

SUPREME COURT OF NIGERIA
22ND APRIL 1994 SC, 32/1992
CORAM: S.M.A. BELGORE, A.B. WALI,
U. MOHAMMED, S.U. ONU, A.I. IGUH, JJSC.

TOTAL INTERNATIONAL LTD. APPELLANT
AND
PRINCE A.O. AWOGBORO RESPONDENT

APPEALS - Grounds of appeal - Before the Court of Appeal - Sought to be amended by adding more grounds - Contention that 4 of the new grounds are ones of fact or mixed law and fact- And that those grounds are complaining against a separate interlocutory order - Whether sustainable

APPEALS - Grounds of Appeal - Under interlocutory appeal - Where the grounds are not of law - Need to obtain leave

FACTS

The Respondent as plaintiff secured judgment against the Defendant/Appellant before the Lagos High Court for the sum of \$25,659,055,25 as commission due to him. The Appellant appealed against the judgment before the Court of Appeal, Lagos. This interlocutory appeal arose out of an application made by the Appellant to the Court of Appeal for leave to amend the Notice and Grounds of Appeal against the trial High Court's decision delivered by Balogun J. Before the substantive judgment, Ilori J. in an ex parte application bearing a separate suit number made some orders in respect of service of the Writ of Summons on the Appellant. Appellant's application before the Court of Appeal for amendment of the Notice and Grounds of Appeal was based on several grounds. The Respondent opposed grounds 1 - 4 as being grounds of fact or mixed law and fact which needed leave of Court. The objection was upheld by the Court below. The Appellant being dissatisfied has now appealed to the Supreme court to determine inter alia, whether the proposed additional grounds of appeal under consideration are complaining against the order of Ilori J. in the previous ex parte application and

whether they are grounds of law for which no leave is required.

HELD (unanimously dismissing the appeal)

1. After a careful scrutiny of the four grounds of appeal (taken together), they did not complain against the interlocutory order of Ilori J, but rather they complain against the final decision of Balogun J. And there is no dispute that the Appellant can appeal against that final decision on any ground be it of law or facts pursuant to s. 220 (1) (a) of the Constitution (P98 L 16)

2. Where as in the instant case which is an interlocutory appeal, grounds of appeal from High Court to the Court of Appeal are found not to be grounds of law, leave must be sought and obtained before such grounds can be allowed to be argued on appeal. (P98 L 38)

3. Grounds 1 and 2 of the grounds of appeal under consideration are rather attacks or complaints against the order made by Ilori J. in respect of service of the Writ of Summons and there is no way those grounds can be argued without reference to the facts or materials presented to the Court, And counsel for the Appellant has even conceded that leave is required in respect of ground 2 as being one of mixed law and fact. (P. 103 L 23 & P. 104 L 24)

4. The proposed grounds 3 and 4 are clearly grounds of mixed law and fact and they either contain a hybrid of grouses against the decision of Balogun J. or Ilori J. (P. 105 L 35)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Proper application of orders 1 r. 20 (7) and 3 r. 22 of Court of Appeal Rules

“The provisions of Orders 1 Rule 20 (7) and 3 Rule 22 of the Court of Appeal Rules are, in my view, meant to cover appeals in interlocutory orders made by Balogun, J. in the course of the trial in ID/794/89 and cannot apply to interlocutory orders antecedent to that case with a different suit number. What the appellant in my view, should

do is to file a distinct appeal against the Ruling of Ilori, J. and not treat it as an interlocutory issue in the final decision of Balogun, J". (P. 100 L 1)

2. Determination of whether a ground of appeal is one of law

It is trite law that in determining whether a ground of appeal is a ground of law or not, the test is not its christening or the appellation attached thereto; the court must examine the nature of the complaint and the particulars given in support thereof before arriving at a view. (P.101 L20)

3. Failure to protest about service before the trial court-Implications

"The appellant in the instant case went through trial before Balogun, J. without protesting about service and lost. It has filed an appeal on the merit. The issue of service would undoubtedly not have been raised had it won the case at the trial Court..... The abandonment of ground 2 (e) to the effect that Service purported to have been effected in the circumstances was ineffectual and void is an invitation to Court to do a surgical operation. This, the court is unable to do". (P. 106 L 23)

BELGORE JSC

4. When issue of substituted service may render a trial nugatory. "Procedural step of having substituted service may render a trial nugatory only if its effect is that it did not in fact lead to the service to attract knowledge of the party it was addressed to. But once appearance was made without protest, and the trial went on to conclusion with unqualified participation by the party substitutedly served with summons, it is too late to make a mountain out of this". (P. 108 L8)

WALI JSC

5. Proper import of the 4 grounds of appeal under consideration

"Ground 1 - 4 do not in my view fall within the ambit of section 220 (1)(a) above as they do not challenge the final decision of Balogun J. in the substantive suit. They seek indirectly to question the validity of the interlocutory decision of Ilori J. The particulars provided in these

grounds show clearly that the challenge is directed against the order of Ilori J. giving leave to issue the Writ on the defendant out of jurisdiction. These same particulars also show that the grounds are either of fact or of mixed law and fact. None of them can be argued without reference to the facts or the materials presented to the court before the order was made.” (P. 112 L 12)

REPRESENTATION

Chief G.O.K. Ajayi SAN, with A.A. Oriola,
Miss Mary Okosun and A. Okeaya - Innch for the Appellant.
O. Ayanlaja with Miss B. Belgore for the Respondent.

