially, is in respect of the second requirement, that is, whether the grounds of appeal show good cause why the appeal should be heard. I think it is appropriate to reproduce in extenso the finding of the Court below on this issue. The Court held thus at pages 108 - 110 of the record:

"With respect to the second limb of Order 3 Rule 4 (2) of the Rules of this Court, the applicant in his proposed Notice of Appeal has raised three grounds of appeal. The grounds without (sic) their particulars read:

"3. GROUND ONE:

The Learned Trial Judge misdirected herself in the law when she held that "... the letter referred to (i.e. Exhibit B2) also charged the Defendant with the responsibility of paying the Plaintiff what was considered to be due to him."

Particulars:

i. After finding that there was a commitment on the part of the 3rd Party/Respondents to pay the Plaintiff/Respondent the sum of \$125,000.00 USD the Honourable Judge did not show how the Defendant/Appellant thereby became liable to pay the said (sic) to the Plaintiff/ Respondent.

ii. Exhibit B2 relied upon by the Honourable Judge to fix liability on the Defendant/Appellant to pay the Plaintiff/Respondent is not a valid assignment of the debt (if any) due the 3rd Party/Respondents from the Defendant/Appellant to grant the Plaintiff/Respondent a right of action against the Defendant/Appellant.

iii. There was neither a contractual relationship between the Plaintiff/Respondent and the Defendant/Appellant nor was any duty of care owed the Plaintiff/Respondent by the Defendant/Appellant.

GROUND TWO

The Learned Trial Judge erred in law in holding that by virtue of Order 14 Rule 22 of the High Court of Lagos State (Civil Proce-

ture) Rules, 1994 the Defendant/Appellant was also accountable to the Plaintiff/Respondent in the Third Party Proceedings and that as there was no proper account made the Defendant/Appellant was thereby liable to the Plaintiff/Respondent.

Particulars:

- B *i. The Third Party Proceedings were not between the Plaintiff/Respondent and the 3rd Party/Respondents, but between the 3rd Party/Respondents vis-à-vis the party at whose instance they had been joined (i.e. the Defendant/Appellant).*
- C *ii. There was no evidence to show that the Defendant/Appellant was an accounting party to the Plaintiff/Respondent.*
- iii. The Learned Trial Judge wrongly assumed in the absence of positive evidence that simply by bringing the Third party proceedings there was “a very strong nexus between the Plaintiff, the Defendant and the 3rd Party.”*

GROUND THREE:

The Learned Trial Judge misdirected herself in the law when she held that the 3rd Party/Respondents were entitled to receive the sum of \$625,000.00 USD from the Defendant/Appellant.

- E *Particulars:*
 - i. A failure to properly account by the Defendant/Appellant did not entitle the 3rd Party/Respondents to judgment in the absence of evidence to establish the alleged indebtedness.*
- F *ii. There was no credible evidence led to establish that the Defendant/Appellant was indebted to the 3rd Party/Respondents in the sum of \$700,000.00 USD.*
- iii. Exhibit C relied upon by the Learned Trial Judge to grant the 3rd Party/Respondents claims was not conclusive proof of the Defendant/Appellant’s alleged indebtedness to the 3rd Party/Respondents.*
- G *iv. The Learned Trial Judge wrongly held that Exhibits KU1 and KU2 which were written by the 3rd Party/Respondents did not constitute proper account by the Defendant/Appellant to the 3rd Party/Respondents simply for the reason that same were made during the pendency of this Proceedings.*

Now, do these grounds show good cause why the appeal should be heard? I think they do. The applicant does not need to show that the grounds of appeal will succeed. It is sufficient if the grounds are

arguable: See Obikoya v. Wema Bank (1989) 1 NWLR (Pt. 96) 157.”

I had noted earlier in this judgment that the appellants’ complaints relate to: alleged inconsistency in the reliefs sought in the notice of appeal, vague or argumentative grounds of appeal, grounds of appeal lacking in particulars and grounds that fail to attack the ratio of the decision of the trial Court. Contrary to Dr. Tunji Braithwaite’s contention, none of these complaints have a bearing on the Court’s jurisdiction to entertain the appeal. Rather they are issues which, if found to be valid, might affect the prospects of the success of the appeal or of particular issues raised therein. In other words, the lower Court was right when it held that the objections were not relevant to the Court’s determination of whether to exercise its discretion in favour of granting the application or not.

