# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC15/1980

**Petitioner:** Ukpe Ibodo & Ors
And
**Respondent:** Iguasi Enarofia & Ors

Date Delivered: 1980-06-20

**Judge(s):** Mohammed Bello, Chukwunweike Idigbe, Andrew Otutu Obaseki, Kayode Eso, Anthony Nnaemezie Aniagolu

## Judgment Delivered

The application which was brought, under Order 1 Rule 5 of the Supreme Court Rules, 1977, by the plaintiff/applicants, Ukpe Ibodo and Others, and which was ofr extension of time within which to apply for leave to appeal, to the Supreme Court, against the judgment of the Federal Court of Appeal, was dismissed by this Court on 28th April 1980 and was the reasons for the dismissal were reserved for delivery to this date. We now give our said reasons for the said dismissal.

Since the delivery of the judgment of the Federal Court of Appeal in this land case on 1st February 1979 the attempt of the plaintiff/applicants to appeal to the Supreme Court has had, from what is to be gathered from the affidavit of Ukpe Ibodo sworn to on 2nd November 1979, a tortuous passage. It would appear that the first motion for leave to appeal was heard by the Federal Court of Appeal in Benin on 5th April 1979. But the applicants\' Counsel (T. A. Makanju Esq. From chief Williams\' Chambers), by reason of the then prevailing Nigerian Airways Pilots\' strike, was unable to arrive Benin in time to argue the motion which was heard in his absence and refused for want of merit. That the court refused the application as unmeritorious is clear from the enrolled order dated 5th April, 1979, which reads:

Thursday The 5Th Day Of April, 1979
Enrolment Of Order

Upon Reading the Application herein and the affidavit of Ukpe Ibodo of Ofori village in Ukpe clan sworn to and filed at the Federal Court of Appeal Registry, Benin City on the 16th day of February, 1979 and the defendants/Applicants counsel being absent and J. Y. Odebala Esquire holding Chief Ororho\'s brief of counsel for the plaintiffs/Respondents/Respondents, it was ordered:-

The ground of Appeal does not specify the judgment of the Court the appellant is attacking. The defect is fundamental. Leave to Appeal is not granted as a matter of course. The proposed Appellant must at least have an arguable ground of Appeal. The proposed ground of Appeal patently does not reveal this. In the circumstances, leave to appeal must be refused, and is hereby refused.

Costs Assessed at N25 is awarded to the respondents.

It would further appear that  and application numbered SC.21/1979 for extension of time within which to appeal to the Supreme Court from the said decision of the Federal Court of Appeal was filed but withdrawn on 18th June 1979 and another application numbered as SC.53/1979 seeking the same order was again filed and again withdrawn on 8th October 1979. After this latter withdrawal applicants\' counsel, Chief F. R. A. Williams, S.A.N., apparently, was no longer prepared to handle the brief and returned the same to the applicants. Thereafter, they briefed G. O. K. Ajayi, Esq., S.A.N., who handled this application before us. These facts were, as I have said, deposed to, in the affidavit of Ukpe Ibodo herein before mentioned, particularly in paragraphs 3 to 13, set out hereunder as follows:

(3) That we are aggrieved by the decision of the Federal Court of Appeal Benin City delivered in this Suit on 1st day of February 1979 and instructed our Solicitor Chief F. R. A. Williams to appeal against the judgement.

(4) That motion for leave to appeal was accordingly filed and taken at Benin on 5th April, 1979.

(5) That our Solicitor, T. A. Makanju Esq., from Chief Williams\' Chambers was unable to arrive at Court on time on 5th day of April, 1979 when the motion was taken, and leave was refused us to appeal.

(6) That our Lawyer T. A. Makanju Esq. came into court when the ruling was being read and he informed me that because of the industrial dispute in the Nigeria Airways by the pilots his flight for 4/2/79 was cancelled after waiting for the whole day at the Airport. At 5 p.m. when the flight was eventually cancelled he was promised to report the next day at 6.30 a.m. and I verily believe him.

(7) That the Solicitor for the Respondent did not oppose our motion.

(8) That our Lawyer told me that we have good grounds of appeal and I verily believe him.

(9) That my counsel filed two applications in SC.21/1979 and SC.53/1979 for order for extension of time within which to appeal to the Supreme Court from the decision of the Federal Court of Appeal delivered on the 1st day of February 1979 but these applications were withdrawn, by our counsel on the 18th day of June, 1979 and 8th day of October, 1979 respectively.

