**ANI AND ORS**

**V.**

**EFFIOK AND ORS**

SUPREME COURT OF NIGERIA

FRIDAY, 24 FEBRUARY 2017

SC. 634/2013

**LEX (2017) - SC. 634/2013**

OTHER CITATIONS

2PLR/2017/44 (SC)

**BEFORE THEIR LORDSHIP**

OLABODE RHODES-VIVOUR, JSC (Presided)

CLARA BATA OGUNBIYI, JSC

AMIRU SANUSI, JSC

AMINA ADAMU AUGIE, JSC (Read the Lead Ruling)

PAUL ADAMU GALINJE, JSC

**BETWEEN**

1. ETUBOM (DR.) ANTHONY ASUQUO ANI

2. ETINYIN OKON EFFIONG OFFIONG

3. CHIEF OFFIONG EYO OFFIONG

4. CHIEF EMMANUEL ENIANG OFFIONG

5. ANTHONY ENIANG OFFIONG

(For themselves and on behalf of Ufot Ikot Nkpor Clan, Mbiabo Ikoneto, Odukpani Local Government Area)

AND

1. ETUBOM ESSIEN EKPENYONG EFFIOK

2. ETUBOM OKON ASUQUO

3. ETUBOM MICAH ARCHIBONG

(For themselves and representing the Etubom’s Traditional Council, Obong’s Palace)

4. ETUBOM EKPO OKON ABASI OTU

5. ETUBOM OUT EFA OUT

(For themselves and representing the Esit Edik Traditional Council)

**ORIGINATING COURT**

COURT OF APPEAL, CALABAR JUDICIAL DIVISION (Judgment of the Court delivered on 4 July 2013).

**REPRESENTATION/LAWYERS**

O. F. EKENGBA (with him, OLUBOLA OLUSEGUN Esq.,) – For the Applicants.

NELLA ANDEM-RABANA (SAN) (with him, PETER O. ABANG Esq.,) - For the 1st set of Respondents.

LADI ROTIMI WILLIAMS (SAN) [with him, DANIELLA IKEOKWU] - For the 2nd set of Respondents.

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

CONSTITUTIONAL LAW – JUSTICE ADMINISTRATION – RIGHT OF APPEAL:- Guarantee of right of appeal under the Constitution of the Federal Republic of Nigeria, 1999 (as amended) – Supreme status of – Implication for any negative principles aimed at foreclosing the right of appeal – Invocation of – Need to ensure that the exercise of the right is only permissible within limit as provided by law including the securing of necessary leaves of court – Duty of court in the protection of the right of appeal

CONSTITUTIONAL LAW – JUDICIARY – APPEALS:- An appeal from the decisions of the Court of Appeal on question of fact and mixed fact and law – Requirement to first obtain leave of the Court of Appeal or of the Supreme Court – Failure thereto – Implication for the competency of the appeal – Whether incurably fatal - section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 in review

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - EXTENSION OF TIME AND LEAVE TO APPEAL - Applicant desiring to appeal out of time when leave is required - Onus on - Application for - What he must establish to succeed

APPEAL - NOTICE OF APPEAL - Appellant filing two or more notices of appeal - Propriety of.

APPEAL - NOTICE OF APPEAL:– Nature and effect of - When deemed incompetent - Defect in - Effect - Whether may be cured by an amendment – Evolved attitude of the Supreme Court thereto

APPEAL - NOTICE OF APPEAL FILED ON GROUNDS OF MIXED LAW AND FACT WITHOUT LEAVE OF COURT:- Defect attaching thereto – How cured – Invocation of the overriding effect of the Constitutional right of appeal against all statutes which seek to negatively circumscribe exercise of the right of appeal – Device to cure defect – Basis of in Rules of the Supreme Court – Application brought pursuant thereto – Where subsequent in time to a preliminary objection seeking order to strike out appeal – Sequence in which the applications would be resolved – Justification for

PRACTICE AND PROCEDURE - APPLICATION – Whether applicant barred from filing on grounds of pending similar application before court - Multiple notices of appeal - Appellant filing - Propriety of.

WORDS AND PHRASES - ‘OVERREACH’ - Meaning of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The applicants were the respondents in the Court of Appeal. Aggrieved by the judgment of the court against them, they filed an application for leave to appeal against same. The application could however not be determined before the time to appeal expired. The applicants therefore filed another notice on grounds of law alone. Upon discovery that the grounds in the appeal was on law and mixed law and fact, the applicants filed the present application praying for extension of time to seek leave to appeal, leave to appeal, extension of time within which to file their notice and leave to appeal on grounds of mixed law and facts.

The two sets of respondents filed preliminary objections to the application challenging the jurisdiction of the court to determine same.

ISSUE FOR RESOLUTION OF APPLICATION BEFORE THE SUPREME COURT

[The proceeding was not in respect of the substantive appeal before the Supreme Court. Rather it was merely to rule on preliminary objections to the competency of the notice of appeal filed by the Appellant and the application brought by the Appellant to cure the observed defect in the Notice of Appeal, to wit, failure to secure the leave of Court before bringing an appeal falling under section 233(s) of the Constitution of Nigeria.

DECISION(S) OF THE SUPREME COURT

1. An incompetent notice of appeal deprives a court of jurisdiction to hear the appeal. A notice of appeal is the spinal cord of an appeal. It is the foundation upon which an appeal is based. It is the originating process, which sets the ball rolling for the proper, valid and lawful commencement of an appeal. Where the notice of appeal is defective, no proper appeal can stand. It will, certainly, collapse.

2. A notice of appeal can be competent and valid if it contains at least one valid ground of appeal. A bare notice of appeal without any ground or grounds of appeal, is valueless and incompetent. It is incurably bad. The defect cannot be cured by amendment.

