**ADEGBOLA**

**V.**

**IDOWU**

SUPREME COURT OF NIGERIA

THURSDAY, 13 APRIL 2017

SC.584/2013

**LEX (2017) - SC.584/2013**

OTHER CITATIONS

3PLR/2017/20 (SC)

**BEFORE THEIR LORDSHIPS:**

OLABODE RHODES-VIVOUR, JSC (Presided)

CLARA BATA OGUNBIYI, JSC

AMIRU SANUSI, JSC

EJEMBI EKO, JSC

PAUL ADAMU GALINJE, JSC (Read the Lead Ruling)

**BETWEEN**

1. H. R. H. SAMUEL ADEBAYO ADEGBOLA (ELEREUWA)

2. CHIEF JACOB SALAKO ADEWUSI (THE ODOFIN ERUWA) (DECEASED)

3. CHIEF FEMI ATANDA-JAGUN OF ERUWA

4. CHIEF I. O. OLABODE-OLUKOTUN OF ERUWA

5. CHIEF IDOWU OKEOWO-ASIPA OF ERUWA

6. CHIEF E. OJEBISI-BALE AGBE OF ERUWA

7. MR KASALI SANGOTIKUN

AND

1. MR JAMES OLATUNDE IDOWU (For himself and on behalf or Laribikusi Ruling House excepting Lasubu Family or section of Laribikusi Ruling House/Quarters)

2. ALHAJI RASHEED OYEDEPO AJAO

3. THE GOVERNOR OF OYO STATE

4. THE ATTORNEY-GENERAL OF OYO STATE

5. IBARAPA EAST LOCAL GOVERNMENT

**ORIGINATING COURT**

1. COURT OF APPEAL, IBADAN JUDICIAL DIVISION

2. HIGH COURT

**REPRESENTATION/LAWYERS**

K. A. OGUNWOLE SAN (with him, Ahmed Raji SAN with the rest of the counsel on as per the attached lists) - For the Appellants/Applicants.

M. K. RAJI - For the 1st and 2nd Respondents.

O. A. OGUNIRAN, DLS, Oyo State – For the 3rd and 4th Respondents.

5th Respondent not represented.

**ISSUES FROM THE CAUSE(S) OF ACTION**

ETHICS – HEALTH ISSUES:– Where raised by Counsel in an affidavit before an appellate court, in support of a motion for extension of time – When Challenged by the opposing party through an affidavit contradicting the facts furnished in support of motion – Attitude of court thereto.

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - DELAY IN FILING APPEAL:- Grounds for - Error of counsel – Alleged Ill-health of counsel – Attitude of court thereto - Whether sufficiency by themselves

APPEAL - EXTENSION OF TIME WITHIN WHICH TO FILE BRIEF OF ARGUMENT:- What applicant must establish to succeed - Discretionary power of the Supreme Court to grant - Order 6, rule 5(1) and Order 2, rule 31 of Supreme Court Rules considered.

APPEAL - FRESH ISSUE ON APPEAL – Requirement of leave of court thereto - Exception thereof

COURT – DISCRETION:- Exercise of - Proper approach of appellate court thereto.

COURT - RULES OF COURT - NATURE OF:- Interpretation of - Proper approach of court thereto.

COURT - RULES OF COURT:– Compliance with - Propriety of - Whether binding on parties and counsel.

JURISDICTION - ISSUE OF:- Essence and fundamental nature of - Propriety of raising at any stage of the proceedings – Whether restricted to facts deposed to in affidavits

SERVICE OF ADDRESS - ENDORSEMENT OF ADDRESS FOR SERVICE:- Where required - Process filed without same - Competence of - Order 2, rule 2(1)(2), Supreme Court Rules, 2014 in review

STATUTE - INTERPRETATION ACT, SECTION 18(1) AND SECTION 236, CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED) – Scope of.

STATUTE - SUPREME COURT RULES, 2014, ORDER 3, RULE 2(1)(2) – Construction of

STATUTE - SUPREME COURT RULES, ORDER 6, RULE 5 AND ORDER 2, RULE 31:- Construction of

CASE SUMMARY

ORIGINATING FACTS AND CLAIMS

The Appellants/Applicants appealed against the judgment of the Court of Appeal they were dissatisfied with. Being out of time and in contravention of Order 6, rule 5(1) (a) of the Supreme Court Rules that provides that: *“The appellant shall within ten weeks of the receipt of the record of appeal ... file in the court and serve on the respondent, a* *written brief being a succinct statement of his argument in the appeal.”*, Having lost time, a staff from the law firm of the appellants/applicants’ counsel filed an affidavit in support of the appellants/applicants’ motion for extension of time, stating that the time limited for the filing of the appellants/applicants’ brief of argument could not be met because the lead counsel handling the brief was grappling with health issues.

The 1st and 2nd Respondents’ counsel filed a counter affidavit, stating facts that contradicted specific paragraphs of the affidavit in support of the Appellants/Applicants’ Motion for Extension of time. The Court was compelled to decide whether to grant the application for extension of time, in the face of the counter affidavit that specifically contradicted the facts deposed to in the affidavit supporting the appellants/Applicants’ Motion for extension of time.

DECISION(S) APPEALED AGAINST

The Court of Appeal entered judgment in favour of the Appellants/Applicants, hence the appeal by the Appellants.

ISSUES FOR DETERMINATION OF APPEAL

FOR APPELLANT

“Whether or not the court may exercise its discretion in favour of the appellants/applicants by granting the application.”

FOR FIRST AND SECOND RESPONDENT

(a) Whether the appellants/applicants have placed good, substantial and exceptional, sufficient and cogent reasons before the court to deserve granting of an extension of time to file the appellants’ brief of argument.

(b) Whether the order/reliefs 2, 2.3 and 4 of this application are supported by law or grantable by this honourable court in the circumstances of this application.

