In the Supreme Court of Nigeria

On Friday, the 1st day of June 2012

Before their Lordships

Ibrahim Tanko Muhammad	.....	Justice, Supreme Court
Olufunlola Oyelola Adekeye	.....	Justice, Supreme Court
Nwali Sylvester Ngwuta	.....	Justice, Supreme Court
Mary Ukaego Peter-Odili	.....	Justice, Supreme Court
Olukayode Ariwoola	.....	Justice, Supreme Court

SC.183/2005

Between

Nigerian Laboratory Company Ltd Mr. David Salako	…..	Appellants

And

Pacific Merchant Bank Limited	.....	Respondent

Judgment of the Court

Delivered by

Ibrahim Tanko Muhammad. JSC

In an application before the Court of Appeal (court below) holden at Lagos, and dated the 21st day of July, 2004, the appellants/applicants prayed for the following reliefs:

(1) Extension of time within which the appellants/applicants may apply for leave to appeal against the Ruling of Lagos High Court per Honourable Justice O. A. Ipaye delivered on 15/01/04 in suit No LD/3696/99.

(2) Leave to appeal against the ruling of 15/01/04 delivered by Honourable Justice O. A. Ipaye in suit No 3696/99.

(3) Extension of time for the appellants/applicants to appeal against the ruling of 15/01/04 delivered by Honourable Justice O. A. Ipaye in suit No LD/3696/99

(4) And for further or other orders as this Honourable Court may deem fit to make in the circumstances of this application.

In its ruling delivered on the 21st day of March, 2004, the court below refused the application and same was dismissed. Dissatisfied, the appellants appealed to this court on three grounds of appeal.

Briefs were filed and exchanged by learned counsel for the respective parties.

Learned counsel for the appellants posited the following issues for determination:

(1) Whether the court below was right in dismissing the appellants' application dated 21st July, 2004 without considering their reasons for bringing the appeal out of time (Grounds 1 and 2 of the Notice of Appeal).

(2) Whether the said application dated 21st July, 2004 is meritorious and ought to have been granted (Ground 3 of the Notice of Appeal)

Learned counsel for the respondent posited the following issue for determination:

"Whether the Court of Appeal in refusing to grant the application dated 21st July, 2004 exercised its discretion judicially and judiciously"

Before delving into the issues for determination, there appears to be a preliminary objection which prefaced the arguments proffered by learned counsel for the respondent. Learned counsel for the respondent hinged his objection on 3 grounds:

(1) That an order refusing an extension of time within which to appeal is not a final decision on the merits but an

interlocutory decision. He cited the case of *Merchantile Group AG v Aiyela (1995) 8 NWLR (Page 414) 450.*

(2) The reliefs in essence were urging the lower court to exercise its undoubted discretion in favour of the appellants which involves a question of mixed law and facts and requires leave of court which was not obtained, making the appeal incompetent. He cited the cases of *Ifediora v Umeh (1998) 2 NWLR (page 74) 5; Comex Ltd. v Nigeria Arab Bank Ltd. (1997) 3 NWLR (page 496) 643*.

(3) That the three grounds of appeal attack the Court of Appeal's failure to consider some of the facts adduced in the affidavit in support of the motion.

Learned counsel for the respondent urged us to dismiss the appeal as incompetent.

I think the learned counsel forgot or omitted to move this court on this preliminary objection. The trite law is that a preliminary objection which is not moved is deemed abandoned and should be struck out. This preliminary objection is hereby struck out. See: *Ajibade v. Pedro (1992) 5 NWLR (part 241) 237; NHRI v. Ayoade (1997) 11 NWLR (part 530) 541; Jadesimi v. Okotiebo (1986) 1 NWLR (part 16) 255; Onyekwalije v. Animashaun (1996) 3 SCNJ 24.*

Making his submissions on the issues formulated by him, the learned counsel for the appellant argued on issue one that the holding of the court below that the appellants "failed to explain why they are late," is not in line with the processes before the said court. He referred to paragraphs 7 - 12 of the affidavit in support of the application before the lower court which he said were not controverted. The court below, he further argued, did not evaluate the uncontroverted evidence. The cases of *R. Lauwers Import Export v Jozebson Industries Co. (1988) ANLR 310B (1998) 3 NWLR (part 83) page 429. Pavex v. Afribank (2000) 4 SC (part 2) 196 at page 212* were cited in support. Learned counsel submitted that in its failure to evaluate the pieces of evidence which formed part of the record before it, the court below denied the appellants their right to fair hearing as guaranteed by the constitution, thus rendering its decision a nullity liable to be set aside.

On his issue No.2, the learned counsel for the appellants submitted that it is stated in the Notice of Appeal to the court below that the appellants' application was explicit in explaining the reasons for the delay and the grounds of appeal raised substantial points of law. That these conditions were fulfilled by the appellants. The reasons contained in paragraphs 7 to 12 of the affidavit in support thereof were cogent, reasonable and satisfactory. There were also good and substantial grounds of appeal and appellants' application ought to have been granted by the court below. He cited and relied on the case of *Nigerian Drug Law Enforcement Agency v Okorodudu (1997) 3 NWLR (Part 492) 221*. Learned counsel urged this court to resolve both issues in favour of the appellants as the respondent was not opposed to the grant of the said application.

