

**SUPREME COURT OF NIGERIA**  
23RD APRIL, 1996. SC. 89/1993  
**CORAM:- M. L. UWAIS CJN, A. B. WALI, I. L. KUTIGI,**  
**E. O. OGWUEGBU, Y. O. ADIO, JJSC.**

CHIEF BRIGHT ONYEMEH & ORS ..... PLAINTIFFS/APPELLANTS  
AND  
LAMBERT EGBUCHULAM & ORS..... DEFENDANTS/RESPONDENTS

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**APPEALS** - *Preliminary objection - Factors that will determine propriety of the objection - When not to be considered.*

**APPEALS** - *Decision - On an appeal without hearing the parties - Is a fundamental defect fatal to adjudication.*

**APPEALS** - *Hearing of appeal - Writing of judgment based solely on briefs filed by parties - Amounts to no hearing - As it is contrary to the Rules.*

**COURTS** - *Decision - Duty of court - Court of Appeal has a duty to make known its decision on preliminary objection - Before deciding the appeal*

**JUDGMENTS** - *Appeals - Nullity - Judgment of Court of Appeal - On an appeal that was never heard - Is a nullity -Hearing being a fundamental requirement for a valid adjudication.*

**FACTS**

The plaintiffs/appellants sued the 1st to 3rd defendants/respondents in the High Court of Imo State, Owerri, for a declaration that the plaintiffs are entitled to grant of allocation papers in respect of market stalls in their possession, an order of court directing the 1st to 3rd defendants to regularize the allocation of the stalls to the plaintiffs and injunction restraining the 1st to 3rd defendants from interfering with the plaintiffs possession

The 4th to 9th defendants thereafter applied to court to be joined as co-defendants but their application which was opposed by the 1st to 3rd defendants, was dismissed by the trial court. The 4th to 9th defendants appealed to the Court of Appeal against the ruling of the trial judge. The plaintiffs raised preliminary objection to the appeal on the ground of its incompetency, leave of court not having been obtained before it was filed. The Court of Appeal heard the preliminary objection to the appeal and

based on the briefs filed by the parties in the appeal, without hearing the appeal itself, gave a judgment allowing the appeal, without deciding the preliminary objection. Aggrieved by the Court of Appeals decision, the plaintiffs appealed to the Supreme Court raising 3 issues.

***ISSUES FOR DETERMINATION***

1. Was the objection taken against the competence of the appeal in the court below proper?
2. Was the Court of Appeal right in not deciding whether the appeal before it was competent or not?
3. Was the Court of Appeal right in deciding the substantive appeal without giving the Appellants a hearing on same?

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

***Preliminary objection***

1. Be that as it may, I think the issue of whether the preliminary objection before the court below was proper or not would in my view depend on a number of factors. For example - Is the objection permitted by the Rules of Court? Is the decision of the High Court appealed final or interlocutory? Are the Grounds of Appeal grounds of law, facts or mixed law and facts? Has the application any merit? Because of the order which I intend to make finally in the judgment it would be premature and improper for me to make any pronouncement one way or the other now. This being an interlocutory matter, I must avoid making any observation in the appeal which might appear to prejudge the issues in the proceedings relative to the appeal. The court of Appeal ought to be given the opportunity first to decide whether or not the preliminary objection is properly made which in normal circumstances it can only do after listening to the parties. I therefore decline to answer issue (1). (p. 738 C)

***Decision - Duty of court***

2. There is nowhere in the Judgment where the Court of Appeal either overruled or dismissed the preliminary objection. It was certainly not enough for the Court to have merely said that it was “flimsy”. That is not the same thing as saying that the preliminary objection was overruled or dismissed. It is doubtless that a formal ruling on the preliminary objection would have gone to the competence of the appeal itself one way or the other because if the appeal was incompetent, the Court of Appeal would have no jurisdiction to have entertained same as it purported to have done already. The court had a duty to make its decision on the preliminary objection known

to the parties before proceeding to decide the appeal thereby giving opportunity to anyone not satisfied with its decision to appeal against same. (p. 741 A)

