

**SUPREME COURT OF NIGERIA**  
FRIDAY 13TH JANUARY, 2017. SC. 119/2013  
**CORAM:- W. S. N. ONNOGHEN AG. CJN, M. U.**  
**PETER-ODILI, O. ARIWOOLA, K. B. AKA'AHs,**  
**K. M. O. KEKERE-EKUN, JJSC**

SETRACO NIGERIA LIMITED ..... APPELLANT  
AND  
JOSEPH KPAJI ..... RESPONDENT

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APPEALS - Notice of - Competence - The notice was not incompetent because of the preliminary objection filed - As all appellant needed to do was to apply to amend the notice (H1)

APPEALS - Motion - Extension of time - Dismissal of - The motion was rightly dismissed - As appellant had filed notice to discontinue with the appeal (H2)

**FACTS**

Plaintiff/respondent brought this action before the Nasarawa State High Court Keffi, claiming the sum of two hundred and fifty million naira (N250,000,000.00) only as special and general damages as a result of injuries he had suffered due to negligence of defendant/appellant. At the conclusion of hearing in the matter, the trial Court entered judgment in favour of respondent in the sum of N89,640,000.00 (Eighty nine million, six hundred and forty thousand) naira only. Appellant was dissatisfied and appealed to the Court of Appeal Jos Division. Appellant's Notice of Appeal was wrongly headed IN THE COURT OF APPEAL HOLDEN AT ABUJA. On discovering the mistake, appellant filed another Notice of Appeal which was entered as CA/J/43/2009 and equally filed its brief of argument. On being served with appellant's brief, respondent raised a preliminary objection to the competency of the appeal on the grounds that there was no competent appeal before the Court and there was no competent brief of argument filed by appellant.

Appellant did not respond to the preliminary objection but instead decided to change counsel. Subsequently a Notice of Withdrawal of Appeal No.CA/J/43/2009 was thus filed. The appeal was thus, later struck out by the Court pursuant to Order 11 rules (1) and (2) of the Court of Appeal Rules 2010 (as amended). The new counsel S. A. Ngavan Esq. filed a fresh Motion on Notice which was given appeal No.CA/MK/51/M/2012 praying for the following reliefs, inter alia, an extension of time within which applicant may apply for leave to appeal, leave to appeal and extension of time within which to file notice and grounds of appeal. Respondent filed a counter-affidavit in opposition to the motion for extension of time to appeal. The Court heard the application and dismissed same as lacking in merit. Before arriving at its decision, the Court held that the wrong heading of a Notice of Appeal and failure to state the name and address of one of the parties interested in the appeal are blunders that can be amended and they do not warrant the striking out of an appeal which otherwise should be heard on the merit. Aggrieved, appellant appealed to the Supreme Court.

**HELD** (Unanimously dismissing the appeal per  
***AKA’AHS JSC***)

*APPEALS - Notice of - Competence*

**1. Learned Counsel must have laboured under the mistaken belief that the Notice of Appeal was incompetent because of the preliminary objection which was subsisting at the time the Notice of withdrawal of the appeal was filed. The lower Court effectively dealt with the mistaken belief when it held that the appeal was competent and all that learned counsel should have done was apply to amend the Notice of Appeal so as to add the name and address of the appellant as the person affected by the appeal. Even the first Notice which was wrongly headed 'IN THE COURT OF APPEAL HOLDEN AT ABUJA' could have been amended to read "Jos" because**

***the error did not affect the jurisdiction of the Court to entertain the appeal.*** (p. 154 D)

*APPEALS - Motion - Extension of time - Dismissal of*

***2. The motion for leave and extension of time to appeal was rightly dismissed since the appellant had filed Notice to discontinue with the appeal and it was struck out which is tantamount to a dismissal of the appeal under Order 11 Rule 5 Court of Appeal Rules, 2011.*** (p. 154 G)

### **REPRESENTATION**

C. O. Toyin Pinheiro, SAN; with C. A. Chambang, I. Y. Mekah and J. A. Sambo, for the Appellants

A. O. Maduabuchi with Kenechukwu Maduka, Chijioke Dike and Chibueze Ndidigwe for the Respondents

### **CASES REFERRED TO**

Akuneziri v. Okenwa (2000) 15 NWLR (pt. 691) 526

U.T.C. (Nig.) Ltd v. Pamotei (1989) 2 NWLR (pt. 103) 244

Oloba v. Akereja (1988) 3 NWLR (pt. 84) 508

Auto Import Export v. Adeboye (2002) 18 NWLR (pt. 799) 554

FBN Plc v T.S.A. Ind. Ltd (2010) 15 NWLR (pt. 1216) 247

Inyang v. Ebong (2002) 2 NWLR (pt. 751) 284

Young Shall Grow Motors Ltd. v Okonkwo (2010) 15 NWLR (pt. 1217) 524

Fagunwa v. Adibi (2004) 17 NWLR (pt. 903) 544

Lagos State Traffic Mgt. Authority v. Ezezoobo (2012) 3 NWLR (pt. 1286) 49

F.B.N. Plc v. Maiwada (2013) 5 NWLR (pt. 1348) 444

Kraus Thompson Org. v. NIPSS (2004) 17 NWLR (pt. 901) 44

Ihunwo v. Ihunwo (2013) 3 NWLR (pt. 1357) 550

Ogbu v. State (2007) 2 SCNJ 319

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

Edozien v. Edozien (1993) 1 NWLR (pt. 272) 678

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

Constitution of the Federal Republic of Nigeria 1999, ss. 36, 241, 242, 243

Evidence Act, s. 169

Court of Appeal Rules 2011, O. 11 rr. 1, 2, 5

B Supreme Court Rules 1985, O. 8, rr. 6(1), 6(5)