CASES REFERRED TO

Ige v. Obiwale (1967) 1 all NLR 267 (P. 276 of the Reprint)
Ajani v. Giwe (1986) 3 N.W.L.R. (Part 32) 796 at 804
Ojemen v. His Royal Highness Momodu II (1983) 3 S.C. 173
Chief Edewor v. Chief Uwegba (1987) 1 NWLR (Part 50) 313 at 334
Odjevwedje v. Chief Echanokpe (1987) 1 NWLR (Part 52) 633 at 655
Ferne v. Young (1866) 1 H.L 63 at pages 79-81
Nwadike v. Ibekwe (1987) 4 NWLR (Part 67) 718 at 747
Ogbechie v. Onochie (1989) 2 NWLR (Part 23) 484 at 494
Adili v. The State (1989) 2 NWLR (Part 103) 305 at 330 - 331
Abejude v. Ashiru (1967) 2 NMLR 364
Perry v. St. Hellens Land and Construction Co. Ltd (1939) 3 All E. L.
.R 113
Lauwers Import & Export v. Jozebson Ind. Ltd. (1988) 3 NWLR
(Part 83) 20
Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR (Part 109) 250 at
page 271
Nwabueze v. Okoye (1985) 1 NWLR (Part 2) 195

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979 SS.22 (1)(a),
221 (1)
Court of Appeal Rules O. 1 r. 20(7) O. 3 r. 22.

LEAD JUDGMENT BY ONU JSC

This interlocutory appeal arises out of an application made to the Court of Appeal sitting in Lagos for leave to amend the Notice and Grounds of Appeal filed against the decision of Balogun, J., given on the 10th day of May, 1991 wherein he entered judgment in favour of the plaintiff, herein respondent, for \$25,659.055.25 (now about N40 million) and other sums plus interest. The appellant as defendant, in the trial Court had proposed to amend the Notice and Grounds of Appeal in the Court below by adding several additional grounds, but learned counsel for the respondent opposed four of those grounds, to wit grounds 1, 2, 3 and 4 for which see pages 43-48 of the Record, as being grounds of fact or mixed law and fact which therefore needed leave.

As transpired, the court below upheld the objection to these four proposed grounds of appeal by a Ruling - for which see pages 3 - 20 of the Record in which it stated inter alia (per Kalgo, J.CA. and concurred in by Achike and Tobi J.J.CA.) to the effect that -

(i) The four grounds of appeal are complaining against interlocutory order made ex parte by Ilori, J.

(ii) These four grounds of appeal cannot therefore be filed as of right because leave of court ought to be obtained before they can be competent and arguable grounds of appeal.

(iii) The reason why leave must be obtained is that they are not grounds of law alone but are grounds of fact and of mixed law and fact.

(iv) These grounds are not competent in so far as they are related to the interlocutory Ruling or Order of Ilori, J., made on 29th May, 1989.

It is pertinent for a better appraisal of this appeal to give the background setting or facts relevant thereto as follows:-

I. Before Ilori, J., the plaintiff/respondent made an application exparte in Suit No. ID/224M/89 for an order:-

(a) for leave to issue a Writ of Summons for service on the defendant/appellant outside jurisdiction

(b) dispensing with personal service and that the defendant/appellant be served through the Chambers of Chief F.R.A. Williams.

II. Before Balogun, J., a Writ of Summons in Suit No. ID/794/89, which came later for adjudication i.e. after the ex parte ap-

plication before Ilori, J., in I above, by the plaintiff/ respondent for:-

(i) the sum of \$25,659,055.25 cents being commission due to him etc.

(ii) commission on sales made between 1st April, 1990 and 11th July, 1990 etc. and

(iii) interest on (ii) at 15% per annum etc.

Kalgo, J.CA., as earlier pointed out held inter alia at page 13 of the Record thus:

"A very close look at the first four grounds of appeal in Exhibit "AA 13", partly copied earlier in this ruling, will confirm very clearly that all the four grounds of appeal are complaining against the orders made in exparte application by Ilori, J., as contained in the enrolled order above."

Aggrieved by this decision, the appellant has appealed to this Court on three grounds which I deem necessary to set out hereunder as follows:-

"(1) ERROR IN LAW

The Court of Appeal erred in law in holding that the four grounds of appeal in Exhibit "AA 13" - the proposed Notice and Grounds of Appeal- were complaining against the Orders made by Ilori, J., on the exparte Application when:

(i) Each of the 1st, 3rd and 4th grounds of appeal setout in the proposed Notice of Appeal were clearly formulated as complaints as errors in law on the part of the learned Judge for entering judgment in favour of the plaintiff when the whole proceedings before him were a nullity ... and not against the decision of Ilori J.

(ii) The said grounds complain of defect in the final judgment of Balogun J., delivered on the 10th of May, 1991, arising out of the failure to effect service of process on the defendant in accordance with the order made by Ilori J", or as provided by Statute and/or the rules of Court; or because of an inherent defect in the Order in pursuance of which service was purported to have been effected.

(iii) The defendant is entitled to challenge in an appeal against the final decision, an interlocutory order made in the course of the

action notwithstanding the fact that it did not appeal against the interlocutory decision at the time it was made.

5 **2. ERROR IN LAW**

The Court of Appeal erred in law in holding that the defendant required the leave of Court to appeal against the decision of the High Court on the proposed grounds 1, 2, 3 and 4 when:

10 *(i) This is an appeal from the final decision in civil proceedings before the High Court of Lagos State, sitting at first instance.*

(ii) Section 220 (1)(a) of the Constitution of the Federal Republic of Nigeria, 1979, confers a right of appeal as of right against such a decision.

15 *(iii) The defendant is entitled to raise in the substantive appeal the complaint embodied in Ground 2 of the proposed Grounds of Appeal under the principle enunciated by the Supreme Court in Ige v. Obiwale (1967) 1 All NLR 276 notwithstanding the fact that the defendant did not appeal against the interlocutory order at the time it was made.*

20 *(iv) In so far as the issues raised in the proposed grounds 1, 2, 3 and 4 are grounds of law, the defendant is entitled to appeal as of right to the Court of Appeal in respect thereof by virtue of the provisions of section 220(1)(b) of the 1979 Constitution.*

25 **3. ERROR IN LAW**

The Court of Appeal erred in law in holding that the proposed Grounds of Appeal numbered 1, 2, 3, and 4 raise issues of mixed law and fact when each of the said grounds raises only a question of law."