Learned counsel for the respondent submitted that as the application before the court below was brought pursuant to Section 25 of the Court of Appeal Act and Order 3 Rule 4 (1) and (2) of the Court of Appeal Rules 2002, among others, the power conferred on the court below pursuant to the mentioned provisions is one which is exercisable at the discretion of the court judicially and judiciously. He backed his submission by citing the cases of *Federal Housing Authority v F. Bolaji Abosede (1998) 2 NWLR (Part 537)117; The Registered Trustees of Apostolic Church v Uffiem (1998) 10 NWLR (part 569) 312; Gba Akinyede v The Appraiser (1971) All NLR 164; University of Lagos v Olaniyan (1995) NWLR (part 1) 156 at 175 A-F*.

It is settled, as a general rule that before an application for extension of time for leave to appeal can succeed, the applicant must satisfy the court that there are good and satisfactory reasons for not filing his application (appeal) timeously. *Central Bank of Nigeria v Ahmed (2001) 11 NWLR (Part 724) 369 at page 392* was cited. It is the further submission of learned counsel for the respondent that the Court of Appeal exercised its discretion judicially and judiciously by considering the affidavit evidence before it and the fact that the court did not make specific reference to all the averments in the affidavit cannot be conclusive of the fact that those averments were not considered and rejected. Learned counsel analyzed some of the averments in the affidavit in support and submitted that given the totality of the affidavit evidence, the appellants had failed to comply with the first threshold that is required in applications of this nature and the court below was right in refusing the application in its judicious exercise of discretion as there were no good reasons for failure to appeal in time. Learned counsel submitted finally it is trite that once a superior court is shown to have exercised its discretion judicially and judiciously in the exercise of its authentic jurisdiction, that exercise of jurisdiction must not be disturbed by a higher tribunal for the reason that it would have exercised that discretion differently. He cited the cases of *ACME Builders Ltd. v Kaduna State Water Board (1999) 2 NWLR (Part 590) 288 at page 312 A - B; Ohwovoriole San v FRN (2003) 1 SC (Part 1) 1; University Of Lagos v. Olaniyan (supra).*

Learned counsel urged this court to dismiss the appeal.

The antecedents giving rise to the present appeal can be garnered from the ruling of the trial court which was delivered on the 15th day of January, 2004. An application was placed before the trial court by the defendants/applicants/appellants seeking for an order setting down for hearing the issues of law raised in the defendants' statement of defence that is, that the plaintiff's action was statute barred. A brief summary of the plaintiffs'/respondents' action as found by the learned trial judge is that the 2nd defendant, Mr. David O. Salako, is the Managing Director of the 1st defendant's company, Nigerian Laboratory Company Limited. That sometime on or about 9th of October, 1992, the defendants applied for a bank guarantee. The plaintiff bank on or

about 9th of October, 1992 allegedly issued bank guarantees in the sum of £214,850,00 and 89,946.26 ECU on behalf of the defendant. That sometime again on the 5th of October, 1993 an overdraft facility of ₦5 Million was granted to the 1st defendant company. It is the plaintiffs' case that the defendants have failed to repay the sums guaranteed by the plaintiff together with the overdraft facility and interest which now totals ₦19,017,608.51 as at 16th of June, 1999. The defendants are, inter alia, resisting this action for recovery on the alleged ground that the cause of action is statute barred having been commenced after the expiration of 6 years.

After having evaluated the affidavit evidence and the prevailing law, the learned trial judge dismissed the application.

An appeal to the court below was unsuccessful. The application for enlargement of time to apply for leave to appeal, leave to appeal and extension of time to appeal against the trial court's Ruling of 15th January, 2004 was refused and accordingly dismissed.

It is a repeat of that application which is now before this court. In particular (a) of ground No1, and in his submissions on same, the learned counsel for the appellants stated that in failing to consider the said reasons for the delay, the court below denied the appellants their right to fair hearing as guaranteed in the constitution which renders the court below's decision a nullity, liable to be set aside. But, what is the holding of the court below? Below is what the court below, inter alia, held:

> "To succeed in an application of this nature applicant(s) must show why they did not appeal within time and good grounds why the appeal must be heard. The applicant(s) in paragraph 7 of their affidavit in support tersely stated that they briefed counsel on the 23rd of June, 2004 to appeal when the 14 days within which to seek leave and appeal had expired. Since they failed to explain why they are late it is no longer necessary to look at the grounds of appeal since the two must co-exist.
>
> Application is refused and is dismissed"

