In the Supreme Court of Nigeria

On Friday, the 1st day of June 2012

Before their Lordships

Walter Samuel Nkanu Onnoghen	.....	Justice Supreme Court
Ibrahim Tanko Muhammad	.....	Justice Supreme Court
Olufunlola Oyelola Adekeye	.....	Justice Supreme Court
Mary Ukaego Perter-Odili	.....	Justice Supreme Court
Olukayode Ariwoola	.....	Justice Supreme Court

SC. 329/2009

Between

The Nigerian Navy	.....	Appellants
The Chief of Naval Staff		
Attorney General of the Federation		
Rear Admiral S.O. Afolayan		
Captain J. N. Unufe		
Captain A. B. Afolayan		
Captain O. O. Olanipekun		
Captain E. O. Omakwu		
Captain Baje		
Nigerian Navy Board		

And

Navy Captain D. O. Labinjo	.....	Respondent

Judgment of the Court

Delivered by

Walter Samuel Nkanu Onnoghen. JSC

This appeal is against the decision of the Court of Appeal, Holden at Lagos in appeal No CA/L/364/2004 delivered on the 13th day of May, 2008 in which the court dismissed the appeal of the appellants for want of diligent prosecution.

The respondent was a serving officer in the Nigerian Navy of the rank of Captain. Sometime in 2001 he was indicted and charged before a general court martial and tried and convicted for the offence of disobedience of orders contrary to Section 57 of the Armed Forces Decree No 105 of 1993; conduct prejudicial to good order and service discipline contrary to Section 103 (1) of the Armed Forces Decree No 105 of 1993; scandalous conduct contrary to Section 91 of the Armed Forces Decree No 105 of 1999 all as amended. He was sentenced accordingly which sentence was duly confirmed by the appropriate authority as a result of which respondent applied to the Federal High Court for judicial review by way of a declaration that the trial was null and void for gross irregularities and breach of fundamental rights of the respondent. He also requested that he be restored to his pre-trial position in the Navy with payment of arrears of salaries and allowances which reliefs were granted in a judgment delivered on the 3rd day of May, 2004.

Appellants were not satisfied with the decision and consequently appealed to the lower court vide a notice of appeal filed on 31st May, 2004 and followed same up with an application filed on 19th August, 2004 praying for departure from the rules of court which was subsequently fixed for hearing on the 29th day of May, 2005 but adjourned to 8th December, 2005 for appellants to produce clearer copies of the record as those exhibited were found by the court to be illegible. Following the failure of appellants to file more legible copies, the motion was again adjourned to 22nd March, 2006 and many other subsequent adjournments until the 12th day of May, 2008 when it was struck out for want of diligent prosecution. On that day, neither the appellants nor their counsel were in court nor was any letter written to excuse their absence despite service of a hearing notice on them. The appeal itself was subsequently dismissed also for want of diligent prosecution resulting in the instant appeal, the issue for the determination of which has been formulated by learned counsel for the appellants, C. I Okpoko Esq in the appellants' brief filed on 19th January, 2010 as follows:-

> "Whether the learned Justices of the Court of Appeal were right in dismissing the appellants' appeal?"

In arguing the issue, learned counsel submitted that the lower court having struck out the motion for departure from the rules lacked the jurisdiction to dismiss the appeal without giving appellants the opportunity to put forward their case, thereby violating their right to fair hearing as contained in Section 36 of the 1999 Constitution.

It is the further submission of counsel that by the provisions of Order 8 Rules 10(1) (2) and (3) of the Court of Appeal Rules, 2007, the appeal had not been entered at the time the lower court purported to dismiss it, relying on *Ezomo v A-G of Bendel State (1986) 4 NWLR (Part 36) 448 at 469*; that a grant of the application for departure would have resulted in the appeal being entered before the lower court and since it was not so granted, there was no appeal strictly so called to be dismissed by the lower court; that by the operation of Order 8 Rule 18 and the decision in *Ugo v Obiekwe (1989) 1 NWLR (Part 99) 566 at 582*, the respondent ought to have filed a formal application before the lower court praying for dismissal of the appeal which would have put appellants on notice of same; that the decision of the lower court in the circumstance in which it was rendered is a nullity as same was reached in excess of jurisdiction, relying on A-*G of Anambra State v Okafor (1992) NWLR (Part 224) 396 at 429.*

Finally, learned counsel urged the court to allow the appeal.

On his part, learned counsel for the respondent Akin Kejawa Esq in the respondent's brief filed on 9th March, 2010 submitted that Order 8 Rules 10(1) (2) and (3) of the Court of Appeal Rules, 2007 are not relevant to the case as they relate to the duties of the registrar of the court below after compilation of the record of appeal; that the issue before the court is on failure of appellants to compile record in accordance with Order 8 Rule 10 (4) of the Court of Appeal Rules, 2007.