3. The Supreme Court Rules provides a room for a diligent litigant to maneuver under Order 2, rule 31 of the Rules of the Court. Its provision allows an appellant, where leave of court is required and the time within which to appeal has also expired, to apply for extension of time to seek leave to appeal. But it is crucial that an intending appellant filed a tripod application - a prayer for: (a) extension of time to seek leave to appeal; (b) leave to appeal; (c) extension of time to appeal. For there to be a valid appeal, the three reliefs must be granted by the court.

4. The appellants have filed the tripod application to save the appeal and the question now is: what should the Court to do in this case where there are preliminary objections aimed at striking out the appeal in limine in opposition to the said application which seeks to give life to the appeal?

5. Where the complaint in the preliminary objection is to the effect that the court has no jurisdiction to hear the appeal at all or that there is no competent appeal before the court or that a threshold issue is involved, then a fundamental issue which goes to the vires of the court has been raised. When such is the case, one of two factual situations may arise. The respondent’s motion may be one (that) is capable of breathing life into the incompetent process. In other words, the erring appellant has realized his mistake and has filed a motion which, if granted will correct it and bring about a valid and competent appeal.

6. In the hey days of technicality, the practice of the Supreme Court was to take the motion, which sought to strike out the appeal as incompetent first, leaving the appellant to seek to commence another appeal if he liked. However, that does not accord with the present inclination of the courts to do substantial justice, for the days of technicality are gone.

7. Therefore, as a reflection of the present mood of courts to do substantial rather than technical justice, a court of justice and equity would first consider the motion which seeks to bring about a competent appeal, where there is ex-facie a proper application for such, before taking the one which seeks to strike out the appeal as incompetent. To adopt that course will save both time and expenses.

8. The opinion of Oputa JSC, in Awote v. Owodunni & Anor - that the proper course is to consider the appeal as incompetent, in line with the maxim, ex nihilo nihil fit (you can build nothing out of nothing) is with respect obiter and reflective of the old practice. The present attitude of the Court is that where there is before the court a proper application to correct the error which could have the effect of breathing life into an incompetent appeal, the court has the duty to consider such an application first.

9. The applicants have a right of appeal, guaranteed to them by the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which overrides any negative principles aimed at its foreclosing. The right being constitutional therefore, stands to override other negative principles aimed at its foreclosing. The rider also stands clear that the exercise of their right is only permissible within limit as provided by law. The right is lost outside the prescribed statutory period allowed but will only be exercised by leave of court; hence the reason for seeking an order for leave and extending the time within which to appeal. While the constitutional right cannot be extended if the applicant fails to adduce good and substantial reason for obliging the application, the court will also not hesitate to exercise its discretion in favour thereof provided sufficient materials are contained in the affidavit to justify the exercise”.

10. The 2nd set of respondents argued that the application to rectify the processes was brought in bad faith to overreach them and deprive them of their right of fair hearing. The word “overreach” simply means “to take advantage of”. How is that even possible? The respondents took part in the trial at the High Court, Calabar (trial court) where they lost. They exercised their constitutional right of appeal and appealed to the court below, where they got judgment in their favour. The applicants seek to exercise their constitutional right of appeal by appealing against the judgment of the court below which set aside the decision of the trial court in their favour. What is good for the goose is good for the gander - no one stopped the respondents from exercising their right of appeal, and the applicants cannot be deprived of their right of appeal.

**MAIN JUDGEMENT**

AUGIE JSC (DELIVERING THE LEAD RULING):

The applicants are praying this court for extension of time to seek leave to appeal against the judgment of the court below, delivered in Calabar on 4 July 2013 in appeal No. CA/C/97/2012. They also prayed for leave to appeal; extension of time within which to file their notice and grounds of appeal; and leave to appeal on grounds of mixed laws and facts. Prayers 5- 7 are for deeming orders. The grounds for the application are that:

1, They filed an application before the lower court on 11 September 2013 for leave to appeal on grounds of mixed law and fact timeously but unfortunately the lower court could not hear the application until the time allowed to appeal expired on 5 October 2013 and the motion was withdrawn and struck out.

2, However, on sensing that time was running out, they filed a notice and grounds of appeal on 3 October 2013, believing that ground 1 in the said notice of appeal is ground of law not requiring leave of court so as to sustain the appeal.

3, Upon the transmission of the record of appeal to (this) court, they brought an application for leave to appeal on grounds of mixed law and facts as it relates to the other grounds perceived to be grounds of mixed law and facts, which was fixed for hearing on 25 June 2015. The respondents opposed the application and (it) was adjourned to 2 February 2016 for full argument.

4, In order not to dissipate energy and waste valuable judicial time, they have chosen to bring a fresh application as contained in this motion herein.

5, The proposed notice of appeal raised very substantial and arguable grounds of appeal.

6, The delay in bringing this application is not deliberate but as a result of the fact that the distinction between grounds of law alone and grounds of mixed law and facts are not easily discernible and the peculiar circumstances of this matter.

7, Valuable time and energy will be saved by starting the process all over again instead of insisting on arguing the earlier application, which will be withdrawn.

8, The time allowed by law to appeal expired on 5 October 2013.

9, They are desirous of expeditious hearing of this appeal and so have also filed their appellants’ brief of argument.

10, It is in the interest of justice for the application to be granted.

The application is supported by a 16-paragraph affidavit and six annexures - exhibits JA1 to JA6. This includes a proposed notice of appeal with thirteen grounds of appeal (exhibit JA6). The 1st set of respondents are opposed to the application and filed a 16-paragraph counter-affidavit. In opposing same, the 2nd set filed a 4-paragraph counter-affidavit with annexures.

In addition to their respective counter-affidavits, the two sets of respondents also filed notices of preliminary objection. The 1st set of respondents challenged the competency of this application in their notice of preliminary objection filed on 25 January 2015, and their grounds of objection, are as follows:

1. All the grounds of the appellants’ notice of appeal are grounds of mixed law and facts.

2. None of the grounds are grounds based on law alone.

3. (They) did not obtain leave before filling their notice of appeal in accordance with section 233(2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999, and Order 2 rule 30 of the, Supreme Court Rules (as amended) as a condition precedent to bringing the notice of appeal.