### **LEAD JUDGMENT BY AKA'AHs JSC**

The plaintiff (now respondent in this appeal) instituted an action before the Nasarawa State High Court sitting in Keffi claiming the sum of Two Hundred and Fifty Million Naira (250,000,000.00) only as special and general damages as a result of injuries he had suffered due to negligence of the defendant appellant. The suit is numbered NSD/K 25/2006. On 28/11/2008 the Nasarawa State High Court presided over by Viko J. entered judgment in favour of the plaintiff/respondent in the sum of N89,640,000.00 (Eighty-Nine Million, Six Hundred and Forty Thousand Naira) only. The defendant was dissatisfied with the said judgment and appealed against it to the Court of Appeal, Jos Division. The said Notice of Appeal was wrongly headed IN THE COURT OF APPEAL HOLDEN AT ABUJA On discovering this mistake, Mr. Akin Adewale of counsel filed another Notice of Appeal on 16/12/2008. The appeal was entered as CA/J/43/2009 and the appellant filed its brief of argument. On being served with the appellant's brief, the respondent raised a preliminary objection to the competency of the appeal on the grounds that:-

1. There was no competent appeal before the Court, and
2. There was no competent brief of argument filed by the appellant.

The preliminary objection was argued in the respondent's brief wherein objection was also taken regarding the formulation of more than one issue from a single ground of appeal.

H The appellant did not respond to the preliminary objection but instead decided to change counsel.

On 24/2/2012 a Notice of Withdrawal of Appeal No.CA/J/43/2009 was filed by Omale Omale, (see page 239 of the Records). The appeal was struck out on 24/4/2012 by virtue of Order 11

Rules (1) and (2) of the Court of Appeal Rules 2010 (as amended).

The new counsel S. A. Ngavan Esq. filed a fresh Motion on Notice on 25/4/2012 which was given appeal No.CA/MK/51/M/2012 praying for the following reliefs:-

1. Extension of time within which the applicant may apply for leave to appeal against the judgment of Hon. Justice John A. Viko of Keffi High Court, Nasarawa State in Suit No NSD/K25/2006 delivered on the 28th day of November, 2008. B

2. Leave for the Applicant to appeal against the said judgment of Hon justice John A Viko in suit No NSD/K25/2006 delivered on the 28th day of November, 2008 C

3. Extension of time within which the applicant may file its notice and grounds of appeal against the Judgment stated in (1) and (2) above.

The grounds upon which the application was brought are as follows:- D

1. That following the delivery of the said judgment on 28/11/2008 applicant immediately caused her counsel then, Akin Adewale Esq. to file an appeal against it and the said counsel actually filed a Notice of Appeal dated the 29th day of November 2008 and filed on 1st December, 2008 but was wrongly headed In *"the Court of Appeal Holden at Abuja"*. E

2. That another Notice of Appeal dated the 16th December 2008 was filed on 6th February, 2009 within the statutory period for appealing. F

3. That the said appeal No. CA/J/43/2009 was struck out by this Honourable Court on the 24th day of April, 2012.

4. That the applicant is desirous of prosecuting the appeal to its logical conclusion. G

5. That the lapses are caused by counsel

6. Extension of time by this Honourable Court is required to file a competent Notice of Appeal.

In paragraphs 3, 4, 5, 6, 7, 8 and 10 of the affidavit in support of the motion, Ephraim Fater Sarwuan a Legal Practitioner deposed to the following facts- H

*"3. That I know as of fact that on the 19th day of December,*

2011, the law firm of Bernard Hom. & Co. received a brief from the Legal Department of the Trust Insurance Company, on behalf of the applicant that a fresh Notice of Appeal be filed against the judgment of Hon. Justice John A. Viko delivered on the 28th November, 2008. A copy of the said judgment is attached hereto and marked Exhibit 1.

4. That I know as of fact from the records sent to our Law Office that the applicant's former counsel, Akin Adewale Esq. had filed two different Notices of Appeal, one dated 29th November, 2008 and filed on 1st December, 2008 and the other dated the 16th day of December, 2008 and filed on the 6th day of February, 2009.

5. That I also know as of fact that the appeal had been entered as appeal No.CA/J/43/2009 and briefs of argument were settled, filed and exchanged based on the Notice of Appeal filed on 6th February 2009 mentioned above.

6. The appeal No. CA/J/43/2009 being defective has been withdrawn and struck out by this Honourable Court and annexed hereto as Exhibits 2 is the ruling of this Honourable Court striking out the said appeal.

7. That the proposed fresh and competent Notice of Appeal has now been prepared on behalf of the applicant and is attached here and marked as Exhibit 3.

8. That as a lawyer I believe that the proposed Notice of Appeal has arguable grounds of appeal and is likely to succeed.

10. That the defect discovered in the appeal filed by applicant's former counsel is that the names of all persons affected by the appeal were not stated in paragraph 5 of the said Notice."

