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‘FAULT OF COUNSEL’ DEFENCE: A DYING TREND - The Case of *Ali Alaba International Limited & Anor v Sterling Bank Plc*

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INTRODUCTION

It has become commonplace for litigants and their counsel to routinely file applications for extension of time stipulated by the various rules of courts within which they are required to perform certain acts. Filing an application for extension of time has evolved to become the most quotidian application before courts in Nigeria, and motions of this nature have earned the moniker, 'housekeeping applications'.

It has become acceptable practice for courts to grant applications for extension of time as a matter of course without placing much burden on the applicants to convince the court that they indeed deserve the grant of an extension of time within which to perform acts that are essential to their claims or defence. This flexible and lenient approach is often attributed to the 'overriding' interest of justice in furtherance of the constitutional right to fair hearing.

Applicants would argue that a litigant should not be denied the right to fair hearing as a result of procedural tardiness that is not the litigant's fault. It is not unusual to find litigants cite the 'fault of counsel' excuse in their applications for extension of time to perform their obligations.

This article examines the attitude of Nigerian courts towards the defence of 'fault of counsel' in applications for extension of time. It also discusses the respective duties of litigants and counsel in the light of the Supreme Court's decision in ***Ali Alaba International Limited & Anor v Sterling Bank Plc***[1], and the implications this decision will have for litigation in Nigeria.

LITIGANT'S DUTIES

In spite of the number of counsel representing a litigant in a particular case or the vigour and passion of a litigant's advocates, a matter in court is primarily the concern of the litigant as he will be directly affected by the outcome of the dispute resolution process.

[1] [2018] 14 NWLR (Pt. 1639) 254.

Consequently, the litigant has the duty to provide to his counsel and to the court, all resources necessary for the determination of his case. The litigant also bears the primary responsibility for taking all steps required by the relevant laws and rules of courts in the protection of his interest before a court.

COUNSEL'S DUTIES

A counsel has a professional duty to represent the interest of his client to the best of his capabilities. Beyond that general duty, the Rules of Professional Conduct for Legal Practitioners 2007 ("the RPC") mandates counsel to, amongst other duties, devote his attention, energy and expertise to the service of his client and, subject to any rule of law, to act in a manner consistent with the best interest of the client.[2] A counsel also has the duty not to handle a legal matter without adequate preparation and must not neglect a legal matter entrusted to him.[3]

In addition to his duty to his client, a counsel has a duty as an officer of the court not do any act or conduct himself in any manner that may obstruct, delay or adversely affect the administration of justice. This includes his duty to file processes and perform all other necessary acts before the court timeously, to aid the quick dispensation of justice.[4] Rule 32(2)(e) of the RPC specifically prohibits counsel from intentionally or habitually violating any established rule or procedure.

THE NEED NOT TO PUNISH THE LITIGANT FOR COUNSEL'S MISTAKES OR OMISSIONS

Where there has been an inordinate delay in the performance of actions required by the courts, the rules of court ordinarily impose penalties ranging from the award of costs to an outright dismissal of the matter without the option of relisting such matter for hearing. Due to the grave consequences of these penalties, the courts , have lent a

[2] Rule 14(1) of the RPC.
[3] Rule 16(1) of the RPC.
[4] Rule 30 of the RPC.

sympathetic ear to a litigant who claims that a fatal delay was not occasioned by his own laxity but the mistake or ineptitude of his counsel.

The Supreme Court in ***E.F.P.C. Ltd. v N.D.I.C.***[5] considered this when it reasoned as follows:

> *"The sins of counsel will not be visited on a party. In the instant case, the Court of Appeal rightly accepted depositions in the affidavit in support of the application for extension of time to appeal to the effect that, mistake of counsel contributed for delay in filing the appeal timeously, as good and substantial reasons to grant extension of time to appeal."* ***(Per Mukhtar JSC)***

See also ***Opekun v Sadiq***[6]***; Adegbite & Anor v Amosu***[7] and ***Mobil Producing (Nig) Unltd v. Hope.***[8]

ATTITUDE OF THE COURTS TO THE DEFENCE OF FAULT OF COUNSEL

Although the courts have been liberal in granting applications for extension of time as a matter of course, where the litigant blames the failure to timeously take necessary steps on counsel, the litigant has the obligation of showing to the court that he has not been personally negligent.

In ***Ahmed v Trade Bank Plc***[9]**,** the Court of Appeal held as follows:

> *"That the sin of counsel should not be visited on the litigant is without doubt a judicial expedience and although convenient, must not be jeopardized by indiscriminate applications. Hence, to be able to sustain the concept, the applicant needs to show that he acted promptly in giving instruction to his solicitor to file the appeal, but that the inadvertence or negligence of the solicitor caused the delay. It is also the law that even when the applicant acted promptly in instructing his counsel, he is still expected to ensure that the counsel carried out the instruction. This is so*

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[5] (2007) ALL FWLR (Pt. 367) 793, at 830.
[6] [2003] 5 NWLR (Pt.814) 475.
[7] (2016) LPELR-40655(SC).
[8] (2016) LPELR-41191(CA).
[9] (1996) 3 NWLR (Pt.437) 445.

because the litigant who fails to ascertain if his counsel has taken the necessary steps to bring his appeal is as well negligent."