On what an appellate Court should consider in determining whether the grounds of appeal show good cause why the appeal should be heard, the decision of this Court in E.F.P. Co. Ltd. v. NDIC (2007) ALL FWLR (pt.367) 793 @ 812 D-E also found in (2002) 9 NWLR (Pt.1039) 216 @ 239 E -G, per Onnoghen, JSC seems to provide a complete answer. His Lordship held thus:

“It is settled that the duty of the appellate Court in the consideration of the grounds of appeal proposed by the applicant and filed in support of the application for leave to appeal is limited to whether the grounds of appeal are substantial and reveals arguable ground. It is therefore not the duty of the Court at that stage to decide the merit of such grounds as filed in support of the application for to do so would amount to deciding the substantive matter in an interlocutory application which the law frowns upon.”

The following cases were cited with approval: Ibodo v. Enarofia (1980) 5 - 7 SC 42; University of Lagos v. Olaniyan (supra): Obikoya v. Wema Bank Ltd. (supra); Holman Bros, (Nig.) Ltd. v. Kigo (Nig.) Ltd. (1980) 8 - 11 SC 43; Egbe v. Onogun (1972) 1 All NLR (Pt. 1) 95; Ojukwu v. Governor of Lagos State (No. 1) (1985) 2 NWLR H (Pt.10) 806.

In Obikoya v. Wema Bank Ltd., (supra) at 178 F - H, Oputa, JSC held thus:

“The grounds of appeal required to be exhibited are only to

show good cause why the appeal should be heard. The Rule does not require the grounds to show good cause why the appeal should be allowed. Although in both cases, the grounds of appeal should be substantial, the certainty required in the latter case does not necessarily need to be present in the former case. A ground showing good cause why an appeal should be heard is a ground which raises substantial issues of fact or law for the consideration of the Court. It is a ground which cannot be dismissed with a wave of the hand or totally lacking in substance. It is a ground which evokes serious debate about the correctness of the decision of the Court below. It is a ground which taxes the intellect and reasoning faculties of the appeal judges. It is a ground which is not frivolous.”

In light of facts that gave rise to the dispute between the parties summarised earlier in this judgment, it is my considered view that the Court below was correct when it held that the grounds of appeal show good cause why the appeal should be heard.

On the attitude of appellate Courts to the exercise of discretion by lower Courts, this Court held further in E.F.P. Co. Ltd. v. NDIC (supra) at pages 239 - 240 H - A of the NWLR report:

“...There is another very important principle that guides an appellate Court when called upon to review, by way of appeal, the discretion exercised by the lower Court in granting or refusing to grant an application of that nature. The principle is that the attitude of appellate Courts to the exercise of discretion by lower Courts is not dissimilar to that adopted over the issue of findings of fact, which is that unless the exercise of discretion by a Court of first instance or by a lower Court is manifestly wrong, arbitrary, reckless or injudicious, an appellate Court would not interfere merely because faced with similar circumstances it would have reacted differently.”

See also: University of Lagos v. Olaniyan (supra) at 17 SC: University of Lagos v. Aigoro (1985) 1 NWLR (Pt.1) 143 @ 148 G. **I agree with the Court below that the respondent satisfied the two conditions for the grant of the Application. The grounds are arguable. Whether they will succeed is a matter for the hearing of the substantive appeal. The appellants have failed to**

show that the exercise of discretion by the lower Court was arbitrary, perverse, reckless or injudicious. I therefore resolve the sole issue for determination in this appeal against the appellants.