(10) That after the withdrawal of our application on 8th day of October, 1979, our counsel Chief F. R. A. Williams called me and my people to his chambers and informed us that he could no longer handle our case and he handed our case file to us as we were unwilling to have him assign this case to another counsel.

(11) That after we had collected our case file from Chief F. R. A. Williams, we returned home to report to our elders who instructed me and some others chosen to accompany me to go and meet Chief B. O. N. Omoruwa who originally handled this case.

(12) That on reaching Chief Omoruwa\'s house we were told that he had been elected to the House of Representatives and that he was now living in Lagos. The wife informed us that Chief Omoruwa was being expected.

(13) That on the 26th day of October, 1979 I and the other delegates sent along with me met Chief B. O. N. Omoruwa in his house and after I had informed him about our mission he promised to take us to G. O. K. Ajayi Esq., of Unity House, 37, Marina, Lagos on the 5th of November, 1979.

Having finished with Chief Williams and turned to Mr. Ajayi, misfortune appeared to continue to dodge the heels of the applicants, for, Mr. Ajayi\'s \"copy typist\", one Grace, to whom Mr. Ajayi had handed, on 18th December, 1979, his draft of his grounds of appeal and outline of his arguments and reasons for his application for leave to appeal, disappeared, with the draft, after collecting her Christmas Bonus and Salary, and never returned to Mr, Ajayi\'s employment thereafter. Mr. Ajayi was compelled to commence reading the record of proceedings - alleged to contain \"some 360 effective pages\" - again, and to draft anew his grounds of appeal and arguments thereon. These facts were sworn to by Mr. Ajayi in his affidavit dated 25th February 1980, particularly paragraphs 3 to 11 which read:

3. That the record of Appeal consists of some 360 effective pages, a substantial number of which consists of the several proceedings tendered in evidence.

4. That I completed the drafting by about the 18th of December 1979 and handed the same to our copy Typist Grace to type.

5. That the typist commenced to type the application but before she finished the work she ceased, on the 21st of December to come to work after collecting her Xmas Bonus and her salary for December.

6. That we looked in vain for the file which contained both the draft as well as what she had typed, but we could not

find them.

7. That I continued to hope that she would return to work early in January 1980 but she did not.

8. That I thereupon caused advertisements to be put in the National Newspapers for application for copy typist to replace her.

A copy of the advertisement which appeared in the Daily Times of the 15th of January 1980 and of a letter received from the Daily Times in respect thereof are produced and shown to me marked GOKA1 and GOKA2 respectively.

9. That in the meantime, I had to commence all over again to read through the whole record of proceedings and the judgment of the court of Appeal and to prepare the application for leave all over again.

10. That I have only recently completed the exercise.

11. That the delay on the part of the appellants has been due to the fact that their former Solicitor had filed and withdrawn two successive applications for leave to appeal and for extension of time as well as to the facts set out above.

As if the misfortunes already attending the applications of the applicants were not enough, the pre-paid Advertisement for a copy typist which Mr. Ajayi had handed to the Daily Times Newspapers for publication on 10th January, 1980, could not be published on that date for reasons stated in the Advertisement production supervisor\'s letter to Mr. Ajayi dated 15th January 1980 set out hereunder as follows: -

G. C. K. Ajayi & Co.,
P.M.B. 12679,
37 Marina, Unity House,
Lagos.

Dear Sir,

Re-Prepaid Advertisement

Thank you for your letter of 11th January, 1980 seeking for the date your advertisement missed on 10th January, 1980 was rescheduled.

We were very sorry for this unavoidable alteration (sic) made on the publication date of your advert which was due to the cut down in pagination we had for some time now. It was as a result of this that your advertisement was rescheduled for publication in the Daily Times issue of 15th January, 1980.

Thanks for your co-operation.

Yours faithfully,

P. Mba
Advert. Prod. Supervisor

Moving as these aforementioned facts may be, the fact still remains that the documents filed by the applicants in support of their application

(a) For extension of time within which to appeal, and

(b) For extension of time within which to apply for leave to appeal

are, ordinarily, insufficient materials with which this court can come to a decision that the merit of the application justifies the making of the orders asked for. Mr. Ajayi has filed his proposed grounds of appeal numbering nine; a summary of his statement and issues; his resume of the arguments he would put forward, and the judgment of the Federal Court of Appeal against which he is seeking to appeal.