It is the further submission of counsel that the lower court was right in dismissing the appeal under Order 8 Rules 10 (4) and (18) of the Court of Appeal Rules, 2007; that by the provisions of Order 8 Rules 10 (1), (4) and (18) of the Court of Appeal Rules 2007, the lower court is clothed with the jurisdiction to dismiss an appeal for want of prosecution following failure to compile and transmit record of appeal, relying on *Uwechia v Obi & ORS, (1973) All NLR (Reprint) 78; Obiamalu v Nwosu (1973) All NLR (Reprint) 83; Ajayi v Omorogbe (1993) 6 NWLR (Part 301) 512.*

On the sub-issue of non filing of motion for an order dismissing the appeal for want of prosecution, learned counsel referred the court to page 1229 Vol. III of the record and submitted that as far back as 19th October, 2006 the respondent had filed such a motion and same was served on appellants. It is the further submission of counsel that filing of a motion for dismissal is not a mandatory provision but permissive as the word "may" is used in Order 8 Rule 18 of the Court of Appeal Rules, 2007 and that the purpose of Order 8 Rule 18 is to enable the court decongest the cause list.

Finally counsel urged the court to dismiss the appeal. It is not disputed that between the filing of the notice of appeal and the time the appeal was dismissed for want of prosecution is four good years and that within that time, appellants failed and/or neglected to file legible copies of record of appeal to enable the appeal be heard and determined. It should also be noted that appellants failed and or neglected to attend court on the date their motion was fixed for hearing despite being served with a hearing notice neither did their counsel deem it courteous to write to the court to excuse their absence. However, appellants are not complaining about the striking out of their motion for departure from the rules. Their complaint is that they were denied fair hearing in that they were not given notice of any intention by the respondent to apply to the court for the appeal to be dismissed for want of prosecution after their motion for departure was struck out.

The question is whether the submission is supported by the facts. The answer is clearly in the negative. It is clear at page 1229 of the record that as far back as the 19th of October, 2006, the respondent had filed a motion on notice praying the court for an order striking out the appeal for want of prosecution. Appellants have not denied being served with the said notice of motion as contended by learned counsel for the respondent.

The above being the case, it follows that the submission of counsel on the issue has no factual basis.

Apart from there being a motion on notice calling for the striking out of the appeal for want of prosecution which was duly served on the appellants, Order 8 Rule 18 of the Court of Appeal Rules, 2007 on which learned counsel relied in submitting that the filing of a notice of motion for the striking out of an appeal for want of prosecution is mandatory does not support that contention. The rule provides as follows:-

> "If the registrar has failed to compile and transmit the records under Rule 1 and the appellant has also failed to compile and transmit the records in accordance with Rule 4, the respondent may by notice of motion move the court to dismiss the appeal."

From the above, it is clear and I hereby hold that the filing of a motion on notice as provided supra is permissive and not mandatory as the word "may" is used. It is a general principle of interpretation of statute that the use of the word "may" generally connotes permissive action though in exceptional circumstances it may mean mandatory or compulsory action.

However, in the contest in which it is used in the rule under reference, it can mean but one thing, that is, permissive action. Generally, it is the duty of an appellant to produce before the Court of Appeal the record he seeks to challenge in that court. The Rules are made to prevent the appellant from being tardy in the prosecution of his appeal, that is why a respondent is empowered to *ex debito justiciae* have the appeal proceedings terminated by praying the court either by motion on notice or oral application under Order 8 Rule 18 supra for same.

The provisions of Order 8 Rule 18 supra is a clear answer to the submission of learned counsel for appellants that the lower court was without jurisdiction in dismissing the appeal after striking out the motion for departure from the rules since no appeal was in effect entered before the court to be so dealt with.

There are two situations relevant to an application for striking out/dismissal of an appeal for want of prosecution or otherwise summarily dealing with the appeal in any manner the court may deem fit. These are situations where:

(a) an appeal is deemed brought or filed - See Order 6 Rule 11 of Court of Appeal Rules, 2007y end,

(b) when it is said to be entered before the appellate court- See Order 8 Rule 10 (3) of same.

An appeal is deemed brought before the appellate court when the notice of appeal is filed and before the record of appeal is compiled and transmitted to the appellate court, while an appeal is said to be entered when the record of appeal is transmitted to the appellate court and received by it and entered in the cause list of the court, to be dealt with according to the rules of the court.