Before concluding this judgment it is necessary to once again point out the needless delay in the determination of the substantive appeal before the Court below by this appeal. Had the respondent filed his notice of appeal when granted leave to do so, the objections to the competence of the grounds of appeal would have been heard along with the substantive appeal. By now the appeal would have been determined and any party dissatisfied with the final decision would have been able to appeal to this Court on all the issues in controversy between the parties. Even that appeal would probably have been determined by now and the parties would know, once and for all, where they stand. 14 years have been wasted on the current exercise! Whatever the merits or otherwise of the appeal, it is a disservice to both parties and to the administration of justice for learned counsel to engage in the type of delay tactics evident in the filing of this appeal. As an officer in the temple of justice it is the duty of learned counsel to aid and not hinder the smooth administration of justice.

In conclusion I hold that the appeal is devoid of merit. It is accordingly dismissed. The ruling of the lower Court delivered on 18th November, 2002 granting respondent an enlargement of time to seek leave to appeal, leave to appeal and an enlargement of time to appeal against the decision of the High Court of Lagos State sitting at Lagos delivered on 15th September, 2000, is hereby affirmed.

There shall be N200,000,00 costs in favour of the respondent against the appellant.

MUHAMMAD JSC

I read in advance a draft copy of the judgment just delivered by my learned brother, Kekere-Ekun, JSC. I am contented with my lord's reasoning process and conclusions I too, dismiss this appeal as lacking in merit. I abide by all consequential orders made in the lead judgment including that on costs.

PETER-ODILI JSC

I am in total agreement with the judgment just delivered by my learned brother, K.M.O. Kekere-Ekun JSC and in support of the reasoning therefore, I shall make some remarks.

This is an appeal against a Ruling delivered by the Court of Appeal, Lagos Division in which Ruling that Court granted the Respondent's application for an Order for extension of time to appeal, leave to appeal and extension of time within which to seek leave to appeal against the Judgment of the trial Court. The Appellant's Notice of Appeal which is dated 2nd December, 2002 containing three grounds of appeal asking this Court to allow the appeal and set aside the Ruling with an Order dismissing the Respondent's application on the trinity prayers.

The full facts and background leading to this appeal are well captured in the lead judgment and so there is no need to have them repeated.

On the 25th day of January, 2016 date of hearing, learned counsel for the Appellant adopted his Brief of Argument filed on 24/3/2004 and a Reply Brief filed on 22/1/16.

In the Brief of the Appellant were raised two issues for determination which are thus:-

"1. Whether the Court of Appeal was right when it held that "the matters raised in the Notice of Preliminary Objection are not relevant at this state.

2. Whether the Respondent satisfied the requirements for the success of his application as contained in Order 3, Rules 4 (2), 2 (3) and 2 (4) of the Court of Appeal Rules having regard to the incompetence of the Defendants/Respondents proposed Grounds of Appeal."

Mr. Aaron Onyebuchi of counsel for the Respondent adopted his Brief of Argument filed on 21/1/2016 and deemed filed on the 25/1/16. The Brief was settled by C.A. Candide - Johnson Esq. who identified a sole issue for determination which is viz:-

"Whether the Court of Appeal was right in granting the Respondent's application for an Order for extension of time to appeal, leave to appeal and extension of time within which to seek leave to appeal dated 12th June, 2001."

This single issue as crafted by the Respondent is apt for use in

the determination of the Appeal and I shall utilise it for that purpose.

SINGLE ISSUE:

This issue questions the rightness of the Court of Appeal or Court below in the grant of the trinity prayers of leave to appeal, etc.

For the Appellant was contended that once as in this case the attention of the Court was drawn to the incompetence of the proposed ground of appeal, that Court ought to determine that issue first. That to grant leave to an applicant to file an incompetent ground of appeal was assuming jurisdiction where there is no jurisdiction. That the Appellate Court should examine the proposed grounds of Appeal and satisfy after studying the grounds of appeal in relation to the judgment and that there is an arguable Appeal. That the Appellants having filed a Notice of preliminary objection before the Lower Court against the Respondent application for extension of time and leave to appeal and that Court ought to have examined and pronounced on the merit or otherwise of the preliminary objection. He stated that it is wrong to conclude that the issues raised in the preliminary objection could not be considered at that stage. He cited *BWAI v. UBA PLC* (2002) FWLR (Pt. 119) 1538 at 1557.