30 *The parties exchanged briefs of argument pursuant to the rules of Court. The appellant in addition delivered a Reply Brief. The three issues formulated on appellant's behalf as arising for determination are:*

35 *1. Do the four Grounds of Appeal complain against the order of Ilori, J., made on the 29th of May, 1989 in Suit No.ID/22M/89?*

2. Does Ground 2 of the proposed Grounds of Appeal raise only issues of law or does it raise issues of fact or of mixed law and fact?

3. Will the Appeal Court in appeal against course of the decision hear an appeal against an interlocutory decision given in the course of proceedings?

For his part, the respondent submitted the following five issues for our determination. 5

1. Having regard to the provisions section 220(1)(a) of the 1979 Constitution as amended, can an appellant who is appealing against the final decision of a trial Court appeal as of right in respect of interlocutory decisions given in the course of trial on grounds other than grounds of law? 10

2. If the answer to Issue No. 1 is in the negative, must the provisions of Order 1 Rule 20(7) and Order 3 Rule 22 of the Court of Appeal Rules and the decision of the Supreme Court in *Ige v. Obiwale* (1967) 1 All NLR 276 not be limited to interlocutory issues in respect of which the appellant could have appealed as of right? 15

3. Are the proposed additional grounds of appeal by the defendants/appellant (grounds 1 to 4) grounds of law for which no leave is required?

4. Are the proposed additional grounds of appeal in respect of interlocutory decisions given in the course of trial in Suit No. ID/794/89 by Balogun J., within the intendment of Order 1 rule 20(2) and Order 3, rule 22 of the Court of Appeal Rules. 20

5. Even if (which is not admitted) the Court of Appeal was wrong for the reasons given in not allowing the proposed amendment, should this court grant the said application?" 25

On 24th January, 1994 when this appeal came up for hearing learned Senior Advocate Chief Ajayi for the appellant, and Mr. Ayanlaja, learned counsel for the respondent both adopted their briefs (as well as Chief Ajayi on his reply brief) and each expatiated thereon. Learned Senior Advocate, after averting our attention to Kalgo, J.C.A.'s ruling at Pages 13 to 14 of the Record, contended that the learned Justice's contention cannot be right, adding that an ordinary reading of grounds 1, 2, 3 and 4 and the Notice of Appeal would show that it is an appeal against the final decision of Balogun, J. He submitted that as could be seen on ground 1, an interlocutory application had been granted by Ilori, J., earlier for a Writ to issue for service on the respondent and how that decision was being challenged for being a 30 35

nullity.”

Coming to ground 2, learned Senior Advocate pointed out that he had conceded in the brief and Reply brief that it was Ilori, J.,
 5 and not Balogun, J., that granted the substituted service.

On ground 3, learned Senior Advocate argued that it was one challenging the nullity proceedings before Balogun, J., while ground 4 which also emanated from Balogun, J's judgment similarly challenged the decision as a nullity. The Court of Appeal, he argued
 10 was therefore completely wrong in the view it took. Going back to ground 2, learned Senior Advocate contended that as it raised only a question or law, he was entitled to appeal on it without seeking leave vide section 220(1)(b) of the 1979 Constitution. He relied for support on the case of U.B.A. v. GMBH (1989) 3 NWLR (Pt.110) 374 at
 15 391 - 392. Learned counsel further contended that even if this court did not agree with him that grounds 1, 2, 3 and 4 challenged the decision of Balogun, J., it was his submission that they were grounds of law for which there is a right of appeal pursuant to section 220(1)(b) of the Constitution (ibid). After asking court to allow the appeal as of
 20 right because all grounds constituted grounds of law, and consequently that he be allowed to argue these grounds, learned Senior Advocate concluded by submitting that if court agreed with him that they had a right of appeal, namely as of right, then the case of Ige v. Obiwale (1967) 1 All NLR 276 (p. 276 of the Reprint) is apposite. When his
 25 learned friend contended that he was bound by the decision of Ilori, J., learned Senior Advocate agreed that this assertion is correct subject to the qualification that “until that decision is set aside” and that that was what they were in court to do. He cited in support of this contention the case of Ajani v. Giwa (1986) 3 NWLR (Pt.32) 796 at
 30 804 vide page 16 of the Record adding that Obiwale’ s case (supra) be distinguished from the latter case in that while the case here is on law, Obiwale’s case has to do with jurisdiction. Besides, while they are here seeking to appeal to the Court of Appeal as of right, Ilori, J's interlocutory order is an ex parte order.

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Mr. Ayanlaja, a counsel to the respondent for his part, submitted that his learned friend having conceded in respect of the proposed ground 2 that that ground refers to the ruling of Ilori, J., he must be taken to have looked at the totality of the proposed grounds.

To determine whether a ground of appeal is one of law or otherwise, he argued, is not by christening it so but by looking on the totality of such a ground. He referred us to Page 31 of the Record and contended that Ilori J's case was the fore runner of Balogun, J's case, adding that neither of the parties appealed on the interlocutory order given *ex parte*. Learned Senior Advocate could have applied to set aside the *ex parte* order, he submitted, pointing out that in Obiwale's case the issue that arose was one of jurisdiction which could be raised at any time of the proceedings. The cases of S. U. Ojemen & 3 Ors. v. His Highness William O. Momodu II (1983) 3 S.C. 173; Chief J.O. Edewor v. Chief M. Uwegba & Ors. (1987) 1 NWLR (Part 50) 313 at 334 and Odjevwedje v. Echanokpe (1987) 1 NWLR (Part 52) 633 at 655 were cited to buttress the argument.

Of the grounds of appeal, learned counsel submitted that ground 1 of the proposed grounds is one of mixed law and fact. On particular (c) alone invoking foreign law, he argued, it is one of fact. On ground 3 of the proposed grounds, learned counsel submitted that the proof of how the bailiff served the Writ is one of fact while on ground 4, he averred that since one must take evidence to know if the appellant was served or not must evince evidence by eliciting facts of service. Therefore, the ground is one of mixed law and facts, he concluded.