***Decision on an appeal without hearing parties***

3. In the instant case the court below did not only fail to rule on the preliminary objection as to the competence of the appeal but proceeded *suo motu* to decide the appeal without hearing the parties. A court of law deciding a case without hearing the litigants? That is doubtlessly outrageous. It is a fundamental defect fatal to adjudication and I so hold. (p. 741 C)

***Hearing of appeal***

4. In other words, appeals are only decided after hearing notices without exception have been duly served on the litigants or their counsel. When however, an appeal is called and the parties have been duly served with the notice of hearing, and the litigant or counsel fails to appear to present oral argument even though briefs have been filed by the parties, then the appeal will be treated as having been argued. I must say that this latter procedure did not even apply in this present case. Granted that the parties had filed their briefs, was the appeal itself fixed for hearing after the ruling herein was reserved on 26/2/92? And if so, were the parties or counsel duly served with the hearing notices? The answers are clearly in the negative. Justices in the Court of Appeal and the Supreme Court do not just wake up and start to write judgments merely because briefs have been filed by the parties. That in my view will amount to a no hearing as it is contrary to the Rules above. (p. 742 A)

***Judgment of Court of Appeal - A nullity***

5. I have no hesitation therefore in coming to the conclusion that the purported judgment of the court below was a nullity having been based on an appeal which was never heard. The parties were obviously not given a hearing by the court below before delivering its judgment. That is a fundamental and undisputed requirement for a valid adjudication. The breach was fatal as I said earlier. Issue (2) and (3) are therefore both answered in the negative in favour of the Plaintiffs. The appeal therefore succeeds and it is hereby allowed. Consequently the judgment of the Court of Appeal delivered on 11/5/92 is declared null and void and it is hereby set aside. (p. 742 C)

NOTABLE POINTS OF INTEREST

**UWAIS C.JN**

***1. Appeals - Parties must be given opportunity to address the court***

Both the 1979 Constitution of the Federal Republic of Nigeria, Cap. 62, at section 33 subsection (1) and Order 6 rule 9 of the Court of Appeal Rules, Cap. 62 when read together enjoin that at the hearing of an appeal before the Court below, apart from the filing of briefs of arguments, the parties must be given the opportunity to address the Court for at least one hour each. This important condition was not met when the Court of Appeal proceeded to determine the appeal. There can be no doubt that the Court below committed a serious error. Since the parties were denied the right to fair hearing as guaranteed by the Constitution, the determination of the appeal before that Court is a nullity and I have no hesitation to declare it null and void. (p. 743 C)

**OGWUEGBU JSC*****1. Breach of fundamental right provisions***

It is settled that any breach of the provisions of the fundamental right provisions renders the act subsequent to that breach a nullity. (p. 746 B)

**ADIO JSC*****3. Rules of court are meant to be obeyed***

Rules of court are meant to be obeyed. If a party fails to observe the rules of court it is perfectly legitimate for the other party to raise a preliminary objection. Where a preliminary objection is raised and argued before the court, there should be a formal ruling on the preliminary objection by the court particularly in a case like this in which the case was adjourned for a ruling. (p. 746 E)

**REPRESENTATION**

Amechi Nwaiwu for Plaintiffs

1st to 3rd Defendants absent not represented

J. C. Uwazuruonye and G. M. Kamiyal for 4th to 9th Defendants

**CASES REFERRED TO**

Mortune v. Gambo (1979)3 - 4 SC. 54

Ojukwu v. Governor of Lagos State (1986)3 NWLR (Pt 26) 35

Odofoin v. Agu (1992)3 NWLR (Pt. 229)350 .

Kalio v. Kalio (1975)2 SC. 15

Barclays Bank v. Central Bank of Nigeria (1976)6 SC. 175,

ENIGWE V. AKAIGWE (1992)2 NWLR (PT. 225) 505 at 535 - 536

Adigun v. Attorney-General, Oyo State (1987) 1 N.W.L.R. (Pt. 53) 678.