BY COURT

*[Motions are generally argued on the basis of the grounds upon which they are predicated, the supporting affidavits and counter-affidavits. I am not aware of any provisions in the rules of this court that authorize formulation of issues upon which applications are argued.]*

DECISION OF SUPREME COURT

1. Applicants granted extension of time to file the appellant’s brief of argument.

2. Leave granted to the appellants/applicants to raise new issue, a new point of law not raised either in the High Court or the Court of Appeal to wit:

“Whether or not the learned trial judge and the Court of Appeal have jurisdiction to entertain this action which was instituted in a non-judicial division to wit: “Eruwa Judicial Division.”

3. Leave granted to the appellants/applicants to incorporate argument on the new issue; fresh point of law in the appellant’s brief of argument (Exhibit A).

4. Exhibit A, the appellants’ brief of argument is deemed properly filed and served.

**MAIN JUDGMENT**

**GALINJE JSC** (DELIVERING THE LEAD RULING):

By a motion on notice dated 22 April 2014 and filed on 23 April 2014, the appellants/applicants herein sought for the following reliefs:-

1. Extension of time to file the appellants/applicants’ brief of argument attached to the affidavit and marked Exhibit A.

2. Granting leave to the appellants/applicants to raise a new issue/a new point of law not raised either in the High Court or the Court of Appeal to wit:

“Whether or not the learned trial judge and the Court of Appeal have jurisdiction to entertain this action which was instituted in a non-judicial division to wit: “Eruwa Judicial Division.”

3. Granting leave to the appellants/applicants to incorporate argument on the new issue/fresh point of law in the appellants’ brief of argument (exhibit A).

4. To deem as properly filed and served the appellants’ brief of argument (marked exhibit A) already filed and served. The motion is predicated on seven (7) grounds and supported by a four paragraph affidavit sworn to by one Saheed Raji, a legal secretary in the law firm of R. A. Ogunwole SAN & Co., solicitors to the appellants/applicants.

In opposition to this application, the 1st and 2nd respondents filed a 28 paragraph counter-affidavit on 24 May 2016 and a further counter-affidavit to the same motion on notice on 3 June 2016. In line with the relevant rules of this court parties filed written addresses.

The appellants/applicants written address settled by Mr. L. A. Ogunwole. SAN is dated 22 April 2014. Learned senior counsel formulated one issue for determination of this application and it reads as follows:-

“Whether or not the court may exercise its discretion in favour of the appellants/applicants by granting the application.”

Mr. Kolapo Raji Esq. of counsel to the 1st and 2nd respondent submitted two issues for determination of the application. These issues are reproduced hereunder as follows:-

(a) Whether the appellants/applicants have placed good, substantial and exceptional, sufficient and cogent reasons before the court to deserve granting of an extension of time to file the appellants’ brief of argument.

(b) Whether the order/reliefs 2, 2.3 and 4 of this application are supported by law or grantable by this honourable court in the circumstances of this application.

Motions are generally argued on the basis of the grounds upon which they are predicated, the supporting affidavits and counter-affidavits. I am not aware of any provisions in the rules of this court that authorize formulation of issues upon which applications are argued. Applicants are not allowed to proffer arguments not deposed to in their affidavit. Issues in appeals arise from grounds of appeal, which in turn must be related to the decisions against which appeals lie. On cases of applications, where do these issues arise? Applicants certainly cannot formulate issues that are at variance with the contents of their affidavit and expect a favourable endorsement from the courts. The applicant’s issue in the instant application does not seem to have covered the deposition in his supporting affidavit.

The application will therefore be considered in relation to the supporting affidavit. In arguing this application, Mr. Ogunwole, learned senior counsel for the appellants/applicants relied on all the paragraphs of the affidavit, particularly paragraph 3 thereof and submitted that a court of law would normally exercise its discretion in favour of an applicant where his being out of time is due to pardonable inadvertence and/or negligence caused by his counsel. In aid, learned senior counsel cited Isiaka v. Ogundimu (2006) 13 NWLR (Pt. 997) 401 at 414 paragraphs F- G.

On whether the appellant can raise fresh issue or fresh point of law under Order 6, rule 5(b) of the Supreme Court Rules, learned senior counsel submitted that the fresh issue that is sought to be raised in this application touches on the jurisdiction of the court. According to the learned senior counsel, the fresh issue is substantial and no fresh evidence will be called to establish it. In aid, learned senior counsel cited A.I.C. Limited v. Nigerian National Petroleum Corporation (2005) All FWLR (Pt. 270) 1945, (2005) 5 SC 11) 60 at page 68. Finally, learned senior counsel urged this court to grant the application.

Mr. Kolapo Raji, learned counsel for the 1st and 2nd respondents submitted that the appellants/applicants have not disclosed any fact as good, substantial, exceptional and for convincing reasons for late filing of the brief of argument to deserve extension of time to file their brief of argument. In a further argument, learned counsel submitted that the learned senior counsel was throughout the period he claimed to have eye problems, engaged in active practice in courts and that apart from this, there were other counsel in the chambers of Ogunwole SAN, who were competent to file the appellants’ brief of argument. Learned counsel urged the court to refuse prayers one as the appellants/applicants have failed to place sufficient materials before the court.

On the appellants’ prayer to raise fresh issue or fresh point of law before this court, learned counsel submitted that the appellants/applicants have not satisfied the conditions for doing so. In aid, learned counsel cited the decision of this court in Udo v. R. T. B. C. S (2013) All FWLR (Pt. 692) 1771, (2013) LPELR 19910 (SC). Learned counsel further submitted that the applicants have not placed all the relevant facts pertaining to the new point being sought to be raised before this court. Learned counsel raised so many issues which are irrelevant at this stage. I do not need to consider them as doing so will have the effect of determining the appeal at the interlocutory level. I wish to state clearly that a grant or refusal of this application is within the discretionary powers of this court. It is the law that this discretionary powers must not only be exercised judicially but must be exercised judiciously also. An application for extension of time to file a brief of argument is not granted as a matter of course. An applicant who desires that the court’s discretion be exercised in his favour in an application for extension of time must give good reasons and place sufficient materials before the court in order to earn the discretion of the court in his favour.

