

SUPREME COURT OF NIGERIA
5TH MARCH, 1996. SC. 267/1988
CORAM:- M. L. UWAI CjN, I. L. KUTIGI,
E. O. OGWUEGBU, U. MOHAMMED, A. I. IGUH, JJSC.

NALSA AND TEAM ASSOCIATES PLAINTIFF/APPELLANT

AND
NIGERIAN NATIONAL
PETROLEUM CORPORATION DEFENDANT/RESPONDENT

APPEALS - Competence of appeal - Decision of Court of Appeal on an incompetent appeal - Whether valid.

APPEALS - Competence of appeal - Where an appeal on the issue of competence is pending - Stay of proceedings is the proper course.

JURISDICTION - Competence of appeal - Is a basic and fundamental issue that touch on jurisdiction - And should be dealt with at the earliest opportunity.

FACTS

Plaintiff/appellant claimed the sum of N500,000 being special and general damages against the defendant/respondent before the High Court Port Harcourt. Defendant sought to have the action dismissed for being statute barred. Trial court ruled that the claim is not statute barred. Defendant's appeal to the Court of Appeal was challenged by the plaintiff for being incompetent.

The Court of Appeal felt that the appeal was competent and proceeded with hearing in spite of the plaintiffs pending appeal before the Supreme Court on the issue of competence. The Court of appeal allowed the defendant's appeal, whilst 3 years later, the Supreme Court held that the said appeal was incompetent. The plaintiff has now appealed against the lower court's decision that held that its action is statute barred. Issues for determination raised by the parties were found not relevant as the main issue considered by the apex court was whether the defendant's said appeal was competent.

HELD (Unanimously allowing the appeal per lead judgment of **IGUH JSC**)

Where an appeal on the issue of competence of appeal is pending

1. It therefore seems to me that in the face of the above decision to the

effect that the first interlocutory appeal is incompetent, there was nothing pending before the Court of Appeal which it purported to hear and determine on the 14th November, 1988. The point cannot be over-emphasized that where owing to a pending relevant appeal, the hearing of a case could work injustice to a party or constitute an exercise in futility, prudence, if not common sense, dictates that the proper course of action open to the court would stay or adjourn the case pending the determination of such an appeal with liberty to either side to apply for the hearing of the case to be resumed (p. 488 G)

Jurisdiction - Competence of appeal

2. In the present case, it is plain that the main issue raised in the first interlocutory appeal touched on the fundamental question of the competence of the purported appeal pending before the Court of Appeal. It cannot also be disputed that any defect in competence is fatal, for the proceedings will be a nullity, however well conducted and decided, as such defect in extrinsic to the adjudication. The question of competence and jurisdiction being basic and fundamental may be raised at any stage of a proceeding as a judgment delivered by a court without jurisdiction is a nullity and therefore void. Accordingly, it is in the interest of the best administration of justice that where the issue is raised in any proceeding before any court of law, it should be dealt with at the earliest opportunity and before trial or a consideration of any other issue raised in the cause as anything done without or in excess of jurisdiction by any court established under the Constitution is a nullity. (p. 489 C)

Decision on an incompetent appeal

3. Whatever the case, the position is that the Court of Appeal proceeded to determine the appeal in question without awaiting the determination of the issue of the competence of the appeal pending before this court. On the 14th November, 1988, it purported to allow the appeal and set aside the ruling of Okara, J. dated the 26th November, 1986 on the ground that the appellant's claim was statute-barred and liable to dismissal. However, this court on the 15th November, 1991 at the conclusion of hearing of the first interlocutory appeal as aforesaid held that the appeal was incompetent under section 220(l) (b) of the 1979 Constitution and struck out the same. Consequently it appears to me plain that there was in law no pending appeal before the Court of Appeal when it heard the first interlocutory appeal in question and purported to allow the same on the 14th November, 1988. (p. 490 A)

REPRESENTATION

Appellant absent and unrepresented

Respondent absent and unrepresented

CASES REFERRED TO

Falobi v. Falobi (1976) 9 - 10 S.C.1,

Ebon v. Oki (1974) 1 S.C. 179 at 189

Uku v. Okumagba (1974) 3 S.C. 35 at 56

Nalsa & Team Associates v. N.N.P.C. (1991) 8 N.W.L.R. (Part 212) 652

Adefuli v. Oyesile (1989) 5 N.W.L.R. 377 at p. 417-418

Shekoni v. Chief Ojoko (1954) 14 W.A.C. A. 504

Madukolu v. Nkemdilim (1962) 1 All N.L.R. 578 at 594

Skenconsult (Nigeria) Ltd v. Ukey (1981) 1 S.C. 6 at 26 etc.