The respondent filed a Counter-affidavit in opposition to the motion for extension of time to appeal and this is what Bello Lukman Ibrahim, a Legal Practitioner in the Chambers of Oba Maduabuchi Esq. averred in paragraphs 3, 4, 5, 6, 7, 8, 9 and 10:-

"3. That judgment was entered in favour of the respondent by the Nasarawa State High Court on the 28th day of November, 2008.

4. *That the appellant filed an appeal against same and also filed a brief and the respondent also filed his brief.*

5. *That while the parties were waiting for a hearing date the appellant appealed to the Supreme Court on whether it should pay the judgment sum into Court as it had undertaken to do in the Court of Appeal* B

6. *This lasted from 2009 until 2012 when the Supreme Court struck same out and then the appellant paid the judgment sum into Court in Jos instead of Makurdi. The ruling is Exhibit JK1 hereto.* C

7. *That upon noticing that their case was weak in the appeal number CA/J/43/2009 the appellant voluntarily withdrew same pursuant to Order 11 of the Court of Appeal Rules.*

8. *That it is not true that the Notice of Appeal did not contain the names and addresses of the persons interested in the appeal* D

9. *That a copy of the said Notice of Appeal is exhibited thereto as Exhibit JK 2.*

10. *That the appeal No. CA/J/43/2009 having been withdrawn stands dismissed.* E

11. *That the applicant has no right of appeal again against the judgment of the Nasarawa State High Court having exercised same appeal number CA/J/43/2009".*

A further and better affidavit was filed in support of the application to which were attached several exhibits. The Court below thereafter ordered counsel to file written addresses. F

Learned counsel also made oral Submissions. The Court below considered the application and dismissed same as lacking G in merit but before reaching this conclusion, the Court held that the wrong heading of a Notice of Appeal and failure to state the name and address of one of the parties interested in the appeal are blunders that can be amended and they do not warrant the striking out of an appeal which otherwise should be heard on the merit. H

This prompted the appellant to file an appeal to this Court on 11th February, 2013 containing 6 grounds of appeal from which the appellant distilled three issues for determination which are as

follows:-

1. Was the Court of Appeal right when it held that, the appellant having withdrawn her appeal under Order 11 of the Court of Appeal Rules 2011, was barred from bringing an application for extension of time and for leave to appeal against the substantive judgment of Hon. Justice John A. Viko, notwithstanding her constitutional right of appeal and right to fair hearing. (This issue is distilled from Grounds 1, 3, 4 and 6).

2. Was the Court of Appeal right when in determining the application before it, it did not consider the appellant's Further and better Affidavit and the Reply Address on points of law, which were properly before it. (This issue is formulated from Ground 2).

3. Was the Court of Appeal right to hold, as it did, that the defects leading to the withdrawal of the original Notice of Appeal could have been cured by amendment even at the stage when briefs had been filed and exchanged. (Formulated from Ground 5)

The respondent on his part felt there was only one issue for determination and it is:-

Whether an appeal which has been withdrawn and struck out pursuant to Order 11 Rules (1) and (2) of the Court of Appeal Rules, 2011 can be relitigated.

Granted that the respondent had filed Notice of preliminary objection to the Notice of Appeal which the appellant filed on 16/12/2008, it is the substantiality of that preliminary objection that will determine the fate of this appeal.

There is no dispute whatsoever that the appellant filed Notice of Withdrawal of the appeal. The process which is at page 239 of the record states:-

*"NOTICE OF WITHDRAWAL OF APPEAL BROUGHT PURSUANT TO ORDER 11 RULE 1 OF THE COURT OF APPEAL RULES 2011.*

*TAKE NOTICE that the Appellant herein intends not to prosecute this appeal any further and hereby gives notice of withdrawal to the respondent in accordance with the Rules of this Court.*

*Dated this 24th day of February, 2012*

*Signed:*



*Omale Omale Esq.*”

The proceeding of the 24th day of April, 2012, when the appeal was withdrawn is at page 157 of the records and it is reproduced in extenso as follows:-

*APPEAL NO. CA/J/43/2009*

*BETWEEN:*

*SETRACO NIG. LTD - APPELLANT*

*V.*

*JOSEPH KPAJI - RESPONDENT*

*PARTIES ABSENT*

*S. A. Ngavan (with Omale Omale) for the Appellant.*

*Mr. Oba M. for the Respondent*

*S. A. NGAVAN :- We filed a Notice of discontinuance of this appeal and urge this Court to discontinue with this case. The Notice was filed on 27/2/2012*

*Mr. Oba:- No objection*

*Court:- The Appeal No. CA/J/43/09 having been discontinued is hereby struck out by virtue of Order 11 (1)(e) of this Court Rules 2010 (as amended)*

*Mr. Ngavan:- I wish to withdraw our motion filed on 3/2/2012.*

*Mr. Oba:- No objection*

*Court:- Application filed on 3/2/2012 for extension of time apply (sic) for leave to appeal, etc., is struck out having been withdrawn.*