It is true that where one of the parties to a litigation before a court of law is aggrieved with a decision given by that court, he has an option or sometimes, a right to fall back to appeal to a higher tribunal or court. Where the decision is handed down by a state High Court (as in this matter), or by the Federal High Court, the aggrieved person can exercise his right of appeal as conferred upon him by Section 241 (1) of the Constitution, 1999 (as amended). In any other subject matter which is not covered by Section 241 (1) of the Constitution (supra), the person aggrieved may have to ask for leave either from the Federal High Court, State High Court (as the case may be) and, or, from the court of appeal as circumstance may warrant. This category of cases is covered by Section 242 (1) of the Constitution. This apart, it is to be noted as well that the grant of right of appeal by the Constitution is quite different from the exercise of such a right. For instance, Section 243 of the Constitution provides:

> 243 Any right of appeal to the Court of Appeal from the decisions of the Federal High Court or a High Court conferred by this Constitution shall be
>
> (a) exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Federal High Court or the High Court or the Court of Appeal at the instance of any other person having interest in the matter, and in the case of criminal proceedings at the instance of an accused person or, subject to the provisions of this Constitution and any powers conferred upon the Attorney- General of a State to take over and continue or to discontinue such proceedings at the instance of such other authorities or persons as may be presented;
>
> (b) exercised in accordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.

The prevalent law (Act) or rules of court in relation to the Court of Appeal are the Court of Appeal Act 1976 (Cap C. 36 LFN 2004) and the Court of Appeal Rules (as amended). Each makes stipulations in relation to appeals. For instance, Section 25 of the Act provides:

> 25 (1) Where a person desires to appeal to the Court of Appeal he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this Section that is applicable to the case.
>
> (2) The periods for the giving of notice of appeal or notice of application for leave to appeal are:
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> (a) In an appeal in a Civil cause or matter fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against final judgment.
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> (underlining supplied).

The proposed appeal by the appellants to the court below was from a ruling of the trial court of 15th of January, 2004. It was interlocutory. By the above provision of the Rules of the court below, the applicants had 14 days within which to appeal to the court below from the date of delivery of the ruling.

From the affidavit in support of the application before the court below, the appellants/applicants averred as follows:-

> "7 That the appellants being dissatisfied with the ruling of 15/01/04 just instructed their counsel to file a Notice of Appeal on 23/06/04.
>
> 11 That the time to file the Notice of Appeal has expired.
>
> 12 That the delay in filing the Notice and Grounds of Appeal is not deliberate or out of disrespect to this Honourable court."

From the averments as set out above the court below found that there was a delay or rather tardiness and the appellants did not in fact appeal within time. It is the requirement of the law as provided by Order 3 Rule 4 (1) and (2) of the Court of Appeal Rules 2002 (as amended) as follows:

> "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."

Thus, the fundamental requirements as per the above provisions are two:

> (a) Good and substantial reasons for failure to appeal within the period prescribed, and
>
> (b) Grounds of Appeal which *prima facie* show good cause why the appeal should be heard.

These two requirements are interwoven such that they must co-exist. If one is satisfied and the other is not, then the whole application will collapse. See generally: *Doherty v Doherty (1964) 1 All NLR 299; Ibodo & Ors. v Enarofia & Ors. (1980) 5 - 7 SC 42 ; Mobil Oil Ltd. v Agadaigho (1988) 2 NWLR (part 77) 385; Okere v Nlem (1992) 4 NWLR (Part 234) 132; Balogun v Afolalu (1994) 7 NWLR (Part 355) 206; Okwelume v Anoliefo (1996) 1 NWLR (Part 425) 468; Federal Housing v Abosede (1998) 2 NWLR (Part 537) 177 at page 187.*

The court below in its ruling stated, among other things, as follows:

> "The applicant(s) in paragraph 7 of their affidavit in support tersely stated they briefed counsel on 23rd June, 2004 to appeal when the 14 days within which to seek leave and appeal had expired. The applicants have therefore not explored (explained?) their tardiness. Since they failed to explain why they are late it is no longer necessary to look at the grounds of appeal since the two must co-exist."

That of course is the correct position of the law as stated earlier.

In the light of the submissions put forward by learned counsel for the appellants that paragraphs 7 - 12 of the affidavit in support of the application before the court below contained copious explanations for the delay and that the respondent did not controvert same, yet the court below did not evaluate the said uncontroverted evidence before it, I urge my Lords to bear with me to reproduce the said paragraphs:

> "7 That the appellants being dissatisfied with the ruling of 15/01/04 just instructed their counsel to file a Notice of Appeal on 23/06/04.
>
> 8 The company Secretary of the 1st appellant had an accident and had been hospitalized at the local orthopedic home to set his legs for about 5 months.
>
> 11 That the time to file the Notice of Appeal has expired.
>
> 12 That the delay in filing the notice and Grounds of Appeal is not deliberate or out of disrespect to this Honourable Court"

It is clear from the above averments as found by the court below that the instruction to counsel to appeal (paragraph 7) was given on the 23rd of June, 2004, well over 5 months after delivery of trial court's decision. What the appellants should have

done was to proffer "good and substantial" explanation of what prevented them from filing the appeal. From paragraphs 8 - 12 of the affidavit in support, it can be seen clearly that there is nothing substantial which can cogently and convincingly be relied upon to give a detailed and satisfactory explanation of the delay. If at all, the company secretary of the 1st appellant had an accident which lasted him about five months in hospital, supporting evidence such as the picture(s) of the scene of accident, picture of the position of the broken legs; bills of medication, medical report et cetera will have furnished a more convincing evidence.