In the instant application, learned senior counsel for the applicant relies on all the paragraphs of the supporting affidavit, particularly paragraph 3 thereof, for delay in filing the appellant’s brief of argument within the prescribed period. Paragraph 3 of the supporting affidavit is hereunder reproduced as follows:-

“That Mr. R. A. Ogunwole SAN, the lead counsel in this appeal told me and I verily believe in our law office on Saturday, 19 April 2014 at about 4:00pm as follows:-

i. That he was served with the records of appeal on 23 October 2013.

ii. That he commenced work on the preparation of the appellants’ brief of argument when he suddenly developed some problem in his eyes and his doctor advised him to take some rest to avoid straining the eyes.

iii. That during the period, he could not do much reading, the time for filing the brief of argument has (sic) expired.

iv. That he has fully resumed his legal practise and he has completed the appellants’ brief of argument which has been filed.

v That the delay was caused by the appellants’ counsel which is deeply regretted.

vi. That in the cause of reading the records of appeal, he discovered that the writ of summons, the statement of claim and all court processes filed by the plaintiffs were titled ‘in the Eruwa Judicial Division’ which is non-existence in Oyo State.

vii. That all the facts in support of the new point of law are contained in the records of appeal before this honourable court.

viii. That no further evidence is required which could have affected the decision of this honourable court.

ix. That it is in the interest of justice to grant this application so as to prevent obvious miscarriage of justice.

x. That to avoid further delay, new issue/new point of law has been incorporated in the appellants’ brief of argument already filed and copy of which is herewith attached and marked exhibit A.

xi. That the respondents will not be prejudiced if the application is granted.

xii. That it is in the interest of justice to grant the application.”

Learned counsel for the 1st and 2nd respondents contradicted the averments reproduced above at paragraphs 8 - 21 of their counter-affidavit. These paragraphs of the counter-affidavit are hereunder reproduced as follows:-

8. On 23 May 2016 at 2.00pm at No. 24 Adeoyo Hospital Road, off Ring Road, Ibadan, one Mr. Tunde Adegbola, a journalist of Olorunsogo, Akanran Road, Ibadan informed me and I verily believed him as follows:

i. That Mr. R. A. Ogunwole, SAN is counsel to the defendants in a pending civil suit No. 1/192/2008 before Honourable Justice M. L. Abimbola of High Court of Oyo State, Ibadan Judicial Division and that the suit is between Yekini Sanusi Ida & 2 Ors. v Oladepo Fakunle & Anor.

ii. That on 13 November 2013, 28 November 2013 and 6 February 2014, Mr. R. A Ogunwole, SAN personally attended the proceedings of the court in the said suit and participated actively and strenuous in the proceedings which were hearing of interlocutory application and hearing of the substantive suit.

iii. That Mr. R. A. Ogunwole, SAN during the periods mentioned in the said suit strenuously conducted cross-examinations of claimants’ witnesses in the said case.

9. Based on the facts deposed to in-paragraphs 8(i - iii) above, I verily believe that Mr. R. A. Ogunwole, SAN had no problem in his eyes, he took no rest, he did much reading in preparation for his active and strenuous participation in the said proceedings and he was in his full legal practices during that time.

10. Mr. R. A. Ogunwole, SAN during the periods from 23 October 2013 to 23 April 2014 had the following Solicitors and Advocates in his law firm as legal practitioners in his employment, namely; J. D Olaniyan Esq., Joy Z. Joseph Esq., Tope Olufokunbi Esq., Oluwatosin Oni Esq., R. U. Ugwu Esq., J. A. Ikedieze Esq., and many others.

11. A copy of a letter written by the said J. D. Olaniyan Esq. of Mr. R. A. Ogunwole, SAN’s law firm relative to this case/appeal and served on the 1st and 2nd respondents’ solicitor, Adebayo Shittu is herewith attached and marked as exhibit ROA and based on its content, I verily believe that legal practitioners in the employment of Mr. R. A. Ogunwole, SAN in his firm that are mentioned above are competent and well conversant with the facts of this appeal as well as conversant with the relevant laws that are involved in this case/appeal.

12. Based on the facts and circumstances deposed to in paragraphs 9, 10 and l 1 above, I believe that the said J. D. Olaniyan Esq. or any of the above mentioned legal practitioners in the employment of Mr. R. A. Ogunwole, SAN could within time required by the rules, prepare and file the appellants’ brief of argument in this appeal.

13. Also, during the period from 23 October 2013 to 23 April 2014 more particularly on 10 January 2014, the 1st and 2nd respondents through their counsel (Abdur-Raheem Adebayo Shittu Esq), pursuant to the judgment of the trial court in this case/appeal filed an application by motion of notice dated 10 January 2014 before the trial court. A copy of the said motion is herewith attached and marked as exhibit ROA 1.

14. On 15 January 2014 the said J. D. Olaniyan Esq. Of Mr. R. A. Ogunwole, SAN’s law firm mentioned above prepared and filed a counter-application by a motion on notice (dated and filed on 15 January 2014) to strike out the application in exhibit ROA1 above. A copy of the counter-application/motion referred to in this paragraph is herewith attached and marked as exhibit ROA2.