Learned counsel for the Appellant stated further that for an application for both extension of time and leave to appeal, the proposed grounds of appeal must disclose prima facie good cause why the appeal must be heard. He cited *Ukpe Ibodo v. Iguasi Enarofia* (1980) 5-7 SC 42; *Holman Bros (Nig.) Ltd. v. Kigo (Nig.) Ltd. & Anor* (1980) NSCC 251.

He said the three Grounds of Appeal formulated by the Respondent are incompetent and Ground One alleges a misdirection which the Court has to ascertain whether the particulars furnished by the Respondent are indeed particulars of misdirection. He cited *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718 at 774; *Egbe v Alhaji* (1990) 1 NWLR (pt. 128) 546 at 590.

On ground 2, learned counsel for the Appellant said it did not arise from the decision sought to be appealed and so does not qualify as an arguable ground. He referred to *Babalola v. State* (1990) 4 NWLR (pt. 115) 264. That the ground is not substantial and does not qualify as an arguable ground and this, the Court of Appeal would have found in the light of the provision of Order 14, Rule 22 of the High Court Rules. He cited *Provost Alvan Ikoku College of Educa-*

tion v. Amuneke (1991) 9 NWLR (pt. 213) 49 at 58 - 59.

Learned counsel for the Respondent stated that the Court of Appeal is empowered to grant the trinity prayers where there is no unreasonable delay in bringing the application for same. He cited Order 7, Rules 7 and 10 of the Court of appeal Rules 2011; Okafor B v. Bendel Newspapers Corporation & Anor (1991) 9-10 SCNJ 107 at 114 to 115.

That the Appellants' insistence that the Court below ought to have determined their Notice of Preliminary Objection alongside Respondent's application is a desperate attempt to unduly deny the Respondent his constitutional right to appeal. That it is upon determining the Respondent's application and the filing of the Notice of Appeal by Respondent that the Preliminary Objection would be ripe for hearing.

Learned counsel for the Respondent submitted that a Court ought to be cautious when deciding interlocutory applications so as to avoid making a decision on the substantive issue in the appeal that is yet to be heard. He cited Obikoya v. Wema Bank Ltd. (1989) NWLR (pt. 96).

He said the Court cannot take into consideration facts which were not before the Court at the time of the exercise of the discretion. He cited Akin Akinoyemi v. Odua Investments Co. Ltd. (2012) 1 SC (Pt.iv) 1; Minister PMR v. El (Nig.) Ltd. (2010) 12 NWLR (Pt.1208) 261.

That the Lower Court rightly gathered and relied on the uncontroverted facts deposed to in the affidavit in support of the application filed by the Respondent at the Lower Court before arriving at its decision that a litigant should not be made to suffer for the mistakes of his counsel. He referred to Iroegbu v. Okwordu (1990) 6 NWLR (pt. 159) 643; EFP CO. LTD v. NDIC (2007) All FWLR (pt. 367) 793 at 812.

In a nutshell, the stance of the Appellants is that the Court below ought not to have granted the Respondent the extension of time and leave to file incompetent grounds of Appeal, this because the said grounds did not show prima facie good and substantial grounds.

Countering that position, the Respondent contends that he having complied with Order 7 Rule 7 and (10) of the Court of Ap-

peal Rules, 2011 impari materia with Order 3 (6), (7) and or 4 (2) of the Court of Appeal Rules 2002, the Court of below was right in granting the Respondent's application for leave to appeal. That the Appellants have not placed before this Court a special circumstance upon which this Court will rely on to set aside the exercise of discretion duly made. B

Having set down in brief what the contest in this appeal in the main is with the opposing positions of either side, I would want to state that what were before the Court of Appeal were the Respondent's as applicant's application for the trinity prayers and the now Appellant's Preliminary Objection. The Application of the Respondent in that Court below was to jump start the appeal if the Trinity prayers were granted but that had to be on hold in view of the Preliminary Objection of the now Appellant which is hereunder reproduced thus:- C

"1. The application for stay of execution having not been made and determined first by the Lower Court is incompetent. D

2. The application in its entirety is an abuse of Court process for reasons stated hereunder:

(i) This honourable Court has considered and struck out a similar application by the Application for incompetence. E

(ii) The proposed grounds of appeal are as incompetent as those struck out by this honourable Court on 11th June, 2001.