**STATUTES AND RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1979, s. 33(1)

Court of Appeal Rules, 1981, 0.3, R.2(2) - (4)

Court of Appeal (Amendment) Rules, 1984, 0.6, R. 2; 0.6, R.3(c) 0.6, R.9

B

**LEAD JUDGMENT BY KUTIGI JSC**

In the High Court of Imo State holden at Owerri, the plaintiffs sued the 1st to 3rd defendants for a declaration that they are entitled to the grant or issuance of allocation papers in respect of lock up market stalls in their possession; an order of court directing the 1st to 3rd defendants to regularise the allocation of the stalls to the plaintiffs, and an injunction restraining the 1st to 3rd defendants, their servants, agents or privies from interfering with the plaintiffs' possession of the said market stalls.

Soon thereafter the 4th to 9th defendants by motion on notice applied to the court to be joined as co-defendants. The 1st to 3rd defendants opposed the application and filed a counter-affidavit. Arguments on the motion for joinder were heard and the learned trial Judge in a reserved ruling set out on pages 164 to 178 of the record. refused the application and dismissed same.

Aggrieved by the Ruling of the High Court, the 4th to 9th defendants appealed to the Court of Appeal, Port Harcourt Division. The Notice of Appeal is to be found on pages 179-184 of the record. There are only three Grounds of Appeal contained therein. In obedience to the Rules of Courts the parties filed and exchanged briefs of argument. These are to be found on pages 199-232 of the record.

Before the appeal was fixed for hearing, the plaintiffs filed a Notice of Preliminary objection to the appeal lodged against the Ruling of the High Court by the 4th to 9th defendants vide pages 193-195 of the record, contending that the purported appeal was incompetent and ought to be struck out because the Grounds of Appeal were on facts, or mixed law and facts which required leave and that the 4th to 9th defendants had not obtained any leave.

At the hearing of the appeal on 26/2/92, the plaintiffs sought and were granted leave to argue the preliminary objection first. There was no objection from the other side. Arguments on the preliminary objection were then entertained by the court and Ruling reserved to 27/4/92. The Ruling was finally delivered on 27/5/92 as contained on pages 239-258 of the record. But the Court of Appeal rather than ruling on the preliminary

objection as to whether the appeal lodged before it was competent or incompetent, proceeded to deliver judgment in the appeal which it had not heard and allowed the appeal in its entirety. The Court of Appeal set aside the ruling of the High Court and ordered the 4th to 9th defendants to be joined as co-defendants in the suit.

Dissatisfied with the judgment of the Court of Appeal, the plaintiffs have appealed to this Court. Three grounds of appeal were filed. Briefs of argument were filed and exchanged by the parties. Mr. Nwaiwu learned counsel for the plaintiffs has submitted in his brief three issues for determination in the appeal as follows -

1. Was the objection taken against the competence of the appeal in the court below proper?

2. Was the Court of Appeal right in not deciding whether the appeal before it was competent or not?

3. Was the Court of Appeal right in deciding the substantive appeal without giving the appellants a hearing on same?

On Issue (1) learned counsel Mr Nwaiwu referred to the judgment of the Court of Appeal on page 257 of the record where Ndoma-Egba, J.C.A. reading the leading judgment said -

*"The preliminary objection to the grounds of appeal is with respect, flimsy. It could hamper the early determination of this matter and in the end consolidate the position of the plaintiffs/respondents in respect of possession of the lock-up stores before the substantive suit is finally determined"* and submitted that the preliminary objection related to the competence of the appeal and as a threshold issue it cannot be described as flimsy in that where the grounds of appeal are found to be incompetent the Court of Appeal would lack the necessary requisite competence to adjudicate in the appeal. That want of competence is not a mere irregularity which can be cured by consideration of the main appeal in advance as was done herein or by way of speedy trial. He said the appeal before the Court of Appeal was not only interlocutory but that the Grounds of Appeal were of facts and of mixed law and facts and that leave to appeal was not obtained. In addition, he said the Grounds of Appeal contravened the provision of Order 3 Rule 2(2)-(4) of the Court of Appeal Rules, 1981 as they failed to state or specify the particulars of error or misdirection, He said the preliminary objection to the competency of the appeal in the court below was not therefore flimsy but necessary because the appeal was incompetent.