15. Upon filing and service of a counter-affidavit filed by the 1st and 2nd respondents to the counter-application (i.e exhibit ROA2 above), the counter-affidavit which is herewith attached and marked as exhibit ROA3; it was Mr. R. A Ogunwole, SAN himself that personally prepared and filed on 30 January 2014, a further affidavit and a written address in support of the exhibit ROA2 mentioned above. A copy of the said further affidavit and written address so prepared by Mr. R. A Ogunwole, SAN himself is hereby attached and marked as exhibit ROA4

16. On 10 October 2013, appellants/applicants through their counsel, Mr. R. A Ogunwole, SAN, pursuant to the judgment of the lower court filed before the Court of Appeal, Ibadan, an application by motion on notice dated 10 January 2014. A copy of the said motion is herewith attached and marked as exhibit ROA5.

17. The said motion, i.e., exhibit ROA5 of this affidavit was fixed by the Court of Appeal, lbadan for hearing 10 April 2014. A copy of the hearing notice of the application served on the 1st and 2nd respondents is herewith attached and marked as exhibit ROA6.

18. On 10 April 2014, Mr. R. A Ogunwole, SAN was present in the Court of Appeal and participated actively in the proceeding of the court.

19. Based on the facts deposed to in paragraphs 8 (i- iii) and 9 - 13 above, I verily believed as follows:

i. That Mr. R. A. Ogunwole SAN did much reading to prepare and file the said exhibit ROAl, ROA2 and ROA3 above as well as several relevant case laws to prepare and file exhibit ROA4 attached to this affidavit.

ii. That Mr. R. A Ogunwole, SAN did much reading to prepare and file the said exhibit ROA4.

iii. That Mr. R. A. Ogunwole, SAN did not develop any problem in his eyes and he could do much reading with his eyes during the period from 23 October 2013 to 23 April 2014 to prepare and file within time, the appellants brief of argument in this appeal.

iv. That between the period of 23 October 2013 and 23 April 2014, Mr. R. A Ogunwole, SAN was healthy; he did not develop any problem in his eyes, his doctor did not advise him to take rest for any reason whatsoever and he did not take any rest from his full legal practices.

v. That during the period mentioned above, Mr. R. A. Ogunwole, SAN could do much reading and he was in his full legal practices.

20. The appellants themselves took no steps to prompt Mr. R. A. Ogunwole, SAN to instruct any of other practitioners in his employment in his law firm to prepare and file their appellants’ brief within the time required under the rule.

21. The appellants also took no steps to brief any other counsel who had no eyes problem to handle their appeal, and to prepare and file their brief within the time required under the rule.

Learned counsel contended that the averments contained in paragraph 3 (i) - (xii) of the affidavit in support of the appellants/applicants’ motion on notice are most untrue and are complete fabrication that were concocted to mislead the court.

Learned counsel deposed at paragraph 8 of the counter-affidavit that the information that led to his belief that the appellant’s deposition at paragraph 3 of the affidavit in support were most untrue was given to him by one Tunde Adegbola, a journalist of Olorunsogo, Akanran Road Ibadan. He set out the information from Tunde Adegbola at the paragraphs of the counter-affidavit reproduced above. Learned counsel neither disclosed the relationship between Tunde Adegbola and Ogunwole SAN nor is there evidence that the counter-affidavit was served on the said Tunde Adegbola. An affidavit in which a total stranger to a case is mentioned as an informant, that stranger must be put on notice. There is no address for service on Tunde Adegbola on the counter-affidavit, as such it is very clear that he was not served. In absence of address for service, this court has no basis upon which the informant could be called to verify the depositions alluded to by the 1st and 2nd respondents’ counter-affidavit. I do therefore think the paragraphs of that counter-affidavit reproduced above have countered nothing, since there is no way to verify the depositions aforesaid. The law is very clear that where any notice or any other process is required to have an address for service endorsed on, it shall not be deemed to have been properly filed unless such address has been endorsed on it. See Order 2, rule 1(2) of the Supreme Court Rules, 2014 (as amended). Since the information supplied by the 1st and 2nd respondents are incapable of being verified, they therefore go to no issue.

The first prayer in the applicants’ application is for extension of time to file a brief of argument. The only viable reason advanced for failure to file the brief of argument within the prescribed period is that, the learned senior counsel who is handling the case suddenly developed some problems in his eyes, and his doctor advised him to take some rest to avoid straining the eyes. There is no medical report in support of this deposition and the doctor has also not been put on notice in respect of the allegation concerning him. In an application to appeal, this court has held that it may not amount to sufficient reason merely to say that the counsel was ill or that there was dereliction of duty on the part of his junior or that the volume of chamber work made the counsel forget to file the appeal. See Omoregie v. Emovon (1997) 6 SC 6; Benson v. Nigerian Agip Oil Co. Ltd (1952) 5 SC 1. However, it is accepted as good reason where counsel commits error of judgment and fails to do what he is supposed to do.

In this respect counsel’s carelessness cannot be visited on the litigant where such carelessness is pardonable. See Doherty v. Doherty (1464) 1 All NLR 299; Bowaje v. Adediwura (1476) 6 SC 143.

In an appeal, the court’s discretion should always be exercised towards hearing the parties on the merit. This court can therefore, not shut out the appellant when he has shown that the brief is available for deeming. I am therefore, of the firm view that justice will be better served if this application for extension of time to file the appellant’s brief of argument is granted as prayed. The second prayer is for leave to the appellants/applicants to raise a new issue/a new point of law not raised either in the High Court or the Court of Appeal and to incorporate argument on the new issue/fresh point of law in the appellant’s brief or argument. The new issue which the applicants wish to raise has been reproduced elsewhere in this ruling. Learned senior counsel submitted that the new issue touches on the jurisdiction of the court and that no new evidence will be called. In aid, learned senior counsel cited A.I.C Ltd v. NNPC (2005) 5 SC (Pt. 11) 60 at 68. In opposition learned counsel for the 1st and 2nd respondents deposed at paragraphs 22 and 23 of the counter-affidavit as follows-

“22. Conventionally, the Eruwa Judicial Division is in existence in Oyo State.