4. It is the same notice of appeal that the appellants seek to amend by their application filed on 23 April 2014.

5. The appellants’ brief of argument sought to be deemed properly filed and served is settled based on the same notice of appeal.

6. The defect of the notice of appeal cannot be cured by an order of amendment or extension of time being sought by the appellants. The 1st set of respondents also filed a 13-paragraph affidavit in support of their objection. The 2nd set of respondents, in their own notice of preliminary objection filed on 1 February 2016, to pray for:

(i) An order that this court lacks jurisdiction to hear this appeal No. SC.633/2013 for failure of the appellants to first obtain leave of the court before filling the appeal on 30 December 2015 as required under section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

(ii) An order to dismiss/strike out the 2nd appeal No. SC.633/2013 filed on 30 December 2015 for being defective and/or incompetent.

(iii) An order to dismiss the appellants’ motion on notice of 30 December 2015 for being an abuse of the process of this court.

The grounds for the application are as follows:

1. The applicants’ grounds of appeal filed on 30 December 2015 contain grounds other than law alone (i.e) grounds of facts and of mixed law and facts).

2. (They) ought to have first sought and obtained leave of either the court below or this court before filing the appeal on 30 December 2015.

3. The failure to first seek and obtain such leave of court before filing their notice of appeal on 30 December 2015 contravenes section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

4. (They) admitted in paragraph 12 of the affidavit in support of their application of 30 December 2015 that their said notice and grounds of appeal raised grounds of mixed law and facts requiring the leave of this court, and they filed their notice and grounds of appeal.

5. The said admission in paragraph 12 of their said affidavit, is an admission that they have failed to comply with section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which is a condition precedent to filing an appeal containing grounds of facts and of mixed law and facts.

6. The appellants’ brief of argument filed separately as admitted by them in paragraph 13 of their affidavit in support filed on 30 December 2015 is premised on an incompetent notice of appeal.

7. Where (they) failed to satisfy a condition precedent to filling an appeal containing grounds of fact and of mixed law and facts, this court cannot proceed with the determination of such an appeal.

8. Seeking and obtaining leave is a condition precedent to filling the notice of appeal filed on 30 December 2015 and having failed to obtain such leave as required under section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999, they cannot invoke adjudicatory power/jurisdiction of the court. 9. The motion filed on 30 December 2015 in SC.633/2013 is an abuse of court process having regard to their motion on notice filed on 23 May 2014 in the same SC.633/2013 seeking similar prayers’ and the proceedings in this court in SC.633/2013 on 25 June 2015.

10. The motion on notice filed on 30 December 2015 will deprive the 4th and 5th respondents of the right to fair hearing having regard to the proceedings in the first appeal No. SC.633/2013 on 25 May 2015.

11. The (application) filed on 30 December 2015 is aimed at overreaching (the respondents) having regard to the proceedings on 25 June 2015 and the processes (they) filed on 22 June 2015 and 5 October 2015 and served on the appellants on 6 October 2015.

12. (They) have seen and read the 4th and 5th respondents’ counter-affidavit in objection (to their application filed on 23 April 2014) and amended notice of appeal filed on 22 May 2014, notice of appeal filed on 3 October 2013 and their brief in support of their objection, after which they filed a fresh application for leave and a fresh notice of appeal on 30 December 2015 in the same SC.633/2013.

13. There is no further affidavit, counter affidavit nor brief of argument filed in response of 4th and 5th respondents’ processes mentioned in paragraph 13 above before (they) filed a fresh application for leave and fresh notice of appeal on 30 December 2015.

14. The deeming orders being sought by (them) in their application filed on 30 December 2015 and their averment that they have paid penalties charged them for filling their processes cannot cure their failure to comply with section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999.

The notice of preliminary objection is supported by an affidavit containing the same averments as in their counter-affidavit, and they also attached the same exhibits to the said affidavit. Parties written addresses for and against the application and written addresses and replies thereto, for the objections. The respondents proffered, more or less, the same arguments in opposing the application and in objecting to its competency. However, the crux of their objections to the application is that this court lacks jurisdiction to hear this appeal because the applicants failed to first obtain leave before filing the appeal, contrary to section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999, which provides:

“Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the Court of Appeal with the leave of the Court of Appeal or the Supreme Court.”

The said subsection (2) of section 233 referred to provides:

An appeal shall lie from decisions of the Court of Appeal as of right in the following cases:

(a) Where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal.

They contend that since the applicants failed to seek leave of court to file the notice of appeal, containing grounds of facts and mixed law and facts, the appeal is incompetent, defective, and incurably bad, so this court lacks the jurisdiction to hear it. The applicants countered that this court has jurisdiction to hear the application, and give life to the appeal, citing Nalsa Team Associates v. N.N.P.C (1991) 8 NWLR (Pt. 212) 652, (1991) 11-12 SC 83, and that they can correct the errors in the process of the appeal - Tsokwa Oil Marketing Co. Nig. Ltd. v. Bank of The North Ltd. (2002) FWLR (Pt. 112) 1, (2002) 11 NWLR (Pt. 777) 163.

At this point, the issue is not whether there is any merit in this application or not, it is whether this court has jurisdiction to entertain this application filed on 30 December 2015, in the first place.

There is no question about it, the respondents are right. An incompetent notice of appeal deprives a court of jurisdiction to hear the appeal. See Aderibigbe v. Abidoye (2009) 10 NWLR (Pt. 1150) 553, (2009) 4 - 5 SC (Pt. 3) 123, where Muhammad JSC, explained:

“A notice of appeal is the spinal cord of an appeal. It is the foundation upon which an appeal is based. It is the originating process, which sets the ball rolling for the proper, valid and lawful commencement of an appeal. Where the notice of appeal is defective, no proper appeal can stand. It will, certainly, collapse.