*Signed.*

*Hon. Justice M L TSAMIYA - PJCA*

*24/4/2012*

*Signed.*

*I agreed Hon. Justice A. A. B. Gumel – JCA Signed.*

*I agreed Hon. Justice U. Onyemenam - JCA”*

It is on the basis of this ruling that the Court below dismissed the Motion in CA/MK/51/M/2012 when the panel (coram: Mikailu, Mshelia and Oseji JJCA) unanimously held that the failure of appellant to state the name and address of one of the parties interested in the appeal amounts to a blunder which constitutes only an amendable irregularity and does not warrant the striking out of

an appeal which otherwise should be heard on the merit. In his own contribution, Mshelia JCA dealing with the import of filing the Notice of discontinuance of the appeal as it relates to the motion stated at page 288 of the record:-

*"It is clear from the proceedings of this Court dated 24/4/2012 that appellant now applicant applied to discontinue the appeal filed on 27/2/2012 and same was struck out by this Court pursuant to Order 11 Rules 1 and 2 of the Court of Appeal Rules, 2010 as amended. Once an appeal is withdrawn under Order 11 Rules 1 and 2, with or without consent of the parties, the appeal stands dismissed pursuant to Order 11 Rule 5 of the said Rules".*

Learned counsel for the appellant has argued that since appeal No. CA/J/43/2009 was not decided on the merits when the appeal was struck out on 24/4/2012, Order 11 of the Court of Appeal Rules 2011 cannot be interpreted and applied to defeat the express constitutional provision relating to right to fair hearing and the right of appeal as guaranteed under Sections 36, 241, 242, 243 of the Constitution of the Federal Republic of Nigeria 1999. It was argued in the Reply Brief that before the Court of Appeal can have jurisdiction to dismiss the appeal, there must be a competent and valid Notice of Appeal.

In the lead Ruling Oseji JCA examined Order 11 with a view to establishing its effect on the withdrawal and striking out of an appeal. The said Order 11 provides:-

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

*2. If all parties to the appeal consent to the withdrawal of the appeal without an order of the Court, the appellant may file in the registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the registrar and in such event any sum deposited against costs shall be paid out to the appellant.*

3. *The withdrawal of an appeal with the consent of the parties under Rule 2 of this Order shall be a bar to further proceedings on application made by the respondent under Order 9.*

4. *If all the parties do not consent to the withdrawal of an appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, including any application made by the respondent under Order 9, and for the making of an order as to the disposal of any sum deposited against cost.*

5. *An appeal which has been withdrawn under this Order, whether with or without an order of the Court, shall be deemed to have been dismissed.*

6. *Where an appeal is withdrawn under this Order, any respondent who has not given a notice under Order 9, may give notice of appeal and proceed therewith in the manner prescribed by the foregoing Rules, and in such case the time limited for giving notice of appeal, for depositing the sum estimated to cover the cost of the record and for making deposit against costs may, on application to the Court, be extended so far as is reasonably necessary in all the circumstances of the case”*

He continued thus:-

*“Order 11 Rule 5 is in Pari materia with Order 3 Rule 18(5) of the Court of Appeal Rules 1981 wherein the Supreme Court in EZOMO V. A-G BENDEL (1986) 4 NWLR (Pt. 36) 448 at 462 had cause to consider the effect of the said provision on an appeal that was withdrawn.*

*Their lordships per Aniagolu JSC held inter alia as follows:-*

*“Having held that the withdrawal notice filed by Mr. Obasuyi was validly filed, Order 3 Rule 18 of the Court of Appeal Rules would automatically take effect. By Sub rule 5 of Rules 18,*

*“An appeal which has been withdrawn under this Rule, whether with or without an order of the Court, shall be deemed to have been dismissed”.*

*“This Sub-rule 5 is in identical terms with Order 7 Rule 17(5) of the Supreme Court Rules 1985. The effect of the withdrawal*

*notice filed by Mr. Obasuyi, in my view, was to terminate the appeal filed against the judgment of the High Court with or without an order of Court”*

B *“I do not consider it necessary to decide the question whether the respondents are estopped by their conduct in resiling from their notice of withdrawal. This is because the appeal having been dismissed by virtue of Order 3 Rule 18(5), it is only the respondent to such dismissed appeal who had given notice under Order 3 Rule 14 that the judgment should be affirmed or varied on other grounds, C and on fulfilling the conditions prescribed in that Rule who can continue with the appeal. There is no provision enabling an appellant to re-list the appeal so dismissed. I am therefore unable to conceive from the Rules, how having validly withdrawn the appeal it would again be entered for hearing”.*

D ***Learned Counsel must have laboured under the mistaken belief that the Notice of Appeal was incompetent because of the preliminary objection which was subsisting at the time the Notice of withdrawal of the appeal was filed. The lower Court effectively dealt with the mistaken belief when it held that the appeal was competent and all that learned counsel should have done was apply to amend the Notice of Appeal so as to add the name and address of the appellant as the person affected by the appeal. Even the first Notice which was wrongly headed ‘IN THE COURT OF APPEAL HOLDEN AT ABUJA’ could have been amended to read “Jos” because the error did not affect the jurisdiction of the Court to entertain the appeal.***

G ***The motion for leave and extension of time to appeal was rightly dismissed since the appellant had filed Notice to discontinue with the appeal and it was struck out which is tantamount to a dismissal of the appeal under Order 11 Rule 5 Court of Appeal Rules, 2011.***

The appeal lacks merit and accordingly dismissed.

There shall be costs of N500,000.00 against the appellant in favour of the respondent.