3. The proposed grounds of appeal are also incompetent for the reasons following: F

(i) Grounds one and three complain of misdirection in law without giving particulars of misdirection in law.

(ii) Ground 2 is vaguer and did arise from the decision sought to be appealed. G

4. By the issues raised in the further affidavit sworn to by Jimmy Ufot on 18th June, 2001 though totally false, the applicant has overreached himself before this honourable Court".

Within the body of the Preliminary Objection above quoted can be seen that the Objection which is really a contest to the competence of the process and therefore a jurisdictional matter at an interlocutory stage is calling upon the Court to delve into and decide matters which can only be dealt with at the hearing of the appeal, a stage that had not been set in this instance. H

On the purpose of a Preliminary Objection, Order 10 (1) of the Court of Appeal Rules prescribes as follows:-

“A Respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days’ notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with twenty copies thereof with the Registrar within the same time”.

The stipulation above definitely anticipates a hearing of the appeal and not for purposes of when an application is asking for a leg room to come in and ventilate his grievance by an appeal which permission he is seeking. Therefore, at this preliminary state in which interlocutory applications are initiated such as the application commenced by the Respondent at the Court below, a Court has to tread cautiously when deciding such interlocutory application avoid veering into the substantive issue in the appeal proper. In this regard, the Supreme Court had in the case of *Obikoya v. Wema Bank Ltd (1989) NWLR (Pt.96)* per Craig JSC stated as follows:-

“But a judge does not have such latitude. He must confine himself within respectable limits of the scope of the enquiry before the Court. A motion should be treated in all respects as an appeal. The Judge should not be seen to have prejudged a legal point which is yet to come before him in related proceedings otherwise he would disqualify himself from sitting on the latter aspect of the case... In the instant motion therefore, it would be wrong for the Court to make a definite decision on the merits of the proposed grounds of appeal when the appeal itself was not before the Court. In my view, such a course of action would eventually prejudice the fair hearing of the appeal, panel of Justices”.

Taking a cue from the *Obikoya v. Wema Bank (supra)* and placing the principles therein alongside the prayers in the Preliminary Objection and the contents thereof, clearly the Appellant is asking for the Court entering into the appeal proper, as appeal that was not before the Court, a situation where leave to so appeal is what is on ground. How the Court could entertain such a move and come out unscathed is for the imaginative mind and a situation outside the contemplation of the law or Rules of Court.

For a fact what was really before the Court below was application for leave along the guidelines of what is popularly known as

“Trinity” prayer” to appeal pursuant to Order 7, Rules 7 and 10 of the Court of Appeal Rules 2011 which provide thus:-

“(7): The application for leave to appeal from a decision of a Lower Court shall contain copies of the following items, namely:

(a) Notice of motion for leave to Appeal (From 5);

(b) A certified true copy of the decision of the Court below B sought to be appealed against;

(c) A copy of the proposed grounds of appeal; and

(d) Where leave has been refused by the Lower Court, a copy of the order refusing leave.

10 (1) The Court may enlarge the time provided by these C Rules for the doing of anything to which these Rules apply except the filing of notice of intention not to contest an application under Rule 8 above.

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

The above order and rules are impari materia with Order 3 Rule 4 of the Old Court of Appeal Rules and the Supreme Court in the case of Okafor v. Bendel Newspapers Corporation & Anor (1991) F 9-10 SCNJ 107, at 114 to 115, the Supreme Court held that:

“...These provisions which are the same as those of Order 7, Rule 4 (2) of the Supreme Court Rules, 1977 (since repealed) have been interpreted in the case of Ibodo & Ors v. Enarofia & Ors (supra) per Aniagolu, JSC to mean. ‘There must therefore be; G

Good and substantial reasons for the failure to appeal within the period prescribed, and

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

However, it is significant to note that the provisions of Order 3, H Rule 4 (1) and those of Order 3, Rule 4 (2) of the Court of Appeal Rules are intended to serve different purposes. Order 3, Rule 4 (1) is a general provision enabling the Court of appeal to enlarge time in departure to the provisions of the rules. But the provisions of Order