Learned counsel further contended that for there to have been an entertainable appeal against the interlocutory decision (*ex parte*) of Ilori, J., in this court by way of argument, there must have been an appeal in the Court of Appeal against that *ex parte* decision. He referred us to the case of Fernie v. Young (1866) 1 H.L. 63 at Pages 79 - 81 and the White Book, 1993 of the 1965 Rules, Order 59/10/27 which is *pari materia* with Order 3 rule 22 Court of Appeal Rules. Learned Counsel thereafter submitted that where the issues involve mixed law and fact it cannot be appealed from as of right; one must obtain leave. It is where the matter involves that of law simpliciter, he maintained, that appeal is as of right. He called in aid the case of Nwadike v. Ibekwe (1987) 4 NWLR (Pt.67) 718 at 747 (per Nnaemeka-Agu, J.S.C.) The abandonment of ground 2(e) by his learned friend is requesting the court to do a surgical operation. This, he concluded, the court should decline to do.

On the preliminary point raised in the respondent's brief for

an order striking out grounds 1, 2 and 3 of the Notice of Appeal reproduced on Pages 1 and 2 of the Record and in consequence to strike out the appeal, suffice it to say that as there is the overriding
 5 need to consider the threshold issue of whether these grounds are grounds of law or mixed law and fact or facts only, the preliminary objection is in my view, premature and cannot be allowed to stand. It is accordingly overruled.

In my consideration of the appeal proper, I deem it necessary to
 10 adopt the five issues formulated by the respondent which in my opinion are more comprehensive and will enable the court arrived at a better and more salutary resolution. Because Issue 1, 2 and 4 overlap. I intend to consider them together and then issues 3 and 5 separately; they thus tally with Issues 1, 2 and 3 of the appellant's respectively.

15 Issues 1, 2 and 4 taken together:

The issue first of whether the four proposed grounds of appeal complained against the order of Ilori, J., made on 29th May, 1989 in Suit No. ID/22M/89, my answer after a careful scrutiny of these grounds, is that they do not. Rather they complain against the
 20 final decision of Balogun, J., in Suit No. 1D/794/89 delivered on the 10th day of May, 1991. There is no dispute that appellant can appeal against that final decision pursuant to section 220(1)(a) of the Constitution on any ground, be it of law, mixed law and fact or facts.

Be that as it may, section 220(1)(a) and (b) of the 1979
 25 Constitution, as amended provides as follows:

"220(1) An appeal shall lie from decision of High Court to the Court of Appeal as of right in the following cases -

(a) final decisions in any civil or criminal proceedings before the High Court sitting at first instance.

30 *(b) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings."*

Section 220(1)(b) (ibid) therefore allows the appellant to appeal on grounds of law alone on any decision (civil or criminal) of the trial court. 'Any decision' here would in my view, clearly mean both final
 35 or interlocutory decisions. Hence, where the decision appealed against under the subsection is interlocutory, the ground of appeal must be one of law before the appellant can appeal as of right. Otherwise, leave of the trial court or the Court of Appeal is required. In other words, where as in the instant case which is an interlocutory appeal,

grounds of appeal from the High Court to the Court of Appeal are found not to be grounds of law, leave must be sought and obtained before such grounds can be allowed to be argued on appeal. Order 1 Rule 20(7) of the Court of Appeal Rules and Order 3 Rule 22 of the Court of Appeal Rules provide as follows:-

Order 1 Rule 20(7):

"The powers of the Court in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal"

Order 3 Rule 22:-

"No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving such decision upon the appeal as may seem just."

Learned Senior Advocate in his argument of the scope and intendment of Orders 1 rule 20(7) and 3 rule 22 (ibid) has been unable before us to fault the conclusions arrived at by the Court below that the four proposed grounds of appeal relate to the interlocutory decision of Ilori, J., and not the final decision of Balogun, J. However, where at page 6 of the appellant's brief (paragraph 3 - 10) Counsel stated, inter alia, that -

"It therefore cannot be right to say that the ground of appeal complained against the judgment of Ilori, J., because it has not done so. It may be correct to say that in complaining against the decision of Balogun, J., the Appeal based the grounds of his complaint upon some antecedent defect in the proceedings, which in this case was something which Ilori, J. had done which rendered the decision of Balogun, J., a nullity ..."

The first question that comes readily for consideration is, how can the grounds of appeal be said to be against the decision of Balogun, J., in a matter never raised before him and for reasons given in an application heard and determined by Ilori, J? It should be borne in mind that while the suit number in the case before Balogun, J., is ID/794/89 that before Ilori, J., bore the number ID/224M/89. Secondly, given the fact that there was a full scale trial before Balogun, J., at which appellant participated as well as being represented by counsel, how can counsel now contend that his grouse against Balogun, J's judgment is that appellant did not get a hearing or was not given an opportunity to be heard?

The provisions of Orders 1 Rule 20(7) and 3 Rule 22 of the Court of Appeal Rules are, in my view, meant to cover appeals in interlocutory orders made by Balogun, J., in the course of the trial in
 5 ID/794/89 and cannot apply to interlocutory orders antecedent to that case with a different Suit number. What the appellant, in my view, should do is to file a distinct appeal against the Ruling of Ilori, J., and not treat it as an interlocutory issue in the final decision of Balogun, J.

