



**COMMENTARIES ON SELECTED
JUDGEMENTS OF
HON. JUSTICE M.M.A. AKANBI**



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PRINCIPLES OF LAW APPLIED IN THE JUDGEMENT

Court's Exercise of Discretionary Power to Grant an Extension of Time Within Which to Appeal And the Principles Underlying the Exercise of the Discretion

INTRODUCTION

Indeed, the importance of providing remedy for every aggrieved individual cannot be understated. Constitutional rights, including the right to fair trial and hearing in section 36 of the Nigerian Constitution 1999 and courts' duty to see that justice is done to parties, may seek to serve many social purposes. However, a sacrosanct principle of justice among them is protecting individuals from unjustified use of overweening power of court's discretion in matters.

It is however trite that a judge must not myopically apply his discretion. Application of discretion must at all times be judicial and judicious, it must as well be fair and persuasive to all concerned and most importantly, justice in the case must be the aim and the end.⁹⁰ The fulcrum of this case under review is whether the trial High judge in its appellate sitting rightly exercised his discretion by allowing the plaintiff/appellant to argue his ground of appeal when the court has found the reasons given for one year delay before appealing against the judgment of the lower court unreasonable and unsatisfactory.

FACT OF THE CASE

The dispute between the plaintiff Aker Bashi and the defendant Gandeoron Orakaa in the Upper Area Court Gboko was in connection with a parcel of land situate and lying at Mbakor in the Gboko Judicial Division of Benue State of Nigeria. The matter reached that court via the Grade II Area Court on 25th May, 1982. Hearing began on 12th January, 1983 and was concluded on 10th June 1983. Judgment was delivered on 7th July 1983. It is on record that as soon as judgment was delivered both parties were informed of the right of an aggrieved party to appeal to the High Court within 30 days of the informed of the date of judgment. No such appeal was filed within the time allowed by law. However, a year and some days after the delivery of the judgment precisely on 23rd July, 1984, the plaintiff filed in the High Court an application for an enlargement of

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90. Sonia A. Review of Oshunrinde v. Akande (1990) 6 NWLR (pt 855) 383; (1998) 2 Nigerian Law and Practice Journal (Nigerian Law School Publication Abuja, 1998) p. 82

time within which to appeal. In the support affidavit, it was averred that the failure to appeal within time, was due to the sudden illness which afflicted the plaintiff after the judgment. The defendant however countered this and was able to show by affidavit evidence that quite contrary to what the plaintiff would want the court to believe his illness (if at all) was not such as could have prevented him from filing an appeal in this matter if he was so minded and that as a matter of fact during the period of the said illness, he was busy prosecuting another case suit No. 150/83 at the Wunne Area Court and was regularly attending the court.

After hearing arguments from counsel on the motion, the High court came to the conclusion, that the excuse offered by the plaintiff/appellant that he was ill "has no substance" however, it went on to examine the ground of appeal proposed to be canvassed and observed as follows:

It is my firm view that the Appeal Court may be interested to find out whether Justice has infact been done to both parties. On this ground alone, I consider the proposed ground of appeal of great interest; and will give the applicant an opportunity to have it argued in the appeal court. The application therefore succeeds. Leave is give to the applicant to file and argue the proposed ground of appeal within 7 days of this order. The appellant was dissatisfied with court's decision thus, the basis of this appeal.

ANALYSIS OF THE PRINCIPLES

- i. Whether the High Court properly exercised its discretion and what the applicant must show as the cause of delay in order to obtain an extension of time within which to appeal

It is an established position of the law that unless the exercise of discretionary power by a lower court is found to be perverse, arbitrary and not judicial, the appellate court will not interfere with a properly exercised discretionary power.⁹¹

Exercising discretion to grant an extension of time within which a party appeals as in this case under review or carries out a failed action is often difficult. However, determining what general principles require in a particular case is significant to the exercise of discretionary power in that respect. The Supreme Court of Nigeria in the case of *Ogundimu v Kasumu*⁹² has laid down two guiding principles for the exercise of discretion to grant an extension of time; and they are:

- i. Good and substantial reason for failure to appeal within the prescribed period

⁹¹ *Ogundimu v Kasumu*, (2006) 8 MJSC 19

⁹² *ibid*

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- ii. The grounds of appeal which prima facie show good cause why the appeal must be heard.

