IN THE SUPREME COURT OF NIGERIA

Suit No: SC64/2001

Petitioner: H.R.H. Eze Dr. Frank Adele Eke
And
Respondent: Mr. Godfrey Chizieze Ogbonda

Date Delivered: 2006-12-08

Judge(s): Umaru Atu Kalgo,Niki Tobi, George Adesola Oguntade, Mahmud Mohammed, Francis Fedode Tabai

Judgment Delivered

This appeal is against the decision of the Court of Appeal Port Harcourt Division delivered on 12-2-2001 refusing to set aside its own judgment delivered on 16-7-1998.

The appellant and the respondent in this appeal were also parties in appeal No. CA/PH/304/97 then pending at the court below in which the respondent in this appeal was the appellant while the appellant in the present appeal was the respondent. The record of this appeal shows that when that appeal No CA/PH/304/97 between the same parties in this appeal came up for hearing at the court below on 12-5-1998, on the application of the appellant who was yet to file his respondent\'s brief, the appeal was adjourned to 23-6-98 for hearing. On this date both parties were represented by counsel but the appellant who was the respondent was yet to file the respondent\'s brief of argument. In line with the provision of Order 6 Rule 10 of the Court of Appeal Rules, the Court below heard the appeal on the appellant\'s brief alone without hearing the respondent in oral argument and the record does not show any such request coming from his counsel. Two days after hearing of the appeal, the appellant as respondent in the court below filed a motion on notice on 25-6-1998 for extension of time to file the respondent\'s brief. This motion was fixed for hearing on 5-10-98. However, on 16-7-1998, the court below delivered its judgment allowing the appeal and ordering the hearing of the appellant\'s action afresh by another judge of the trial High Court of Rivers State.

Not satisfied with the judgment against him, the appellant filed a motion at the court below on 15-5-2000 asking for the setting aside of the judgment of that court of 16-7-1998 and the striking out of the Notice of Appeal filed on 14-11-97 upon which the appeal was heard. The court after hearing the parties on this application, saw no reason to set aside its judgment and therefore dismissed the appellant\'s application on 12-2-2001. It was this decision of the lower court against the appellant that gave rise to this appeal.

From the three original grounds of appeal and one additional ground contained in the appellant\'s Notice of Appeal, two issues were formulated in the appellant\'s brief of argument. The two issues are-

\"(i) Whether or not the judgment of the Court of Appeal dated 16th July, 1998 was a nullity, having regard to all the circumstances.

(ii) Whether or not the Court of Appeal has jurisdiction to review its own judgment which is null and void.\"

In the respondent\'s brief of argument however, from the same four grounds of appeal in the appellant\'s Notice of Appeal, the following two issues were distilled:-

\"1. Whether this appeal is competent

2. Whether the decision of the Court of Appeal was correct.\"

In the respondent\'s brief of argument, the index to the contents therefore shows the respondent was relying on a Notice of Preliminary Objection to the appellant\'s appeal. However, there is no such notice in the respondent\'s brief or any

indication from the record that such notice was ever filed in the Registry of this court giving the appellant three clear days notice of the objection before the date fixed for the hearing of the appeal in compliance with Order 2 Rule 9 of the rules of this court. Instead, what the respondent did was to incorporate the terms of his preliminary objection to the appellant\'s appeal as an issue arising for the determination of the appeal as issue one in his brief of argument which reads -

\"Whether the appeal is competent.\"

Obviously, this is not how a preliminary objection is raised under Order 2 Rule 9 of the rules of this court. The law is trite that an issue for determination of any appeal is derived from the grounds of appeal filed by the appellant. Therefore any issue not distilled from such grounds of appeal is incompetent and ought to be discountenanced in the determination of the appeal. See Globe Fishing Industries Ltd v. Coker (1990) 7 NWLR (pt.162) 265, Onyido v. Ajembu (1991) 4 NWLR (pt. 184)203.

As none of the appellant\'s grounds of appeal complained of the competence of the appeal, the respondent\'s issue as to whether this appeal is competent has no place in the determination of this appeal. This is because a respondent to an appeal who has not cross-appealed, can not raise an issue outside those framed or formulated by the appellant from the grounds of appeal filed. See Nzekwu v. Nzekwu (1989) 2 NWLR (pt. 104) 373 and Kuusu v. Udom (1990) 1 NWLR (pt. 127) 421. Consequently, the preliminary objection to the competence of this appeal raised as issue one and argued in the respondent\'s brief of argument, not having been raised in accordance with Order 2 Rule 9 of the Rules of this court is incompetent and shall be ignored in the determination of this appeal. See Niger Progress Ltd v. N.E.L. Corporation (1989) 3 NWLR (pt.107) 68 at 82 and Ezukwu v. Ukachukwu (2004) 17 NWLR (pt.902) 227 at 245. For the same reason, the second issue in the respondent\'s brief which also does not arise from the grounds of appeal filed by the appellant must suffer the same fate.