Whereas the argument of counsel for appellants is that since no record of appeal had been received by the lower court as at the time the court dismissed the appeal the court had no jurisdiction to do so, as the appeal had not been entered before it, Order 8 Rule 18 supra clearly deals with a situation where an appeal is deemed brought, in that a notice of appeal had been filed but there is failure on the part of either the registrar of the lower court or the appellant, to compile and transmit the record of appeal to the appellate court. That is the situation relevant to the facts of this case. In that case, the appeal needs not be entered before the lower court to cloth that court with the jurisdiction to summarily deal with it.

In fact I hold the considered view that an appellate court, in a situation like the one under consideration in this appeal, has the inherent jurisdiction to *suo motu* list the appeal and summarily dismiss same for want of prosecution without waiting for the respondent to make the application either orally or by way of a motion on notice as the court has the inherent power to do away with frivolous, or vexations appeals so as to decongest its cause list particularly where the appeal is intended to overreach or deny the respondent the enjoyment of the fruits of the judgment in his favour by the lower court.

In short, I find no merit in the issue raised by counsel for appellants and consequently resolve same against the appellants.

In conclusion, the sole issue having been resolved against appellants, it is clear and I hereby hold that the appeal is grossly without merit and is consequently dismissed by me.

It is further ordered that the judgment of the lower court entered on the 12th day of May, 2008 be and is hereby affirmed with ₦50,000.00 (Fifty Thousand Naira) costs against the appellants.

Appeal dismissed.

Judgment delivered by
Ibrahim Tanko Muhammad. JSC

I was afforded an opportunity by my learned brother, Onnoghen. JSC, to read the leading judgment before today. I am in complete agreement with my learned brother that the appeal lacks merit. I accordingly dismiss the appeal. I abide by all orders made by my learned brother in his lead judgment.

Judgment delivered by
Olufunlola Oyelola Adekeye. JSC

I had read before now the judgment just delivered by my learned brother W.S. N. Onnoghen, JSC. My learned brother in the lead judgment had narrated the background facts of the case in this appeal. The sole issue raised for determination by the appellants reads –

"Whether the learned justices of the Court of Appeal were right in dismissing the appellants' appeal."

The respondent also raised the lone issue which reads that –

> "Whether having regard to the circumstances of this case the Court of Appeal erred in law and denied the appellants the right to fair hearing when it dismissed their appeal for lack of diligent prosecution."

The argument and contention of the appellants are that -

a. The court below after striking out the appellants' Motion on Notice for departure from the Rules lacked the requisite jurisdiction to dismiss their appeal without giving the appellants the opportunity to be heard. The dismissal in that circumstance violates the principle of fair hearing as enshrined in Section 36 of the 1999 Constitution.

b. Going by the provisions of Order 8 Rules 10 (1), (2) and (3) of the Court of Appeal Rules 2007, the appellants' appeal has not been entered in the Cause List of the court below hence there was no appeal before the court below to warrant order of dismissal. The court was wrong to have acted on the entreaties of the respondent's counsel to dismiss the appeal.

c. Dismissing the appeal upon the oral submission of the respondent's counsel only and without any formal application filed in line with the requirement of Order 8 Rule 18 of the Court of Appeal Rules 2007, the appellants' rights of fair hearing have been violated. The appellants cited these cases –

Ugo v Obiekwe (1989) 1 NWLR (Part 99) page 566; Kotoye v Central Bank of Nigeria (1989) 1 NWLR (Part 98) page 419.

The appellants consequently concluded that there was no notice of motion filed by the respondent and the failure of the respondent to file such motion for dismissal of the appeal on grounds of non-compliance with Order 8 Rule 4 by the appellants, robbed the court below of the jurisdiction to dismiss the appeal. The steps taken by the court below in dismissing the appeal is a nullity in law.

In view of the argument of the appellants in this appeal, I find it convenient to go back to the drawing board so as to discuss the essential and basic traits of an appeal.

An appeal itself is an invitation to a higher court to review the decision of a lower court in order to find out whether on proper consideration of the facts placed before it and the applicable law, the lower court arrived at a correct decision. See *Egbe v Alhaji (1990) 1 NWLR (Part 128) page 546; Oredoyin v Arowolo (1989) 4 NWLR (Part 114) page 172; Oba v Egberongbe (1992) 8 NWLR (pt 685) pg 485*.

The process of appeal either to the Court of Appeal or the Supreme Court is as embodied in the Rules of the respective court. Order 6 Rule 11 of the Court of Appeal Rules 2007 provides that –

> "An appeal shall be deemed to have been brought when the notice of appeal has been filed in the registry of the court below."

In order to kick-start the process of appeal, the appellant must file a notice of appeal. It is a necessary prerequisite to the hearing of an appeal. It is the notice of appeal that gives an appellate court the necessary jurisdiction to hear, an appeal. It is not surprising that the Notice of Appeal is referred to as the foundation and substratum of every appeal. The next stage is the compilation and the transmission of the record to the appellate court.