These two conditions must be satisfied together and at the same time. If one fails, the entire application will fail.⁹³ The principles listed above established that exercise of discretion for extension of time must always aim at achieving justice in a case which the court in the case under review failed to achieve.

The question then is whether or not the lower appellate high court exercised its discretion properly or it is such that appellate court can interfere thereon. On this the Court of Appeal's judgment delivered by Justice MMA Akanbi rightly held that the High Court judge misdirected itself in fact and in law by allowing the plaintiff/appellant to argue his ground of appeal when it had refused the reasons advanced for the delay in applying for an of extension time within which to appeal. The court of Appeal per Akanbi JCA, citing several Supreme Court Cases⁹⁴ held:

...the appeal court may interfere with the exercise of judicial discretion if it is shown that there has been a wrongful exercise of the discretion such as where the tribunal acted under misconception of law or under misapplication of fact in that it either gave weight to irrelevant or unproven matters or it omitted to take into account matters that are relevant or where it exercised or failed to exercise the discretion on wrong or inadequate materials and in all other cases where it is in the interest of justice to interfere.

It may be argued further that knowing what is right is not enough but self-interest exercises of discretion is a strong pull, and the trial appellate High Court judge in the case under review gave in to self-deception to allay cognitive dissonance, convincing himself that he acted consistently with law when he did not. This can be said of the case under review, the trial court having found the reason advanced by the plaintiff/applicant that "he was ill" has no substance, should not have proceeded to examine the ground of appeal proposed by the plaintiff/applicant but having held that view still held:

It is my firm view that the Court of Appeal may be interested to find out whether justice has in fact be done to both parties. On this ground alone I consider the proposed ground of appeal of great interest, and will give the applicant the opportunity to have it argued in the Appeal

⁹³ Order 3 Rule 4(2), Court of Appeal Rules

⁹⁴ Enekebe v Enekebe (1964) 1 All NLR 102 at 106, Saffiedine v COP (1965) 1 All NLR 54 at 55, Demuren v Asuni (1967) 1 All NLR 94 at 101, Mobil Oil v Federal Board of Inland Revenue (1977) 3 SC 97 at 141, Sonikan v Smith (1967) 1 All NLR 329 and Solanke v Ajibola (1968) 1 All NLR 46 at 52

Court. The application therefore succeeds. Leave is given to the applicant to file and argue the proposed ground of appeal within 7 days of this order.

The position of the appellate High Court cannot but be considered an erroneous belief and a miscarriage of justice that the proposed ground of appeal by the plaintiff/applicant raised a *prima facie* cause. A court cannot exercise discretion based on its whims and caprices it has to act judicially and on bases of materials before it. Instructively, the reviewer agrees with the reasoning of Akanbi JCA (as he then was) that:

It appears to me evident from the case cited that the primary duty of an applicant seeking an extension of time to appeal is to place before the court (from which indulgence is sought) such materials as may be adjudged sufficient to explain the cause of delay or reason why he breached the rule which requires him to appeal with specified period. To my mind if the primary duty is not discharged as indeed the lower court found in this case, the fact that the ground of appeal is "is of great interest" would hardly avail an applicant who is shown to be guilty of inordinate delay or lackadaisical in his observance of the rules. For it is trite to say that the rules of court are meant to be obeyed and if there be any breach of same there must be good and substantial reasons for doing so. It would indeed be traverse of justice to allow a losing party in a case to choose his time and decide the moment when to exercise his undoubted right of appeal.