Coming back to the two issues earlier quoted in this judgment as raised in the appellant\'s brief of argument, it is quite clear that both issues were framed from ground (iii) of the grounds of appeal which specifically complained that the court below erred resulting in the violation of the appellant\'s right of fair hearing when that court refused to set aside its own judgment of 16-7-1998 which was a nullity. Following this development, it means that no issue for determination was distilled from the appellant\'s ground (i) complaining that the decision of the court below on the grounds of appeal contained in the respondent\'s Notice of Appeal filed on 14-11-97 were grounds of law requiring no leave for the grounds to be filed; ground (ii) complaining of the refusal of the court below to strike out the respondent\'s Notice of Appeal filed on 14-11-97 and ground (iv) of the appellant\'s grounds of appeal being an omnibus ground of appeal. In this situation where appellant fails to frame an issue from any ground of appeal filed, and the ground is not related to any issue for determination, the ground of appeal is deemed abandoned by the appellant and is liable to be struck out. See Eholor v. Osayande (1992) 6 NWLR (pt. 249) 524; Management Enterprises Ltd v. Otusanya (1987) 2 NWLR (pt.55) 179; Onifade v. Olayiwola (1990) 7 NWLR (pt.161) 130; Momodu v. Momoh (1991) 1 NWLR (pt.169) 608; Okeke v. Oruh (1999) 6 NWLR (pt.606) 175 at 192 and Ibrahim v. Mohammed (2003) 6 NWLR (pt.817) 615 at 647. Putting it differently, as the two issues distilled by the appellant in the appellant\'s brief of argument for the determination of this appeal are not covered by, nor arise from grounds (i), (ii) and (iv) of the appellant\'s grounds of appeal, those grounds are deemed abandoned as was the case in Sparkling Breweries Ltd v Union Bank of Nigeria Ltd (2001) 15 NWLR (pt.737) 539 at 556. In line with the law applicable in this regard, the appellant\'s grounds (i), (ii) and (iv) of the grounds of appeal having been abandoned are hereby struck out.

In any case the grounds of appeal being a challenge to the competence of the respondent\'s appeal before the lower court by the Notice of Appeal filed on 14-11-1997, in the absence of an appeal against the same judgment of 16-7-1998, the competence of the judgment cannot be challenged through the back door by an application to set it aside. In other words the competence of the respondent\'s appeal resulting in the judgment of 16-7-1998 can be challenged only by an appeal against that judgment. This leaves ground (iii) from which the appellant\'s issues (i) and (ii) have been formulated. Although framing two issues from a single ground of appeal by the appellant amounts to proliferation of issues the practice of which had been frowned at in several cases by this court such as Anaeze v. Anyaso (1993) 5 NWLR (pt. 291) 1 at 30; Buraimoh v. Bamgbose (1989) 3 NWLR (pt.109) 352, Utih v. Onoyivwe (1991) 1 NWLR (pt. 166) 166 at 214; Oyekan v. Akinrinwa (1996) 7 NWLR (pt.459) 128 at 136 and Yusuf v Akindipe (2000) 8 NWLR (pt.669)

376 at 384, the ground and the issues are in my view competent to sustain this appeal and I shall proceed to determine the appeal on the issues together.

Starting with the first issue which is whether or not the judgment of the Court of Appeal dated 16th July, 1998 was a nullity, the appellant had argued that although under Order 6 of the Court of Appeal Rules, that court may not hear oral argument of a respondent who has defaulted in filing his brief of argument, for the Court to proceed with the hearing of the appeal without the respondent\'s brief, the appeal must first have been set down for hearing on the appellant\'s brief alone. Learned appellant\'s counsel contended that since the record of appeal were obtained by the appellant only on or about 11-5-1998; the 45 days allowed under the rules for the respondent\'s brief to be filed expired on 27-6-1998. Therefore by 23-6-1998 when the respondent\'s appeal was heard, the appellant was not out of time to warrant his being excluded from participating in the hearing resulting in that court denying him or depriving him of his right of fair hearing under section 33(1) of the 1979 Constitution. That since on the authority of Okoye & Ors v. Nigerian Construction & Furniture Co. Ltd & Ors (1999) 6 NWLR (pt 199) 501 at 539, the decision arrived at after denying a party right of fair hearing is a nullity, the court below acted in error in refusing to set aside its decision of 16-7-1998, which was a nullity. Learned counsel further argued that because the judgment of 16-7- 1998 was further vitiated by the failure of the court below to hear and determine one way or the other, the appellant\'s motion dated 23-6-1998 for extension of time to file respondent\'s brief and fixed for hearing on 5-10-1998 before the delivery of the judgment, the appellant\'s right of fair hearing was further breached justifying the setting aside of the judgment. The case of Chungwom Kirn v The State (1992) 4 NWLR (pt. 233) 17 at 37 was relied upon in support of this submission.

On the question of whether or not the Court of Appeal has power or jurisdiction to review its own judgment raised in the second, issue, learned appellant\'s counsel relied on several authorities of this court including Leonard Okoye & Ors v. Nigerian Construction & Furniture Co. Ltd & Ors (1991) 6 NWLR (pt.199) 501 at 547-548 and concluded that the Court below has inherent jurisdiction to review its judgment in the present case in which the judgment was null and void. This issue was not addressed by the respondent in his brief of argument.

It was submitted by the respondent however, on the first issue, that the respondent\'s appeal at the lower court was heard on 23-6-1998 on the appellant\'s brief of argument alone because the appellant who was the respondent in that court had failed to file the respondent\'s brief of argument. That the action of the court below was in compliance with the provisions of Order 6 Rule 10 of the Court of Appeal Rules and the decisions in Management Enterprises v. Otusanya (1987) 12 NWLR (pt.55) 179 and Nwokoro v Onuma (1990) 3 NWLR (pt. 136) 22

On the complaint of the appellant that the judgment of the Court below was further vitiated by the failure of that court to hear his motion dated 23-6-1998 and fixed for hearing on 5-10-1998, before delivering its judgment on 16-7-1998, learned counsel for the respondent pointed out that the appellant\'s motion for extension of time to file respondent\'s brief was not filed on 23-6-1998, the day the appeal was heard but on 25-6-1998, two days after the hearing of the appeal. Counsel observed that as the motion was not pending before the court on the day the appeal was heard, the court below cannot be blamed for refusing to hear it before hearing the respondent\'s appeal. Learned counsel maintained that in the circumstances of this case, no question of any violation of the appellant\'s right of fair hearing occurred taking into consideration of the cases of Nwokoro v Onuma (1990) 3 NWLR (pt. 136) 22 at 32 and Management Enterprises Ltd v. Otusanya (1987) 2 NWLR (pt.55) 174 at 183.