Timitimi v. Amabebe 14 W. A.C. A. 379

Mustapha v. Governor of Lagos State (1987) 5 S.C.N.J. 143

Tukur v. Government of Gongola State (1987) 4 N.W.L.R. (Part 117) 517 D at 545

Nwadike v. Ibekwe (1987) 4 N.W.L.R. (Pt.67) 718

Tilbury Construction Co. Ltd. v. Ogunniyi (1988) 2 N.W.L.R. (Pt. 74) 64

Olowosoke v. Oke (1972) 11 S.C. 1.

STATUTES & RULES REFERRED TO

Nigerian National Petroleum Act No. 33 of 1977 s.11

Court of Appeal Rules 1981 0.3 r. 15

Court of Appeal Act 1976 s. 25(4)

Supreme Court Act 1960 s. 31 (4)

Constitution of the Federal Republic of Nigeria 1979 s. 220 (1) (b)

LEAD JUDGMENT BY IGUH JSC

In the Port Harcourt Judicial Division of the High Court of Justice, Rivers State, the plaintiff, who is now the appellant, caused a writ of summons to issue against the defendant, who is now the respondent, claiming the sum of N500,000.00 being special and general damages for alleged breach of contract. The cause of action is said to have arisen as the result of a letter dated the 10th day of April, 1979 written by the defendant to the plaintiff terminating a contract between the parties.

Pleadings were subsequently ordered in the suit and were duly settled, filed and exchanged with the same further amended by various orders of the trial court.

The defendant in its amended Statement of Defence raised the issue

that the plaintiff's claim was statute-barred by virtue of the provisions of section 11 of the Nigerian National Petroleum Corporation Act. No. 33 of 1977. This was followed by a formal application on notice by the said defendant for the dismissal of the plaintiff's action by reason of the fact that it was statute-barred as afore-said.

B Section 11 (1) of the Nigerian National Petroleum Corporation Act of 1977 provides thus -

C *"11 (1) Notwithstanding anything in any other enactment, no suit against the Corporation, a member of the Board or any employee of the Corporation for any act done in pursuance or execution of any enactment or law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of such enactment or law, duties or authority, shall lie or be instituted in any Court unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance or damages or injury, twelve months next after the ceasing thereof".*

D The case for the defendant as deposed in its affidavit in support of the application was that although the cause of action arose on the 10th April, 1979, the suit was not commenced in court until the 13th February, 1981, that is to say, one year and ten months after the cause of action arose. The defendant contended that the action was therefore statute-barred
E by virtue of the said provisions of section 11(1) of the Nigerian National Petroleum Corporation Act. 1977.

The plaintiff's answer to this averment as deposed in its own counter-affidavit was that following an understanding by the parties to waive or suspend the running of the limitation period prescribed under section 11(1)
F of the Nigerian National Petroleum Corporation Act. 1977, the parties went into negotiations for an out of court settlement of their dispute. The plaintiff contended that there was an understanding or agreement between the parties that the defendant would not plead the Statute of Limitation if the negotiations protracted beyond the period within which the plaintiff could
G lawfully file an action against the defendant in respect of the dispute.

In the light of the irreconcilably conflicting facts deposed in the affidavit and counter-affidavit of the parties, the trial court, as it was obliged to do, called for oral evidence from the parties and their witnesses with a view to resolving the said conflicts. See *Joseph Falobi v. Elizabeth Falobi* (1976) 9 - 10 S.C.1, *Eboh and others v. Oki and others* (1974) 1 S.C. 179
H at 189 *Uku and others v. Okumagba & 3 others* (1974) 3 S.C. 35 at 56 etc.