A notice of appeal can be competent and valid if it contains at least one valid ground of appeal. A bare notice of appeal without any ground or grounds of appeal, is valueless and incompetent. It is incurably bad. The defect cannot be cured by amendment”.

That is true; but there is room for the appellant to maneuver. Order 2, rule 31 of the Rules of this Court provides as follows:

(1) The court may enlarge the time provided by these rules for the doing of anything to which these rules apply, or may direct a departure from these rules in any other way when this is required in the interest of justice.

(2) Every application for an enlargement of time in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal and to apply for leave to appeal within the prescribed period.

Therefore, where leave of court is required and the time within which to appeal has also expired, the appellant may apply for extension of time to seek leave to appeal. But it is crucial that an intending appellant filed a tripod application - a prayer for: (a) extension of time to seek leave to appeal; (b) leave to appeal; (c) extension of time to appeal. For there to be a valid appeal, the three reliefs must be granted by the court - see Odofin v. Agu (1992) 3 NWLR (Pt. 229) 350, (1992) 3 SCNJ 161, wherein this court held:

The appellant made his application as prescribed by the rules, but omitted a relevant prayer. That is the prayer extending time to give notice of appeal. This notice is crucial and decisive because the judgment appealed against was decided on 16 May 1985. Thus on 4 and 21 October 1985, when the application was made and the Court of Appeal gave the ruling respectively, the appellant was more than six weeks out of time. It was, therefore, necessary for the court to enlarge the time for giving notice, to have a valid notice of appeal before the court. The notice of appeal is the real and constitutional signal of dissatisfaction against the judgment. Where as in this case, the application to appeal was made out of time; a notice of appeal made out of time will require a prayer for enlargement of time within which to file such notice of appeal. In the absence of a notice of appeal, namely, the foundation of the appeal, there is no appeal before the court.

In this case, the notice of appeal is definitely incompetent and the applicants are not even contesting that fact because they admitted as follows in paragraph 12 of their affidavit that:

The grounds of appeal all raise grounds of mixed law and facts requiring leave of the honourable court. By their own admission, the notice of appeal filed in this court on 3 October 2013, which required leave of court, and which leave was not sought and obtained before it was filed, is incompetent.

But they filed the tripod application to save the appeal and the question now is - what to do in this case where there are objections aimed at determining this application in limine and the said application, which seeks to give life to the appeal? In Nalsa Team Associates v. N.N.P.C’s case (supra), this court held:

“Where the complaint in the preliminary objection is to the effect that the court has no jurisdiction to hear the appeal at all or that there is no competent appeal before the court or that a threshold issue is involved, then a fundamental issue which goes to the vires of the court has been raised. When such is the case, one of two factual situations may arise. The respondent’s motion may be one (that) is capable of breathing life into the incompetent process. In other words, the erring appellant has realized his mistake and has filed a motion which, if granted will correct it and bring about a valid and competent appeal. In the hey days of technicality, the practice was to take the motion, which sought to strike out the appeal as incompetent first, leaving the appellant to seek to commence another appeal if he liked, I am of the view that does not accord with the present inclination of the courts to do substantial justice, for the days of technicality are gone. If, as a reflection of the present mood of courts to do substantial rather than technical justice, a court of justice and equity decides to first take a motion which seeks to bring about a competent appeal, where there is ex-facie a proper application for such, before taking the one which seeks to strike out the appeal is incompetent, I can see nothing wrong with the practice. To adopt that course will save both time and expenses. In saying so, I am not unaware that in Awote v. Owodunni & Anor - my learned brother Oputa JSC expressed the opinion that this was not the proper course because as the appeal was incompetent, ex nihilo nihil fit (you can build nothing out of nothing). But with respect, I think the statement was obiter and that, although reflective of the old practice, does not now represent the mood of the courts. Now, where there is before the court a proper application to correct the error even if it could have the effect of breathing life into an incompetent appeal, I see nothing wrong with the court taking such an application first.”

Karibi-Whyte JSC, also observed as follows in the same case:

“Whenever a party detects an error - which if uncorrected will adversely affect his chances, and has by application made effort to correct such errors, the principles of justice demands that he should not be denied the opportunity to do so. It will be preposterous to concede to the contention that the error so detected should remain uncorrected, so that the adversary can take advantage of it. It is important to appreciate the basic distinction between hearing an application and granting the prayers in it. Hearing an application does not necessarily mean granting the prayers. The prayers if granted, may remedy the defect in errors and render the preliminary objection unnecessary. If rejected, the preliminary objection can be argued.”

In this case, the complaint is that there is no competent appeal before the court, and this court lacks the jurisdiction to hear it. But the fact remains that the applicants have a right of appeal, guaranteed to them by the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which overrides any negative principles aimed at its foreclosing - See Anachebe v. Ijeoma (2014) 14 NWLR (Pt. 1426) 183, (2015) All FWLR (Pt. 784) 183, cited by the appellants, where Ogunbiyi JSC, aptly observed:

“It is well settled that a right of appeal is constitutional as is provided in the Constitution. The right being constitutional therefore, it stands to override most other negative principles aimed at its foreclosing. The rider also stands clear that the exercise of their right is only permissible within limit as provided by law. The right is lost outside the prescribed statutory period allowed but will only be exercised by leave of court; hence the reason for seeking an order for leave and extending the time within which to appeal. While the constitutional right cannot be extended if the applicant fails to adduce good and substantial reason for obliging the application, the court will also not hesitate to exercise its discretion in favour thereof provided sufficient materials are contained in the affidavit to justify the exercise”.