In tackling the two issues framed by the appellant in his brief of argument for the determination of the appeal, I shall start with the second issue which is whether or not the Court of Appeal has jurisdiction to review its own judgment which is null and void. The law in this respect is quite plain and well settled. If a judgment or order of a court is a nullity, it can be set aside without much ado. Dealing with this question in Craig v. Kanseen (1943) K.B. 256, Lord Green stated at page 262 '

\"Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled Ex-debito justitiae to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order and that it is not necessary to appeal from it.\"

This principle of law has been cited with approval in many decisions of this court particularly, Obimonure v. Erinosho

(1966) 1 All NLR 250 at 252; Skenconsult (Nig) Ltd & Anor v. Ukey (1981) 1 SC 6 at 26; Adegoke Motors Ltd v. Adesanya & Anor (1989) 3 NWLR (pt. 109) 250 at 273 and Okoye v. Nigerian Construction and Furniture Co. Ltd (1991) 6 NWLR (pt.199) 501 at 547-548. In other words such judgments or orders are rendered null and void by fundamental defect and can be set aside. On these authorities therefore, the Court of Appeal, indeed like any other superior court, has inherent jurisdiction to set aside its own judgment or order which is a nullity.

Going back to the first issue for determination on whether or not the judgment of the Court of Appeal dated 16-7-1998 was a nullity having regard to the refusal of that court to afford the appellant a hearing on 23-6-1998 when the respondent\'s appeal was heard, all I am required to do is to apply the law to the facts and circumstances revealed in the record of appeal. The main reason the appellant relied upon in urging the court below to set aside its own judgment of 16-7-1998, was that the procedure adopted by that court in hearing the respondent\'s appeal without the appellant\'s then respondent\'s brief of argument had deprived the appellant of his right of fair hearing guaranteed under section 33(1) of the 1979 Constitution. The question is, why was the appellant unable to file his respondent\'s brief from the date he was served with the appellant\'s brief of argument up to the date the appeal was heard on 23-6-1998' The facts averred on behalf of the appellant in the affidavit in support of his motion for enlargement of time to file his respondent\'s brief is quite revealing at pages 13-14 of the record. The facts show that the parties in the appeal No CA/PH/304/97 the judgment in which the appellant described as a nullity were before the court below on 18-3-1998 when the appeal was fixed for hearing. The appeal came up for hearing on 12-5-1998 when on the application of the appellant\'s counsel, who was fully aware that the appellant who was the respondent was yet to file the respondent\'s brief, asked for adjournment on the ground that he had just obtained the record of proceedings. The adjournment was granted and the appeal was adjourned to 23-6-1998, for hearing. Even on this adjourned date requested by the appellant for the hearing of the appeal presumably to enable his learned counsel to prepare and file his respondent\'s brief before that date, the learned counsel to the appellant came to the court not only without the respondent\'s brief of argument but without even an application for enlargement of time to file the same. As the result of that situation, the court below heard the appeal under Order 6 Rule 10 of the Court of Appeal Rules. These undisputed facts coming from the appellant himself who also admitted that the failure to file the respondent\'s brief was largely due to their error in assuming that time had not lapsed within which to file the brief, can the appellant be heard to complain that he was denied a fair hearing by the court below' I do not think so. The court below acted rightly in hearing the appeal on the appellant\'s brief of argument alone without affording any oral hearing to the respondent\'s counsel in the absence of a respondent\'s brief of argument duly filed and served or an application for an enlargement of time to file one on 23-6-1998, when the appeal was heard. See Management Enterprises Ltd v. Otusanya (1987) 2 NWLR (pt.55) 174 at 183 and of Nwokoro v Onuma (1990) 3 NWLR (pt. 136) 22 at 32 where Karibi-Whyte JSC said '

\"A brief of argument is prima facie exhaustive of the arguments intended to be presented. Hence no oral argument is allowable except by leave of the court in support of any argument not raised in the brief or on behalf of any party in respect of whom no brief has been filed. Where parties who have filed briefs of argument are absent at the hearing, the appeal will be treated as argued on the briefs filed. This is also the position where only one of the parties had filed his brief. Thus obligation to hear the other side, i.e. audi alteram patrem, is observed by the filing of briefs which is taken to represent the case of the party in the litigation.\"

In the present case therefore, the appellant who had ample opportunity to file his respondent\'s brief of argument between the time he was served with the appellant\'s brief to the time the appeal was fixed for hearing on 18-3-1998, to the date the appellant asked for further adjournment on 11-5-1998, up to the time the appeal was heard on 23-6-1998, may complain of any other thing but certainly not the denial of fair hearing by the court below warranting the setting aside of its own judgment of 16-7-1998 on the ground that it was nullity.

From the arguments of the appellant on this issue, it is apparent that the learned counsel to the appellant was working under the misconception that the court below could not have heard the respondent\'s appeal until and unless the respondent as appellant had filed a motion on notice at the court below asking it to hear the appeal on the appellants brief alone in the absence of the respondents brief of argument. While this is the practice in some Divisions of the Court of Appeal, it is certainly not the requirement of Order 6 Rule 10 of the Court of Appeal Rules which merely stated that if the respondent fails to file his brief, he will not be heard in oral argument except by leave of court. Therefore, it is not the requirement of this rule that the filing of a motion on notice to hear an appeal on the appellant\'s brief is a precondition

for hearing an appeal on the appellant\'s brief alone where a respondent fails to file and serve a respondent\'s brief.