At the conclusion of this hearing the learned trial Judge, Okara, J. in a considered ruling on the 26th day of November, 1986, held that the

defendant had waived its right to rely on the plea of limitation of the action pursuant to the said section 11 of Decree No. 33 of 1977. The defendant's application for the dismissal of the suit was accordingly refused.

Dissatisfied with the said interlocutory ruling, but without seeking the leave of either the trial court or the Court of Appeal, the defendant on the same 26th November, 1986 filed an appeal, otherwise also referred to as the first interlocutory appeal, against the said ruling to the Court of Appeal, Enugu Division on a two ground notice of appeal. These grounds complained as follows:-

"(i) The learned trial Judge misdirected himself in law and on the facts in holding that the photocopy of the letter dated 10th April, 1979 allegedly given to the Plaintiff constituted an agreement by the Defendant/Appellant not to rely on the statute of limitation i.e. Section 11 of the Nigerian National Petroleum Corporation Decree 1977.

PARTICULARS OF MISDIRECTION

(1) The original of the said letter was sent to Alhaji Hashim of the Defendant Corporation.

(2) The said letter bears no endorsement attesting to any agreement between the parties.

(ii) Judgment is against the weight of evidence."

The defendant subsequently filed an additional ground of appeal in which it further complained thus -

"(iii) The learned trial Judge erred in law and on the facts in holding that the Defendant/Applicant is estopped from raising the plea of statutory bar as provided for in Section 11 of the Nigerian National Petroleum Corporation Decree 1977 as a result of an agreement with the Plaintiff.

PARTICULAR OF MISDIRECTION

(1) Plaintiff gave insufficient evidence to discharge the burden of proving that there was an agreement by the parties not to rely on the statute.

(2) Defendant's witness, Prince Essien, the Deputy Manager of the Legal Department gave evidence to impugn the Plaintiff's claims:

(3) The 12-month limitation period had expired before the alleged agreement was reached."

When the defendant's first interlocutory appeal came before the Court of Appeal for hearing, it was contended on behalf of the plaintiff that all the grounds of appeal were on facts or mixed law and facts. Pursuant thereto, the plaintiff filed a notice of preliminary objection brought under Order 3 rule 15 of the Court of Appeal Rules, 1981 seeking an order

of court to strike out the appeal on the ground that it was incompetent. The contention was that the grounds of appeal filed were all on facts or mixed law and facts and were therefore incompetent as no leave of either the High Court or the Court of Appeal was obtained as required by law before the appeal which was interlocutory was lodged.

The defendant, apparently conceding that the grounds of appeal filed were all on facts or mixed law and facts subsequently filed a motion dated 7th January, 1988 seeking the following reliefs, namely -

“(i) Extension of time within which to apply for leave to appeal in this matter;

(ii) Leave of court to appeal against the ruling of Okara, J., delivered on the 26th November, 1986;

(iii) That the notice and grounds of appeal and additional ground of appeal filed be deemed to have been properly filed”.

Both applications came up for hearing on the 10th May, 1988 and the court below, overruling the application of learned counsel for the plaintiff, decided that the latter motion should be taken first. At the conclusion of arguments, the Court of Appeal in a considered ruling, granted the application for extension of time within which to apply for leave to appeal, leave to appeal and deeming the notice of appeal already filed as duly filed. It further ordered inter alia as follows -

“(4) The appellant shall within 14 days of this decision have the decision drawn up as a formal order and file a copy of the order in the court below; but it shall not be necessary to file another notice of appeal or to serve the respondent with such order.

(5) It is hereby ordered that this appeal shall be given accelerated hearing having regard to all the circumstances of the case.”

Without giving any consideration to the plaintiff's application for leave to take a preliminary objection on the ground that there was no valid appeal pending before that court, the Court of Appeal, brevi manu, dismissed the same.

The plaintiff being dissatisfied with this ruling of the court below further appealed to this court upon two grounds of appeal.