**ONNOGHEN AG. CJN**

I have had the benefit of reading in draft the lead Judgment of my learned brother, AKA'AH'S J.S.C just delivered. B

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

My learned brother has dealt exhaustively with all the issues calling for determination. I therefore have nothing to add. C

I therefore abide by the consequential orders made in the said lead Judgment including the order as to costs.

Appeal dismissed.

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D

**PETER-ODILI JSC**

I agree with the judgment just delivered by my learned brother, Kumai Bayang Aka'ahs JSC and to place my support for the reasonings on record, I shall make some comments. E

The respondent as plaintiff at the High Court of Nasarawa State sitting at Keffi Coram: Viko J claiming the sum of N250,000,000.00 for the negligence of the appellant as defendant which resulted in the amputation of his leg. After full trial, judgment was entered for the plaintiff/respondent in the sum of N89,600,000.00 and dissatisfied, the defendant appealed to the Court of Appeal, Makurdi Division and also filed a motion for stay of execution. F

At the Court of Appeal or Lower Court or Court below the appellant and respondent agreed that the judgment be stayed on terms being that appellant pay the sum of N29,600,000.00 to the present respondent and bring a bank guarantee for the balance sum of N60,000,000.00. The appellant appealed against the order to the Supreme Court in spite of the agreement. The appellant then paid the sum of N29,600,000.00 into the account of the Chief Registrar of the Court below to abide the outcome of the main appeal. On the 13th day of February, 2012, the application for H

leave to appeal against the judgment was filed and on the 24th day of February, 2012, the present appellant withdrew the appeal and on 24th day of April 2012, the Court below struck out the appeal pursuant to Order 11, Rules 1 and 2 of the Court of Appeal Rules 2011.

B The appellant on the 25th day of April, 2012 sought leave to appeal the same said judgment and the present respondent opposed it on the ground that the appeal having been withdrawn pursuant to Order 11, the appeal deemed dismissed and it is against C that refusal of the application for leave to appeal that the appellant has come before the Supreme Court.

Toyin Pinherio SAN of counsel on the day of hearing, adopted appellant's Brief of Argument settled by B. I. Hon SAN and filed on 30/4/2013.

D In the Brief were crafted 3 Issues for determination of the appeal and they are as follows:-

(1) Was the Court of Appeal right when it held that the appellant, having withdrawn her appeal under Order 11 of the Court E of Appeal Rules, 2011, was barred from bringing an application for extension of time and for leave to appeal against the substantive judgment of Hon. Justice John A. Vika, notwithstanding her constitutional right of appeal and right to fair hearing. (This issue is distilled from Grounds 1, 3, 4 and 6).

F (2) Was the Court of Appeal right when, in determining the application before it, it did not consider the appellant's Further and Better Affidavit and the Reply Address on Points of Law, which were properly before it. (This issue is formulated from Ground 2).

G (3) Was the Court of Appeal right to hold, as it did, that the defects leading to the withdrawal of the original Notice of Appeal could have been cured by amendment even at the stage when briefs had been filed and exchanged. (Formulated from Ground 5)

H Learned counsel for the appellant also adopted the Reply Brief filed on 14/3/16.

Oba Maduabuchi of counsel for the respondent adopted respondent's Brief filed on 4/3/15 and deemed filed on the 17/10/16. He raised a lone Issue which is thus:-

Whether an appeal which has been withdrawn and struck out pursuant to Order 11, Rules 1 and 2 of the Court of Appeal Rules, 2011 can be relitigated?

This sole issue so crafted by the respondent covers the grounds on which this appeal is based and has the appellant's 3 issues subsumed therein and so without beating about the bush, I shall make use of it in the determination of this appeal. B  
SOLE ISSUE:

This raises the question whether an appeal which has been withdrawn and struck out pursuant to Order 11, Rules 1 and 2 of C the Court of Appeal Rules 2011 can be relitigated.

Learned counsel for the appellant submitted that the constitutional right of the appellant to appeal to the Court of Appeal guaranteed under Section 243 subject to Sections 241 and 242 of the Constitution of the Federal Republic of Nigeria, 1999 as D amended. That where the determination of an appeal by a Party is not on the merits but by withdrawal, for some reasons, such party cannot be prevented from approaching the Court once more and bring a proper appeal. He cited *Akuneziri v. Okenwa & Ors* (2000) E 15 NWLR (Pt.691) 526 at 539; Order 8, Rules 6(1) to 6(5) of the Supreme Court Rules, 1985 which counsel contends are in pari materia with the provisions of Order 11, Rules 1-5 of the Court of Appeal Rules, 2011.

He stated further that Rules of Court are meant to be obeyed F but the application of the Rules are not to defeat or truncate justice as that is not the intention of the legislature. He relied on *U.T.C. (Nig.) Ltd v. Pamotei* (1989) 2 NWLR (Pt.103) 244 at 296; *Oloba v Akereja* (1988) 3 NWLR (Pt.84) 508 at 528. G

That Rules of Court cannot override statutory or constitutional Provisions. He referred to *Auto Import Export v. Adeboye & 2 Ors* (2002) 18 NWLR (Pt 799) 554 at 580.

That an appeal withdrawn and struck out can be brought back either by relisting or by a fresh application for leave to appeal H out of time. He cited *First Bank of Nigeria Plc v T.S.A. Industries Ltd* (2010) 15 NWLR (Pt. 1216) 247 at 287; *Inyang v. Ebong* (2002) 2 NWLR (Pt. 751) 284 at 319 - 320; *Young Shall Grow Motors*

Ltd v Okonkwo (2010) 15 NWLR (Pt. 1217) 524.