That was not alone, it appears learned counsel to the appellant was also of the view that the time to file the respondent\'s brief of argument starts to run from the date the respondent receives the record of appeal under the Court of Appeal Rules. The case of Ajayi & Anor v. Omorogbe (1993) 6 NWLR (pt.301) 512 at 527 cited and relied upon by the appellant is not in support of his case as a respondent in the appeal at the court below. This is because by Order 6 Rule 2 of the Court of Appeal Rules, time within which to file the appellant\'s brief is sixty days from the date of the receipt of the record of appeal by Rule 4 of the same Order 6, the time within which to file the respondent\'s brief is forty five days from the date of service of the appellant\'s brief. Therefore while for the appellant under the rules the time to file appellant\'s brief begins to run from the date of the receipt of the record of appeal, the starting point is not the same for the respondent whose time begins to run from the date of service of the appellant\'s brief on him.

The appellant also relied heavily on the fact that the failure of the lower court to hear his motion for enlargement of time to file his respondent\'s brief dated 23-6-1998 and fixed for hearing on 5-10-1998 before delivering its judgment on 16-7-1998, also nullified that judgment on the ground of denial of fair hearing. It is the law that where an appellate court like the court below refused to hear and determine all interlocutory applications pending in the court before the hearing and determination of an appeal, may indeed result in a denial of fair hearing as enshrined under the 1979 Constitution as complained by the appellant in the present appeal. In Obomhense v. Erhahon (1993) 7 NWLR (pt.303) 22 at 45 where the Court of Appeal failed to rule on an oral application for adjournment by an appellant made before it and proceeded to dismiss his appeal, such conduct was held by this court to amount to a breach of right of fair hearing justifying the setting aside of the judgment arrived at as the result of the breach. It is indeed a cardinal principle of administration of justice to let a party know the fate of his application whether properly or improperly brought before the court. See Onyekwuluje v. Animashaun (1996) 3 NWLR (pt.439) 637 at 644. In the present case however, as the appellant\'s application dated 23-6-1998 for enlargement of time to file his respondent\'s brief was not filed before the court below until 25-6-1998, two days after hearing the respondent\'s appeal on 23-6-1998, that motion can not be said to be pending before the court on the date the appeal was heard. Thus not being a pending matter before the court, that court cannot be accused of refusing to entertain it before proceeding to hear the appeal on 23-6-1998. The judgment of the court below of 16-7-1998 being the product of the hearing of the appeal on 23-6-1998 when no motion was pending before the court, cannot vitiate the judgment on the ground that the hearing of the appeal was in breach of the appellant\'s right of fair hearing under section 33(1) of the 1979 Constitution. In other words even from this aspect of the proceedings of the court below, the complaint of the appellant of alleged denial of fair hearing warranting the setting aside of the judgment of the court below, has no basis whatsoever.

On the whole, the appellant having failed to establish that the judgment of Court of Appeal delivered on 16-7-1998 was a nullity on account of the appeal having been heard in the alleged violation of the appellant\'s right, of fair hearing under section 33(1) of the 1979 Constitution warranting the setting aside of the judgment, this appeal must fail. Accordingly, I dismiss the appeal with N10,000.00 costs to the respondent.

Judgement delivered by Umaru Atu Kalgo. J.S.C.

I have had the privilege of reading in draft, the judgment of my learned brother Mohammed JSC in this appeal. I agree with him entirely that there is no merit in the appeal and it ought to be dismissed.

The main grouse of the appellant was that the Court of Appeal heard the appeal without hearing from him and delivered a judgment against him on 16th July 1998. That, according to him, was a violation of his right to fair hearing contrary to S.33 (1) of 1979 Constitution and the judgment was a nullity.

It is very clear from the record of appeal that the appellant, as respondent in the Court of Appeal failed to file his respondent\'s brief despite having been served with the appellant\'s brief and the time granted to him to do so. The Court of Appeal then on application of the respondent in this appeal heard the appeal on 23rd June, 1998 and reserved

judgment pursuant to the provisions of Order 6 rule 10 of the Court of Appeal Rules 1981 as amended. On 25th June, 1998 two days after the .appeal was heard, the appellant filed an application for enlargement of time to file respondent\'s brief and not to arrest the judgment. It is pertinent to observe that on the 23rd of June, 1998 when the appeal was heard the appellant was physically present in Court and he made no application to the Court to be heard orally even though he did not file a respondent brief. The Court had no duty to ask him to do so as the rules did not say so. The relevant part of the said Order 6 Rule 10 provides that:

\"If the respondent fails to file his brief, he will not be heard in oral argument except by leave of the Court.\"

(Underlining mine)

There is no doubt that the appellant\'s motion for enlargement of time to file respondent\'s brief in the Court of Appeal fixed for hearing on 5/10/98 was not heard. I am of the view, that since the Court of Appeal decided to proceed under Order 6 rule 10 mentioned above, it was not necessary to come back and hear the said motion especially as it was not a motion for the arrest of the judgment. In the circumstances, I am satisfied that the issue of failure to grant fair hearing to the appellant by the Court of Appeal did not arise. The judgment of the Court of Appeal delivered on 16/7/98 is therefore valid and subsisting. I accordingly so hold.

As I said earlier in this judgment, I agree with the findings and conclusions reached in the leading judgment on issue 2 of the appellant. For the above and more detailed reasons given in the leading judgment, 1 also find no merit in the appeal which 1 hereby dismiss accordingly. 1 abide by the order of costs made therein.