From the two grounds of appeal filed, the plaintiff raised the following issues for the determination of this court, namely -

“(i) Whether the Court of Appeal was right in refusing to take first the appellant's notice of intention to rely upon a preliminary objection and in taking first the respondent's application for extension of time, taking into consideration the crucial nature of the appellant's application.

(ii) Whether the Court of Appeal was competent to foist upon a

notice and grounds of appeal that was indisputably invalid and therefore void, an application for extension of time within which to obtain leave to appeal and leave to appeal and then to order that the said incompetent and void notice and grounds of appeal be deemed properly filed." (Underlining supplied for emphasis).

The defendant, for its own part, adopted the above issues as arising for determination in this appeal, otherwise, also referred to as the second interlocutory appeal.

A point of definite importance which must be noted is the jurisdictional undertone which was the basis of the first interlocutory appeal. The main complaint in the preliminary objection was to the effect that the notice of the interlocutory appeal by the defendant having been filed without the leave of either the trial court of the court below, was incompetent and invalid. Accordingly a vitally fundamental issue which went to the vires of the court was therein raised as the preliminary objection was to the effect that the court below had no jurisdiction to hear the application since there was no competent appeal before the court. The argument was that a prayer deeming an incompetent or invalid notice of appeal as having been duly lodged even though it was filed a long time after the statutory period to appeal had expired could not properly be an appropriate substitute for a substantive prayer for extension of time to appeal. It was argued that without a prayer asking the court for extension of time to appeal as contemplated by section 25(4) of the Court of Appeal Act, 1976 or section 31(4) of the Supreme Court Act, 1960, neither court had power to deem any invalid or incompetent notice of appeal as having been duly filed. I will have cause later in this judgment to return to this aspect of the appeal.

While the plaintiff's second interlocutory appeal was still pending before this court, the Court of Appeal proceeded to hear the appeal lodged by the defendant against the ruling of Okara, J., delivered on the 26th November, 1986 wherein he held that the said defendant had waived its right to rely on the Limitation Law. In the end, it allowed the defendant's appeal, set aside the said ruling of Okara, J., dated the 26th November, 1986 and dismissed the plaintiff's claim as statute-barred. This was on the 14th day of November, 1988.

The plaintiff being dissatisfied with the said decision appealed to this court. The present appeal is against this decision of the Court of Appeal delivered on the 14th November, 1988 as aforesaid.

Pursuant to the rules of this court, the parties filed and exchanged their written briefs of argument. In the appellant's brief, the following issues are set out as arising for determination in this appeal namely -

“(i) Whether it was competent for the Court of Appeal to entertain the respondent’s appeal lodged without leave when the grounds of appeal were on mixed law and fact.

“(ii) Whether the Court of Appeal is right in law in embarking upon its own evaluation of evidence and ascription of probative value with a view to setting aside the findings of fact made by the Court of trial on the evidence before it.

“(iii) Whether the respondent, a Corporation is not in law entitled to waive pleading section II of Decree No. 33 of 1977 as in fact it did in the circumstances of this case.”

The respondent, for its own part, did not consider that the questions posed for determination by the appellant accurately highlighted the real issues that arise for consideration in the appeal. Accordingly it formulated one single issue which it considered crucial in the determination of the appeal. This issue is framed thus-

“Whether the evidence adduced by the Plaintiff/Appellant at the trial court was sufficient to establish the existence of an agreement between it and the Respondent Corporation not to raise the plea of limitation of time as in section 11 of the Nigerian National Petroleum Corporation Decree, 1977.”

However, for some reason which will presently become apparent, it does not seem that any useful purpose will be served in considering any of the issues set out by the parties for the determination of this appeal. This is because the appeal under consideration is itself incompetent as the Court of Appeal had no jurisdiction to entertain the same.