The 2nd set of respondents complained that the appellants had seen the processes they filed in respect of the applications of 23 May 2015 before they filed this one, but that is of no moment. The fact that the applicants brought this application after they filed the objection challenging the competency of the earlier application, will not hinder the applicants from correcting any errors that will put them on the appropriate footing – See Shanu v. Afribank (supra), where Ayoola JSC, clearly stated that:

“The contention that this application should not be granted because a preliminary objection has been raised showing the errors in the process of the applicant’s appeal is without substance. The applicant is not foreclosed by the preliminary objection from correcting those errors or starting the process afresh on a more appropriate footing.”

Piecing the above principles together, the fact that an appellant had filed an incompetent notice of appeal does not preclude him from applying to an appellate court for an extension of time within which to file the notice of appeal, and salvage the appeal - See Nalsa & Team Associates v. N.N.P.C (supra). In this case, the earlier application was still pending when the applicants brought this application but the law makes room for them to realize their mistakes and file an application, which if granted, will correct defects in the notice of appeal, which is what they did. Obviously, the objections lack merit and are hereby overruled. This application will, therefore, be determined on its merits. The question is whether the applicants provide sufficient materials and reasons to grant this application in their favour.

To this end, the applicants have to show that the delay in bringing this application is neither wilful nor inordinate and that there are good and substantial reasons for the failure to appeal within the prescribed period; and their grounds of appeal must prima facie show good cause why the appeal should be heard. The two conditions are conjunctive and not disjunctive; they must co-exist. If one is missing, the application must fail See Nwora v. Nwabueze (2011) 15 NWLR (Pt. 1271) 467 SC.

In this case, the essence of the applicants’ application is that:

1. They are out of time to seek leave to appeal;

2. They are also out of the statutory period allowed to file their notice and grounds of appeal;

3. They are appealing on grounds of mixed law and facts;

4. The grounds of appeal are substantial and arguable;

5. The delay in filling of the notice of appeal is not deliberate, but due to the inability of the lower court to grant them leave, before the expiration of the statutory time to file the appeal;

6. They filed the appeal timeously with the hope of regularizing same at this court, but have chosen to restart the whole process.

The 1st set of respondents say the appeal must be withdrawn because the applicants cannot put a legal process on an illegal foundation; that they cannot bring this without withdrawing the first one; and citing Central Bank of Nigeria v. Ahmed (2001) FWLR (Pt. 56) 670, (2001) 5 SC (Pt. 11) 146, on what constitutes abuse of court process, they argued that:

“The applicants filed an application while waiting for the pending application to be fully heard, and also filed the present application seeking substantially the same reliefs. Nothing can be more irritating and annoying than this. The application is targeted at irritating, annoying and misleading the respondents”.

The 2nd set of respondents averred that they will suffer great injustice by the grant of this application, which is brought mala fide and is aimed at overreaching them and short change them of their right to fair hearing; and that this fresh application filed on 30 December 2013, is an abuse of the process of this court.

I read the exhibits attached to this application, including Exhibits JA6 - the proposed notice and grounds of appeal, and I believe that this application should be granted as prayed. The applicants explained why the notice of appeal was filed out of time. They filed the application timeously but the court below did not hear it until time to appeal expired on 5 October 2013. I am also satisfied that the grounds of appeal in the said Exhibits JA6 that complains of wrongful evaluation of evidence, raise substantial and arguable issues, particularly in this case, where there are conflicting findings of facts by the lower courts, which is reason enough, in my view, to grant this application.

The 2nd set of respondents argued that the application was brought in bad faith to overreach them and deprive them of their right of fair hearing. The word “overreach” simply means “to take advantage of” - Webster’s Comprehensive Dictionary. They have not shown how these allegations will come into play. How is that even possible? The respondents took part in the trial at the High Court, Calabar (trial court) where they lost. They exercised their constitutional right of appeal and appealed to the court below, where they got judgment in their favour. The applicants seek to exercise their constitutional right of appeal by appealing against the judgment of the court below which set aside the decision of the trial court in their favour.

What is good for the goose is good for the gander - no one stopped the respondents from exercising their right of appeal, and the applicants cannot be deprived of their right of appeal. This is the apex court - the last bus stop for litigants and as Ogunbiyi JSC explained in Anachebe v. Ijeoma (supra), the right of appeal, being a constitutional right, overrides most other negative principles as long as an applicant adduces good and substantial reason for obliging an application of this nature. The respondents also said it is an abuse of court process, for the same reasons canvassed for the preliminary objections.

Let me quickly reiterate the point I made that the applicants are not barred from filing this application to give life to the appeal. The argument that the earlier application must be withdrawn before the applicants can bring this application lacks merit. There is no rule of law or practice that stops a party from filing an application when a similar application is pending in the file. The practice in court is that a previous application can be withdrawn before the fresh application is moved or thereafter. As to multiplicity of notices of appeal, this court made it clear in Tukur v. Government Gongola State (supra) that an appellant can file two notices of appeal, and can validly withdraw any of them. In the circumstances, the respondents’ arguments lack merit.

This application filed on 30 December 2015 is granted as prayed. The applicants are, therefore granted the following orders:

1. An extension of time to seek leave to appeal against the judgment of the Court of Appeal sitting in Calabar; delivered on 4 July 2013 in appeal No: CA/C/97/2012.

2. Leave to appeal against the said judgment.

3. An extension of time within which the applicants may file the notice and grounds of appeal against the judgment in appeal No: CA/C/97/2012.

4. Leave to appeal on grounds of mixed laws and facts. In the circumstances of this case, reliefs 5, 6 and 7 praying for three deeming orders are refused and struck out.

The applicants are, however granted an extension of (21) twenty one days from today to file their notice and grounds of appeal against the judgment of the Court of Appeal sitting in Calabar, delivered on 4 July 2013 in appeal No: CA/C/97/2012. Each party will bear their respective costs.

**RHODES-VIVOUR JSC**:

I have had the advantage of reading in draft, the ruling of my learned brother Augie JSC. I agree that both preliminary objections are overruled and the application granted.