23. In Oyo State, the litigants, the Bar and the Bench conventionally know, call, refer to and addressed Ibarapa Judicial Division of Oyo State High Court as Eruwa Judicial Division because the official place of sitting of the division is High Court of Oyo State at Eruwa, Oyo State.”

Now the issues raised by learned counsel in the paragraphs of the counter-affidavit are matters to be considered at the hearing of the appeal. Learned counsel has submitted that the new issues touch on the jurisdiction of the court. At this point the court cannot go into the determination of whether ‘Eruwa Judicial Division’ exist or not, as doing so will amount to a determination of the main appeal at interlocutory stage which this court is not allowed to do. The law is settle that issue of jurisdiction, being the soul of litigation can be raised at any time even in this court for the first time.

See Bronik Motors v. Wema Bank Nig Ltd (1983) 1 SCNLR 296; Oredoyin v. Arowolo (1989) 4 NWLR (Pt. 114) 172; Gen.. Electric Motors v. Akande (1999) 1 NWLR (Pt. 588) 532.

For this reason, I am also prepared to grant the applicant’s second prayers. On the whole, I grant the application in the following terms:-

1. Applicants are hereby granted extension of time today to file the appellant’s brief of argument.

2. Leave is hereby granted to the appellants/applicants to raise new issue, a new point of law not raised either in the High Court or the Court of Appeal to wit:

“Whether or not the learned trial judge and the Court of Appeal have jurisdiction to entertain this action which was instituted in a non-judicial division to wit: “Eruwa Judicial Division.”

3. Leave is hereby granted to the appellants/applicants to incorporate argument on the new issue; fresh point of law in the appellant’s brief of argument (Exhibit A).

4. Exhibit A, the appellants’ brief of argument is deemed properly filed and served today.

**RHODES-VIVOUR JSC:**

I have had the benefit of reading in draft, the lead ruling delivered by my learned brother, Galinje JSC.

I agree with his lordship that the application should be granted.

The applicants seek the following reliefs:

1. Extension of time to file the appellants/applicants’ brief of argument attached to the affidavit and marked exhibit A.

2. Granting leave to the appellants/applicants to raise a new issue/a new point of law not raised either in the High Court or the Court of Appeal to wit;

“Whether or not the learned trial judge and the Court of Appeal have jurisdiction to entertain this action which was instituted in a non judicial division to wit. “Eruwa Judicial Division.

3. Granting leave to the appellants/applicants to incorporate argument on the new issue/fresh point of law in the appellants‘ brief of argument (exhibit A).

4. To deem as properly filed and served the appellants’ brief of argument (marked exhibit A) already filed and served. Hon. Justice Galinje examined the affidavit in support of the application and the counter-affidavit filed in opposition and came to a conclusion which I gratefully accept. I shall have cause in this ruling to refer to his lordships conclusions.

Reliefs 3 and 4 can be granted, if reliefs 1 and 2 succeed.

Relief 1

Order 6, rule 5(1) (a) of the Supreme Court Rules state that:

5(1)(a) The appellant shall within ten weeks of the receipt of the record of appeal ... file in the court and serve on the respondent, a written brief being a succinct statement of his argument in the appeal.

Where, as in this case the applicants were unable to file their brief within 10 weeks as prescribed by Order 6, rule 5 (1)

(a) of the Supreme Court Rules, they can still file their brief if they file an application under Order 2, rule 31 of the Supreme Court seeking extension or enlargement of time to file appellants’ brief. For an application for extension of time to file brief to succeed, the applicant must by affidavit evidence show good and substantial reasons for failure to file brief within the prescribed period. This is premised on the law that when no credible excuse is given no indulgence can be granted. Affidavit evidence must show something which entitles the applicants to the courts discretion e.g. mistake, inadvertence or error of judgment of counsel. Under Order 2, rule 31 of the Supreme Court Rules, this court may extend the period prescribed under Order 6, rule 5(1)

(c) For filling brief. This is a discretion which must be exercised judicially and judiciously. That is with correct and convincing reasons and not arbitrarily or at the whim and fancies of the judge.

Affidavit evidence accepted by this court reveals that learned counsel for the applicants was careless while taking steps to perfect the applicants’ appeal. Such carelessness is pardonable since no delay is envisaged, as the applicants have already filed their brief and it would be wrong to punish the applicants for lapses by their counsel. Relief No. 1 is granted.

Relief 2

The well laid down position of the law is that leave must be obtained from the Supreme Court before a fresh issue not canvassed in the lower courts can be argued, but where the fresh issue relates to the issue of jurisdiction, it must be brought to the notice of the adverse party and can be argued with or without the leave of this court, even if it is coming before this court for the first time. Obiakor v. State (2002) FWLR (Pt. 113) 299, (2002) 6 SC (Pt. II) page 33.

Jurisdiction is a substantial question of law. It can only be ousted by clear provisions of the Constitution or Statute. It is a threshold matter, so once raised, even for the first time in the top court, it must be determined quickly as it is the life wire of the court. See Madukolu v. Nkemdilim (1962) 2 NSCC page 374; Obiuweubi v. C.B.N. (2011) All FWLR (Pt. 575) 208, (2011) 2-3 SC (Pt. 1) page 46. The respondents have been given good notice of the applicants intention to raise the issue of jurisdiction and have gone the extra mile to seek leave from this court which is graciously granted.

It is for these brief reasons as well as those more full given by my learned brother, Galinje JSC, that I too grant the application.