This situation has arisen as a result of the decision of this court in the first interlocutory appeal aforementioned. In that appeal, the jurisdiction of the Court of Appeal to grant the defendant’s prayers for extension of time to apply for leave to appeal, leave to appeal and to deem the notice and grounds of appeal filed as duly and properly filed was directly in issue. According to the plaintiff, there was no competent appeal before the court as the leave of court was not obtained prior to the filing of the first interlocutory appeal on grounds which were essentially based on facts or, at best, on mixed law and facts. Besides, in the absence of a substantive prayer seeking extension of time within which to appeal, a prayer in a motion asking the court to deem an invalid notice of appeal as duly and properly filed can be of no consequence.

Delivering the Judgment of this court in the first interlocutory appeal, to wit, *Nalsa & Team Associates v. N.N.P.C (1991) 8 N.W.L.R. (Pt. 212) 652*, *Nnaemeka-Agu, J.S.C.*, with whom *Karibi-Whyte, Kawu, Wali*

and Omo, JJ.S.C., agreed observed at p. 670 thereof as follows -

"The difference in this case is that there is no application for extension of time to appeal at all. All that is included is a prayer deeming an invalid and incompetent appeal as having been duly filed. I would like to seize this opportunity to reiterate that such a prayer deeming an incompetent or invalid notice of appeal as having been duly filed a long time after the statutory period to appeal had expired cannot properly be a substitute for a substantive prayer for extension of time to appeal. Without a prayer asking the court to invoke its statutory power to extend time to appeal as contemplated by section 25(4) of the Court of Appeal Act. 1976, or section 31(4) of the Supreme Court Act. 1960, neither court has power to deem an invalid or incompetent notice of appeal as having been fully filed. The Court of Appeal was, therefore, in error to have thought that it had such a power. A leave of court to appeal obtained after the statutory period to appeal has expired or an appeal filed thereon is useless where there is no extension of time to appeal or a prayer therefore upon which the court could extend time. See Timothy Adeilo Adefulu & Ors. v. Bello Oyesile & Ors. (1989) 5 NWLR (Pt.122) 377, at p. 417 - 418. The Court of Appeal was, therefore, in error when it proceeded to exercise its discretion in favour of the defendant upon a motion without a prayer for extension of time within which to appeal. It is, of course, settled that although the discretion in this case is that of the Court of Appeal, yet, when it turns out as it now appears, that that Court exercised its discretion upon wrong principles, this Court has the right, indeed the duty to intervene".

He concluded -

"For the above reasons, the appeal succeeds and is allowed. I set aside the decision of the Court of Appeal extending time for the defendant to apply for leave to appeal against the decision of Okara, J., sitting in a Port Harcourt High Court. In its place, as it has not been disputed that the three grounds upon which the interlocutory appeal was based are of fact or mixed law and facts and that they have been filed without leave, I hold that the appeal was incompetent under section 220(1)(b) of the Constitution, 1979. I therefore strike it out. I set aside all the orders made by the Court of Appeal."

In the same vein, Karibi-Whyte, J.S.C., in his own contribution put the matter at p. 681 thereof thus -

"Thus, the Court below could only have validly considered the other prayers in the application after it had considered and granted the prayer for extension of time within which to appeal. It is the substantive prayer which vests jurisdiction in the Court to consider and grant the other prayers sought.

Leave of Court to appeal obtained after the statutory period, or an appeal filed thereon, without an order of extension of time to appeal granted a prayer far that purpose seems to me worthless.

B *The Court below was therefore in error when it proceeded to grant the prayers in applicant's motion which did not contain the fundamental prayer for extension of time within which to appeal. It clearly had no powers to exercise its discretion to make the orders and the prayers sought, since it had no jurisdiction to make the orders. In my view the orders made were nullity. I so declare them."*

C He, too, concluded as follows -

"For the reasons I have given above, the appeal succeeds and is allowed. The orders of the Court of Appeal extending time for the defendant to apply for leave to appeal against the ruling of late Okara, J., of the Rivers State High Court, sitting at Port Harcourt on the 26th Nov., 1986, and deeming the notice and grounds of appeal as duly and properly filed is D hereby declared a nullity.

Furthermore, since the three grounds of appeal filed against the ruling have been admitted as based on facts or mixed law and facts, and were filed without leave, the notice of appeal is a contravention of section 220(1)(b) and 221 (1) of the Constitution, 1979, and is consequently incompetent.