The applicants’ application filed on 30 December 2015 seeks the following orders:

1. Extension of time to seek leave to appeal against the judgment of the Court of Appeal delivered on 4 July 2013 in appeal No: CA/C/97/2012.

2. Leave to appeal.

3. Extension of time within which the applicants may file the notice and grounds of appeal against the judgment in appeal No: CA/C/97/2012.

4. Leave to appeal on grounds of mixed laws and facts.

5. Deeming the record of appeal already compiled and transmitted to this court as properly compiled and transmitted.

6. Deeming the notice and grounds of appeal as properly filed and served.

7. Deeming the appellants’ brief as properly filed and served. Judgment was delivered on 4 July 2013 in suit No: CA/C/97/2012 against the applicants and so they decided to appeal.

They filed a notice of appeal where the grounds were of mixed law and fact, but they could not make up their mind if they should file for the tripod prayers or simply rely on their notice of appeal. Finally they quite rightly filed this application after a few wrong processes to kick start their appeal were filed, withdrawn and/or abandoned.

Without this application, the applicants do not have a valid appeal. This application was filed to correct the blunders filed by the applicants’ counsel. It becomes necessary as a result of the well known fact that most of the time it is difficult to make a distinction between grounds of law and grounds of mixed law and facts. See Ogbechie & Ors. v. Onochie & Ors. (No. 1) (1986) 2 NWLR (Pt. 23) 484, (1986) 3 SC 54; N.N.P.C. & Anor. v. Famfa Oil Ltd (2012) All FWLR (Pt. 635) 204, (2012) 17 NWLR (Pt. 1328) 148, (2012) 5 SC (Pt. II) 38.

WHY SHOULD THIS APPLICATION BE GRANTED

Section 27 of the Supreme Court Act states that:

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

(a) in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.

(4) The Supreme Court may extend the periods prescribed in subsection (2) of this section. When, as in this case the time to appeal has since run out and no appeal was filed the applicant can still appeal by filling for:

1. Extension of time to seek leave to appeal.

2. Leave to appeal.

3. Extension of time to file notice of appeal. The applicants’ no longer have a right to appeal. They now pray that the court exercises its discretion in their favour and grant the application. They would succeed if they are able to show by affidavit:

(a) Substantial reasons for failure to appeal within the prescribed period;

(b) Grounds of appeal which show good cause why the appeal should be heard. (a) and (b) must co-exist and all that the applicants’ need show in (b) is that the grounds are arguable and not that they must succeed. Where the applicant has a good ground on jurisdiction there would be no need to enquire into the reasons for delay in filing the application.

See Federal Housing Authority v. Kalejaiye (2010) 10 NWLR (Pt. 1226) 147, (2011) All FWLR (Pt. 562) 1633; Ibodo v. Enarofia (1980) 5-7 SC 42, (1980) NSCC 195; Ukwu v. Bunge (1997) 8 NWLR (Pt. 518) 527, (1997) 7 SCNJ 2629.

On the state of the affidavits, the applicants have satisfied this court why prayers 1, 2 and 3 should be granted and they are hereby granted. Prayer 4 reads:

“Leave to appeal on ground of mixed laws and facts.”

I earlier on in this ruling alluded to the fact that the notice of appeal contained grounds of appeal that were of law and mixed law and fact. Such a notice of appeal filed without leave is incompetent. That explains the necessity for prayer 4. Prayer 4 is accordingly granted since there is a prayer for it. Prayer 6. Before this application was filed, the notice of appeal was incompetent since the notice of appeal is now competent by the grant of prayer 4, the notice of appeal cannot be deemed as properly filed and served, rather the applicants is to be given time to file the notice of appeal. In the circumstances, prayers 5 and 7 are premature. The record of appeal and the notice of appeal go together while time to file the appellants’ brief starts to run after the notice of appeal is filed and served. It must always be borne in mind that this court will readily grant an extension of time to a litigant to do an act if failure to do such act was occasioned by the negligence or carelessness of the litigant’s counsel. See Bowaje v. Adediwura (1976) 6 SC 143. This appears to be the situation in this application. The application had become necessary due to the blunders by the litigants’ counsel.

The following orders are hereby granted:

1. Extension of time to seek leave to appeal is granted.

2. Leave to appeal is granted.

3. Extension of time to file notice of appeal is granted.

4. Leave to appeal on grounds of mixed law and facts is granted.

5. Prayers 5 and 7 are premature and a deeming order is hereby refused.

6. The applicants’ are given 21 days from today to file notice of appeal.

For this and the more detailed reasoning in the leading ruling, I too grant the application.

**OGUNBIYI JSC:**

My learned brother, Amina Adamu Augie JSC has dealt adequately with the preliminary objections raised as well as the merit of this application. I adopt her ruling as mine. In the same terms as the orders made therein, I also overrule the preliminary objections raised and grant the application in terms of the orders made in the lead ruling inclusive of costs.

**SANUSI JSC:**

I read in draft form, the ruling just delivered by my learned brother Augie JSC and I am in agreement with her reason and conclusion reached in granting reliefs 1-4 in the application filed on 30 December 2015, I therefore order as below:

(1) Time is extended to today for the applicant to seek leave to appeal against the judgment of the Court of Appeal, Calabar Division delivered on 4 July 2013 in appeal No: CA/C/97/2012.

(2) Leave to appeal against that judgment is hereby granted.

(3) Time is extended with 21 days from today within which to file notice and grounds of appeal against the said judgment delivered by the Court of Appeal on 4 July 2012 in appeal No: CA/C/97/2012.

(4) The applicants are also granted leave to appeal on grounds of mixed law and facts. With this development, reliefs nos 5, 6 and 7 for deeming orders are hereby refused and struck out. Application therefore partly succeeds and granted and partly refused and struck out.

I make no order on costs so each party to bear their costs.