Judgement delivered by Niki Tobi. J.S.C.

The respondent was the appellant in the Court of Appeal. The appellant was the respondent in that court. On 14th November 1997, the respondent, as appellant, filed a notice of appeal containing two grounds of appeal. He also filed his brief of argument on 15th January, 1998.

On 23rd June, 1998, when the Court of Appeal heard the appeal, the appellant had not filed his brief. The court heard the appeal on the brief of the respondent as appellant in that court. The appellant did not say when he filed his motion for extension of time to file brief and for stay of further proceedings until the determination of the motion. He only said that his motion for extension of time was dated 23rd June, 1998 and fixed for hearing on 5th October, 1998.

On 16th July, 1998, the Court of Appeal entered judgment in favour of the respondent. On 9th October, 1998 the appellant brought a motion to set aside the judgment delivered on 16th July, 1998. The motion was struck out on 15th May, 2000 on the ground that both the appellant and his counsel were absent. On that same day (15th May, 2000) the appellant filed the same motion seeking to set aside the same judgment on the ground that it was a nullity. The Court of Appeal dismissed the motion.

Aggrieved by that decision of dismissal, the appellant filed this appeal. Briefs were filed and duly exchanged. The appellant formulated two issues for determination. So too the respondent. The respondent has also raised a preliminary objection on the grounds of appeal and the need to seek leave.

I do not intend to go into the preliminary objection. My brother has taken the issue very adequately. Let me take the merits of the appeal. To me, the appeal falls on a very narrow area. It is the determination of the date the motion for extension of time to file respondent\'s brief and stay of proceedings until the determination of the motion dated 23rd June, 1998, was filed. If the motion was filed before the Court of Appeal delivered its judgment on 16th July, 1998, the appellant has a good case. If on the other hand, the motion was filed after the Court of Appeal heard the appeal, then the appellant will not have a good case. The bad case of the appellant will be a good case for the respondent.

Learned counsel for the respondent submitted that there is nothing on the record to show that the appellant, as

respondent, filed the motion in the Court of Appeal before 23rd June, 1998. He submitted further that the official stamp on the motion shows that it was filed on 25th June, 1998, two days after the appeal was heard. Accordingly, the motion was not in existence as at 23rd June, 1998 when the appeal was heard. It does not appear that the appellant specifically dealt with the above submission of the respondent.

I should go to the case file and see things for myself. After all, it is good law that a court is free to examine the case file and I will do just that. I have seen the motion on page 12 of the Record. It was dated 23rd June, 1998 and filed on 25th June, 1998. And so learned counsel for the respondent is correct.

In a matter concerning computation of time, the date that the motion was prepared is not important or relevant because time does not start running from that date. On the contrary, the important date is the date of filing the motion. Time starts to run from that date. I was thoroughly surprised and taken aback when appellant in his brief mentioned only the date the motion was prepared and the date it was fixed for hearing without indicating the important date of filing the motion. I should say for clarity that the date of filing a court process comes in between the date the court process was prepared and the date it is fixed for hearing. And for purposes of computation of time, the date the court process was prepared is not important. I realise that I am repeating myself. I think it is good for emphasis. I think the appellant had something to hide when he avoided the date of filing the motion. That is not good.

The appellant made a great play with the issue of alleged failure on the part of the Court of Appeal to hear the motion before delivering judgment. He strengthened his argument with the usual pet constitutional expression of lawyers who at times find themselves in trouble in the litigation. It is fair hearing. The appellant found section 33(1) of the 1979 Constitution which was in operation at the time, very handy and very useful too. He waved that at us and the case of Kim v. The State (1992) 4 NWLR (Pt. 233) 17 at 37.

I think I have seen through the case the appellant is struggling to make. I have seen so much gimmick and foul play in the case. The respondent first saw this and placed all the cards at our disposal. That is good advocacy. I have said it in the past and I will say it here again that the provision of fair hearing in the Constitution and as adumbrated by the courts in the cases is for both parties in the litigation. It is not only for the appellant. It is also not only for the respondent. It is for both parties in the litigation, if I may repeat at the expense of prolixity. And so the Judge in the application of the principles of fair hearing must ensure that the pendulum tilts in favour of the party really aggrieved by the court\'s conduct of violating the principles. The duty of a court is to create the environment for fair hearing in an egalitarian manner for the benefit of the parties. A court of law cannot force parties to take advantage of the principles. Once the court creates the environment, its duty stops and the parties are at liberty to take advantage of the environment created by the court. If the parties fail to take advantage of the environment created by the court, they cannot be heard on appeal to complain that they were denied fair hearing. Such will be unfair to the Judge who has placed the fair hearing principles at the door steps of the parties.

In the instant case, the motion for extension of time to file respondent\'s brief and for stay of further proceedings until the determination of the motion was dated 23rd June, 1998. The Court of Appeal reserved the delivery of judgment the same day. And so when the motion was filed on 25th June, 1998, it looked like a toothless dog as there was nothing for it to bite. The appellant did not expect the Court of Appeal to wait for the filing of the motion. And so the court delivered judgment on 16th July, 1998.

In whatever way one looks at this appeal, it must fail and is hereby dismissed. It is for the above reasons and the abler ones given by my learned brother Mohammed, JSC, that, too dismiss the appeal. I abide by the order as to costs made by my learned brother in his judgment.

Judgement delivered by George Adesola Oguntade. J.S.C.