Mr. Ojiako learned counsel for the 1st-3rd defendants argued that the appeal before the Court of Appeal was from a final and not an

interlocutory decision of the High Court and consequently leave to appeal was not necessary and that the Court of Appeal was right to have described the preliminary objection as flimsy.

Mr. Uwazuruonye learned counsel for the 4th-9th defendants also said the decision of the High Court was final and as such leave to appeal was not required. The preliminary objection was therefore flimsy as stated by the Court of Appeal. With due respect to both Mr Ojiako and Mr. Uwazuruonye, I must say at once that the Court of Appeal never stated in its judgment that the decision of the High Court was either final or interlocutory. The Court of Appeal did not also state anywhere whether leave was required or not.

Be that as it may, I think the issue of whether the preliminary objection before the court below was proper or not would in my view depend on a number of factors. For example - Is the objection permitted by the Rules of Court? Is the decision of the High Court appealed final or interlocutory? Are the Grounds of Appeal grounds of law, facts or mixed law and facts? Has the application any merit? Because of the order which I intend to make finally in the judgment it would be premature and improper for me to make any pronouncement one way or the other now. This being an interlocutory matter, I must avoid making any observation in the appeal which might appear to pre-judge the issues in the proceedings relative to the appeal. (See *Morrune v. Gambo* (1979) 3-4 SC 54. *Ojukwu v. Governor of Lagos State* (1986) 3 NWLR (Pt. 26) 39. The Court of Appeal ought to be given the opportunity first to decide whether or not the preliminary objection is properly made which in normal circumstances it can only do after listening to the parties.

I therefore decline to answer issue (1). I know in the judgment cited above, the Court of Appeal described the preliminary objection as "flimsy" simply because it thought the objection would hamper an early determination of the suit. I fail to understand how the plaintiffs' preliminary objection, rather than the 4th to 9th defendants appeal, would hamper an early determination of the suit. I say no more on that.

The 2nd and 3rd issues will be taken together. The plaintiffs contended that the Court of Appeal was wrong for failing to decide whether or not the appeal lodged before it was competent. Mr. Nwaiwu referred to page 234 of the record where he sought leave of the Court of Appeal to argue his preliminary objection first. That there was no objection to his request from the other side. He said the Court of Appeal having taken arguments first on the preliminary objection and reserved ruling thereon, had a duty to properly consider and rule on the preliminary objection on

whether the appeal before it was competent. It was only after the ruling that the Court would call upon the parties to argue the appeal. This is because if the Grounds of Appeal were found to be incompetent the Court of Appeal would lack the requisite competence to adjudicate in the matter. That the question of competence is fundamental and crucial to any adjudication. The following cases were cited -

Odofin v. Agu (1992) 3 NWLR (Pt. 229) 350

Kalio v. Kalio (1975) 2 SC 15

Barclays Bank v. Central Bank of Nigeria (1976) 6 SC 175.

It was also submitted that the court below was wrong in deciding the appeal without giving the parties a hearing. He referred to pages 234-236 where arguments on the preliminary objection were recorded and the Ruling thereon reserved. That there was nothing on record to show that the appeal itself was argued. By delivering judgment without hearing the parties, the court below was in breach of the appellants constitutional right of fair hearing guaranteed under Section 33(1) of the 1979 Constitution. He cited in support -

Enigwe v. Akaigwe (1992) 2 NWLR (Pt. 225) 505 at 535-536

Isiyaku Mohammed v. Kana N.A. (1968) 1 All NLR 424 at 426

Responding, Mr. Ojiako for the 1st to 3rd defendants submitted that the parties in the appeal having filed and exchanged their briefs of argument, the appeal should be taken as having been argued. He referred to Order 6 Rule 2 of the Court of Appeal (Amendment) Rules 1984. He said although the Rules allow oral argument at the hearing of the appeal to emphasize or amplify the written brief already filed in court, that is "*just a mere formality which could be jettisoned or ignored*". That the provision is not mandatory but merely desirable which did not occasion any miscarriage of justice as to vitiate the judgment in this case. He referred to the case of Onagoruwa v. I.G.P. (1991) 5 NWLR (Pt. 193) 593; Mohammed v. Kana N.A. (supra).