**GALINJE JSC:**

I have read before now, the draft of the ruling just delivered by my learned brother Augie JSC and I agree with the reasoning contained therein and the conclusion, arrived thereat. The motion on notice that gave rise to this ruling is dated 29 December 2015 and filed on 30 December 2015. The prayers are reproduced in the lead ruling. I do not need to repeat them here. It is however sufficient to state that the 1st and 2nd sets of respondents separately issued preliminary objection to the competence of this application. Mrs. Nella Andem-Rabana SAN, learned senior counsel for the 1st set of respondents issued the following preliminary objection thus:

1. An order that this honourable court lacks the jurisdiction to hear this appeal No: SC/634/2013 for failure of the appellants/respondents to first obtain leave of the court before filling the appeal herein on 30 December 2015 as required under section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
2. An order to dismiss/strike out the 2nd appeal No: SC/634/2013 filed on 30 December 2015 for being defective and/or competent.
3. An order to dismiss the appellants/respondent’s motion on notice filed on 30 December 2015 for being an abuse of the process of this honourable court. lChief Ladi Rotimi Williams, learned senior counsel for the 2nd set of respondents also issued a preliminary objection which was filed on 27 September 2016 in the following terms:

1. An order dismissing the appellants’ motion on notice dated 29 December 2015 and filed on 30 December 2015 on the ground that the Supreme Court is not vested with the requisite jurisdiction to entertain and/ or grant the prayers in the application filed.

2. An order striking out and/or dismissing the notice of appeal dated 3 October 2013 as same is incompetent, null and void.

3. An order striking out and/or dismissing the record of proceedings already transmitted to this court in the said appeal.

4. An order striking out and/or dismissing this appeal No: SC/634/2013 between the parties hereto as same is incompetent, null and void. I wish to state clearly that what is before this court for consideration is an application for extension of time to seek leave to appeal, leave to appeal and extension of time to file the appeal. The first set of respondents’ 1st and 2nd objection are not relevant to this application as their objection are directed against the hearing of the appeal No: SC/634/2013. The only objection that is relevant to the determination of this application is the 3rd objection which even at the risk of repetition, is hereunder reproduced as follows:

“An order to dismiss the appellants’/respondents’ motion on notice filed on 30 December 2015 for being an abuse of the process of this honourable court.”

I am also of the firm view that the only relevant objection to the motion under consideration contained in the 2nd set of the respondents’ preliminary objection, is the first objection which I also reproduce hereunder as follows:

“An order dismissing the appellants’ motion on notice dated 29 December 2015 and filed on 30 December 2015 on the ground that the Supreme Court is not vested with requisite jurisdiction to entertain and/or grant the prayers in the application filed.” The 2nd, 3rd and 4th objections are irrelevant as they are diverted at the hearing of the appeal and record of proceedings which the court is urged to either dismiss or strike out. The only objection to the motion under consideration therefore is whether it is an abuse of court process and liable to be dismissed.”

In his argument, learned senior counsel for the 1st set respondents argued that the filing of three similar processes in the same matter constitutes an abuse of court processes. Learned counsel listed the processes as follows:

1. Notice of appeal filed on 3 October 2013 with appeal No: SC/634/2013.

2. Amended notice of appeal filed on 22 May 2014 with appeal No: SC/634/2013 without leave of court.

3. The appellants/respondents’ notice and grounds of appeal filed on 30 December 2015 with appeal No: SC/634/2013.

In addition, learned senior counsel referred to the earlier motion for leave to appeal filed on 23 May 2014 and an identical motion for leave filed on 23 December 2015 and contended that the documents aforementioned constitute gross abuse of the processes of this court on the ground that they are similar and are used in respect of the exercise of the same right. In aid, learned senior counsel cited Ubaka & Sons Ltd v. Ezekween & Co. (2000) FWLR (Pt. 1) 77; Arubo v. Aiyeleru (1993) NWLR (Pt. 280) 126 at 146, (1993) 2 SCNJ 90.

In a further argument, learned senior counsel submitted that the present application is meant to overreach the 2nd set of respondents, as such the court should either strike it out or dismiss it. In support of this argument, learned counsel cited National Inland Waterways Authority v. Shell Petroleum Development Company of Nigeria (2008) All FWLR (Pt. 433) 1402, (2008) 13 NWLR (Pt. 1103) 48 at 68; In Efetioroje v. Okpalefe (1991) 5 NWLR (Pt. 193) 517, (1991) 7 SCNJ 85; Nwokedi v. R.T.A. Limited (2002) 6 NWLR (Pt. 762) 181 at 192; Olumesan v. Ogundepo (1996) 2 NWLR (Pt. 433) 628 at 645, (1996) 2 SCNJ 172. Still in argument, learned counsel submitted that the applicants should not be allowed to have a second bite at the cherry as the applicant failed to obtain leave before filing his appeal. In support, learned counsel cited Ekudan v. Keregbe (2008) All FWLR (Pt. 405) 1641, (2008) 4 NWLR (Pt. 1077) 422 at pages 433-434.

Learned counsel for the 2nd set of respondents, that is 3rd-4th respondents formulates the following issues for determination of this application as follows:

1. Having regard to the fact and circumstances of this case, whether the motion on notice dated 29 December 2015 can be predicated on the invalid notice of appeal dated 3 October 2013.

2. Whether or not granting of trinity prayers or deeming orders of the Supreme Court can validate an incompetent notice of appeal.

3, Having regards to the provisions of Order 7 rule 2(e) of the Supreme Court Rules, 1999, whether the record of appeal can be deemed as properly filed.

4. Having regard to he peculiar facts and circumstances of this case, whether the processes of this honourable court have not been abused.