The dispute which led to this appeal may be directly traced to a Notice of Appeal which the respondent before us filed before the Court of Appeal, Port-Harcourt (hereinafter referred to as the court below) challenging on two grounds of

appeal the refusal of Daniel-Kalio. J. of the Rivers State High to hear an application for interlocutory injunction filed by the respondent against the appellant.

At the court below, the respondent who was the appellant filed his brief of argument on 15-1-98. The respondent before the court below (now appellant) it would seem, had not filed his brief when the appeal came before the court below for hearing on 23-06-98. The proceeding for the said 23/6/98 is eye-opening and I set it out in full:

\"CA/PH/3 04/97

G. O. OGBONDA

AND

H.R.H. EZE (DR.) FRANK EKE & ORS.

W. Akindutire for the appellant.

E. B. Ukiri for the respondents.
CT - AKINDUTIRE: What do you want to do having regard to the fact that the respondent has failed to file his brief'

ANS: I want the appeal to be heard on the appellant\'s brief.

COURT: You may argue your appeal.

AKINDUTIRE: The appellant\'s brief dated 14/1/98 was filed on 15/1/98. I adopt same. I have nothing more to add except to urge that the appeal be allowed.

COURT: Judgment reserved.

(SGD.)
A. I. Katsina-Alu
Presiding Justice
23/6/98\"

As the record of proceedings above shows, the appeal was heard on 23/6/99. The counsel for the present appellant was in court. He was not recorded as having sought an adjournment on the ground that he had not filed his respondent\'s brief. On 16-7-98, the court below in a unanimous judgment allowed the appeal by the present respondent.
In reaction, the appellant brought an application before the court below praying that the judgment delivered on 16/7/98 be set aside. The grounds relied upon for bringing the application are:

\"(a) The appellant/respondent did not seek and obtain any prior leave of either the High Court or this Honourable Court before filing his notice of appeal on 14/11 /9 8.

(b) The said notice of appeal was fundamentally defective and incompetent in the absence of leave to appeal in that all the grounds of appeal herein are either of mixed law and facts or facts.

(c) This Honourable Court lacked jurisdiction to entertain and determine the interlocutory appeal filed by the appellant/respondent as aforesaid.

(d) The entire proceedings in this Court, including the judgment of this Honourable Court dated 16/07/98 were nullities and ought to be set aside.\"

The court below on 12/2/2001 heard arguments on the application. It dismissed it in the following words:

\"I do not agree with the learned senior counsel. A refusal to entertain a matter does not amount to a decision in the substantive matter one way or the other. However, I have looked at the grounds of appeal Exhibit \'A\' a, b, d. They are really grounds of law which do not require leave. See section 220 (1)(b) of the 1979 Constitution.

The applicant was not diligent before the decision sought to be set aside was handed down. If he had filed a respondent\'s brief and raised the competence of the notice of appeal, a lot of time would be saved.

I am of the view that the grounds of appeal contained in the Notice of appeal did not require leave. Accordingly, this motion is dismissed.\"

The appellant was dissatisfied with the ruling of the court below which I have reproduced above. On 26-2-2001, the appellant filed against it a Notice of appeal containing four grounds of appeal. The said grounds of appeal without their particulars read thus:

\"(i) The learned Justices of the Court of Appeal erred in law when they held that the grounds of appeal filed on 14th November, 1997 were grounds of law and that no leave was required by the Respondent.

(ii) The learned Justices of the Court of Appeal erred in law when they refused to strike out the respondent\'s Notice of appeal filed on 14th November, 1998

(iii) The leaned Justices of the Court of Appeal erred in law and thereby violated appellant\'s right to fair hearing when they refused (to) set aside the judgment of the Court of Appeal dated 16th July, 1997.

(iv) The decision of the Court of Appeal is against the weight of evidence.\"

It is important to bear in mind that the appellant\'s Notice of appeal under discussion was directed against the ruling of the court below on 12-2-2001. It was not directed against the judgment given by the court below on 16-7-97. There is no gainsaying that a Notice of appeal filed on 26-2-2001 would be ineffectual to challenge the judgment given on 16-7-97 unless an extension of time was first sought and obtained. The appellant in his brief before this court also raised an additional ground of appeal which reads:

\"(iv) The learned Justices of the Court of Appeal erred in law in refusing to set aside their judgment of 16th July, 1998 when the said judgment was unconstitutional, null and void; having been delivered in violation of the Appellant\'s right to fair hearing.

Particulars

(a) On 23/6/98 when the Court of Appeal heard the appeal, there was no order setting down the said appeal for hearing on the Respondent\'s (then Appellant\'s) brief alone. The statutory period for the filing of the Respondent\'s brief had not expired.

(b) The Appellant\'s counsel, though present was not heard at all on 23/6/98 before judgment was reserved.

(c) The Court of Appeal had not determined; the Appellant\'s motion for extension of time to file Respondent\'s brief/stay of proceedings fixed for 5/10/98 one way or the other before proceeding to enter judgment on 16/7/98.

(d) The judgment of 16/7/98 was vitiated by the violation of the Appellant\'s right to fair hearing and ought to have been set aside by the Court of Appeal, without the necessity for an appeal.\"

The appellant has formulated two issues for determination in this appeal, namely:

\"(i) Whether or not the judgment of the Court of Appeal dated 16th July, 1997 was a nullity having regard to all the circumstances.

(ii) Whether or not the Court of Appeal has jurisdiction to review its own judgment which is null and void.\"

Appellant\'s counsel under issue 1 above argued that the grounds of appeal which the respondent had brought in the Notice of appeal before the court below were of fact or mixed law and fact for which the respondent needed to have obtained the leave of the High Court or the court below; and that since no such leave was obtained the decision of the court below was a nullity. Counsel argued that the court below should have struck out the respondent\'s appeal. Counsel relied on Nwadike & Anor. V. C. Ibekwe & Ors. [1989] 4 NWLR (Part 67) 718 at 72.