E I hereby strike out the grounds of appeal also. There being no extant ground of appeal on which the notice of appeal is based, it is hereby struck out." See *Nalsa and Team Associates v. Nigerian National Petroleum Corporation* (1991) 8 N.L.R. (Pt. 212) 652.

F It is therefore clear that this court on the 15th November, 1991 allowed the plaintiff's first interlocutory appeal and the order of the Court of Appeal extending time for the defendant to apply for leave to appeal against the ruling of Okara, J., of the Rivers State High Court dated the 26th November, 1986 and deeming the notice and grounds of appeal as duly and properly filed was declared a nullity and set aside. The purported G appeal was also declared incompetent and accordingly struck out.

It therefore seems to me that in the face of the above decision to the effect that the first interlocutory appeal is incompetent, there was nothing pending before the Court of Appeal which it purported to hear and determine on the 14th November, 1988.

H Attention must now be drawn to one vital point. This is the fact that although both parties to this proceeding were represented throughout the litigation by their respective firm of solicitors, it does not appear from the

records that they drew the attention of the Court of Appeal to the pendency of the plaintiff's first interlocutory appeal to this court, before the court below proceeded to hear and determine the purported appeal on the 14th November, 1988. The point cannot be over-emphasized that where, owing to a pending relevant appeal, the hearing of a case could work injustice to a party or constitute an exercise in futility, prudence, if not common sense, dictates that the proper course of action open to the court would be to stay or adjourn the case pending the determination of such an appeal with liberty to either side to apply for the hearing of the case to be resumed. See *Joseph Shekoni v. Chief Ogunyemi Ojoko* (1954) 14 WAC.A. 504. B

In the present case, it is plain that the main issue raised in the first interlocutory appeal touched on the fundamental question of the competence of the purported appeal pending before the Court of Appeal. It cannot also be disputed that any defect in competence is fatal, for the proceedings will be a nullity, however well conducted and decided, as such defect is extrinsic to the adjudication. See *Madukolu and others v. Nkemdilim* (1962) 1 All N.L.R. 578 at 594, *Skenconsult (Nigeria) Ltd. & Another v. Godwin Secondy Ukey* (1981) 1 S.C. 6 at 26 etc. The question of competence and jurisdiction being basic and fundamental may be raised at any stage of a proceeding as a judgment delivered by a court without jurisdiction is a nullity and therefore void. See *Timitimi v. Amabebe* (1953) 14 WA.C.A. 374; *Mustapha v. Governor of Lagos State* (1987) 5 S.C.N.J. 143, *Tukur v. Government of Gongola State* (1987) 2 NWLR (Pt. 58) 539; (1989) 4 NWLR (Pt. 117) 517 at 545, *Management Enterprises Ltd. v. Jonathan Otusanya* (1987) 2 NWLR (Pt. 55) 179 etc. Accordingly, it is in the interest of the best administration of justice that where the issue is raised in any proceeding before any court of law, it should be dealt with at the earliest opportunity and before trial or a consideration of any other issues raised in the cause as anything done without or in excess of jurisdiction by any court established under the Constitution is a nullity. See *Onyema and others v. Oputa and others* (1987) 2 N.S.C.C. 900; (1987) 3 NWLR (Pt.60) 259; *Attorney-General of the Federation and others v. Sode and others* (1990) 1 N.S.C.C. 271; (1990) 1 NWLR (Pt.125) 500 etc. E

In the circumstances, it seems to me that once the question of competence of the purported appeal before the Court of Appeal was an issue pending before this court, the Court of Appeal ought to have stayed proceedings or adjourned the hearing of the appeal sine die pending the determination of the issue to avert possible injustice to either of the parties or an exercise in futility by proceeding with the hearing of the purported appeal before this court has determined whether or not there was an appeal pending before the said Court of Appeal. This, the court below did not do. F G H

It may well be that the attention of the Court of Appeal was not drawn to the pendency of the said first interlocutory appeal. It may also be that the court itself lost sight of the said first interlocutory appeal. Whatever the case, the position is that the Court of Appeal proceeded to determine the appeal in question without awaiting the determination of the issue of the competence of the appeal pending before this court. On the 14th November, 1988, it purported to allow the appeal and set aside the ruling of Okara, J., dated the 26th November, 1986 on the ground that the appellant's claim was statute-barred and liable to dismissal.