In ***NNPC v Samfadek & Sons Ltd***[10]**,** the Supreme Court held that the Applicant had:

"an uphill task of convincing this Court that it gave instruction to its counsel to appeal against the decision of 27 May 1996 and counsel failed to do so. Mere instruction to counsel is not sufficient. The Appellant must show that it took some steps to ensure that the counsel complied with the instruction. Applicant has not shown in the supporting affidavit that it took some measures to ensure that its counsel complied with its instruction."

THE ALI ALABA CASE

The case of ***Ali Alaba International Limited & Anor v Sterling Bank Plc***[11]**,** decided by the Supreme Court (the SC) on 6 July 2018 is of note to this discourse.

The Appellants in this case filed an appeal against the decision of the trial court at the Court of Appeal (the CA) on 19 November 1999. After entering their appeal, they became lax by and failed to file a brief of argument to prosecute their appeal. The CA thus invoked its powers under the applicable rule of the Court and dismissed the appeal on 10 May 2005.

In December 2005, the Appellants filed an application at the CA to relist the appeal and also applied for extension of time within which to file their brief of argument. The Appellants subsequently withdrew these applications on 18 August 2006 and the CA consequently struck out the applications.

The Appellants then proceeded to instruct a new counsel who filed an application at the CA dated 23 April 2007, seeking an order for extension of time within which to appeal against the May 2005 decision of the CA. The Appellants also sought an extension of time to file a Notice of Appeal against the CA's decision. These applications were

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[10] (2018) LPELR-44980(SC)
[11] 14 NWLR Pt. 1639, 254

granted by the CA and the Appellants proceeded to appeal to the Supreme Court on 13 December 2007.

The issue for determination before the Supreme Court was whether the Appellants' appeal, having been previously dismissed because they failed to file their brief of argument within time, can be relisted?

In its decision, the Supreme Court answered in the negative and further held that where there has been a failure to file a brief of argument and the court exercises its power to dismiss the appeal, the court becomes *functus officio*.[12] The court agreed with the Respondent that the dismissal operates as a judgment on the merits as it terminates the life of the appeal. It is an irreversible dismissal and the CA cannot relist same.

The Supreme Court quoted with approval, its earlier decision in ***Akanke Olowu & Ors v Amudatu Abolore***[13] where the Court, per Karibi-Whyte JSC had said of the CA:

> *"It has no inherent jurisdiction to set aside an order of dismissal properly made in the valid exercise of its jurisdiction and re-enter the appeal. An appeal dismissed on the ground of the failure to file appellant's brief of argument is final. The appeal so dismissed cannot be revived."*

Eko J.S.C. while agreeing with the lead judgment in the Ali Alaba case, made a note on the defence of fault of counsel as follows;

> "*I should think that a time has come for defaulting litigants, relying on error or blunders of their counsel, to be told, and I hereby tell the appellants herein, that it is not enough for them to rely on the error or blunder of the counsel of their own choice, when they are in default of statutorily prescribed time-table for taking steps in litigation; they must show what efforts they made themselves to follow up on the counsel in order that their counsel carried out their instructions within the time prescribed.*"

[12] i.e. the Court ceased to have further authority to act.
[13] [1993] 5 NWLR (Pt.293) 255

The Supreme Court's pronouncement above on the limitation to the defence of 'fault of counsel', reiterates a trend by the courts to impose a duty on a litigant who blames a counsel for its tardiness, mistake, or omission.

IMPLICATIONS ON PENDING LITIGATIONS

The impact of the Supreme Court's pronouncement in the ***Ali Baba case*** is that litigants can no longer be content with entrusting their matters to their counsel and then taking a back seat. Litigants will have to exercise some level of diligence to ensure the timely performance of procedural acts required in the litigation, and would be required to be familiar with the respective rules applicable to their matters in order to ensure compliance.

Courts may no longer be predisposed towards granting applications for extension of time as a matter of course. Litigants and counsel who are lax or indolent in prosecuting or defending a claim will not be given an opportunity to delay the speedy resolution of disputes. This is expected to ensure an expeditious hearing of substantive matters before the courts.

Lastly, litigants whose cases are struck out or dismissed due to the failure to take certain actions within the stipulated time owing to fault of counsel may have a right of action against such counsel for breach of duty and professional negligence. This may well serve as an awakening for litigants and counsel who either deliberately or inadvertently fail to keep to the set timelines for taking required actions before the courts, only to purport to take advantage of the right to fair hearing by seeking an extension of time.

* This article is not intended to give legal advice. Any specific questions about any legal matter should be referred to a lawyer for professional advice.

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