In the case of *Leaders & Company Ltd. v Kusamotu (2008) All FWLR (Part 405) page 1800*, it was held that an appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the court below. On the other hand, an appeal is however entered when the record of appeal is transmitted to the Court of Appeal or Supreme Court and the appeal entered in the Cause List of the appellate court. See *Oguche v Mba (1994) 4 NWLR (Part 336);Abina v Tila-Tore Press (1968) 5 NSCC page 164.*

Under Order 8 Rule 1 of the Court of Appeal Rules 2007, the Registrar of the court shall within 60 days after the filing of a notice of appeal compile and transmit the record of appeal to the Court of Appeal. Order 8 Rule 4 stipulates that: -

> "Where at the expiration of 60 days after the filing of the notice of appeal the Registrar has failed and or neglected to compile and transmit the records of appeal in accordance with the proceeding provisions of this Rule, it shall become mandatory for the appellant to compile the records of all documents and exhibits necessary for this appeal and transmit it to the court within 30 days after the Registrar's failure or neglect."

The appellant in order to address the issue of delay and pursue the appeal expeditiously in the interest of justice can bring an application for departure from the Rules under Order 19 Rules 2 and 3 of the Court of Appeal Rules 2007 to compile and

transmit the records to the Court of Appeal. The appellant must compile the records to meet the requirements of the Rules on completeness of records, legibility, proper numbering of the pages and sequential presentation of the facts in the records and certification of the record. See *U.S.N. Ltd. v Tropic Foods Ltd. (1992) 3 NWLR (Part 228) page 231.*

Order 8 Rule 10 directs the transmission of the record within the time stipulated in Order 8 Rule 10 (1). The format of the record as indicated under Order 8 Rule 7 (a) - (d) is compulsory as it is designed to ensure that the documents are legible for easy reading and understanding. See *Nitel Ltd. v Ikpi (2007) 8 NWLR (Part 1035) page 96.*

The appellants filed before the Court of Appeal a motion for departure from the Rules on the 19th of August 2004. When the motion came up for hearing on the 19th of May 2005, it was adjourned by the court for hearing to the 8th of December 2005 for the appellants to produce clearer and legible copies of the record of appeal. The appellants failed to comply with the directives on that date; the motion was consequently adjourned to the 22nd of March 2006. The motion suffered further adjournments for failure to comply with producing legible copies of the record. The respondent filed a motion in the interval for an order of the Court of Appeal to strike out the appeal for lack of diligent prosecution. That was the scenario on the 12th May 2008 when the motion came up for hearing.

The appellants and their counsel were not in court whereas hearing notice was served on them. The respondent moved the court to strike out the motion for departure and to dismiss the notice of appeal for lack of diligent prosecution. The Court of Appeal granted both requests.

The appellants took an exception to the dismissal of the appeal on the ground that the appeal has not been entered under Order 8 Rule 10 (3) which provides that: -

> "The Registrar of the court below or the appellant as the case may be shall also cause to be served on all parties mentioned in the notice of appeal a notice that the record has been forwarded to the Registrar of the court who shall in due course enter the appeal in the cause list."

The appellants argued that there was no appeal before the court below to warrant the order of dismissal. There would have been an existing appeal if the motion for departure was heard and granted.

The order of the Court of Appeal at page 1236 of Volume III of the Record reads-

> "The Notice of appeal was filed on 22/6/04 and to this date, being the 12/05/08 no record has been entered. We uphold the submission of the learned counsel for the respondent and hold that by the provisions of Order 8 Rules 4 and 18 of the Court of Appeal rules 2007 that this appeal has become stale. The appellants have failed/neglected to prosecute the appeal in compliance with the provisions of the rules of court. The said appeal is accordingly hereby dismissed for want of diligent prosecution."

The appellants argued and submitted that the court below can only dismiss the appeal on the formal application filed in accordance with the requirement of Order 8 Rule 18 of the Court of Appeal Rules 2007. Order 8 Rule 18 reads –

> "If the registrar has failed to compile and transmit the records under Rule 1 and the appellant has also failed to compile and transmit the records in accordance with Order 8 Rule 4, the respondent may by notice of motion move the court to dismiss the appeal."

The foregoing section cannot avail the appellant. The effect of the section is that the appeal can be relisted by notice of motion based on Order 8 Rule 20. See *Akinjinwa v Nwaonuma (1998) 13 NWLR (Part 583) page 632; Olowu & ors v Abolore & Anor (1993) 5 NWLR (Part 293) page 225.*

The appellant filed the motion for departure in respect of compilation and transmission of the record of appeal. The Notice of Appeal which is fundamental to the appeal is different from the motion for departure from the Rules. The Notice of Appeal remains after striking out of the motion for departure. They are two different stages in the process of appeal. The court below struck out the motion for departure for reason of non appearance of counselor the appellants to turn up in court to argue the motion after several adjournments.