Mr. Nwazuruonye also submitted that to the extent that the parties herein filed and exchanged their briefs of argument in the appeal, the plaintiffs cannot be heard to say that they were not heard. That the judgment of the court below was based on the briefs filed by the parties and that arguments of counsel at the hearing of an appeal are meant to amplify what is contained in the brief only. He referred to Order 6 Rule 3(c) of the Court of Appeal (Amendment) Rules, 1984 and said that there was no breach of Section 33(1) of the 1979 Constitution as contended by the plaintiffs. He



said the case referred to by plaintiffs' counsel also do not apply here.

Now, the record shows on pages 234-236 that on 26/2/92 when the case came before the Court of Appeal only the Preliminary Objection filed by the plaintiffs against the appeal was argued. The day's proceedings concluded on page 236 thus

*"Court: Ruling reserved to 27/4/92.*

*(SGD)*

*S.U. ONU, J.C.A.*

*26/2/92"*

On 27/4/92 the Ruling was further adjourned to 11/5/92 the day it was finally delivered. It is thus abundantly clear from the record that apart from the preliminary objection which was heard on the relevant day, 26/12/92, the appeal was not and never heard on that day or on any day thereafter. The Court of Appeal clearly reserved Ruling in the Preliminary Objection to a certain future date which it was bound to have delivered before proceeding to hear the appeal itself. Instead it delivered judgment on 11/5/92 as stated above. The preliminary objection as I said above was simply that the Grounds of Appeal filed by the 4th to 9th defendants were incompetent being grounds of facts or mixed law and facts and filed without leave. Consequently therefore it was contended that the appeal itself was incompetent and ought to have been struck out. The question now is - Did the judgment delivered by the Court of Appeal on 11/5/92 decide that issue? I have read through the judgment carefully myself and what was said about the preliminary objection appears only on page 257 lines 5-10 of the record thus-

*"The preliminary objection to the Grounds of Appeal is with respect, flimsy. It could hamper the early determination of this matter and in the end consolidate the position of the plaintiffs/ respondents in respect of possession of the lock-up stores before the substantive suit is finally determined."*

The Court of Appeal thereafter proceeded to allow the appeal set aside the ruling of the High Court and ordered the joinder of the 4th to 9th defendants in the suit.

The portion of the judgment referred to above can hardly be said to be ruling on the preliminary objection which was whether or not the appeal before the Court was competent. As I said earlier - Was it the preliminary objection or the appeal that would hamper the early determination of the suit? If the preliminary objection had succeeded and the appeal struck out would it not have in a way speeded up the trial of the suit? Be that as it