In arguing the preliminary objection, learned counsel for the 2nd set of respondents submitted that the appellants’ notice of appeal filed on 3 October 2013 cannot support the extant motion as same is incompetent for failure to seek and obtain leave before it was filed. According to the learned counsel, the motion on notice is an application predicated on a defective notice of appeal and therefore it should be struck out for being incompetent. In a further argument, learned counsel submitted that the said motion on notice dated 29 December 2015 which seeks to deem a fresh notice of appeal dated and filed on 30 December 2015 is an attempt to substitute the incompetent notice of appeal filed on 30 December 2015 through the back door and in contravention of Order 2 rule 28 (5) of the Supreme Court Rules, 1999, thereby resorting to the use of improper judicial process to interfere with the due administration of justice. Learned senior counsel contended that the extant motion is an abuse of court process whereby a procedure unknown to law is being applied to amend a defective notice of appeal. In support, learned counsel cited Ugesi v. Siki (2007) 8 NWLR (Pt. 1037) 452; Ogoejeofo v. Ogoejeofo (2006) All FWLR (Pt. 301) 1792, (2006) 3 NWLR (Pt. 966) 205; Abubakar v. Bebeji Oil and Allied Products Limited (2007) All FWLR (Pt. 362) 1855, (2007) 18 NWLR (Pt. 1066) 319.

In reply to the submissions by learned counsel for the 1st set of respondents, learned counsel for the applicants submitted that this court has jurisdiction to hear the appellants’ motion so as to give life to the appeal. In aid, learned counsel cited Nalsa Team Associates v. N.N.P.C (1991) 8 NWLR (Pt. 212) 652, (1991) 11-12 SC 83-93.

It is learned counsel’s submission that the appellants have the constitutional right of appeal guaranteed by the 1999 Constitution and nothing should be done to deny them that right as is being contended by the respondents. In aid, learned senior counsel cited Anachebe v. Ijeoma (2014) 14 NWLR (Pt. 1426) 183, (2015) All FWLR (Pt. 784) 183. Learned senior counsel repeated this argument in his reply to the 2nd set of respondents’ written address as well as the reply to the 5th respondent’s address.

From the onset, I wish to state that the motion dated 29 December 2015 on its face is not predicated on the notice of appeal filed on 3 October 2013. Both learned senior counsel for the 1st and 2nd set of respondents have admitted that the notice of appeal filed on 3 October 2013 is incompetent because the applicant did not obtain leave before same was filed. Now having discovered that the notice of appeal is incompetent, was the applicant required to do nothing to ventilate his right of appeal. What then is the position of an incompetent notice of appeal. In Odoemena Nwaigwe & Ors. v. Eze Edwin Okere (2008) All FWLR (Pt. 431) 843, (2008) 13 NWLR (Pt. 1105) 445 at 474, paragraphs C-F, which was cited and relied by learned counsel for the 2nd set of respondents this court per Onnoghen JSC (as he then was) held:

“The issue of the filing of six additional grounds of appeal is a non-starter as it amounts to an exercise in futility, there being no valid notice of appeal due to the absence of valid ground of appeal raising question of customary law for determination. Since there was no valid motion and ground of appeal to which any further grounds would have been added, the attempt at making the addition is to try to resurrect a dead horse. It is stone dead. The same reasoning also applies to the purported amendment of the original omnibus ground of appeal. It is settled law that you cannot amend a fundamentally defective document such as a notice of appeal so as to infuse live into it. In other words, a fundamentally defective notice of appeal cannot be cured by an amendment of same. You can only validly amend a valid notice of appeal not a fundamentally defective one which in the eyes of the law is non-existent or dead.”

The application before this court has not prayed for an amendment of a previous notice of appeal. The prayers are for extension of time to seek leave to appeal, leave to appeal, extension of time to appeal and leave to appeal on grounds of mixed law and facts. Prayers 5, 6 and 7 that sought for deeming orders are independent of prayers 1-4. Parties agreed that the notice of appeal filed on 3 October 2013 is incompetent. By the authority of Nwaigwe v. Okere (supra), that notice of appeal is non-existent or dead in the eyes of the law. Therefore any attempt to file a fresh valid notice of appeal cannot amount to an abuse of court process or deprive this court of its jurisdiction to hear same. I am therefore of the firm view that the applicant having realized that he had no appeal because of his failure to apply for and obtain leave to appeal on grounds of mixed law and facts, decided to file this application in order to bring a valid notice of appeal before this court, See First Bank of Nigeria Plc v. T.S.A. Industries Ltd (2010) All FWLR (Pt. 537) 633, (2010) 15 NWLR (Pt. 1216) 247; Olanrewaju v. Bon Ltd (1994) 8 NWLR (Pt 364) 622; Nwaigwe v. Okere (supra).

On whether appeal is a constitutional right, I wish to state that an appeal lodged within the prescribed period cannot be ignored by the court, as doing so will deprive the appellant of his constitutional right. However, when an aggrieved party fails to appeal within the time prescribed by Court of Appeal Act and the Act of this court, his right of appeal becomes subject to the discretion of this court. The preliminary objection herein is bereft of any merit as same is overruled accordingly.

With respect to the application before this court, I agree with my learned brother, that by the averments in the affidavit in support, I find merit therein and same is granted in terms of prayers 1-4. This is so because the applicant did not sleep over his right. He mistakenly filed notice of appeal without the leave of either the lower court or this court, and on discovery that he made a mistake, he went on to file this motion. However the deeming order sought by the applicant in respect of the record of appeal, notice of appeal and the brief of argument cannot be granted.

A notice of appeal cannot be deemed as having been duly filed and served because it is a document which by definition commences an appeal. The documents which a court can deem are those which parties exchange between themselves during the course of proceedings, such as statement of claim or defence and briefs of argument, and not those which require the signature of the registrar for their validity. The time for transmission of the record of appeal and the filing of briefs of argument can only begin to run after the appeal is filed. Prayers 5-7 are hereby refused.

I abide by the consequential order of 21 days made in the lead ruling for the applicant to file the notice of appeal and any other orders.

Application granted.