The notice of appeal was filed on the 31st of May 2004. The notice of appeal was dismissed for non-appearance of the appellants and their counsel in court on the 12th of May 2008, almost four years after the notice of appeal was filed. On that day, the appellants had not filed the record of appeal. All courts have an inherent power to strike out a matter before them for want of diligent prosecution. The exercise of such power is however always backed up with reasons - as the court would rather act on the side of keeping cases alive and hear them on their merits rather than striking them out for want of diligent prosecution. It is my conclusion that the lower court had rightly in the prevailing circumstance disposed of the appeal for lack of diligent prosecution.

In the case of *Banna v Telepower Nigeria Limited (2006) All FWLR (Part 334) page 1813* this court held at pages *1833-1834* that-

> "As is demonstrated in the suit that culminated in this appeal the plaintiff who should in fact exhibit more zeal and anxiety in prosecuting this case which it had filed seeking for some reliefs decided to forget or neglect the suit by not appearing in court or finding out the position of his suit in the registry, just because it had engaged the services of a solicitor. It did not expect the trial judge to merely fold his arms and allow the case to be adjourned until the plaintiff deemed it convenient for the case to be heard or disposed of before he can act, most especially as the defendant was diligent and always in court each time the case came up."

The Rules of court are meant to be obeyed. The purpose of the Rules of court is to regulate matters in court and assist parties to any suit or appeal to present their cases for the purpose of a fair and quick trial or hearing. Where the Rules are quickly complied with, there will be quick dispensation of justice. See *Wellington Registered Trustees Ijebu-Ode (2000) 5 NWLR (Part 647) pg.130; University of Lagos v Aigoro (1985) 1 NWLR (Part 1) page 143.*

The appellants complained of lack of fair hearing in the way and manner the notice of appeal was dismissed. The right to fair hearing is a fundamental right guaranteed by the Constitution of the Federal Republic of Nigeria 1999. A hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard, present his case or call witnesses. It does not however lie in the mouth of a party who disregarded the rules of court or refused to attend court having been served with a hearing notice to talk of denial of justice and fair hearing. See *Kaduna Textiles Ltd. v Umar (1994) 1 NWLR (Part 319) page 163; Ayatagu v Agu (1998) 1 NWLR (Part 532) page 129 at page 144; Ofoegbu v Iheanacho (2001) 4 NWLR (Part 703) page 219; Governor of Oyo State v Olalolade Folayan (1995) 8 NWLR (Part 412) page 92.*

With fuller reasons given in the lead judgment of my learned brother W.S.N. Onnoghen JSC, I also dismiss the appeal for being unmeritorious and abide the consequential orders in the judgment.

Judgment delivered by
Mary Ukaego Peter-Odili. JSC

This is an appeal against the decision of the Court of Appeal on 12th May 2008 in which the appellants appeal was dismissed for want of diligent prosecution.

The respondent was a naval officer, who was tried by the General Court Martial and his conviction was thereafter confirmed by the 11th Appellant. On being charged before the General Court Martial he applied to the Federal High Court Lagos by way of judicial review procedure to challenge the composition of the members and other reliefs. On the 3rd May, 2004 the Federal High Court granted the respondent's application for judicial review and declared the proceedings of the General Court Martial, his conviction and confirmation by the Navy Board as null and void and also quashed the conviction of the respondent ordering his reinstatement into the Nigerian Navy.

The appellants were dissatisfied with the ruling and appealed to the Court of Appeal. The appellants also within five weeks filed a motion on Notice at the Registry of the court below seeking to enter the appeal records by way of departure from the Rules. The parties made several appearances at the court below for the motion on notice for departure to be moved but it was not moved because the court noted that some pages of the records were not legible to the Justices. The court directed that the case file from the Federal High Court be brought and the appellants complied and the case file was transmitted from the Registry of the Federal High Court to the Court of Appeal. The court below also requested the appellant's counsel to change the pages that were illegible and same were changed.

On the next adjourned date when a different panel of the court was sitting, the court raised the issue that the statement of the accused in the Record was hand written and the appellants' counsel was asked to reduce same in typewritten form. The matter was adjourned to 29th of October 2007 but the court did not sit. On the 12th day of May, 2008 the appellants' counsel was not in court and the court below struck out the appellants' motion for departure for want of diligent prosecution on the ground that appellants' counsel was not in court. The court below further dismissed the appellants' application.