But, he has not exhibited the record of proceedings of the High Court or even, alone, the judgment of that court; nor has he exhibited any of the numerous exhibits which he mentioned in his grounds of appeal or so much of the said exhibits as would support the arguments he has put forward before us on which he had urged us to grant his application. Moreover, on a close look at the grounds of appeal one reaches the conclusion that the applicants, in the main, are attacking the concurrent findings of fact of the courts below even though they are headed variously as \"errors in law\", \"misdirections in law\" and \"misdirections on the facts and law\". This court, as it had pointed out recently in SC.72/1979 Mogo Chinwendu V. Nwanegbo Mbamali And Another decided on 28th March 1980, cannot be misled by such ingenuity of Counsel, albeit commendable. In respect of those of the grounds of appeal which on the surface remotely appear to contain arguable legal points, there are no documentary supporting exhibits filed on which this Court can gauge the efficacy of the legal submissions. Faced with this situation, Mr. Ajayi applied thus: -

Now that I have seen that the court has not got the records before the High Court and the exhibits I will ask that this matter be adjourned. If the Court will not grant my application for adjournment I will apply for leave to withdraw with liberty to reapply.

Mr. Ororho, for the Respondents, opposed the application either for adjournment or for a withdrawal with liberty to reapply. We considered the two applications and refused them and ordered Mr. Ajayi to proceed with his main applications which he did, after which we dismissed the motion. We had to do this for various reasons:

Firstly, order 7 Rule 4(2) of the Supreme Court Rules 1977 sets out the conditions which an applicant must satisfy before this court will grant him extension of time within which to appeal. The Rule reads:

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

There must therefore be:

(i) good and substantial reasons for the failure to appeal within the period prescribed, and

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

The old court of Appeal of Western State which had to apply the Supreme Court rules took this view in interpreting the said Rule 4(2) in Kasunmu Aworeni V. Jacob and 3 others (1967 N.M.L.R. 343. The period prescribed is, of course, the period set out in Section 31(2) (a) of the Supreme Court Act, No. 12 of 1960 which allows three months for the giving of notice of appeal or notice of application for leave to appeal, in an appeal in a civil case against a final decision.

From the facts which I have already mentioned as to the various applications filed and withdrawn on behalf of the applicants by Chief Williams, S.A.N.; the applicants\' later approach to Chief Omoruwa, of Counsel, and finally their briefing Mr Ajayi, S.A.N. of counsel, it is clear that the applicants had been eager to pursue their intention to appeal and had diligently taken steps towards achieving that objective. The decision of Counsel to withdraw those applications numbered as SC.21/1979 and Sc.53/1979; the failure of counsel (T. A. Makanju Esq.) to arrive in Court in time in Benin as herein before narrated, and the events in the chambers of Mr. Ajayi, S.A.N., involving his typist - were all matters for which the applicants could not be held to blame, or punished, or for which their rights should not be adversely affected. This court has stated in several decisions that it is not right to visit the parties with punishment arising out of the

mistakes or inadvertence or negligence of counsel and that in such a case the discretion of the court, although always required to be exercised judicially (see: G. B. A. Akiyede v. the Appraiser (1971) 1 ALL N.L.R.162 at p. 165; Doherty v. Doherty (1964) 1 ALL N.L.R. 299; Tunji Bowaje v. Moses Adediwura (1976) 6 SC. 143 at 147), should be exercised with a learning towards accommodating the parties\' interests without allowing mere procedural irregularities, brought about by Counsel, to preclude the determination of a case on the merits (Ahmadu v. Salawu (1974) 1 ALL N.L.R. (Part II) 318 at 324). Following this principle as laid down in these cases, I am of the view that the first part of rule 4(2) of order 7 - namely, good and substantial reasons for the failure to appeal within the prescribed period - has been satisfied by a reasonable explanation as to the cause of the delay.

The second part (i.e. grounds of appeal which prima facie show good cause), however, requires also to be satisfied and whether this has been done must be seen against the background of the facts of the case in respect of which the grounds have been filed. The facts are gathered from the documents filed by the applicants and in particular the judgment of the Federal court of Appeal.