10 In so far therefore as these two rules allow interlocutory decisions to be raised when an appeal is being taken in respect of the final decision, that can be done in a manner consistent with the Constitution, since the rules can neither expand nor take away the rights conferred on the appellant by it. It would, seem clear that learned
 15 Senior Advocate for the appellant shares the same view point as contained in the rules set out above when on page 13, paragraph 4, 17 of his Brief he stated thus:-

“The decision of the Supreme Court in *Ajani v. Giwa* (1986) 3 NWLR (Pt.32) 796 cited by Kalgo, J.C.A., at Page 16 of the Record
 20 would have no application to this case because the point upon which that decision was given does not arise in this case. In *Ajani’s* case (supra) the ground of appeal upon the interlocutory decision involved questions of fact and of mixed law and fact. The Constitution of the Federation clearly provides that leave of Court is needed before a
 25 party can appeal in such a case, and the Rules of court cannot grant a right of appeal when the Constitution of the country says there should be none. But Constitution grants a right of appeal as of right from interlocutory decisions of the High Court in questions of law alone. The relevant rules of court say in effect, that you can exercise
 30 that right immediately the interlocutory decision is given or you can wait until the final decision in the case to exercise that right of appeal”,

ISSUE 3:

On this Issue, the main grouse is:-

35 “Will the Appeal Court in appeal against course of the decision hear an appeal against an interlocutory decision given in the course of proceedings”.
 and whether or not the Court of Appeal was right in holding that grounds 1 to 4 of the proposed grounds are not grounds of law but

rather mixed law and fact. It is enough in answer to the issue to fall back, inter alia, hereunder firstly, upon what the learned Senior Advocate himself says in his Brief at Page 8, Paragraph 3.14 in respect of Ground 2 thus:-

"The defendant concedes, as it did during the course of the arguments on the, application before the Court of Appeal, that the second ground of appeal was a complaint directly against the decision of Ilori. J. The defendant's argument had been that it was entitled to raise a ground of appeal against the interlocutory decision of Ilori, J. in an appeal against the final judgment given by Balogun. J. in the substantive suit. However, for the purposes of the determination of the First Issue for determination in this appeal, it is enough to say that the defendant concedes that Ground 2 was complaining against the decision of Ilori J,"

Having regard to the above concession by learned counsel for the appellant: the added point that it complains against the interlocutory decision of Ilori J. coupled with the fact that I am not persuaded to hold that the ground is one of law alone, as I shall seek to show hereunder. In respect of all four proposed grounds, it needs to be stressed that, it is trite law that in determining whether a ground of appeal is a ground of law or not, the test is not its christening or the appellation attached thereto; the court must examine the nature of the complaint and the particulars given in support thereof before arriving at a view, See Ogbechie v. Onochie (1986) 2 NWLR (Pt.23) 484 at 494; Adili v. The State (1989) 2 NWLR (Part 103) 305 at 330 - 331; Nwadike v. Ibekwe (1987) 4 NWLR (Part 67) 718 and S.U. Ojemen & 2 Ors. v. His Highness Williams O. Momodu & 2 Ors. (1983) 3 S.C. 173. In Nwadike v. Ibekwe (supra) this court at Page 729 observed:-

"A decision on the point whether a ground of appeal raises question of law alone certainly does not depend on the label an appellant gives to the ground in question, Such a question involves an examination of the ground of appeal as framed together with the particulars thereon before resolving the point at issue. This is what this court did in. S. U. Ojemen & 3 Ors. v. His Highness William O. Momodu II & 2 Ors.(1983) 1 SCNLR 188; (1983)3 SC.173 before resolving such a point. And in fact, this is what we did in the instant case as regards the points I am now considering."

And in Ojemen's case at Page 211, this Court said:-

5 *"Having briefly examined all the grounds of appeal, it is probably necessary to emphasise that this court will not be misled by the mere description of a ground of appeal as a ground complaining of Error in Law when in fact the particulars show clearly that the complaint or the substance thereof is against the evaluation, assessment, weight of evidence findings of fact or a complaint of misdirection on mixed law and fact. As this Court has no jurisdiction to entertain*
 10 *appeals from the decision of the Federal Court of Appeal on grounds which involve questions of fact or mixed law and fact without leave either of the Federal Court of Appeal or this court. This Court has a heavy constitutional duty to examine and study the grounds in support of appeals before it carefully and satisfy itself that they are those*
 15 *in respect of which it has jurisdiction to entertain before commencing with the hearing of the appeal."*

See also U.B.A. v. GMBH (supra) at Page 391 this Court held following Ogbechie v. Onochie (1986) 2 NWLR (Pt.23) 484, that it is always difficult to distinguish a ground of law from a ground
 20 of fact but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted in which case it would be a question of law or one that would require questioning
 25 the evaluation of facts by the lower tribunal before application of the law in which case it would amount to a question of mixed law and fact. Indeed, as Oputa, J.S.C., put it briskly at Page 410 of the U.B.A. v. GMBH Case (supra):-

30 *"What is important in determining whether a ground of appeal involves questions of law or fact of mixed law and fact is not its cognomen, nor its designation as "Error-in-law." It is rather the essence of the grounds: the reality of the complaint embedded by that name."*

35 Be it noted that not one of the four proposed grounds in the case in hand of appeal is a challenge to the jurisdiction of Ilori, J., to adjudicate in respect of the ex parte application before him pursuant to the orders complained of were made. Indeed the complaint is that while he had jurisdiction to adjudicate, the orders made by him are

wrong and or null and void in that:-

(a) there were no facts to justify the making of those orders and

(b) based on the facts before him and the applicable rules of Court, the orders should not have been made. 5

I shall now proceed to deal with the four grounds of appeal one by one and to determine if they are grounds of law alone.

Ground (1) Error in Law:

The learned trial Judge erred in law in giving judgment in favour of the plaintiff when the whole proceedings and judgment were a complete nullity. 10

(a) The order for leave to issue the Writ for Service out of the jurisdiction was arbitrary and incompetent as there was no material whatever before the learned trial judge upon which the exercise of discretion could have been based. 15

(b) The order for leave to issue the Writ of Service out of jurisdiction and for substituted service of the same within jurisdiction was not in accordance with the rules of Court and therefore incompetent and incapable of constituting the basis for a valid service of the Writ of Summons. 20

(c) The Writ of Summons was not served in accordance with the law of the Country of residence of the defendant.