The appellants being dissatisfied have appealed to this court. On the 8th day of March 2012 date of hearing learned counsel for the appellants adopted their brief settled by C. I. Okpoko Esq and filed on 19/10/10. In it was couched a single issue which is thus:

> Whether the learned Justices of the Court of Appeal were right in dismissing the appellants' appeal.

For the respondent was filed on 9/3/10 a brief of argument settled by Akin Kejawa Esq. In it he also formulated a sole issue as follows:

Whether having regard to the circumstances of this case the Court of Appeal erred in law and denied the appellants the right to fair hearing when it dismissed their appeal for lack of diligent prosecution.

For the appellants it was contended that the court below having struck out the appellants' motion on notice for departure from the Rules lacked the requisite jurisdiction to dismiss their appeal thereafter without giving the appellants the opportunity to put forward their case and thereby violated their right to fair hearing as enshrined in Section 36 of the 1999 Constitution. He cited Order 8 Rules 10(1), (2) and (3) of the Court of Appeal Rules 2007.

Mr. Okpoko, learned counsel for the appellants stated that going by order 8 rules 10(1), (2) and (3) of the Court of Appeal Rules 2007, the appeal had not been entered in the Cause List of the court below and hence there was no appeal warranting the order of dismissal. He referred to *Ezomo v A. G. Bendel State (1986) 4 NWLR (Part 36) 448 at 469.*

That by dismissing the appeal upon the oral submission of the respondent's counsel only and without any formal application filed in line with the requirement of Order 8 Rule 18, the appellants' right of fair hearing had been violated. He cited *Ugo v Obiekwe (1989) 1 NWLR (Part 99) 566 at 582; Kotoye v Central Bank of Nigeria (1989) 1 NWLR (Part 98) 419 at 448.*

For the appellants was further contended that since there was no notice of motion for dismissal of the appeal on grounds of non-compliance with Order 8 Rules 4 by the appellants, the court below lacked the jurisdiction to dismiss the appeal and so the decision of the court below dismissing it is null and void since it was reached in excess of its jurisdiction. He cited *A. G. Anambra State v Okafor (1992) 2 NWLR (Part 224) 396 at 429.*

Learned counsel for the respondent contended that the failure of the appellants to take steps to compile and transmit the record of appeal to the registry of the court below for four years after the filing of the appellants' notice of appeal denied them the right to the discretion of the Court of Appeal being exercised in their favour. He cited the cases, *Ajayi v Omorogbe (1993) 6 NWLR (Part 30) 512; Banna v Telepower (Nig) Ltd (2006) 15 NWLR (Part 1001) 198 at 216, 220*. He further stated for the respondent that it was the motion on notice for departure from the Rules that was struck out and so the court was right to go further to dismiss the appeal. That it is not in every case where the appeal had not been entered that the court cannot exercise its jurisdiction to dismiss a Notice of Appeal which is an abuse of its process. He cited *Amadi v Commissioner for Education, Imo State (2001) 9 NWLR (Part 717) 17 at 25*. That the appeal had been filed on 31st May 2004 and based on Order 6 Rule 2 of the Court of Appeal Rules 2007 the appeal was in and could be dismissed.

That the appellants lacked the right to say they were denied fair hearing. He referred to *Olowu v Abolore (1993) 5 NWLR (Part 293) 255 at 279; Governor of Oyo State v Olalade Folayan (1995) 8 NWLR (Part 412) 292; Kaduna Textile Mills Ltd v Umar (1994) 1 NWLR (Part 319) 143 at 159; Ofoegbu v Iheanacho (2001) 4 NWLR (Part 703) 219 at 225 - 226.*

That Order 8 Rule 18 of the Court of Appeal Rules on the respondent moving the court by motion on notice is directory and not mandatory. Also that the court can on its own, acting on its inherent powers under Section 6(6) (a) of the 1999 Constitution dismiss the appeal.

This appeal seems hinged on Order 8 Rules 1, 4, 18 the Court of Appeal Rules 2007. Also Order 8 rules 10(1) (2) and (3) of the same Rules of the court below. For clarity I shall recast them below, viz:- Order 8 Rules 10 (1), (2) and (3) of the Court of Appeal Rules 2007 provide as follows:-

"Order 8 rules 10 (1)

> Where the record is compiled by the registrar under rule 1 of this order, he shall transmit the record within the time stipulated for compilation and transmission under rule (1)

Order 8 Rules 10(2)

> Where the record is compiled by the appellant under rule 4 of this order, he shall transmit the record within the time stipulated for compilation and transmission by the appellant under rule 4. The record shall be transmitted in compliance with rule 10 (2)

Order 8 Rules 10(3)

> The Registrar of the court below or the appellant as the case maybe shall also cause to be served on all parties mentioned in the Notice of appeal, a notice that the record has been forwarded to the Registrar of the court who shall in due course enter the appeal in the cause list."