As per the 2nd appellant who was said to have been out of Lagos on official assignment at Abuja, there should have been official documents authorizing the said official journey to Abuja. The name and kind of official assignment and the Ministry, Department, Institution et cetera to which the 2nd appellant was mandated to go and for how long he had been performing the official assignment, should have been made clear. Thus, the bare making of whimsical statements which do not supply convincing, satisfactory, concrete and cogent reasons in explaining away the delay or tardiness caused by an applicant himself can hardly be acceptable to a reasonable court or tribunal in complete disregard to the requirement to the law. I agree with the court below that it was no longer necessary to look at the grounds of appeal as the bottom of the application has been knocked-off by the unexplained tardiness caused by the applicants/appellants themselves. It has already been seen above that it is trite law that where one of the two inseparable twins (requirements) in such an application has failed to satisfy the requirements of the law, the other requirement per force must also give way as it cannot stand alone. The two, thus, must stand or fall together.

Further, it has to be noted that grant of an application of this nature is entirely discretionary. That discretion, however, as held in several authorities, has to be exercised judicially and judiciously. In the case of the *Queen v The Governor in Council, Western Nigeria Ex-Parte Mustapher Oyebola (1962) WNLR 360 at page 365*, it was held that to "act judicially" means a body bound to hear evidence from one side and the other. The need not to be anything called strictly a lie, but the body would have to hear submissions and evidence by each side and come to a judicial decision approximately in the way that a court must do. Judiciously, on the other hand, means, a decision taken which has been directed by sound and sensible judgment. See: *Chief Hutton Tom George & Anor v Dima Opuamieyengo George & 7 Ors. (1994) 3 NACR 70 at page 85*. Once such a discretionary decision has been exercised by a trial court or any other court or tribunal, then it should not and must not be disturbed by a higher court or tribunal sitting on appeal for the simple reason that it would have exercised that discretion differently. See: *Acme Builders Ltd. v Kaduna State Water Board (1999) 2 NWLR (part 590) 288 at page 312; Ohwovoriole (SAN) v FRN (supra); University of Lagos v Olaniyan (supra*). I resolve issue one in favour of the respondent.

On issue two of the appellants' issues, I have myself, carefully considered the depositions in the affidavit in support of the application before the court below. There is nothing in the averments contained especially in paragraphs 7 - 12 thereof, which would require the judicious exercise of my discretion to grant the application as supported by these porous and unsubstantiated averments. I go along with the court below that the tardiness in filing the appeal has not been explained away. He, who comes to equity, must come with clean hands. And, delay, they say, defeats equity. There is nothing one can do to salvage a bad situation which seems to be compounded by the deliberate inaction of the appellants. The law helps the vigilant and not the one who sleeps on his right, *Vigilantibus et non dormientibus jura subvennuint.*

Finally, I find no merit in this appeal and it is hereby dismissed.

The appellants shall pay to the respondent costs in this appeal which I assess at ₦50,000.00 (Fifty Thousand Naira) only.

Judgment delivered by
Olufunlola Oyelola Adekeye. JSC

I was privileged to read in draft the judgment just delivered by my learned brother I. T. Muhammad JSC. The plaintiff Pacific Merchant Bank now respondent before this Court commenced an action for the recovery of Bank guarantee and overdraft facilities to the tune of ₦19,017,608.51 by a Writ of Summons filed on the 13th of December, 1999 against the defendants, now appellants.

On the 30/01/2002 the appellants in the suit, filed a motion for extension of time to file statement of defence and a motion to set down the matter for hearing on the issues of law raised in the statement of defence. In arguing the issue of law, the defendants/applicants/respondents relied on the provisions of Order 23 Rule 2 and Order 42 Rule 1 of the High Court of Lagos State Civil Procedure Rules 1994 and Section 8 (1) (a) and (e) of the Limitation Law Cap 118 Laws of Lagos State. The relief sought was:-

> "An Order setting down for hearing the issues of law raised in the defendant's statement of defence i.e. that the plaintiffs action is statute barred."

The learned trial judge in the considered Ruling delivered on 15/1/2004 refused the application. The defendant being aggrieved by the Ruling appealed to the Court of Appeal Lagos. The appellant/applicant being out of time in the filing of the notice and

grounds of appeal relied on the tripod prayers in the exercise of his right of appeal. The Court of Appeal heard this application on the 21st of March 2005 and decided as follows:-

> "This is an application for enlargement of time to apply for leave to appeal, leave to appeal and extension of time to appeal against the ruling of the learned trial judge of Lagos High Court delivered on 15th January 2004. It is supported by affidavit to which the ruling sought to be appealed against and the proposed Notice of Appeal is attached. To succeed in an application of this nature applicant must show why they did not appeal within time and good grounds why the appeal must be heard.
>
> The applicant in paragraph 7 of their affidavit in support tersely stated that they briefed counsel on 23rd June 2004 to appeal when the 14 days within which to seek leave and appeal had expired. The applicants have therefore not explored their tardiness. Since they failed to explain why they are late it is no longer necessary to look at the grounds of appeal since the two must co-exist. Application is refused and is dismissed. There shall be no order as to costs".