Learned counsel for the appellant stated further that the lower Court did not consider the Further and Better Affidavit filed by the appellant alongside the exhibits. He cited Fagunwa & Anor v. Adibi & 2 Ors (2004) 17 NWLR (Pt.903) 544 at 567 etc.

B That the failure of the Court below to consider the Further and Better Affidavit with the exhibits of the appellant led that Court to a wrong conclusion leading to a denial of fair hearing. He referred to Odunukwe v Oformata & Anor (2010) 18 NWLR C (Pt.1225) 404 at 435 (SC).

It was stated for the appellant that once briefs have been filed and exchanged, no amendment will be allowed and the only way out for the appellant to withdraw the appeal and come back Properly He relied on Lagos State Traffic Management Authority D & Ors v Ezezoobo (2012) 3 NWLR (Pt.1286) 49 at 54 - 55

For the respondent, learned counsel contended that any appeal which is withdrawn pursuant to Order 11, Rules 5(1) and (2) cannot be brought back to life as the process is deemed dismissed. E That the essence of a Court is to interpret the law as it is and not as it is wished it was, He cited F.B.N. Plc v Maiwada (2013) 5 NWLR (Pt.1348) 444 at 448; Kraus Thompson Org. v NIPSS (2004) 17 NWLR (Pt.901) 44 at 64.

F That the Notice of withdrawal under Order 11, Rule 1 of the Court of Appeal Rules, 2011 was clear and did not give room for the alteration of the contents by any extraneous evidence. Learned counsel cited Abalogu v Shell PDC Nig. Ltd SCNJ 262 at 282; Ihunwo v Ihunwo (2013) 3 NWLR (Pt. 1357) 550 at 583.

G That the appellant/applicant has not shown why the decision of the Court of Appeal - is wrong. That the appellant had a duty to show how the exhibits were ignored and how what happened led to a perverse or wrong decision. He cited Ogbu v The State (2007) 2 SCNJ 319 at 329.

H For the respondent, it was canvassed that appellant made the respondent believe that they had dropped all interests in the pursuit of the appeal only to turn around and seek to alter that position which is not allowed. Learned counsel referred to Abalogu



v. Shell P.D.C. Ltd (2003) 6 SCNJ 262 at 284; Section 169 of the Evidence Act: Ezomo v A. G. Bendel State (1986) 4 NWLR (Pt.36) 448 at 462

In brief, the stand of the appellant is that since the Notice of Appeal dated the 16th day of December, 2008 was defective the appellant was right to have withdrawn same and appellant was also right to bring a fresh application for extension of time and for leave to appeal as the earlier withdrawal did not constitute a bar for a new application. B

That position, the respondent did not accept as respondent C is of the view that the withdrawal or discontinuance pursuant to Order 11, Rules 1 and 2 as the appellant had done and the attendant striking out was a dismissal for all time since the jurisdiction of the Court is thereby permanently ousted.

For a clearer view of what is before Court, I shall quote verbatim, the Process at the base of this appeal which is the notice of withdrawal and it is captured at page 239 of the record of Appeal and it is thus:- D

“NOTICE OF WITHDRAWAL OF APPEAL BROUGHT PURSUANT TO ORDER 11 RULES 1 OF THE COURT OF APPEAL RULES 2011. E

TAKE NOTICE that the appellant intends not to prosecute this appeal any further and thereby gives notice of withdrawal to the respondent in accordance with the Rules of this Court. F

Dated this 24th day of February, 2012.

Signed

Omale Omale Esq.

The Court below was of the firm view that the appellant cannot come again with an application to have the matter relisted in the light of the provisions of Order 11 Rules 1, 2, 3, 4 and 5 of the Court of Appeal Rules. G

I shall quote those Rules hereunder so that the issue at stake is seen in a clearer light. Order 11 reads thus:- H

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

*the appeal any further.*

B (2) *If all parties to the appeal consent to the withdrawal of the appeal without an order of the Court, the appellant may file in the registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the registrar and in such event any sum deposited against costs shall be paid out to the appellant.*

C (3) *The withdrawal of an appeal with the consent of the parties under Rule 2 of this Order shall be a bar to further proceedings on application made by the respondent under Order 9.*

D (4) *If all the parties do not consent to the withdrawal of an appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, including any application made by the respondent under Order 9, and for the making of an order as to the disposal of any sum deposited against cost.*

E (5) *An appeal which has been withdrawn under this Order, whether with or without an order of the Court, shall be deemed to have been dismissed”.*

F The Courts including the Apex Court have been well guided over the years in the interpretation of Statutes with the clear boundary beyond which the Courts cannot enter. That is to say that while the Courts have powers of interpretation of the law, it has no licence to veer into the legislative arena or constitute itself into the legislator however harsh or distasteful the piece of legislation may be, as once the words are plain and unambiguous, the Court is duty bound to give effect to those words and not interpret the law as it ought to be. See *F.B.N. Plc v Maiwada* (2013) 5 NWLR (Pt.1348) 444 at 448 and 483.