I agree with learned counsel for respondent's submission on this ground that although couched in a way to suggest that it is an attack on Balogun, J's judgment, the particulars given clearly show that it is rather an attack on Ilori, J's order giving leave to issue the Writ of Service out of jurisdiction. There is no way in which this ground can be argued without reference to the facts or the materials presented to the Court and embedded in particulars (a) (b) and (c) before the order was made. Indeed, learned counsel for appellant admitted that much right in particular (a) above when he stated that "there was no material whatsoever before the trial Judge upon which the exercise of the discretion could have been based." Furthermore, to even suggest that the Writ was not served in accordance with the law of the Country of residence of the appellant required proof of foreign law - a matter of evidence which can be proved before the court which would upon its receipt proceed to apply whatever rule of interpretation the parties are found to have agreed to be bound by in interpreting the agreement. See section 57 of the Evidence Act 25 30 35

and Aguda on Law of Practice Relating to Evidence in Nigeria, paragraphs 9 - 10 to 9 - 14 pages 116 - 118 and Abejide v. Ashiru (1967) NMLR 364.

5 It is a ground of mixed law and fact that would surely need leave before being argued.

Ground (ii) Error in Law:

The defendant being registered and resident outside jurisdiction, the High Court erred in law in making an order for substituted service on the defendant within jurisdiction when:-

10 (a) It is not competent to do so without first having made an antecedent order for service out of jurisdiction.

(b) There was no material before the Court which could have justified it in making an order granting leave to serve the Writ out of jurisdiction.

15 (c) The preconditions laid down by Rules of Court for the making of an order for substituted service within jurisdiction had not been satisfied.

(d) The Court was not competent to make an order for service on the defendant otherwise than in accordance with the provisions of the Companies Act, 1968.

20 (e) Service purported to have been effected in the circumstances was ineffectual and void.

25 This is a complaint against the order of substituted service made by Ilori, J. Learned counsel for appellant has himself invited the Court to look at the materials before the Court to decide whether or not the order should have been made. Besides, learned Counsel concedes that on the ground leave is required being a ground of mixed law and fact.

30 Grounds (iii) and (iv):

Ground (iii): Error in Law

The learned trial Judge erred in law by entering judgment in favour of the plaintiff when the whole proceedings before him were a nullity in that the Writ of Summons was not served upon the defendant in accordance with the Order of Court or at all.

35 Particulars

(a) The order for substituted service had provided inter alia that: *"The defendant be served through the Chambers of Chief F.R.A. Williams SAN"*

(b) The Affidavit of Service sworn to by the Court Bailiff however showed that he served the defendant.

“by delivering the same personally to the defendant (through Mr. A. O. Adeniji Solicitor’s Clerk) at Bailiff’s Office, High Court, Ikeja.” 5

(c) Service through a Solicitor’s Clerk at the Bailiff’s Office at Ikeja is not compliance with an order of Service of originating process through the chambers of Chief F.R.A. Williams, SAN.

(d) There was no evidence that the Writ of Summons was served on the defendant as ordered or at all. 10

Ground (iv) - Error in Law:

The learned trial Judge erred in law in entering judgment in favour of the plaintiff when the whole proceedings up to judgment was a complete nullity because the Writ of Summons was never served on the defendant. 15

Particulars

(a) The defendant is a Foreign Company registered in Bermuda, a Commonwealth Country. 20

(b) What was shown on the Bailiff’s Affidavit of Service as having been served on A. O. Adeniji is the Notice of Writ.

(c) The Writ of Summons is what ought to have been served on the defendant but none was ever so served. 25

The complaint in these two grounds is that the Writ was not served in accordance with the directive of the Court. According to the complaint, the Writ was to be served through the Chambers of Chief F. R. A. Williams, SAN but that the Affidavit of Service showed that it was served through one Mr. A. O. Adeniji (Solicitor’s Clerk at Bailiff’s Office), High Court, Ikeja. Surely, this type of complaint cannot be adjudicated upon without evidence as to whose clerk Mr. Adeniji is and as to how appearance was entered by Chief F. R. A. Williams’ Chambers if they were in fact not served with the Writ. 30

The two proposed grounds are clearly grounds of mixed law and fact and that they either contain a hybrid of grouses against the decisions of Balogun, J., or Ilori, J., or as the learned Justice of the court below (Kalgo, JCA) said “they are complaining against the orders of Ilori, J., as contained in the enrolled order. ..” 35

ISSUE 5:

This issue turns on the exercise of the discretionary powers of the lower court and whether it was wrong when it refused to grant the appellant leave to appeal by regarding the four proposed grounds of appeal as grounds of law alone or whether this court should not automatically grant the leave by the exercise of its discretion.

Now, in the lead judgment of the court below at page 10 of the Record, it was held as follows:-

10 *"This Court is empowered by virtue of Order 3 rule 16 to grant leave to any party to amend any notice of appeal or respondent's notice; at any time. Here again the court has an untrammelled discretion to grant such leave provided that it is judiciously and judicially exercised. See Perry v. St. Helens Land and Construction Co. Ltd. (1939) 3 All E. L. R. 113 at 119." See U.B.A. v. GMBH (supra) and Lauwers Import & Export v. Jozebson Ind. Ltd. (1988) 3 NWLR (Pt.83) 429."*

In the former this court held at Page 388 thus:-

20 *"Similarly, when it is alleged that the learned trial judge failed to exercise his discretion judicially does the ground involve questions of law alone or questions of mixed law and fact? In my view, there is no doubt that it involves questions of law but it also involves question of fact."*

The appellant in the instant case went through trial before Balogun, J., without protesting about service and lost.

25 It has filed an appeal on the merit. The issue of service would undoubtedly not have been raised had it won the Case at the trial court. By its appeal on the four proposed grounds, these grounds are not being taken up as alternative grounds but aimed at saying in one breath that there was no trial and in the other breath challenging the decision on the merit. The abandonment of ground 2(e) to the effect that "Service purported to have been effected in the circumstances was ineffectual and void?, is an invitation to Court to do a surgical operation. This, the court is unable to do. For as it said in Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR (Part 109) 250 at 30 Page 271 paras. F-H; 273, paras. A-B in circumstances not too dissimilar to those in the case in hand:-

"When a defendant desires to object to the regularity of the proceedings by which the plaintiff seeks to compel his appearance,

he may either enter a conditional appearance or an appearance under protest and then apply to the trial court to set aside the plaintiff's proceedings or move to set aside the service of the Writ.