The appellants being again aggrieved by this ruling found their way to this court. The appellants in their joint brief predicated the application on two issues:-

(1) Whether the court below was right in dismissing the appellant's application dated the 21st July 2004 without considering their reasons for bringing the appeal out of time.

(2) Whether the said application dated 21st July 2004 is meritorious and ought to have been granted.

The sole issue raised by the respondent is

> "Whether the Court of Appeal in refusing to grant the application dated 21st July 2004 exercised its discretion judiciary and judiciously".

The argument and submission by both parties were aptly considered in the lead judgment, I shall only add a few words. A party aggrieved by an interlocutory decision of a court as in the instance of this appeal may bring an appeal against it within 14 days of giving the decision. Where the statutory period during which the appellant may exercise the right to appeal has expired the court cannot entertain an application for leave to appeal unless the application contains the Tripod prayers - meaning –

(a) A prayer for extension of time to ask for leave to appeal.

(b) Leave to appeal

(c) Extension of time within which to file Notice and grounds of appeal.

It is worthy of emphasis that leave of court, where it is required, is a condition precedent to the exercise of the right to appeal. Hence failure to obtain leave where it is required will render any appeal filed incompetent as no jurisdiction can be conferred on the appellate court.

However for an application for extension of time to appeal to succeed, the appellant/applicant must show to the court that the delay in bringing the application is neither willful nor inordinate, that there are good and substantial reasons for failure to appeal within the prescribed period and that there are grounds which prima facie show good cause why the appeal should be heard. Both reasons must co-exist. See *Okere v Olem (1992) 4 NWLR, (part 234), page 132; C.C.B (Nig.) Ltd. v Ogwuru (1993) 3 NWLR (Part 284) page 630; Iroegbu v Okwordu (1990) 6NWLR, (part 159) page 643*

The application for leave to appeal and file Notice and grounds of appeal is not granted to an applicant as a matter of course. The power to grant such application which is exercisable at the discretion of the court must be exercised judicially and judiciously. The applicant must place before the court material facts which must satisfy the court that there are good reasons for not filing the Notice and grounds of appeal timeously and grounds of appeal which prima facie must show good cause why the appeal should be heard. The applicants did not explain the reason for the delay in briefing counsel before the 14 days statutory period to seek leave and to appeal expired. The negligence or fault was not that of their counsel, the inadvertence can be blamed on the litigants themselves. In this appeal the applicants have not placed any fresh or additional material facts before this court to explain the delay to the satisfaction of this court either.

Federal Housing Authority v Abosede (1998) 2 NWLR (Part 537) page 117; Central Bank of Nigeria v Ahmed (2007) 11 NWLR (part 724) page 369

This application seeks an equitable relief and the equitable doctrine is that equity aids the vigilant and not the indolent. The grant or refusal of this nature of application is exercisable at the discretion of the lower court. In short the appeal before this

court emanates from the exercise of discretion of the lower court. The attitude of an appellate court to the exercise of discretion of a lower court is that:-

> "An appellate court will not generally question the exercise of discretion by a lower court merely because it would have exercised the discretion in a different manner if it had been in the same position as the lower court or where it has not been shown that a miscarriage of justice has been occasioned. However, an exercise of discretion would be questioned if as a result of that exercise, injustice meted out to either of the parties or if such a discretion was exercised wrongly in that due or sufficient weight was not given to relevant or important considerations."

Oshunrinde v Akande (1996) 6 NWLR (Pt.455); Olumesan v Ogundepo (1990) 2 NWLR (Part 433) page 628; ACME Builders Ltd. v Kaduna State Water Board (1999) 2 NWLR (Part 950) page 288; Milton P. Ohwovoriole San v Federal Republic of Nigeria (2003) 1 SC page 1; University of Lagos v Olaniyan (1985) 1 NWLR (Part 1) page 156

The Court of Appeal properly exercised its discretion in dismissing the application for leave to appeal in the peculiar circumstance of this case, and this court finds no justifiable reason to interfere with it.

With fuller reasons given by my learned brother I T. Muhammad JSC, in the lead judgment- I also dismiss the appea1. I abide the consequential orders including the order on costs.

Judgment delivered by
Nwali Sylvester Ngwuta. JSC

I had the privilege of reading in draft the lead judgment of My Lord, Muhammad, JSC. His Lordship set out, and decisively dealt with, the issues in the appeal. I entirely adopt the reasoning and conclusion reached. The "copious explanations" for the delay are not in the transcript of the proceedings.