However, this court on the 15th November, 1991 at the conclusion of hearing of the first interlocutory appeal as aforesaid held that the appeal was incompetent under section 220(1)(b) of the 1979 Constitution and struck out the same. Consequently it appears to me plain that there was in law no pending appeal before the Court of Appeal when it heard the first interlocutory appeal in question and purported to allow the same on the 14th November, 1988.

For the reasons I have given above this appeal succeeds and it is hereby allowed. The decision and orders of the Court of Appeal delivered on the 14th November, 1988 setting aside the ruling of Okara, J., dated the 26th November, 1986 are hereby set aside and declared incompetent and a nullity. There will be no order as to costs.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Iguh, J.S.C. I entirely agree with him.

The result of the decision of this Court in *Nalsa & Team Associates v. N.N.P.C.*, (1991) 8 N.W.L.R. (Pt. 212) 652 is that the present case should not have been heard by the Court of Appeal since the appeal before it was incompetent. Therefore, the whole of the proceedings (in the present case) before the Court of Appeal was a nullity.

Accordingly, this appeal succeeds and it is hereby allowed. The decision of the Court of Appeal which was delivered on the 14th day of November, 1988 is of no effect whatsoever and it is hereby set aside with no order as to costs.

KUTIGI JSC

Simply put, the Plaintiff claimed against the Defendant the sum of N500,000.00 being special and general damages for breach of contract.

The Defendant in its Amended Statement of Defence pleaded that the Plaintiff's claim was statute barred by virtue of the provisions of Section 11(1) of the Nigerian National Petroleum Corporation Decree No.33 of 1977 and followed it up with a motion to strike out the claim. Oral and documentary evidence were then tendered by the parties to settle the issue. The trial High Court in its Ruling delivered on 26th November, 1986 held that the claim was not statute barred. The Defendant was dissatisfied and filed a Notice of Appeal on the same day. It contained two (2) grounds of appeal only. The Court of Appeal later granted it leave to file one additional ground of appeal.

When the appeal came for hearing in the Court of Appeal, the Plaintiff filed a Notice of Preliminary Objection to the appeal on the ground that the grounds of appeal being of mixed law and facts were incompetent because no leave of either the High Court or the Court of Appeal was obtained before they were filed. The Defendant saw the danger and promptly brought an application asking for leave to appeal and to deem the appeal properly filed. In its Ruling of 3rd June 1988, the Defendant's application was granted and the Plaintiff appealed to the Supreme Court. It was numbered Appeal No. SC. 133/88.

Now, while the Plaintiff's appeal No. SC. 133/88 above was still pending in the Supreme Court, the Court of Appeal proceeded to hear the substantive appeal itself. In its judgment delivered on 14th November 1988 it reversed the ruling of the High Court of 26/11/86 and held that the Plaintiff's action in the High Court was statute barred and dismissed same. Dissatisfied with the judgment of the Court of Appeal, the Plaintiff once again appealed to this Court. This is appeal No. SC. 267/88 now before us. Meanwhile the Plaintiff's appeal No. SC.133/88 above was not decided by the Supreme Court until 15th November 1991. The Supreme Court in its judgment held that the Defendant's application for leave etc., before the Court of Appeal was incompetent and the three grounds of appeal were struck out accordingly. That was exactly 3 years after the Court of Appeal had disposed of the main appeal on 4/11/88.