**OGUNBIYI JSC:**

I have had the privilege of reading in draft, the lead just delivered by my learned brother Galinje JSC. I agree that the application at hand has merit and should obliged. The application has been spelt out clearly in the lead ruling of my learned brother. The reliefs are also within the jurisdiction of this court and hence the reference made to Order 6, rule 5(B); Order 2, rule 31 of the Rules of this court and also under its inherent jurisdiction. However, I seek to restate the position of the law, that the granting of the application is not as a matter of course. It must be based on the governing principles of good and substantial reasons.

In other words, it is pertinent to emphasize that the grant of such application, although it is at the discretion of the court, such must be exercised judicially and judiciously. When a court is called upon to make an order of extension of time within which to do certain things, prescribed 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. It therefore follows, that in order to justify the exercise of the court’s discretion in extending the time, there must be some material upon which to base the exercise of that discretion. See Williams v. Hope Rising voluntary Funds Society (1982) 2 SC 145; Elobisi v. Onyeonwu (1989) 5 NWLR (Pt. 120) 224; Doherty v. Doherty (1964) 1 All NLR 299; Ogar v. James (2001) FWLR (Pt. 67) 930, (2001) NWLR (Pt. 722) 621 and Sanusi v. Ayoola (1992) 9 NWLR (Pt. 265) 275.

In further emphasis, the grounds predicating the application as well as the affidavit deposing to the facts thereon must be convincing, as to warrant the exercise of discretion in favour thereof. See also Nwora v. Nwabueze (2011) All FWLR (Pt. 589) 1002, (2011)15 NWLR (Pt. 1271) page 467.

On the totality of the application, it is obvious that the delay sought to be remedied was caused by the act of the counsel and same should not be visited on the client. The law is also well settled that the best of adjudication which should earn the justice of a case is that which is decided on the participation by all parties in proceeding. The issue in question is substantive and not procedural. It is very fundamental and cannot be trivialised. For all intents and purposes, paragraph 3 sub-paragraphs 26 (viii), (ix), (xi) and (xii) of the affidavit in support of the application are specific and relevant to this application and the facts are as follows:

“(viii) That no farther evidence is required which could have affected the decision of this honourable court.

(ix) That it is in the interest of justice to grant this application so as to prevent obvious miscarriage of justice.

(xi) That the respondents will not be prejudiced if the application is granted.

(xii) That it is in the interest of justice to grant the application.” With the foregoing few words of mine and more, particularly and relying on the fuller reasonings by my learned brother, Galinje JSC, I hereby also grant the application in terms of the lead ruling.

**SANUSI JSC**: T

he appellants /applicants filed a motion on notice seeking four reliefs, namely:-

1. Extension of time to file the appellants/applicants’ brief of argument attached to the affidavit and marked Exhibit A.

2. Granting leave to the appellants’/applicants to raise a new issue/a new point of law not raised either in the High Court or the Court of Appeal to wit;

“Whether or not the learned trial judge and the Court of Appeal have jurisdiction to entertain this action which was instituted in a non judicial division to wit. “Eruwa Judicial Division.”

3. Granting leave to the appellants’/applicants to incorporate argument on the new issue/fresh point of law in the appellants` brief of argument (exhibit A).

4. To deem as properly filed and served the appellants’ brief of argument (marked exhibit A) already filed and served. The appellants/applicant supported their application with four paragraph affidavit and a further affidavit and also filed written address on the application. When served with the applicants’ application, the respondents opposed the applicants motion by filing a counter-affidavit, a further counter-affidavit and a written address.

In arguing the application before us, the applicants in their written address raised lone issue for the determination of their application as follows:-

“Whether or not the court may exercise its discretion in favour of the applicants by granting same.” As for the respondents, two issues were proposed for the determination of the application to wit:-

(i) Whether the appellants/applicants have placed substantial and exceptional sufficient and cogent reasons before the court to deserve granting of an extension of time to file the appellants’ brief of argument.

(ii) Whether order/reliefs 2, 3 and 4 of this application are supported by law or grantable by this honourable court in the circumstances of this application. In his oral argument, the learned senior for the applicants referred to paragraph 3 of the supporting affidavit to the effect that the delay in filing their brief of argument was caused by the negligence and inadvertence of the counsel and he argued that in such situation court can exercise its discretion to grant the application especially in a situation where non-filing of brief within time was due to pardonable inadvertence caused by counsel. He cited the case of Isiaka v. Ogundimu (2006)13 NWLR (Pt. 997) No. 1 at 44.

Regarding the relief that has to do with raising fresh or new issue, be referred to the case of A.I. C Ltd v. NNPC (2005)5SC (Pt. 11) 60 at 68.

On their part, the respondents as I stated supra, opposed the grant of this application vehemently. Their learned counsel argued that the applicants failed to disclose any facts as good, substantial, exceptional and convincing reason for late filing of their brief of argument to deserve being granted the relief sought.

He argued that in their counter-affidavit, they showed and established that the learned counsel to the applicants/appellants Mr. R. A. Ogunwole SAN, was during the period stated, had eye problem and was advised to take some rest. The same learned senior counsel for the applicants had been appearing in courts conducting his cases. He stated that all the facts or reasons deposed to were mere fabrication and most untrue; as they stated to in the counter affidavits of 1st and 2nd respondents. He said even if what he said about his eye problem was true, the learned SAN for the applicants had other able learned counsel on employment in his chambers who could timeously prepare the appellants’ brief of argument. He then urged this court to hold that the applicants did not show cogent and substantial reason for the delay in filing the appellants‘ brief of argument. With regard to the prayer for leave to raise fresh or new issue, the respondents’ counsel submitted that such relief was also not grantable because the three conditions for grant of such relief were not satisfied. He mention those conditions to include the followings:-

(a) That the court had all relevant facts relating to the near/fresh point.