May be what the appellant referred to as the "copious explanations" are contained in Paragraphs 7, 8, 11 and 12 of the Affidavit in Support of the Motion in the trial Court. The said paragraphs are hereunder reproduced:

> "7. That the appellants being dissatisfied with the ruling of 15/01/04 judgment instructed their counsel to file a Notice of Appeal on 25/06/04.
>
> 8. The Company Secretary of the 1st appellant had an accident and had been hospitalized at the local orthopedic home to set his legs for about 5 months.
>
> 11. That the time to file the Notice of Appeal has expired.
>
> 12. That the delay in filing the notice and grounds of appeal is not deliberate or out of disrespect to this Honourable Court."

In my view, the averments set out above do not contain "good and substantial reasons" for failure to appeal within the prescribed period. See Order 3 Rule 4 (1) of the Court of Appeal Rules 2002 (as amended).

Though the Company Secretary of the 1st appellant was said to have been at a local orthopaedic home "to set his legs" for about 5 months, the Court cannot infer from the averment that the 1st appellant will cease to function without its Company Secretary.

Even if the alleged accident of the Company Secretary of the 1st appellant could be considered as a reason for the delay, it is not for the Court to speculate on the date of the accident, the locality of the "local Orthopedic home" and the date of discharge from the home.

In my view, the affidavit of the appellants is bereft of facts upon which the Court could judiciously and judicially exercise its discretion in their favour. Order 3 Rule 4 (1) (supra) has ensured that a party is not shut out for failure to comply with stipulations relating to time for the doing of anything to which the rules apply.

However, Rule 4 (2) of the Order ensures that application for enlargement of time is no free lunch; it is not granted as a matter of grace. It has to be earned by means of a twin showing of good and substantial reasons for the delay and grounds of appeal which prima facie show good cause why the appeal should be heard. To succeed, the applicant has to satisfy the two requirements; one cannot suffice in the absence of the other.

There is a concurrent finding of fact that the appellant failed to explain the reason for failure to appeal within the time stipulated in the rules; a finding that is based on the materials before the Court of trial. The appellants have to bear the consequence of their tardiness for which they advanced no reason, not to talk of good and substantial reasons.

This must be so because "It is the common fate of the indolent to see their rights become prey to the active" per John Philport Curran in a speech on the Right of Election in 1790. The Supreme Being granted liberty to man on condition of eternal vigilance. In the same vein, the law and rules of law grant rights but only those who did not deliberately fall asleep with no explanation for their indulgence but who are diligent and timely in the preservation, protection and prosecution of the rights so granted will benefit from them.

For the above and the fuller and much better reason articulated by My Lord in the lead judgment, I find that appeal is bereft of merit. I also dismiss it with ₦50,000.00 costs to the Respondent.

Judgment delivered by
Mary Ukaego-Peter Odili. JSC

This is an appeal against the judgment of the Court of Appeal, Lagos Judicial Division delivered on 21st March 2005 which said judgment refused the appellants' application for inter alia, extension of time within which to apply for leave to appeal.

Dissatisfied with the said judgment the appellant filed a Notice of Appeal to this court dated 17th June 2005.

The facts relevant to this appeal are as follows:

The respondent was the plaintiff whilst the appellants were the defendants in the High Court, Lagos before O. A. Ipaye J. whereon the respondent claimed against the appellants a sum it said was a debt owed by the appellants. Pleadings were exchanged and later the appellants brought a motion praying for an order setting down the hearing of the issues of law raised in the defendant's Statement of Defence i.e. the plaintiff's action is statute barred. The respondent did not file any counter-affidavit at the trial court but opposed the said motion on points of law. On the 15th January 2004, the trial court dismissed the said motion and the appellants went to the Court of Appeal against the said ruling.

The said application was supported by an affidavit of 16 paragraphs and a proposed Notice of Appeal. The respondent did not file a counter affidavit neither did it oppose the said application. On the 21/3/2005 the court below dismissed the said application on the ground that the appellants had not explained the reasons for the delay in bringing an application for extension of time.

Dissatisfied by the decision of the court below the appellants filed a Notice of Appeal to this court containing three grounds of appeal.

When the matter came up for hearing on the 6th March 2012, learned counsel for the appellant adopted the brief settled by him, Charles Musa Esq. In the brief were distilled two issues for determination as follows:

1. Whether the court below was right in dismissing the appellant's application dated 21st July 2004 without considering their reasons for bringing the appeal out of time.

2. Whether the said application dated 21st July 2004 is meritorious and ought to have been granted.

Dr. Wale Olawoyin, learned counsel for the respondent adopted their brief of argument filed on 6/6/06 in which was formulated a single issue for determination, viz:

> Whether the Court of Appeal in refusing to grant the application dated 21st July 2004 exercised its discretion judicially and judiciously.