In support of issue No 2, it was argued that a court has jurisdiction to set aside its decision which is a nullity. Counsel then argued that the court below \'should have set aside its judgment which is a nullity. Counsel relied on Obimonure v. Erinosho [1966] 1 All NLR 250 at 252 and Skenconsult (Nig.) Ltd. & Anor. V. Ukey [1981] 1 SC.6 at 26.

I think that the argument of appellant\'s counsel and the reliance placed by him on Obimonure v. Erinosho and Skenconsult (Nig.) ltd. & Anor v. Ukey (supra) are not quite apposite or helpful in this case. It is a correct proposition of law that where service of process is required, failure to serve such process is a fundamental vice and the person affected by the order but not served with the process is entitled ex debito justitiae to have the order set aside as a nullity.

Similarly, where the court as constituted lacks the competence to hear a particular case, its decision thereon is considered a nullity and the same court which made the decision may set it aside. In Obimonure v. Erinosho & Another [1966] All N.L.R.24 at 247-248 (Reprint), this Court considered the position thus:

\"In Adeigbe and Another v. Kusimo and Another (1965) N.M.L.R. 284, this Court approved a statement of the position by Bairamian, JSC, of which the relevant part reads-

'A court is competent when -

(1) """""""".

(2) """""""".

(3) The case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided.'

A failure to notify the opposing party of the institution of any proceeding (other than one which is properly brought ex parte, in which case there is no opposing party) means that a condition precedent to the exercise of jurisdiction has not been fulfilled.

This view was taken by the Court of Appeal in Craig v. Kanssen [1943] K.B. 256, to which Mr. Molajo referred us, but which was apparently not cited to Beckley J. In that case the plaintiff was granted an order by the High Court giving him leave to enforce a judgment under the Courts (Emergency powers) Act, (1939) though the defendant had not been served with the summons. The High Court held that the order could only be set aside on appeal, but the Court of Appeal held that the defendant was entitled ex debito justitiae to have it set aside by the court which made it. In delivering the judgment of the Court, Lord 1 Greene M.R., drew attention [at p. 258] to \'the distinction between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity\'. After considering a number of cases which turned on the distinction he said [at pp.262-263]

\'Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled ex debito justitiae to have it set aside. So far as procedure is concerned, it seems to me that the court in

its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it. I say nothing on the question whether or not an appeal from the order, assuming it to be made in proper time, would be competent. The question, therefore, which we have to decide is whether the admitted failure to serve on the defendant the summons on which the order of January 18, 1940, was based was a mere irregularity, or whether it gives the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an order which has been made in those circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice.\'

This is a clear statement of principle, with which we respectfully agree, and if failure to serve process would be a fundamental vice in a court of first instance it cannot be a mere irregularity in an appellate court. In our view the High Court in the present case had jurisdiction to make the order sought. Though the ground for resisting it in the High Court was purely that of jurisdiction the notice of appeal does not invite this Court to allow the motion, but merely to rule that the court below has jurisdiction to entertain it. That will be the judgment of this Court, but in view of the reasons for our decision we take it that the motion will now be granted as a matter of course by the High Court.\"

In Skenconsult (Nig.) Ltd. & Anor. v Ukey (supra), the appellants were shown not to have been served with the processes leading to the orders made by the judge who heard the motions. This Court at page 15 of the report (Reprint) said:

\"A court can only be competent if among other things all the conditions precedent for its having jurisdiction are fulfilled. In Madukolu and Ors. V. Nkemdilim (1962) 1 All N.L.R. 587 at 594 Bairamian, F.J., (as he then was) stated the principles which have been accepted in successive cases in this Court.

\'A court is competent, he said, \'when -

(1) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and

(2) The subject matter of the case is which its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(3) The case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication.\'

The service of process on the defendant so as to enable him appear to defend the relief being sought against him and appearance by the party or any counsel must be those fundamental conditions precedent required before the court can have competence and jurisdiction. This very well accords with the principles of natural justice.\"

It is only in this class of cases that the court which made the orders or judgment challenged can assume the jurisdiction to set it aside. This is because the orders or judgment complained of are affected by a fundamental vice which impaired the jurisdiction of the court. Such judgments or orders could be vacated by the appeal process or by an application for it to be set aside.

These cases are to be contrasted with cases where a court has before it all the parties to the suit (all having been served); and the court is competent (in its personnel) to hear the matter. If in the course of such hearing the court makes a mistake as to the limits of its jurisdiction, the only method to correct the mistake is by the appeal process. Certainly not by a motion as the appellant has done in this case. Once a court has jurisdiction (in terms of due service on the parties and competence in terms of personnel), it has jurisdiction to decide the case rightly or wrongly. A party who perceives that the said court was wrong can only appeal against the order or judgment. An instructive case on the point is Hession v. Jones [1914] 2 KB. 421. In Timitimi v. Amabebe [1953] 14 WACA 374 at 377, the West African Court of appeal per

Coussey J. A. succinctly made the distinction between the two categories of jurisdiction in these words:

\"There is a distinction, between an order which, even if erroneous in law or in fact is within the court\'s competency. In Re- Padstow Total Loss and Collision Assurance Association 20 Ch D137 decides that where there is no jurisdiction the proceedings are void; but where a court of competent jurisdiction makes an erroneous order, it is appealable.\"

In the instant case, it is the belief of the appellant that the grounds of appeal raised by the respondent before the court below were of fact or mixed law and fact. Under Section 220 of the 1979 Constitution (which was applicable), the respondent needed to have obtained the leave of either the High Court or the court below to raise such grounds. None was obtained. If indeed they were grounds of fact or mixed law and fact, the said grounds of appeal raised as it were without such leave would be a nullity.