Order 8 Rules 4 and 18 of the Court of Appeal Rules 2007 stated as follows:

Order 8 Rule 4

> Where at the expiration of 60 days after filing the notice of appeal the registrar has failed and/or neglected to compile and transmit the records of appeal in accordance with the preceding provisions of this Rule, it shall become mandatory for the appellant to compile the records of all documents and exhibits necessary for his appeal and transmit to the court within 30 days after the registrar's failure or neglect."

"Order 8 rules 18

> If the registrar has failed to compile and transmit the records under Rule 1 and the appellant has also failed to compile and transmit the records in accordance on the Rule 4, the respondent may by notice of motion move the court to dismiss the appeal"

Learned counsel for the appellants took the view that the appeal should be allowed because the court below lacks the jurisdiction to dismiss the appellants' appeal as at 12th day of May, 2008. That the respondent did not file any notice of motion for the dismissal of the appeal as required by Order 8 Rule 18 of the Court of Appeal Rules 2007. That the dismissal of the appeal violated the appellants' right of fair hearing by virtue of Section 36 of 1999 Constitution.

Respondent's contrary point is that the motion of the respondent on notice filed on 9th October 2006 praying for the dismissal of the appeal for lack of diligent prosecution was in adequate compliance with Order 8 Rule 18 of the Court of appeal Rules. That appellant being notified of the hearing of 12/5/08 and not appearing with or without counsel, they lost their right to plead that their right of fair hearing had been denied them.

It is indeed true that it is a basic fundamental principle in our system of justice that no one can have a decision entered against him without him being heard. That being the essence of the *maxim audi alteram partem*. See *Ugo v Obiekwe (1989) 1 NWLR (Part 99) 566 at 582* per Nnemeka Agu JSC

Going into what the court of Appeal did, I shall recapture part of the ruling as follows:

> "The Notice of Appeal was filed on 22/06/04 and to this date being the 12/05/08 no record has been entered. We uphold the submission of the learned counsel for the respondent and hold that by the provisions of Order 8 Rules 4 and 18 of the Court of Appeal Rules 2007 that this appeal has become stale. The appellants have failed/neglected to prosecute the appeal in compliance with the provision of the Rules of court. The said appeal is accordingly hereby dismissed for want of diligent prosecution."

In the case of *Uwechina Obi & Ors (1973) All NLR 7 (Reprint) 78*, this court per Coker JSC said in similar circumstances thus:-

> "We think it proper at this juncture to point out that it is the duty of the appellant to ensure that the records or the notes which he proposes to challenge in the Supreme Court are made available to that court. If those records are not made available, the respondent is entitled *ex debito justitae* to have the appeal proceedings terminated."

Taking the situation above further this court had in *Obiamalu & Ors v Nwosu & Ors (1973) ALL NLR (Reprint) 83* again by Coker JSC stated:-

> "Furthermore, it is the duty of an appellant to produce before the Court of appeal the record which he seeks to challenge in that court."

The above citations notwithstanding I would still want to cite a few more judicial authorities from this court to show the very strong views in circumstances such as are present in the case in hand.

This Honourable court per Belgore JSC (as he then was) said in *Ajayi v Omoregbe Supra at page 537 paragraph G - H* as follows:-

> "It is the duty of the appellant to prosecute his appeal and in doing so he must not be tardy. The fact that an appeal has been filed should not be exploited to delay the appeal from being heard. The appellant must not only make sure the records are ready for transmission to the appellate court but settling the records, he must also fulfill all the conditions of appeal …. While it is the duty of the court Registrar to get the records ready and notify the appellant and the respondent of the situation, the appellant has an added responsibility and diligently pursuing the timeous and correct preparation, settlement and transmission of the records of appeal. To merely file notice of appeal and do nothing more, thereby sitting back with the judgment against him unexecuted, he is abusing the court process."

Olatawura JSC in the same *Ajayi v Omorogbe (supra) at page 528* said:-

> "A litigant who deliberately, carelessly or wantonly disregard the rules of court cannot expect the discretion of the court to be exercised in his favour. Justice, after all said and done, is for both parties. Delay tactics can lead to a miscarriage of justice, witnesses may no longer be available; in the case of an appeal not filed or prosecuted within time the rights of a third party may be affected."

Speaking along the same lines this Honorable Court per Oguntade JSC (as he then was) while delivering the lead judgment in *Banna v Telepower (Nig) Ltd (2006) 15 NWLR (Part 1001) 198 at 216, paragraphs E - G* said:-

> "It is needful that it be stressed that a plaintiff who is not ready to pursue his suit with diligence upon which the court must insist has no business bringing such case to court. Counsel and parties alike must bear in mind that the time of the court is valuable and must be apportioned between the different cases requiring attention. It is the duty of the court to proceed with the hearing of the cases before it expeditiously. The courts in the land must exact from parties and counsel as much diligence in the prosecution of their cases as would enable the court consign the incidence of congestion in our courts to history."