(b) That if the points were raised at the lower court, it would have remained unsatisfactorily determined, and

(c) That the point being sought to be raised is substantial point of law be it procedural or substantial.

Learned counsel for the respondents went ahead to delve into some facts in his argument, which if considered will be prejudicial or pre-emptory to the determination of the fresh or new issue sought to be raised. The learned respondents’ counsel finally urged this court to refuse and dismiss the applicants’ application.

In the first prayer, the applicant herein is seeking the indulgence of this court to extend time for them to file their brief out of time. For this court and indeed any appellate court to grant such prayer, the applicant must establish good, substantial or exceptional reasons or circumstances explaining satisfactorily, the delay in filling his brief as would justify the giant of such extension of time applied for. Of course this court always has the discretion to grant or refuse such application but such discretion must be exercised judicially and judiciously. That is to say before granting such relief, the court must ascertain that there are some concrete material upon which to base such exercise of discretion.

In actual fact, the bottom line is that in granting such extension of time, the court must have in its mind the aim doing substantial justice to the parties, because that is the cardinal determining factor. See Chief T. O. S. Benson v. Nigeria Agip Oil Co. Ltd (1982) 5 SC 1.

In this instant application, the learned applicants’ counsel gave his reasons for the delay in fling the appellant’s brief in paragraph 3 of the affidavit supporting his motion, which he gave as principally because of his eye problem to the extent that during the period he was supposed to work on the brief of argument and prepare it he had eye problem and was advised to rest. Conversely, in paragraph 8 of the counter-affidavit filed by 1st and 2nd respondents, the learned counsel for the two respondents tried to debunk such reasons given by the learned senior counsel for the applicants by deposing that during the period of the supposed rest by the learned silk, he was seen personally conducting other cases in various courts despite the alleged eye problem. It seems to me that the averments in the counter affidavit trying to debunk the applicant counsel’s averment in the supporting affidavit, appear to be erroneous because the affidavit appeared not to have been served on the learned senior counsel for the applicants and also the deponent of the averments in the counter-affidavit.

Mr. Tunde Adegbola had no connection whatsoever in the case and appeared to be a total stranger in the case or at least, can be regarded as “busy-body”. There is also no any disclosure in the averments of Tunde Adegbola, of any connection or relationship whatsoever between him and Mr. Ogunwole SAN. Also, there was no identifiable address of service of Tunde Adegbola in the said counter-affidavit.

It must however be stated here, that the reason given by the learned senior advocate for the applicants as cause of his inability to file the brief timeously are not very sound. Even if it was true that he was sick, he is expected to show medical evidence to support his averments. Reason of ill-health or fault of junior counsel in the chambers is not enough. However, there is no dispute whatsoever that the applicants’ counsel was careless and negligent.

At any rate, this court in multiplicity of decided authorities held that negligence or carelessness of counsel can still serve as acceptable explanation for delay to apply for extension of time to appeal. See the cases of Shanu v. Afribank Nigeria Plc. (2000) FWLR (Pt. 23) 1221, (2000)18 WRN 1 or (2000)13 NWLR (Pt. 684)392 at 403; Alasbe v. His Highness S. Abinbola & Ors.(1978) NSCC 84 or (1978) 2 SC 139; Dokoly v. Dokoly (1976) 6 All NLR 399; Bowale v. Adediwura (1976) 6 SC 143; Akinyede v. The Appraiser (1971)1 All NLR 162.

As I said above, the exercise of discretion must be judicially and judiciously done. The cardinal principle is always that the discretion to be exercised must be geared towards doing substantial justice in the surrounding circumstances of the case. The justice of the case is to avoid the appellants or party making them to suffer from the negligence, inadvertence or mistake of their counsel due to no fault of theirs. To put it in another words, they should not be visited with the lapse, negligence or mistake of their counsel. The justice of this application is that the extension of time sought should be granted to enable them file their brief of argument, rather than to hinder them as that tantamount to shutting them out and preventing them from ventilating their grievances on the judgment they are desirous of appealing against. This prayer therefore ought to be and is hereby accordingly granted by me.

The second prayer has to do with the grant of leave to raise fresh or new issue not raised or canvassed at the two lower courts. It appears to me that the issue sought to be freshly or newly raised relates to point of jurisdiction. The law is trite that issue that relates to jurisdiction before being raised, the adverse party must as of necessity be put on notice and such notification can only be effectively done by obtaining the leave of this court, since it is sought to be raised for the first time in this court. It is also settled law that, though question of law and jurisdiction can be raised at any time in the proceedings, however in view of the importance and fundamental nature of the topical issue of jurisdiction which is the life wire or spinal cord of any case or matter, the law requires that parties must be given opportunity to address it on that, in order not to breach the time honoured principle or rules of fair hearing it. It is basically in view of that principle of law, that where a party to an appeal is desirous of raising new or fresh issue on jurisdiction which was never raised in any of the two courts below, should and indeed must seek and obtain leave of court where he intends to raise it. It is sequel to that that, I find it appropriate to grant this prayer. Thus, in the light of these few remarks and for the fuller and more detailed reasons contained in the lead ruling of my learned brother, Paul Adamu Galinje JSC, which I entirely agree, with that I too see merit in this application. It is accordingly granted by me. I abide by all the consequential orders made in the lead ruling.

**EKO JSC:**

On 23 April 2014, the appellant/applicants filed a motion wherein they are seeking:

1. Extension of time to file appellants/applicants’ brief of argument attached to the affidavit and marked Exhibit A.

2. Granting leave to the appellants/applicants to raise a new issue/a new point of law not raised either in the High Court or the Court of Appeal to wit:

Whether or not the learned trial judge and the Court of Appeal have jurisdiction to entertain this action which was instituted in a non judicial to wit: Eruwa Judicial Division.