In the instant case since the Writ of Summons was served on the defendant and the defendant failed to challenge both the validity of the writ and its service in the High Court but rather entered an unconditional appearance, the implication is that it wanted and intended to contest the case of the plaintiff respondents and it cannot now raise the issue in the Supreme Court."

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At page 270, paragraphs D - E:-

"Where a defendant wishes to challenge the validity of a Writ or the validity of the service of the Writ or both, such challenge should be made at the High Court stage so that it will form an issue in the case, thereby giving the trial court an opportunity to consider the issue and the appellate courts an opportunity to review the decision of the High Court thereby fulfilling their role as Appellate Courts."

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But compare *Nwabueze v. Okoye* (1988) 4 NWLR (Pt.91) 664, the circumstances of which are distinguishable from those of the instant case.

20

The above observations apply with equal force to the grounds of appeal the appellant wants to raise in the court below. This is the moreso when having regard to the affidavit involves allegation that the counsel who appeared for the appellant had no instruction so to do. These issues cannot be determined without the advantage of taking evidence on oath, including evidence from the counsel whose action is being put in issue. In this regard, the court below made it quite clear that the application was refused for the reasons appealed upon by the appellant to the Supreme Court and that it was not necessary for it to consider the other issues raised in the application, including of course, the exercise of its discretionary powers.

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Certainly, in the exercise of those discretionary powers, the Appellate Court (Supreme Court) would want to know whether or not the appellant herein applied to set the orders of Ilori, J., aside and if it did, what was the outcome of such an exercise and what facts were established in support of that application.

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In the light of the foregoing, I agree with the respondent that

this appeal lacks merit and it is accordingly dismissed by me with N1,000 costs to the respondent.

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BELGORE JSC

I read in advance the judgment of Onu, J.S.C., and I am in full agreement that this appeal lacks merit and ought to be dismissed.
10 Procedural step of having substituted service may render a trial nugatory only if its effect is that it did not in fact lead to the service to attract knowledge of the party it was addressed to. But once appearance was made without protest, and full trial went on to conclusion with unqualified participation by the party substitutedly served with
15 summons, it is too late to make a mountain out of this. I also dismiss the appeal for reasons advanced in the lead judgment of Onu. J.S.C., which I adopt as mine. I make the same orders at to costs.

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WALI JSC

I was opportuned to read before now, the judgment of my learned brother, Onu, JSC and I entirely agree with him that the appeal lacks merit and it must fail and be dismissed.

25 Before the Court of Appeal Lagos Division, the appellant as the applicant, filed an application on 22nd October, 1991 and dated 18th October, 1991, praying among other things for the following -

30 *“(ii) further amending the notice of appeal filed on 15/5/91 so that the appeal be now heard on the grounds contained in the Amended Notice and Grounds of Appeal exhibited to the Affidavit in support thereof.”*

The application was opposed and contested and in the unanimous Ruling of the Court of Appeal delivered by Kalgo. J.C.A. on 29th January 1992 the application was refused and stated among
35 other reasons, the following as the main reasons for doing so:

1. *“A very close look at the first 4 grounds of appeal in Exhibit “AA 13” partly copied earlier in this ruling will confirm very clearly that all the 4 grounds of appeal are complaining against the orders made in the Ex-parte application by Ilori J., as contained in the en-*

rolled order above. Surely the effect of the orders made in the Ex-parte application was not to dispose of the rights of the parties to the action ... It is therefore my view that the ruling or order of Ilori J., pursuant to the Ex-parte application made on 29/5/89 is interlocutory. Therefore any appeal against the said ruling or order is subject to the rules of court and the Constitution of the Federal Republic of Nigeria, 1979... These 4 grounds of appeal cannot be filed as of right. For them to be competent grounds of appeal in the appeal in this matter leave to file them must have been obtained.”

x x x x x x x x x

2. “And what is more, the said 4 grounds of appeal in my view raised issues of mixed law and fact and cannot therefore come under S. 220(1)(b) of the 1979 Constitution. Therefore they fall under S. 221(1) of the 1979 Constitution where leave must be obtained to file them in an appeal.”

The 4 proposed grounds of appeal objected to and also the subject matter in this appeal are as follows:-

“(i) Error in Law

The learned trial judge erred in law in giving judgment in favour of the plaintiff when the whole proceedings and judgment were a complete nullity because:-

(a) The order for leave to issue the Writ for Service out of the jurisdiction was arbitrary and incompetent as there was no material whatever before the learned trial judge upon which the exercise of discretion could have been based.

(b) The order for leave to issue the Writ of Service out of jurisdiction and for substituted service of the same within jurisdiction was not in accordance with the rules of Court and was therefore incompetent and incapable of constituting the basis for a valid service of the Writ of Summons.

(c) The Writ of Summons was not served in accordance with the law of the Country of residence of the defendant.

(ii) Error in Law

The defendant being registered and resident outside jurisdiction, the High Court erred in law in making an order for substituted service on the defendant within jurisdiction when -

(a) *It was not competent to do so without first having made an antecedent order for service out of jurisdiction.*

(b) *There was no material before the Court which could have justified it in making an order granting leave to serve the Writ out of jurisdiction.*

(c) *The pre-conditions laid down by Rules of court for the making of an order for substituted service within jurisdiction had not been satisfied.*

(d) *The Court was not competent to make an order for service on the defendant otherwise than in accordance with the provisions of the Companies Act 1968.*

(e) *Service purported to have been effected in the circumstances was ineffectual and void.*

(iii) *Error in Law*

The learned trial judge erred in law in entering judgment in favour of the plaintiff when the whole proceedings before him were a nullity in that the writ of summons was not served upon the defendant in accordance with the Order of Court or at all.