In arguing the appeal, learned counsel for the appellants referred to the relevant paragraphs of their supporting affidavit at the court of trial explaining their delay in bringing the application for extension of time to appeal. He stated that those paragraphs were not controverted. In spite of that the court did not evaluate those reasons which would have enabled the court of trial to grant the application especially since the grounds of appeal disclosed a good cause for the appeal. That since the respondent did not counter those averments nor oppose the application it meant respondent agreed that the appellant's application was meritorious. He cited *R. Lauwers Import- Export v Jozebson Industries Co (1988) All NLR 310; (1988) 3 NWLR (Part 83) 429; Pavex v Afribank (2000) 4 SC (Part 2) 196 at 212; NDLEA v Okorodudu (1997) 3 NWLR (Part 492) 221.*

Dr. Olawoyin for the respondent stated in response that the subject of this appeal was brought pursuant to Section 25 of the Court of Appeal Act and Order 3 Rule 4(1) and (2) of the Court of Appeal rules 2002. That the power conferred on the Court of

Appeal is one which is exercisable at the discretion of the court which is to be exercised judicially and judiciously. He cited *Federal Housing Authority v Abosede (1998) 2 NWLR (Part 537) 117, The Registered Trustees of Christ Apostolic Church v Uffiom (1998) 10 NWLR (Part 569) 312; Gba Akinyede v The Appraiser (1971) ALL NLR 164; University of Lagos v Olaniyan (1985) NWLR (Part l) 156 at 175*.

For the respondent was contended that the Court of Appeal had considered the supporting affidavit with its reasons and came to a correct decision in refusing to favourably grant the application and reliefs sought. That this exercise of the discretion available to the court below was done judicially and judiciously and cannot be faulted. He cited Central Bank of Nigeria v Ahmed (2001) *11 NWLR (Part 724) 369 at 392; ACME Builders Limited v Kaduna State Water Board (1999) 2 NWLR (Part 590) 299 at 312; Milton P. Ohwovoriole San v Federal Republic of Nigeria (2003) 1 SC 1*.

The long and short of the basis of this appeal are for the appellant the following:

1. The court below failed to consider the reasons for the delay of the appellants.

2. The said reasons satisfactorily explained the delay.

3. There were arguable and good grounds of appeal before the court below.

4. To shut the appellant out would not be in the interest of justice.

5. The respondent did not oppose the said application.

For the respondent was put across the following:

1. The appellants' reasons for not filing the application timeously were not satisfactory in the circumstances.

2. The reasons for failure to appear in time and the grounds of appeal must co-exist.

3. The Court of Appeal exercised its discretion judiciously and judicially.

I shall recast the relevant paragraphs 7, 8, 9, 10, 11 and 12 of the supporting affidavit which the court below felt were below the standard required to move the court to grant the application in that the delay for the late filling would have been explained appropriately. They are, viz:-

"7. That the appellant being dissatisfied with the ruling of 15/01/04 just instructed their counsel to file a notice of appeal on 23/06/04.

8. The company secretary of the 1st appellant had an accident and been hospitalized at the local orthopaedic home to set his broken legs for about 5 months.

9. That the 2nd appellant the alter ego of the 1st appellant has been out of Lagos on official assignment at Abuja.

10. That the company secretary of the 1st appellant and the 2nd appellant have just jointly instructed the chambers of Messrs Rickey Tarfa & Co., to prosecute this appeal on behalf of the appellants.

11. That the time to file the Notice of Appeal has expired.

12. That the delay in filing the notice and grounds of appeal is not deliberate or out of disrespect to this honorable court."

The materials upon which the application is sought in keeping with Section 25 of the Court of Appeal Act and Order 3 Rule 4 (1) and (2) of the Court of Appeal Rules 2002 are what had been shown in the paragraphs above quoted. These the court has to utilise, consider and come to a decision bearing in mind it is a discretion which must be exercised judicially and judiciously. See *Federal Housing Authority v Abosede (1998) 2 NWLR (Part 537) 117; The Registered Trustees of Christ Apostolic Church v Uffiom (1998) 10 NWLR (Part 569) 312; University of Lagos v Olaniyan (1985) NWLR (Part 1) 156 at 175.*

The reasons proffered by the appellant/applicants for the delay in filing the appeal five months beyond the time prescribed are skeletal without body or details. It does not matter that the hospitalization was in a local orthopaedic hospital, no address, no name of the native doctor and some details of what was done therein at least to satisfy the court, it was not being taken for a ride. Also in respect of the absence of the company secretary for the five months he was hospitalized, the appellant could not say why no one else could do what the absent company secretary was in a position to do. The bottom line is that the vagueness with which the appellant tried to put across the persuasion that could force the hand of the court below in his favour just was

not there. It is clear that the appellant had not fulfilled the conditions necessary for his application to be favourably considered and what the Court of Appeal did cannot therefore be faulted. See *ACME Builders limited v Kaduna State Water Board (1999) 2 NWLR (Part 590) 299 at 312; Milton P. Ohwovoriole San v Federal Republic of Nigeria (2003) 1 SC 1.*

It is therefore without doubt that the application before the court below could not be maintained and so this appeal lacks merit, based on the foregoing and the fuller reasons in the leading judgment of my learned brother, I. T. Muhammad JSC

I abide by the decision dismissing the appeal and the consequential orders in the lead judgment.

Judgment delivered by
Olukayode Ariwoola. JSC

The appeal was against the decision of the Court of Appeal Lagos Division delivered on the 21st day of July, 2004. The appellants had before the Court below sought the following prayers:

1. Extension of time within which the Appellants/Applicants may apply for leave to appeal against the Ruling of Lagos High Court per Honourable Justice O. A. Ipaye delivered on 15/01/04 in Suit No LD/36/99.