It is thus clear from the sequence of events as narrated above that the Court of Appeal having delivered its ruling of 3/6/88 which the Plaintiffs had appealed against to the Supreme Court as SC. 133/88, should not have proceeded to hear the substantive appeal and deliver judgment on 14/11/88. Certainly, the Ruling given on 3/6/88 remained valid and binding until it was reversed by a higher court. But that Ruling clearly went to competence of the appeal itself necessitating extra caution on the part of the Court of Appeal. And so as it turned out the Supreme Court in the

Appeal No. Sc. 133/88 decided on 15/11/91 held that the appeal before the Court of Appeal which was filed by the Defendant without leave was incompetent and struck it out. The judgment delivered in the matter by the Court of Appeal on 14/11/88 is therefore clearly a nullity. The Supreme Court having struck out the appeal, there was no more appeal before the Court of Appeal to be heard. Appeal No. SC.133/88 has since been reported as (1991) 8 NWLR (Pt. 212) 652.

There is therefore merit in this appeal and I hereby allow it for the above reasons and the fuller ones as contained in the lead judgment of my learned brother Iguh, J.S.C., which I read before now and with which I agree. I will also make no order as to costs.

OGWUEGBU JSC

I had the advantage of reading in draft the judgment of my learned brother Iguh, J.S.C., just delivered. I agree that this appeal be allowed.

The defendant/respondent in this case appealed to the Court of Appeal, Enugu Division against the ruling of Okara, J., of the blessed memory dated 26th November, 1986 refusing the application of the respondent to dismiss the plaintiff's action on the ground that it is statute barred. The present appellant who was the respondent in that court filed a notice of preliminary objection to the appeal on the ground that the defendant/appellant did not obtain the leave of court to appeal on ground of mixed law and facts.

The appellant in the said court filed a motion in that court seeking the following reliefs:

- (i) Extension of time within which to apply for leave to appeal.
- (ii) Leave to appeal, and
- (iii) That the Notice and Grounds of Appeal already filed be deemed to have been properly filed.

Both applications, namely, the plaintiffs objection and the defendant's motion which purported to cure the defect came up for hearing on the same day.

The Court of Appeal took the defendant's motion first and granted the application for extension of time to apply for leave to appeal, leave to appeal, and an order deeming the notice of appeal already filed as duly filed.

Thereafter, the court below dismissed the plaintiff's preliminary objection without considering it. The plaintiff appealed to this court against the ruling.

While that appeal was pending in this court, the court below proceeded to hear the interlocutory appeal against the ruling of Okara, J. In its judgment dated 14:11:88, it set aside the ruling of the learned trial judge and dismissed the plaintiff's action. The plaintiff has appealed to this court against that decision. The Court of Appeal proceeded to hear and determine the appeal when the appellant's appeal against the ruling of that court was pending in this court. B

This court on 15th November, 1991 delivered its judgment on the said appeal. It set aside the ruling of the court below and declared the grounds of appeal incompetent. It accordingly struck out the defendant's appeal in that court. See *Nalsa & Team Associates v. NNPC* (1991) 8 N.W.L.R. (Pt. 212) 652. The effect of that decision is to nullify the decision of the court below dated 14th November, 1988 which is the subject of the present appeal. C

It was not competent for the Court of Appeal to entertain the appeal of the respondent lodged without leave when the grounds of appeal were in contravention of sections 220(1)(b) and 221 (1) of the 1979 Constitution. It has no jurisdiction to do so. There was no valid exercise of the right of appeal by the appellant to that court and the purported notice of appeal was invalid and of no effect. See *Nwadike & Ors. v. Ibekwe & Ors.* (1987) 4 N.W.L.R. (Pt. 67) 718, *Tilbury Construction Co. Ltd. v. Ogunniyi* (1988) 2 N.W.L.R. (Pt. 74) 64 and *Olowosoke v. Oke* (1972) 11 S.C. 1. D E

This court having struck out the said appeal in Suit No. SC. 133/1988 on 15:11:91, the decision of the court below giving rise to this appeal is null and void. This appeal succeeds and is hereby allowed.

MOHAMMED JSC

I entirely agree with my learned brother, Iguh, JSC., that this court's decision in the appeal No, SC 133/1988 on 15th November, 1991, which was between the same parties, had declared the present appeal incompetent. F

For those reasons and the reasons given by my learned brother in his judgment I also set aside the decision delivered by the Court of Appeal on 14th November, 1988 in which the lower court set aside the judgment of Okara J. I made no order as to costs. G

H