

**IN THE HIGH COURT OF THE FEDERAL CAPITAL
TERRITORY**

IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)

**HOLDEN AT COURT 14, APO ABUJA ON THE 21ST DAY OF
SEPTEMBER 2016.**

BEFORE THEIR LORDSHIPS: HON. JUSTICE U.P. KEKEMEKE (PRESIDING JUDGE)

HON. JUSTICE V.V. VENDA (HON. JUDGE)

APPEAL NO: CVA/143/15

COURT CLERKS: AMINU ZAKARI

BETWEEN:

ATLANTIC DOWN LIMITED.....APPELANT.

AND

BASIL BIDE MI AROGUNDADE.....RESPONDENT.

RULING

The Appellant/applicant's Motion dated and filed 27/06/16 is for:

1. An Order of Court directing a departure from the rules to enable it compile and transmit records from the Lower Court.
2. An order deeming the said Records of Appeal as having been properly compiled and transmitted.
3. And for such order or other Orders as the Court may deem fit to make in the circumstance.

Learned Counsel to the Appellant/Applicant relied on the 7 paragraph Affidavit and the Exhibit A which is the Record of Appeal.

The reasons for the application are contained in paragraphs 2(c) (d) and (e) of the Affidavit in support. Succinctly, he states that the Appellant who was the defendant at the Lower Court was not represented nor filed any process because he was not served. That getting the Certified True Copies of the processes including the judgment was difficult because the District Judge had since been elevated to the Federal High Court Bench. That the delay in getting those Certified True Copies occasioned the inability of the Registrar to compile the Records of Appeal. That Appellant had no choice but to compile the records itself at great cost after making serious efforts to obtain the Certified True copy of the processes.

The Respondent opposed the application by relying on his Counter Affidavit of 19 paragraphs. He stated that Judgment was delivered on 29/04/15. That it took Appellant seven months to file Notice of Appeal after he had obtained a Garnishee Order Nisi at the Lower Court. That the Notice of Appeal is annexed to his Affidavit and marked B2 dated 03/11/15 but deemed properly filed on 26/11/15. That this application is now being brought six months after the Notice of Appeal was deemed to be properly filed. That on 20/06/16, a similar Motion was struck out because the records were not certified by the Registrar of the Lower Court. That the Record of Appeal still bears the same defect complained of at the last appeal session. That there is no valid Record of Appeal. That the Notice of Appeal was not stamped and sealed as directed in Exhibit B2. That the Notice of Appeal stands abandoned.

The Appellant/applicant raised only one issue for determination which is whether the applicant is entitled to the reliefs in the application. He canvassed that the

Appellant is entitled to the application in the exercise of the Courts discretion which must be judicial and judicious. He posited relying on the case of **Soleye Vs. Sonibare (2002)** FWLR pt. 95 page 234 and 234 paragraphs A – B that there is no kind of error or mistake if not fraudulent or intended to overreach that cannot be corrected if it can be done without causing any injustice to the other party. He urges the Court to exercise its discretion in favour of the Appellant.

The Respondent adopted the Appellant's sole issued. He argued that the defect complained about in the earlier appeal session still subsists. That the Record of Appeal was certified by the Registry of this Court and not that of the Lower Court where the Judgment was delivered. Learned Counsel referred to Section 104 of the Evidence Act. That having failed to certify the record of proceedings or record of appeal at the Registry of the Lower Court which has custody of same, this Court cannot rely on same as true copies.

Learned Counsel further canvassed that the Notice of Appeal which was deemed properly filed and served has not been affixed with stamp and seal as directed by this Court. That having failed to rectify same, this Court cannot take cognizance of the said Notice of Appeal.

We have read the Affidavit evidence and considered the Written Addresses of Counsel. Order 43 Rules 1 – 7 contains the procedure in filing appeals from the District Court to this Court By Order 43 Rule 11 of the rules of Court, this Court has powers to direct a departure from the rules in respect of compilation of records from the Lower Court upon an application such as under consideration contrary to Order 43 (3).

We have read the reasons and difficulties encountered by the Appellant in a bid to compile the records which are now ready.

The contention of the Respondent's Counsel is that the records of proceedings compiled by the Appellant are not certified in accordance with Section 104 of the Evidence Act and Order 43 of the rules of Court. By Section 104 of the Evidence Act, every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees prescribed in that respect together with a certificate at the foot of such copy that it is a true copy of such document or part of it as the case may be.

We have perused the Record of Appeal. It is compiled at the Registry, Appeal and assessed by this Court which is responsible for District Court Appeals. It is also certified. The name and date of the Officer who certified same is Madugu Miabat with the title Principal Registrar II.

The Respondent has not shown in his Court Affidavit that the said Officer who certified the records is not a public officer who has custody of the records.

The Records of Appeal in our view are certified contrary to the argument of Respondent's Counsel and we so hold.

Learned Counsel further argued that the Notice of Appeal which was deemed to be properly filed and served at the last appeal session with a directive that it should be rectified has not been so rectified. We have perused the Notice of Appeal dated 03/11/15. It has been deemed to be properly filed and served by Exhibit B even though the Appellant's Counsel's stamp and seal are not on it. We are not competent to reverse ourselves. If Appellant's Counsel fails and continues to fail to do so, Counsel can raise the issue at his final argument. The Records of Appeal are now ready and indeed has been filed.

This Court does not see a clog in his way by exercising its discretion in favour of the Appellant. The application has merit and it is hereby granted as prayed.

HON. JUSTICE U.P. KEKEMEKE

(PRESIDING JUDGE

21/09/16

HON. JUSTICE V.V. VENDA

(HON. JUDGE)

21/09/16.