Whether or not the said grounds of appeal were of law or of facts or mixed law and fact was a decision to be taken by the court below before which the appeal came. The appellant in this Court who was respondent in the court below failed to file a brief. The reason why he did not file one is not relevant in this appeal. The court below heard the appeal and allowed it. By hearing the appeal, the court below had clearly come to the decision that the ground of appeal were of law and did not require leave. It could have been right or wrong in that decision. The only remedy available to the appellant who contended that the grounds of appeal were not of law was to appeal. The appellant was clearly mistaken when he brought a motion to set aside a final judgment of the court below.

The court below should have struck out the application to set aside its judgment of 16-7-97 instead of considering and dismissing it. I now have before me an appeal against the order dismissing appellant\'s motion. To dismiss the appellant\'s appeal would be tantamount to legitimizing the procedure by which the appeal got to this Court. Suppose I have been able to conclude that indeed the respondent\'s ground of appeal were of mix law and at or fact requiring leave, would I be placed to set aside the final judgment of the court below which was challenged not by an appeal but by a motion'

It is in this aspect touching on the proper order to make that I respectfully disagree with the lead judgment. It will, in my view, set a dangerous precedent to validate a procedure which enables parties to vacate a final judgment of court on the ground that the same is a nullity by an application to set aside instead of an appeal.

Appeal is struck out with N10,000.00 costs in favour of the respondent.

Judgement delivered by Francis Fedode Tabai. J.S.C.

I read, in advance the leading judgment prepared by my learned brother Mohammed JSC and I agree entirely with his reasoning and conclusion.

The facts of the case are very comprehensibly stated in the leading judgment and I need not repeat them in details. The Respondent herein who was Appellant at the Court of Appeal lodged an appeal against the ruling of the High Court of Justice, Rivers State given on the 5th of November 1997. The Notice of Appeal was filed on the 14th of November 1997. He eventually filed his Appellant\'s Brief of Argument at the Court below on the 15/1/98. The Respondent therein who is Appellant herein did not file his Respondent\'s Brief of Argument and the matter was fixed for the 23/6/98 for hearing. On the 23/6/98 both parties were represented by counsel and the appeal was heard with learned counsel for the Appellant therein merely adopting the Appellant\'s Brief. Learned counsel for the Respondent proffered no argument and made no application to be heard. The Court of Appeal then reserved judgment. On the 25/6/98 the Appellant herein filed a motion dated 23/6/98. The motion was for extension of time to file Respondent\'s Brief and it was fixed for 5/10/98 for hearing. On the 16/7/98 the Court below delivered its judgment allowing the appeal therein and set aside the ruling of the High Court.

Two issues are raised in the Appellant\'s Brief of Argument and it is the first I shall comment upon briefly. It is whether the judgment of the Court of Appeal dated 16th July 1998 was not a nullity, having regard to the circumstances. The first submission of learned counsel for the Appellant is that the Appellant obtained the record of appeal only on or about the 11th of May 1998 and that the 45 days allowed for filing the Respondent\'s Brief only expired on the 27th of June 1988. It was contended therefore that the Appellant could not have been in defaulted of filling his Respondent\'s Brief. Order 6 Rule 2 of the Court of Appeal Rules 2002 says:-

\"The Appellant shall within sixty days of the receipt of the Record of Appeal from the court below file in the court a written brief, being a succinct statement of his argument in appeal.\"

This provision applies only to the Appellant in the proceedings at the Court of Appeal. The requirement to file Brief within 60 days upon receipt of the Record of Appeal is applicable only to the Appellant. The provision relevant to the Respondent is Order 6 Rule 4 which states:-

\"The Respondent shall also within forty-five days of the service of the brief for the appellant on him file the respondent\'s brief which shall be endorsed with an address or addresses for service.\"

The Appellant as Respondent never complained that the appellant\'s brief was not served on him. There is therefore no substance in that complaint.

Learned counsel for the Appellant also argued that it was wrong for the lower court to hear the appeal when there had been no motion to hear the Appeal on the Appellant\'s Brief alone. There is a misconception here also. Order 6 Rule 10 simply provides that if a Respondent fails to file his brief, he will not be heard in oral argument except by leave of the Court. There is no provision that filing a motion to hear the appeal on the Appellant\'s Brief alone is a pre-condition to hearing the appeal.

Finally on the first issue the Appellant alleges a violation of his rights of fair hearing under section 33(1) of the 1999 Constitution for hearing the appeal on the 23/6/98 when there was a pending motion that had been fixed for the 5/10/98. It is clear from the facts that although the motion was dated 23/6/98 it was filed on the 25/6/98 when the case had already been adjourned for judgment. There was therefore no pending application on the 23/6/98 when the appeal was heard. The appeal came up for hearing first on the 18/3/98 but could not go on because the Appellant who was Respondent therein complained that he had not obtained the record of appeal and the matter was adjourned, at his instance to the 12th of May 1998 for hearing. On that 12/5/98 the case could not be heard and was, again at the instance of Appellant, adjourned to the 23/6/98. And on the 23/6/98 the appeal was heard. In these circumstances, can the Appellant be heard to complain about any violation of his rights of fair hearing' I do not think so. In my view there is also no substance in the complaint of the Appellant on this issue.

On the whole I also hold that there is no merit in the appeal which is therefore also dismissed by me. I abide by the consequential order on costs contained in the leading judgment.