Particulars

(a) *The order for substituted service had provided inter alia that:-*

“The defendant should be served through the Chambers of Chief F.R.A. Williams S.A.N.”

(b) *The affidavit of service sworn to by the court bailiff however showed that he served the defendant.*

“by delivering the same personally to the defendant (through Mr. A. O. Adeniji Solicitor’s Clerk) at Bailiffs Office, High Court Ikeja.”

(c) *Service through a Solicitor’s Clerk at the Bailiff’s Office at Ikeja is not compliance with an order for service of originating process through the Chambers of Chief F.R.A. Williams S.A.N.*

(d) *There was no evidence that the writ of summons was served on the defendant as ordered or at all.*

Error in Law

The learned trial Judge erred in law in entering judgment in favour of the plaintiff when the whole proceedings up to judgment was a complete nullity because the writ of summons was never served on the defendant.

Particulars

(a) The defendant is a Foreign Company registered in Bermuda, a Commonwealth country.

(b) What was shown on the Bailiff's Affidavit of Service as having been served on A.O. Adeniji is the notice of writ. 5

(c) The writ of summons is what ought to have been served on the defendant but none was ever so served."

A careful look and consideration of these 4 proposed grounds of appeal certainly reveal that they all question the validity of the orders made by Ilori J., in Suit No. ID/224M/89 to wit - 10

1. Leave to issue a Writ of Summons by the plaintiff on the defendant out of the jurisdiction of the Lagos State High Court.

2. Dispensing with personal service of the Writ and all other processes in the suit and that the defendant be served through the Chambers of Chief F. R. A. Williams S.A.N. of counsel to the defendant herein. 15

Pursuant to the orders above, the substantive case - Suit No. ID/794/89 was filed and heard by Balogun J., who thereafter concluded:- 20

"I think that all that I have said in this case is sufficient for a satisfactory determination of the case in favour of the plaintiff against the defendant. In the end therefore and for all those reasons

I have endeavoured to give, I enter judgment for the plaintiff against the defendant for the sum of \$5,019.00 (American Dollars), being commission due to the plaintiff from the defendant under the contract sued upon: as well as interest on that sum of the rate of 13% per annum from 1st January, 1986 until the judgment debt is fully paid. I shall now hear counsel on the costs of this action." 25

It is my view that the 4 grounds of appeal are all directed at faulting the order of Ilori J., made on the Ex-parte application. These orders, as rightly pointed out by the learned Justices of the Court of Appeal are interlocutory. They were made by a different judge in a case bearing a different suit number, though it is the forerunner of the substantive suit tried by Balogun J. Where a party wants to appeal against an interlocutory decision of this nature, he must do so within the specified time allowed by law where the grounds of appeal involves issues of law only. Where however the party appealing is out of time or the grounds involve issues of mixed law and fact or fact 30 35

alone, he must, as a condition precedent, seek and obtain leave of the court. See section 220(1)(a) and (b) of the 1979 Constitution which states that: -

- 5 *"220(1) An appeal shall lie from the decisions of a High Court to the Court of Appeal as of right in the following cases -*
 (a) final decision in any civil or criminal proceedings before the High Court sitting at first instance;
 (b) where the grounds of appeal involve questions of law
 10 *alone, decisions in any civil or criminal proceedings".*

Grounds 1 - 4 do not in my view fall within the ambit of section 220(1)(a) above as they do not challenge the final decision of Balogun J., in the substantive suit. They seek indirectly to question
 15 the validity of the interlocutory decision of Ilori J. The particulars provided in these grounds show clearly that the challenge is directed against the order of Ilori J., giving leave to issue the Writ on the defendant out of jurisdiction.

These same particulars also show that the grounds are either
 20 of fact or of mixed law and fact. None of them can be argued without reference to the facts or the materials presented to the court before the order was made. To be specific -

- (a) Particulars (a) and (c) in ground (i) involve issues of fact;*
 (b) Particular (b) in ground (ii) involves issue of fact;
 25 *(c) Particulars (b) and (d) in ground (iii) involve issues of fact.*
 (d) Particulars (a) and (c) in ground (iv) involve issues of fact.
 Therefore grounds (i) to (iv) are not covered by section 220
 (1)(b) of the 1979

Constitution. See *Ojemen & Ors. v. H. H. William O. Momodu*
 30 11 or 2 or 3 (1983) 3 S.C. 173; (1983) 1 SCNLR 188.

I agree with the submissions of learned counsel for the respondent that Order 1 rule 20(7) and Order 3 rule 22 of the Court of Appeal Rules, 1981 (as amended) are not meant to cover interlocutory proceedings of this nature. They are meant to apply to interlocutory orders made by the same Judge in the course of trial of
 35 the substantive suit before him. The Court of Appeal rightly in my humble view applied the ratio in *Ajani v. Giwa* (1986) 3 NWLR (Pt.32) 796 particularly at 804 in dismissing the application.

For these and other reasons given in the lead judgment of

my learned brother Onu, J.S.C. I also hereby dismiss this appeal. I abide by the consequential orders contained in the lead judgment.

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MOHAMMED JSC

I agree with the opinion of my Lord, Onu, J.S.C., that this appeal lacks merit and ought to be dismissed. My learned brother has permitted me to read his judgment, in draft, and I agree that the issues canvassed in that appeal have been adequately covered in that judgment. Accordingly the appeal is dismissed. I award N1,000.00 costs in favour of the respondent. 10

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IGUH JSC

I have had the opportunity of reading in draft the judgment just delivered by my learned brother, Onu, J.S.C. I agree with him that there is no merit whatsoever in this appeal. 20

Consequently, I too dismiss this appeal for the reasons fully advanced in the said judgment which I adopt as mine. I abide by the consequential orders including the order for costs contained in the lead judgment. 25

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