3. Granting leave to the appellants/applicants to incorporate argument on the new issue/fresh point of law in the appellants’ brief of argument (Exhibit A).

4. To deem as properly filed and served the appellants’ brief of argument (marked exhibit A) already filed and served. There are two main segments of the application, that is: extension of time within which to file appellants’ brief of argument - exhibit A, and leave to raise a fresh or new point or issue that was not raised at the trial court and the Court of Appeal. The two are within the discretion of this court to grant.

The appellant in every appeal has ten (10) weeks of the receipt of the record of appeal within which to prepare, files and serve his brief of argument. The period is big enough for any serious minded appellant or his counsel to prepare, file and serve his brief of argument. It is trite that Rules of court are not made for fun. They are made to be complied with. Where the purpose of the Rules is to provide time-table for conduct of litigation, there must be strict compliance with the Rules; because to do otherwise will defeat the purpose of the Rules. See Ratnam v. Cumarasamy (1964) 3 All E.R. 933 at 935. The obligation of the litigant and/or his counsel to comply with the Rules of court has been re-stated by this court in a number of cases including Ezeigbo v. F. A. T. B. Ltd (1992) 1 NWLR (Pt. 216) 197; Iroegbu v. Okwordu (1990) 6 NWLR (Pt. 159) 648; C.C.B. (Nig.) Plc. v. Attorney-General, Anambra State (1992) 8 NWLR (Pt. 261) 526; Dingyadi v I. N. E. C. (2010) All FWLR (Pt. 550) 1204, (2010) 18 NWLR (Pt. 1224) 154. The point in all these cases is that it must be appreciated that where the exercise of a right is circumscribed or limited by a rule of practice, except where it is satisfactorily shown that compliance with such a rule has been raised, then the rule must be complied with, and that the Rules are meant to be obeyed. The Rules of this court made pursuant to Section 236 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), not only do they partake of the nature of subsidiary legislation by virtue of section 18(1) of the Interpretation Act, per Ogbuagu JSC in MV Arabella v. NAIC (2009) 4 - 5 SC (Pt. 2) 189 at (205 -206); they are accordingly entitled to be given purposive interpretation. Whereby, effect is given to the true purpose of the legislation. See Nafiu Rabiu v. The State (1980) 8 -11 SC 130; Onyema v. Oputa (1987) 6 SC 362 at 371; First Bank of Nigeria Plc v. Maiwada (2012) LPELR - 4713 (SC).

One of the causes of the baneful situation or the quagmire of the congestion we have found ourselves in this court presently is the tardy or sloppy attitude of lawyers and litigants to rules providing time table for conduct of litigation. We are in dire situation. As Shakespeare would put it, desperate malady deserves desperate remedy. The panacea appears to what this court stated in Solanke v. Somefun (1974) 1 All NLR 586 at 592; F. B. N. Plc. v. Abraham (2008) 362 NSCQR 1058 at 1076. That is, strict compliance with the Rules of court makes administration quicker. The extant Rules of this court provides in the proviso to Order 2, rule 31 that when time within which anything provided by the said Rules shall be done, enlargement of time for doing such a thing may be granted only in exceptional circumstances. That is, that such indulgence may only be granted in very unusual circumstances. The adjective: exceptional means “very unusual”. See Oxford Advanced Learner’s Dictionary. The proviso to Order 2, rule 31 therefore demands that the appellant who has failed, neglected or refused to file his brief of argument within 10 weeks provided by Order 6, rule 5, then it is only upon his showing exceptional or very unusual circumstances that he may be allowed extension of time within which to file the said brief of argument.

For the appellant, the reason given in the affidavit for the 24 week delay in filing the appellant’s brief is that his counsel, Mr. Ogunwale, SAN developed serious eye problems just at the time he had commenced working on the brief. I grudgingly accept this reason. The counter-affidavit which seeks to prove a lie of the reason for delay as proffered by Mr. Ogunwole, SAN, suggest that Mr. Ogunwole SAN, inspite of the alleged eye problems was actively in courts in other cases. My learned brother, Paul A. Galinje JSC, in the lead ruling, has dismissed the counter-affidavit and given reasons for not acting on it. I agree with him.

The learned senior counsel, however, may not be that lucky some other time. As a senior advocate, he is expected to have other counsel in his chambers. If for any reason any counsel in the chambers, including himself, is unable to do a thing within the statutory time or period prescribed any other counsel within the chambers should be above to take over and to the needful. See A. J. Adeka v. M. A. Vaatia (1987) 1 NWLR (Pt.487) 134. In a firm of legal practitioners when one legal practitioner is unable to perform an assigned responsibility for any reason, including sickness; in an application for extension of within which to do that thing prescribed by the Rules of court, proper account of not only the counsel assigned but also of other counsel in the chambers should be given.

The application also seeks leave to raise the issue of jurisdiction for the first time in this court. I would not rewire adducing fresh evidence on the evidence or facts available in the printed record, that issue can be determined without necessity for fresh evidence. I agree with the appellant that the new issue touches on the jurisdiction of the trial to entertain the suit. It is a threshold issue, and it is prima facie substantial. Counsel for the respondents seems to suggest that it is a non-issue. His submission backed by paragraphs 22 and 23 of the counter-affidavit, is that it is a notorious fact “Eruwa Judicial Division” is also known and called “Ibarapa Judicial Division” in Oyo State. As I am satisfied that my agreement with the 1st - 2nd respondent’s counsel would prematurely lead only to dabbling in the issues in the substantive appeal. I hereby impose self restraint.

I am like my learned brother, Paul A. Galinje JSC, ready grant appellant leave to raise and argue the fresh point or issue in the appellant’s brief. I also grant appellant extension of time within which to file his brief of argument as in exhibit A. The appellant’s brief of argument filed and served on the respondents is hereby deemed properly filed and served today.

Application granted