H A point to be noted in this matter is that briefs had been filed by parties even though, that of the respondent had embedded in it a preliminary objection contesting the validity of the Notice of Appeal before the Notice of withdrawal of the appeal was filed

and moved by learned counsel for the appellant. This Court had in a similar scenario in the Young Shall Grow Motors Ltd v Ambrose O. Okonkwo & Anor (2010) 3 SCNJ 396 at 409 - 412 stated as follows:-

*“A case which has been withdrawn and subsequently struck out/dismissed when the point of *litis contestio* has been reached cannot be relisted for another bite at the cherry...”* B

*In other words, after briefs of argument have been exchanged by the parties whereby issue between them became crystallized *litis contestio* can be deemed to have been reached. A withdrawal from that point in time must, as an inflexible rule lead to the dismissal of the appeal”.* C

What I am labouring to put across is that in interpreting Order 11 Rule 5 of the Court of Appeal Rules under which the withdrawal was made, the appellant had reached a point of no return and there is no turning back the hand of the clock. In similar circumstances Kalgo JSC in Kraus Thompson Organization v NIPSS (2004) 17 NWLR (Pt 901) 44 at 64 described the situation thus:- D

*“Once the Respondent applies under the said Rule, the appeal must be dismissed and such dismissal is final... Therefore the order striking out the appeal is in full compliance with the provisions of Order 5 Rule 10 of the Court of Appeal Rules and “striking out” amounts to a “Dismissal” of the appeal, there is no relisting of such an appeal”.* E F

In the case at hand, the wordings of the Notice of Discontinuance or Withdrawal left no doubt that it was the intendment of the appellant to withdraw from further prosecution of the appeal. In fact, those were the exact words and stated under Order 11 Rules 1 and 2 of the Court of Appeal Rules underscored what was expected and the Court obliging in carrying out those wishes cannot now be told that the resultant effect was not what was expected. A party cannot be allowed to play with the processes of the Court as the mood propels him irrespective of the plain, clear and unambiguous provisions of the law he had set out to utilize. The party must sink and swim with what he had by his own volition activated. I place reliance on Abalogu v. Shell Petroleum Develop- G H

ment Company Ltd (2003) 6 SCNJ 162 at 284 per Iqbal JSC.

The case of Ezomo v A. G. Bendel State (1986) 4 NWLR (Pt.36) 448 at 362 could easily have had this case in mind and I shall quote Aniagolu JSC thus:-

*“Having held that the withdrawal notice filed by Mr. Obasiyi*  
*was validly filed. Order 3 Rule 18 of the Court of Appeal Rules*  
*would automatically take effect. By Rule Sub-rule 5 of Rule 18:*

*An appeal which has been withdrawn under this Rule, whether with or without an Order of the Court shall be deemed to have been dismissed.*

*This Sub-rule 5 is in identical terms with Order 7 of Rule 17 (5) of the Supreme Court Rules 1977 and the current Order 8 Rule 6(5) Supreme Court Rules 1985. The effect of the withdrawal notice filed by Mr. Obasiyi, in my view, was to terminate the appeal filed against the judgment of the High Court with or without an order of Court.”*

It is not difficult for me to say from the foregoing and the better reasoning in the lead judgment that the appellant labours E herein in vain as he attempts to wake up a dead matter. This appeal lacks merit and I too dismiss it as I abide by the consequential orders made.

F **ARIWOOLA JSC**

I had the privilege of reading in draft the lead judgment just delivered by my learned brother, Kumai Bayang Aka'ahs, JSC and I agree entirely with the reasoning in the said lead judgment that G led to the conclusion that the appeal is devoid of merit and deserves to be dismissed. I too will dismiss the appeal for the same reasoning.

Appeals dismissed.

I abide by the consequential orders arrived at including the H order on costs.

### **KEKERE-EKUN JSC**

This is an appeal against the ruling of the Court of Appeal Makurdi Division delivered on 6/2/2013 refusing the appellant's motion on notice filed on 25/4/2012 for the trinity prayers for extension of time to seek leave to appeal, leave to appeal and extension of time to appeal against the judgment of the High Court of Nasarawa State, holden at Keffi Judicial Division in Suit No. NSD/K25/2006 delivered on 28/11/2008.

The appellant was dissatisfied with the judgment of the trial Court awarding the sum of N89,640,000.00 against it and in favour of the respondent as damages for negligence when it blasted rock at Kofar Nasarawa Primary School, Keffi as a result of which one of the rocks hit the respondent and resulted in his left leg being amputated. The appellant filed two notices of appeal. The first was dated 29/11/2008 and filed on 1/12/2008 but wrongly headed "*In the Court of Appeal holden at Abuja.*" The second was dated 16/12/2008 but did not include the name of the appellant as the person interested in the appeal. The appeal was entered at the Court below as Appeal No. CA/S/43/2009.

The parties duly exchanged briefs of argument. The respondent raised a preliminary objection to the competence of the appeal in his brief of argument. Believing the objection to be sustainable, the appellant filed a notice of withdrawal of the appeal pursuant to Order 11 Rule 1 of the Court of Appeal Rules, 2011. On 24/2/2012 the appellant's counsel applied to withdraw the appeal on the basis of the said notice. The Court made an order striking out the appeal. The following day, 25/4/2012, learned counsel sought to restore the appeal by filing an application seeking the trinity prayers, the refusal of which is the subject of this appeal. The application was predicated on the inadvertence of counsel in filing the two defective notices of appeal. The appellant's counsel was under the impression that the application was competent as the appeal that was withdrawn was struck out and not dismissed.