The substratum of the appellant/applicants\' case was that the land in dispute came into their ownership by a disposition of the land (whether by sale or pledge - a matter hotly contested) to their predecessor-in-title Aboiyigbe, by one Okpako who supposedly came from the Respondents family, on a payment, by Aboiyigbe, to the said Okpako a sum of '6. The Applicants (from what can be gathered from the judgement of the Court of Appeal) claimed that Okpako sold the land to Abioyigbe while the Respondents claimed it was a pledge which Okpako had no right to make. Now, this Okpako, subsequent to the transaction, testified on oath before the District Officer, Mr. Harry Maddocks, in the proceedings, Suit No. 12/24 (said to be Exhibit B) and swore that he had no right to dispose of the land to Aboiyigbe; that he sold the land to Aboigbe on an erroneous belief that it belonged to his father and the Respondents\' Narofia\'s ancestral father both of whom he had thought were related, a fact he later found to be wrong; and that on discovering the error he paid back the '6 by paying it into Sapele Native Court, on the orders of that Court, for the benefit of Aboiyigbe. The court of Appeal quoted the evidence of Okpako before Mr, Harry Maddocks as follows:

Okpako: Sworn, States: Formerly my father and Narofia\'s father lived together at Amukpe and used the land. After their death I sold the palm bush as I thought it belonged to us all. I did not sell it all now Okotie claims it all (note so also does Narofia). During the time I sold the palm bush I considered we were all related myself and Narofia but afterwards I found out we weren\'t. I thought this as our fathers lived together. We were born in Asagba\'s town (Amukpe) but I went to Kogbrode when my father died, Narofia lives at Ogeraye (village of Amukpe) and Okotie lives at Egbeku (another village of Amukpe). Iyayerubo is the boundary fixed by the Sapele Chiefs between the piece I sold and the piece I did not. Many years ago I redeemed back the piece I had sold and case was taken to Sapele N.C. they said the money should be brought to court and paid '6 to the Court.

The Applicants having admitted that the derivation of their title (whether as vendee or pledgee) was from Okpako, and Okpako having admitted that he disposed of the land to Applicants\' predecessor-in-title on an erroneous belief of his proprietory right to dispose of it, the substratum - as stated by the High court and the Court of Appeal - of the Applicants\' claim had gone. It became therefore a case of Nemo dat quod non habet and even if the Applicants argued to doomsday, they would have to face the fact that their transferor, on his own admission had no right to transfer. In the premises, the Applicants cannot, prima facie, as required by that second part of Order 7 Rule 4(2), show good cause why their appeal should be heard, and, a fortiori, why this Court should grant them extension of time within which to apply for leave to appeal to this Court.

Secondly, both the High court and the court of Appeal had made concurrent findings of fact, supported by the evidence, and justified by the circumstances, on the position of Okpako in relation to his lack of title to sell or pledge the land in dispute. Nothing, it is appreciated, stops this court from interfering with a finding of fact which the Court considers is not justified by the evidence, or by the surrounding circumstances of a particular case. It is, however, necessary that attention be drawn to the important changes which have since taken place in the structure of our Courts.

In the past, appeals went from the Old \"Supreme Courts\" (as the High Courts were then called) to the West African Court of Appeal (briefly known as W.A.C.A.) and from thence to the Privy Council in England. Later the West African Court of Appeal broken up and the \"Federal Supreme Court\" was constituted for Nigeria to take the place of the said

West African Court of Appeal but appeals still lay from the \"Federal Supreme Court\" to the Privy Council. Later still, the present Supreme Court was crated as the final Court of Appeal for Nigeria and appeals to the Privy Council abolished. Appeals went from the High Courts to the new Supreme Court and ended there. Being the only, and the final, appeal Court from decisions of the High Courts, it became necessary, in the interest of justice, for many and sundry matters to be heard by the Supreme Court from decisions of the High Courts. Although the then Constitution provided for appeals to the Supreme Court with leave, yet the leave was very readily granted as there was no other appeal Court to go to, than the Supreme Court.

With the creation of the Federal Court of Appeal on 1st October 1976 (Decree No. 43 of 1976) the position has now changed. The Court of Appeal is now an intermediate Court between the High Courts and the Supreme Court with the Supreme Court now being in apposition with the old Privy Council. It had been the Privy Council practice, not to hear arguments seeking to disturb concurrent judgements in the Court below on pure questions of fact, unless there were particular circumstances dictating otherwise. (See: Chief Kweku Serbeh V. Ohene Kobina Karikari (1938) 5 W.A.C.A. 34; Ohene Tekyi Akyin III V. Kobina Abaka II (1937) 5 W.A.C.A. 49 at 55). In Mogo Chinwendu v. Nwanegbo Mbamali (supra) this court took the same view as per the judgment of Obaseki, J.S.C. who observed that:

The 5th and 6th questions were effectively answered by the findings of the trial Court which findings were confirmed by the Federal Court of Appeal. There are no facts on record to lead me to the contrary view. It is necessary to emphasise that in such a case where there are two concurrent findings of fact, these findings cannot be disturbed without any substantial error apparent on the record of proceedings.