3, Rule 4 (2) are specific and limited to applications for enlargement of time in which to appeal, hence the two provisions are not the same and cannot, in my opinion, be given the same interpretation. Whereas Order 3, Rule 4 (2) prescribes the conditions to be satisfied before an application for enlargement of time in which to appeal can be granted, Order 3, Rule 4 (1) does not prescribed any condition on which an application for an extension of time simpliciter should be granted. It is left to the Court to use its discretion as it deems fit. This implies that in considering an application under Order 3, Rule 4 (1), the Justices of the Court of Appeal are obliged to exercise their discretion judicially.

The question that now raises in this appeal is: did the learned justices of the Court of Appeal properly consider the application, by the Appellant, for enlargement of time to file Respondent's notice? In other words, did they exercise their discretion judicially in refusing to grant the application? It is clear from the excerpts above that in considering the application; the Court of Appeal went into the merits of the Respondent's notice which the Appellant had intended to file if his application were granted. In my respectful opinion, the Court of Appeal was in error when it did so. It could not rightly be concerned with the merits of the proposed respondent's notice at the stage, for it would be pre-judging the merits of the Respondent's notice.

What the learned justices should have concerned themselves with, since the application was brought under Order 3, Rule 4 (1) of the Court of Appeal Rules, was the content of the affidavit in support of the application to see whether the delay in filing the Respondent's notice had sufficiently been explained and that the delay had not been inordinate or without reasonable excuse. For in the exercise of discretion by Court to grant application for extension of time, the length of the delay as well as the sufficiency of the explanation proffered for the delay must be taken into consideration by the Court, before the discretion could be regarded as having been judicially exercised. See *Agbeyegbe v. Ikomi* 12 WACA 383 at pages 385-386. This is what the learned justices of the Court of Appeal omitted to do in the present case.

The Court of Appeal in the light of the plethora of authorities including that of *Okafor v. Bendel Newspapers* (supra) highlighted above, considering the supporting affidavit of the Respondent and

being satisfied, there was good explanation for the delay in appeal within the timeframe prescribed by law and there was sufficient, good and substantial reason for the Respondent to be allowed in to appeal especially in this instance where the reasons proffered by the Respondent were unchallenged by the now Appellant. Therefore, the Court below was on firm ground to grant him the leave sought to appeal. It is to be said from the above and the fuller reasons in the lead judgment that this appeal lacks merit and I too dismiss it. I abide by the consequential orders as made.

AKA'AH'S JSC

I was privileged to read in draft the judgment of my learned brother, Kekere-Ekun JSC. I agree entirely with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

Where an applicant files an application for extension of time to seek leave to appeal, leave to appeal and extension of time to appeal, the application should contain the trinity prayers. Apart from this, the applicant must give satisfactory reasons for his failure to appeal within time coupled with arguable grounds of appeal. Once the applicant satisfies these requirements, the Court's discretion to appeal should be exercised in his favour. See: Iroegbu v. Okwordu (1990) 6 NWLR (Pt. 159) 643. In the Instant case Oguntade JCA (as he then was) had pointed out that the depositions contained in the affidavit in support of the application were not challenged as the respondent did not file any counter affidavit and as a result he accepted the explanation for the failure to appeal within time. As there was no appeal against this finding, the first hurdle was scaled. The next hurdle is to scrutinize the grounds of appeal to see if they are arguable grounds and not whether they will succeed. See: E.F.P. CO. LTD. v. NDIC (2007) 9 NWLR (Pt. 1039) 216 per Onnoghen JSC at 239 where his Lordship stated:-

"It is settled that the duty of the appellate Court in the consideration of the grounds of appeal proposed by the applicant and filed in support of the application for leave to appeal is limited to whether the grounds are substantial and reveal arguable grounds..."

The grounds of appeal which have been reproduced in the lead judgment of my learned brother, Kekere-Ekun JSC are sub-

stantial and arguable. For this reason and the more detailed reasons contained in the lead judgment, I too find that the appeal has no merit and I accordingly dismiss it. I abide by the order on costs made in favour of the respondent against the Appellants.