The grounds of preliminary objection before the lower Court,

which prompted the appellant's counsel to file a notice of withdrawal of the appeal as contained in the respondent's brief of argument at pages 131 - 136 of the record were:

- (a) That the Notice of Appeal was defective because it was not shown on whose behalf the appeal was filed; and
- (b) That the appellant's brief was defective on the ground of proliferation of issues.

The appellant did not respond to the objection. Rather, he changed his counsel who promptly withdrew the purportedly defective notice of appeal and filed the application, which resulted in the ruling appealed against. It was submitted that the appellant believed the notice of appeal to be incurably defective and incapable of being amended. And that in any event, having regard to the fact that both parties had filed and exchanged their respective briefs of argument, it was too late in the day to effect any amendment. Learned counsel for the appellant argued that even if the matter proceeded to hearing and the notice of appeal was found to be defective, the only order the Court could have made was one striking out the appeal, hence the notice of withdrawal and the application for the trinity prayers.

Learned counsel for the respondent on the other hand argued that the appellant had the option of coming under Order 6 Rule 6 of the Court of Appeal Rules or Order 11 Rules 1 & 2 thereof. He submitted that while the appeal could have been struck out pursuant to Order 6 Rule 6, once a notice of withdrawal is filed pursuant to Order 11 Rule 1, the appeal is deemed dismissed under Order 11 Rule 5, with or without a Court order.

Order 6 Rule 6 of the Court of Appeal Rules, 2011 provides:  
*"The Court shall have the power to strike out a notice of appeal when an appeal is not competent or for any other sufficient reason."*

It should be noted here that Order 6 Rule 6 will not avail an appellant whose notice of appeal is incurably defective.

Order 11 Rules (1), (2) & (5) Provide:

*"1. An appellant may at any time before the appeal is called on for hearing, serve on the parties to the appeal and file with the*

*Registrar, a notice to the effect that he does not intend to prosecute the appeal any further.*

*2. If all parties to the appeal consent to the withdrawal of the appeal without an order of the Court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the Registrar and in such event any sum deposited against costs shall be paid out to the appellant.*

*5. An appeal which has been withdrawn under this Rule, whether with or without an order of the Court, shall be deemed to have been dismissed.”*

I agree with learned counsel for the respondent that the appellant having opted to proceed under Order 11 Rules 1 & 2 of the Court of Appeal Rules, is bound by the consequences as per Order 11 Rule 5, which is in pari materia with Order 8 Rule 6 (5) of the Supreme Court Rules 1985, interpreted in the case of Edozien Vs. Edozien (1993) 1 NWLR (Pt.272) 678 @ 692 E where His Lordship, Olatawura, JSC had this to say:

*“There can be no better manifestation of intention to withdraw an appeal than an appeal withdrawn by the appellant or one of the Solicitors briefed by the party withdrawing the appeal. The Court will believe in the sincerity of that intention.”*

See also: The Young Shall Grow Motors Ltd. Vs Okonkwo (2010) 15 NWLR (Pt.1217) 542.

The Notice of withdrawal is at page 239 of the record It is clear and unambiguous It states:

*“NOTICE OF WITHDRAWAL OF APPEAL BROUGHT PURSUANT TO ORDER 11 RULES 1 OF THE COURT OF APPEAL RULES, 2011*

*Take notice that the appellant herein intends not to prosecute this appeal any further and hereby gives Notice of withdrawal to the respondent in accordance with the Rules of this Court.*

*SIGNED*

*OMALE OMALE ESQ.”*

It is noteworthy that from the record of proceedings of 24/4/2012 at page 157 of the record, when the appellant's counsel sought to withdraw the appeal, he did not give any reasons. Unfortunately for the appellant, the respondent's objection was not well founded. Even if there was an omission to state the name of the appellant as one of the parties to be affected by the appeal, as required by Order 6 Rule 2(1) of the Court of Appeal Rules, it was a mere irregularity that could have been cured by a simple application for leave to amend the notice of appeal.

The reason why the Courts have been strict in enforcing the provision of Order 11 Rule 5 of the Court of Appeal Rules or its equivalent in the Rules of this Court when a notice of withdrawal of appeal is filed, as stated by my learned brother, I.T. Muhammad, JSC in *Young Shall Grow Motors Ltd. Vs Okonkwo (supra)* @ 541 - 542 E - C, is *"to prevent the uncertainty with which the respondent may be confronted or on the other hand the abuse to which this procedure could be subjected if an appellant after the withdrawal of the appeal shall be at liberty to refile his appeal."* In his contribution Dahiru Musdapher, JSC (as he then was) at 546 F-G (Supra) held, *"It is trite law that when an appeal is set for hearing after briefs of argument are filed and the appellant withdraws the appeal, the striking out of the appeal amounts to the dismissal of the appeal."*

In the instant appeal, the notice of withdrawal of appeal having been brought under Order 11 Rule 1 of the Court of Appeal Rules, the order of striking out made by the lower Court on 24/4/2012 amounts to a dismissal as provided under Order 11 Rule 5. The appellant cannot revive the appeal under any guise.

I have had a preview of the leading judgment of my learned brother, KUMAI BAYANG AKA'AH, just delivered. I agree entirely that the appeal lacks merit I accordingly dismiss it and affirm the ruling of the lower Court.