The third reason need only be mentioned since what I have said in the second part of the first reason (namely, the defect of title in Okpako to dispose of the land) will, in any event, render the disposition of the land ineffective. As I have already said, the documents filed by the Applicants would ordinarily be insufficient materials upon which this court will come to a decision. The judgment of the High Court was not exhibited by the Applicants. It cannot be overemphasized that where an applicant required the Court to exercise its discretion for a grant of extension of time within which to appeal or within which to apply for leave to appeal, all the documents which it will be necessary for the court to see in order to decide on the application must be exhibited. These normally should include, among others, the affidavits of the applicant and/or his Counsel; the judgments of the Courts below; the exhibits or so much of the exhibits on which the applicant will rely to argue his application; his proposed grounds of appeal; where necessary, the record of proceedings or so much of the record of proceedings as will enable the Court to found on the substantiality of those grounds of appeal based solely, or in the main, on the evidence given; the brief of the applicant\'s argument, and any other document or documents which in the special circumstances of a particular case the court will need to see in order to be able to decide on the matters in contest in the application.

Order 9 Rule 1(2) of the Supreme Court Rules specified what an application for leave to appeal should contain. The necessity for the full exhibition before the Court of the materials necessary for the Court to exercise its discretion is to be found in the wordings of Rule 1(5) of the said order, which states:

(5) Failure on the part of an applicant for leave to present with accuracy, brevity, and precision whatever is essential to the clear and adequate understanding of the question which require consideration shall be a sufficient reason for refusing the application.

My Lords, I am humbly of the confirmed view that the legal profession has reached such an advanced stage in this country and the Rules of the Court stayed so long in our statute Book that all Counsel appearing before this court should by now master them. Accordingly, it is my view that, subject to the powers of the Court to relax the Rules in civil cases as contained in the Rules, notably, Order 1 Rule 5, Order 7 Rule 26; Order 10, and the Supreme Court (Amendment) Rules 1979, L.N. No. 18 of 1979, and subject in all cases to the Court always striving to do, and doing, substantial justice, the Rules ought now to be followed more strictly and that the earlier indulgence granted to Counsel by this Court, dictated by the then newness of the rules, ought now to give way to a proper adherence to the rules and where there is no such adherence, for the Court (subject as aforestated) to consider striking out or dismissing the application as the circumstances will dictate, with or without hearing the parties.

Finally (and the Fourth reason), since in all cases it is the duty of the Court to do justice, an applicant for extension of time within which to appeal or within which to apply for leave to appeal, must show that the circumstances are such that it is just that the application should be granted (see: Property and Reversionary Investment Corporation Ltd. V. Templar and Another (1977) 1 W.L.R. 1223 at 1225 - per Cumming-Bruce, L.J.).

In the present application the circumstances were such that it was just that the application should be refused. It was for the foregoing reasons that the application was refused and dismissed as hereinbefore stated.

Judgement delivered by
Bello. J.S.C.

I have had the advantage of reading in draft the reasons for Ruling just delivered by my learned brother, Aniagolu J.S.C. and I entirely agree.

Judgement delivered by
Idigbe. J.S.C.

My Lords, I have had the advantage of reading in draft the reasons for our ruling of 28th April, 1980, just delivered by my learned brother, Aniagolu J.S.C. who most adequately considered the issues involved in this application. I am in complete agreement and do not consider that I can usefully add anything more.

Judgement delivered by
Obaseki J.S.C.

My Lords, it was for the reasons just delivered by my learned brother, Aniagolu J.S.C., the draft of which I had the privilege of reading earlier on, that I also dismissed the application of the Plaintiffs /Appellants/Applicants on the 28th day of April, 1980.

Judgement delivered by
Eso. J.S.C.

My Lords, I agree with the reasons just given for the dismissal of the application of the applicants as contained in the ruling of my learned brother Aniagolu J.S.C.