What is to be considered an exercise of discretion by a judge in this circumstance is the deposition of the applicant in his affidavit in support of his application and counter affidavit, if any, from the opposing side. From the facts of the case under review the only assumed genuine reason advanced for the delay as deposed to by the plaintiff/applicant was that of 'sudden illness,' in appealing against the decision until a year and some days after. This reason was adequately countered by the respondent in his counter affidavit to the extent that contrary to what the plaintiff/applicant would want the court to belief and as a matter of fact during the period of the said illness the plaintiff applicant was busy prosecuting another case suit No. CR 150/83 at Wunne Area Court and was regularly attending the court.

It is submitted that the Appellate High Court rightly came to the conclusion that the excuse offered by the plaintiff/applicant that he was ill "has no substance". Though in law the length of time for delay is immaterial, however, the applicant is duty bound to

explain the delay and show good cause why the appeal should be heard.⁹⁵ This was what the plaintiff/applicant in the case under review failed to establish to the satisfaction of the court, thus in the absence of good and substantial reason for the delay the court appropriately refused the application.⁹⁶

iii. Whether the court has the power to allow the applicant argue his ground of appeal when the cause of delay and reason for extension time to appeal was found unsatisfactory.

In the case under review, the trial Appellate High Court said that the ground of appeal sought to be canvassed is of "great interest". The question here is having found that the cause of delay to be unsatisfactory, was it the right for the Court to proceed to extend time on the basis that the ground of appeal sought to be canvassed is 'of great interest' and that this court 'may be interested to find out whether justice has in fact been done to both parties'.

The court discretion in this paradigm cannot be said to be judicial. It is pertinent to note however, that where the exercise of discretion goes beyond constraints set down by legislation, by binding precedent, or by a constitution, the court may be abusing its discretion and undermining the rule of law. This is what exactly happened in the case under review thereby justifying the Court of Appeal's interference and declaring the High Court position ultra vires. The Court of Appeal though, observed that the appeal is a challenge to the lower court's exercise of its discretionary power which ordinarily this court should be slow in interfering with, however correctly held that; "the High court in exercising its discretion in this case did not apply the correct principle of the law. It erred in granting leave to the plaintiff/applicant to appeal out of time".

The decision in this case of *Gandeoron Orakaa v Aker Bashi* delivered by M M A. Akanbe JCA (as he then was) and under review is a significant decision as it re-affirms the position of the law as regard the use of discretion by judges. This is because the trial appellate High Court judge in the case under review did what would appear as not been done before to advance or develop the law in contrast to the established principle guiding the application of discretionary power by courts.

CONCLUSION

The High Court in this case undoubtedly was largely influenced by extraneous and irrelevant consideration which the court itself surprisingly, though referred as "of great interest" insinuation.

⁹⁵ See the case of *Alagbe v H H Samuel Abimbola* (1978) 2 SC 39

⁹⁶ See the cases of *Ojora v Bakare* (1976) 1 SC 47 and *Akano v Adeniran* (1975) 1 NMLR 37

The Court of Appeal was right in setting aside the High Court ruling. Apposite to this preposition is MMA Akanbi's position that "...would it be just to keep the successful party in a state of uneasy suspense perhaps with his fingers crossed, hoping that day in day out that his opponent may, when it pleases him, one day be disposed to exercise his right of appeal; or file any application for extension of time to do so. I suppose the lower court was not appreciative of the inherent danger of extending the time when no good, or substantial reason has been given, hence it quite rightly jettisoned the reason given for the delay in this case".

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are mere instruments of the law, and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.⁹⁷ It is the reviewer's contention that strength of character is therefore required of a judge to act in accordance with the principle of the law. Invariably, the only way to test our strength of will is to act consistently with principle in the face of adversity, danger, or temptation. It is easy to do right when it costs you nothing. It is thus important to integrity to create the risk of such costs. This is because it is beyond question that it is the duty of all courts to strive at all times to do justice in all cases. But it has to be justice according to the law.