In emphasising the above His Lordship Tobi JSC (as he then was) in the same case of *Banna v Telepower (Nig) Ltd (2006) 15 NWLR (Part 1001) 198 at 216 paragraphs E- G* said:-

> "A plaintiff has not only a right to file an action in court to redress a wrong done him by a defendant; he also has a duty to prosecute the matter to conclusion within the rules of court. Of course, the duty is not mandatory, compulsory or sacrosanct as he can decide not to prosecute. A plaintiff who files an action in court and exhibits some indolence and nonchalance has himself to blame. After all, he brought the defendant to court and if he decides not to pursue the case diligently, the court has no option than to either strike out or dismiss the matter, depending on the enabling rules of court."

Hitting the nail on the head, His Lordship Mukhtar, JSC also *in Banna v Teiepower (Nig) Ltd supra at pages 224 - 225 paragraphs H -A* said:-

> "Just as much as there is a saying that there must be an end to litigation, I will add here that there must also be an end to playing pranks, wasting the court's time."

Conceptualising the facts of this case to the view point of the appellants would translate to something like this; That the Notice of appeal was filed on 31st day of May 2004 at the court below against the decision of the Federal High Court. A motion on notice for departure from the rules of court was filed again by the appellants to enable them compile and transmit the records on the failure of the Registrar of court to so compile and transmit. Four years later, all the appellants were able to do was transmit records that had salient parts of it illegible. Their attention was called to this and nothing was done by the appellants to at least make the records usable precipitating the respondent with the passage of time to file a motion to strike out the Departure Motion and dismissal of the appeal for lack of diligent prosecution.

On being served with the hearing notice for a hearing of the motion of appellants for departure, the appellants having been served failed to attend court and also not represented. The court on being orally moved by the respondent struck out the motion for departure and proceeded to dismiss the appeal hence the grouse of the appellants yelling that their right to fair hearing had been infringed upon. The appellants anchoring on the position that even if the court below could struck out the motion for departure, the dismissal of the appeal was another cup of tea which it could not do without a properly moved motion on notice by the respondent. On a similar situation as the present, this court in *Chime v Ude (1996) 7 NWLR (Part 461) 379* per Uwais CJN (as he then was) at 421 - 422 stated on the powers of court faced with this scenario thus:-

> "With regard to whether the court has the power to deal with the appellants' default *suo motu* under Order 6 Rule 3 (2), I think there cannot be doubt about that whatsoever. The court has a duty to do away with the congestion of cases filed before it, particularly where those cases are frivolous and are intended to merely overreach or deny the respondent the enjoyment of the fruit of the judgment given in his favour by the law courts or court below. The golden rule is that justice delayed is justice denied. I therefore see nothing wrong or unconstitutional in this court invoking its inherent jurisdiction to deal with such infractions."

The situation on ground is one that has no room for beating about the bush or second guessing the powers of court either the court below, trial court or this one as to its inherent powers when it is clear to the court that it is being taken for a ride or being used as a vehicle to frustrate the rights of the other party under the guise of the seductive interest of justice cliché as if the other side is not entitled to the same protection within that interest of justice. My humble view is that once the court finds that such a ploy is in the offing, the court is duty bound to resist and place its stamp of authority in place. In the case in hand clearly the appellants have shown a lack of care for sensibilities of the court and thereby held in abeyance the interest of the respondent and so even if the respondent through counsel did not urge the court either by motion or orally, there is the option open to the court to end the rigmarole and the Court of Appeal rightly did so. I place reliance on *Olowu v Abolore (1993) 5 NWLR (Part 293) 255 at 279; Banna v Telepower (Nig) Ltd supra at 217.*

From the foregoing and the fuller reasoning of my learned brother, W. S. N. Onnoghen JSC, I dismiss this appeal.

I abide by the consequential orders made in the leading judgment.

Judgment delivered by
Olukayode Ariwoola. JSC

I had had the privilege of reading in draft, the lead judgment just delivered by my learned brother, Onnoghen, JSc. I am in total agreement with his Lordship's reasoning and the conclusion. I adopt them as my own. The appeal lacks merit and is liable to dismissal. Accordingly, it is dismissed by me.

I abide by the consequential orders in the lead judgment including the order on costs.

Counsel

No representation	……	For the Appellants
Akin Kejawa *with him* Franca Adaora Okafor (Mrs) Helene Nene (Miss)	……	For the Respondent