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OKORO JSC

C Fourteen years ago, exactly on 18th, November, 2002, the Court of Appeal, Lagos Division delivered a ruling which granted the prayers in a motion on notice by the respondent herein. The prayers granted were an Order for extension of time to appeal, leave to appeal and extension of time within which to seek leave to appeal against the judgment of the trial High Court of Lagos State. Had the appeal been allowed to run its course at the Court below, may be it would D have been disposed of even on a further appeal to this Court. In other words, the parties would, by now, have known their rights and responsibilities in the matter. Alas, it was not to be. This interlocutory appeal by the 1st appellant herein has stayed the matter and kept it in the cooler for these fourteen years. What a sad commentary on E our judicial process. In the instant case, the appellant bears the blame. Definitely, not the Court.

F My Lords, My learned brother, Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC, has meticulously and quite efficiently resolved the salient issues submitted for the determination of this appeal. I have nothing new to say but to adopt both her reasoning and conclusion as mine. That notwithstanding, I shall make a fee comments in support of the judgment only.

G But before doing so, let it be known that Dr. Tunji Braithwaite was reported dead on 28/3/16. One of his children, Mr. Olumide Braithwaite applied via motion on notice filed on 5/4/16 to substitute his late father. The said application was duly granted on 13/4/16. By that Order of this Court, Mr. Olumide Braithwaite becomes first appellant in this case.

H By Order 3, Rules 4(1) & (2) of the Court of Appeal Rules 2011, the Court may enlarge the time provided by the Rules for the doing of anything to which the Rules apply.

Every such application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and sub-

stantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard.

I need to emphasize that in an application for extension of time to appeal, the applicant must explain the cause of the delay and give cogent reasons why the notice of appeal was not filed within the statutory period. In addition, the applicant must show that he has an arguable and not a frivolous appeal. He is not required to show that his appeal will succeed. He is only to show that he has good and arguable grounds of appeal. See *HOLMAN BROS. NIG. LTD. v. KIGO NIG. LTD & ANOR.* (1980) NSCC 251, *IROEGBU v. OKWORDU* (1990) 9 – 10 SC 1990, (1990) NWLR (pt. 159) 643. B
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One other issue which, I think must be made clear is that the two conditions espoused above must be satisfied conjunctively. If one condition fails, the entire application will fail. See *ISIKA v. OGUNDIRU* (2006) 13 NWLR (pt. 997) 401, *WILLIAMS v. HOPE RISING VOLUNTARY FUNDS SOCIETY* (1982) 1 - 2 SC. 145.

The appellant herein appear not to have problem with the 1st condition i.e. the reason for the delay in filing the notice of appeal. According to the Court below, “a Court should not visit the mistake of counsel on the litigant”. My reason for saying so is that the 1st appellant did not file a counter affidavit challenging the reasons for the delay. He is deemed to have admitted those reasons in the affidavit of the applicant, now respondent. E

The grouse of the 1st appellant seems to be centered on the grounds of appeal. Even at that, the cases cited above and many more agree that at this stage, an applicant does not need to show that the grounds will succeed. All he needs to show, according to Order 3 Rule 4 (2) of the Court of Appeal Rules 2011, is that the grounds of appeal prima facie show good cause why the appeal should be heard. What this means is that he is only to show that he has good grounds of appeal with reasonable prospect of influencing the minds of the justices in his favour. See *IROEGBU v. OKWORDU* (supra) *HOLMAN BROS. NIG. LTD v. KIGO NIG. LTD & ANOR.* (supra). F
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In my well considered opinion, the Court below was right when it considered appropriate to grant the application for extension of time to appeal. The two conditions explained above were present together at the same time and the Court below was on a very strong

wicket when it granted the application.

It is on this note that I agree with my learned brother, Kekere-Ekun, JSC that there is no iota of merit in this appeal. Counsel should have the interest of their clients at heart when pursuing their matters. This appeal, to say the least, was in bad taste and ought not to have been brought in the first place. I hereby dismiss the appeal and abide by all the consequential orders made in the lead judgment. I also award costs of N200,000.00 against the appellants in favour of the respondent.

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