2. Leave to appeal against the ruling of 15/01/04 delivered by Honourable Justice O. A. Ipaye in Suit No 3696/99.

3. Extension of time for the appellants/applicants to appeal against the ruling of 15/01/04 delivered by Honourable Justice O. A. Ipaye in Suit No LD/3696/99.

4. And for further or other orders as this Honourable court may deem fit to make in the circumstances of this application.

The court below had refused and dismissed the above application leading to the instant appeal.

The filing of an appeal against the decision of a trial court to the Court of Appeal in Nigeria is guided by the provisions of the Court of Appeal Act, 1976 Cap C.36, Laws of the Federation of Nigeria, 2004 and the Court of Appeal Rules, 2002 (as amended).

Section 25(1) & (2) of the Act provide as follows:

"25 (1) Where a person desires to appeal to the Court of Appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provisions of subsection (2) of this Section that is applicable to the case.

(2) The periods for the giving of notice of appeal or notice of application or leave to appeal are:

(a) In an appeal in a Civil cause or matter fourteen (14) days where the appeal is against an interlocutory decision and three (3) months where the appeal is against final judgment."

It is noteworthy that the appeal upon which leave was sought so to do was an Interlocutory appeal against a ruling of the trial court, hence, the notice of appeal was expected to be given within fourteen (14) days from the date of the decision sought to appeal against.

From the records, it is clear that the appellants were out of time in seeking leave to appeal. The decision sought to appeal against was given on 15/01/2004 but according to the appellants they just instructed their counsel to file a Notice of Appeal on 23/06/2004. That, no doubt, is well over five (5) months after the decision was handed down by the trial court.

However, in a bid to do justice at all times, the Rules of court make allowance for enlargement of time, by the Court of Appeal for the doing of anything to which the Rules on time apply. But an appellant seeking extension of time to do a thing, such as, filing an appeal shall do so by a formal application supported by an affidavit setting forth good and substantial reasons for failure to appeal within the period so prescribed and giving grounds of appeal which shall prima facie show good cause why the appeal should be heard. See; Order 3 Rule 4 sub rules (1) and (2), Court of Appeal Rules, 2002.

There is no doubt, the consideration of an application for extension of time within which to appeal or seek leave to appeal entirely at the discretion of the court even though such discretion must be exercised judicially and judiciously. In the exercise of the said discretion, The court is expected to bear in mind that the Rules of Court are meant to be obeyed and as such there must be material before the court upon which to base the exercise of its discretion.

In *Williams & Ors v Hope Rising Voluntary Funds Society (1982) 2 SC 145 at 152, (1982) 1 All NLR, (Part 1)* 1, this court had held thus:

> "When a court is called upon to make an order for extension of time within which to do certain things (i.e. extension of time presented by the Rules of Court for taking certain procedural steps) the court ought always to bear in mind that the Rules of Court must prima facie, be obeyed and that it therefore follows that in order to justify the exercise of the court's discretion in extending the time within which a procedural step has to be taken there must be some material upon which to base the exercise of that discretion."

See also *Uyaemenam Nwora & Ors v Nweke Nwabueze & Ors (2011) 7 SCM 1163; Elobisi v Onyeonwu (1989) 5 NWLR (Part 120) 224; Doherty v Doherty (1964) 1 All NLR 292; Ogar v James (2001) 10 NWLR (Part 722) 621; Sanusi v Ayoola (1992) 23 NSC (Part 111) 420. Akinpelu v Adegbore (2008) 7 SCM 1 at 25-26.*

The requirement of the Rules in the consideration by the court of an application for extension of time to apply for leave to appeal had been interpreted and the principles governing the court have been settled in several decisions of this court as follows:

(a) There must be substantial reasons for failure to appeal within time

(b) There must be grounds of appeal which prima facie show good cause why the appeal should be heard.

It must be noted that the two conditions must co-exist.

Therefore for an application for enlargement of time to seek leave or to appeal, to succeed and be granted the applicant must show by the facts deposed to in the supporting affidavit that the failure to file the appeal within the prescribed time was not wilful and not deliberate and that there are good and substantial reasons for the delay but not inordinate.

In the instant appeal, a careful consideration of the affidavit evidence in support of the application shows that there is no reason adduced at all much more talking about substantial reasons, for the five months delay in filing, the application for leave to appeal within the fourteen (14) days prescribed by the Rules.

The court below was therefore right and correct in exercising their discretion against the appellant. The application was rightly dismissed.

Without any further ado, for the above reasons and detail reasons in the lead judgment of my learned brother, Muhammad, JSC, I agree that the appeal is not meritorious. Accordingly, it is hereby dismissed by me. I abide by the consequential order including order on costs.

Counsel

Mr. Charles Musa	…..	For the Appellants
with him	…..	
Moses Ideh		
Dr. Adewale Olawoyin	…..	For the Respondent
with him	…..	
S. Loko (Mrs)		