may, there is nowhere in the judgment where the Court of Appeal either overruled or dismissed the preliminary objection. It was certainly not enough for the Court to have merely said that it was “flimsy”. That is not the same thing as saying that the preliminary objection was overruled or dismissed. It is doubtless that a formal ruling on the preliminary objection would have gone to the competence of the appeal itself one way or the other because if the appeal was incompetent, the Court of Appeal would have no jurisdiction to have entertained same as it purported to have done already. The court had a duty to make its decision on the preliminary objection known to the parties before proceeding to decide the appeal thereby giving opportunity to anyone not satisfied with its decision to appeal against same. In the instant case the court below did not only fail to rule on the preliminary objection as to the competence of the appeal but proceeded suo motu to decide the appeal without hearing the parties. A court of law deciding a case without hearing the litigants? That is doubtlessly outrageous. It is a fundamental defect fatal to adjudication and I so hold. The two sets of defendants though conceding that they were not heard on the appeal still contended, erroneously in my view, that there was no breach of the principle of fair-hearing because the parties had in compliance with the Rules of Court filed and exchanged their briefs of argument and had said all that they wanted to say in the said briefs. They also contended that the rule of court which allows counsel to present oral argument at the hearing of the appeal to emphasise and clarify their briefs is only desirable and not mandatory. I think it all depends on the way one looks at it. All I need say at this stage is that as far as I know the practice as sanctioned by the rules in both the Court of Appeal and the Supreme Court where briefs are being filed, is that definite hearing notices are sent to the parties or counsel for the hearing of an appeal. At the hearing of the appeal case is called and each side is given one hour to address the court unless the court otherwise directs. Counsel are, however, free to adopt and rely on their briefs at the hearing and say nothing else. These procedures are, I must say, strictly observed by the courts because even where briefs have been filed, the court will not normally proceed to hear and decide an appeal merely on the briefs of the parties alone without satisfying itself that hearing notices of the appeal have been duly and properly served on the litigants or their counsel. This procedure has become necessary in view of the fact that counsel might have become aware of new authorities relevant to their cases after they might have filed their briefs. And by appearing in court on the day of hearing, counsel have the opportunity to draw court’s attention to any new authority. It is also an opportunity for the court to ask counsel any question

- it may wish in connection with the case and before arriving at its decision. In other words, appeals are only decided after hearing notices without exception have been duly served on the litigants or their counsel. Where however, an appeal is called and the parties have been duly served with the notice of hearing, and the litigant or counsel fails to appear to present oral argument even though briefs have been filed by the parties, then the appeal will be treated as having been argued. I must say that this latter procedure did not even apply in this present case. Granted that the parties had filed their briefs, was the appeal itself fixed for hearing after the ruling herein was reserved on 26/12/92? And if so, were the parties or counsel duly served with the hearing notices? The answers are clearly in the negative. Justices in the Court of Appeal and the Supreme Court do not just wake up and start to write judgments merely because briefs have been filed by the parties. That in my view will amount to a no hearing as it is contrary to the Rules above. I have no hesitation therefore in coming to the conclusion that the purported judgment of the court below was a nullity having been based on an appeal which was never heard. The parties were obviously not given a hearing by the court below before delivering its judgment. That is a fundamental and undisputed requirement for a valid adjudication. The breach was fatal as I said earlier.
- Issues (2) and (3) are therefore both answered in the negative in favour of the plaintiffs.

The appeal therefore succeeds and it is hereby allowed. Consequently, the judgment of the Court of Appeal delivered on 11/5/92 is declared null and void and it is hereby set aside. The case is sent back to the Court of Appeal, Port Harcourt Division for the preliminary objection, and if necessary thereafter, the appeal to be heard afresh. The plaintiffs are awarded costs of N1,000.00 against the defendants.

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### **UWAIS CJN**

- I have had the advantage of reading in advance the judgment read by my learned brother Kutigi, J.S.C. I entirely agree with the judgment.
- The Court of Appeal, Port Harcourt, was in serious error when it failed to determine the preliminary objection as “flimsy”. But with respect, this could not be so since it concerned the competence of the appeal and its jurisdiction to hear the appeal. A ruling is in a way similar to a judgment. It is in fact a decision. It, therefore, behoves the Court of Appeal to consider the merits and demerits of the addresses by counsel to the parties and to give its reasons for upholding or dismissing the preliminary

objection. It is not enough to peremptorily dispose of the preliminary objection since it was adjourned for ruling. In my opinion the following observation, made in passing in the judgment of the Court below (Per Ndoma-Egba, J.C.A.) in reference to the preliminary objection does not qualify as a ruling on the preliminary objection:-

*'The preliminary objection to the grounds of appeal is, with respect, flimsy. It could hamper the early determination of this matter and in the end consolidate the position of the plaintiffs/respondents in respect of possession of the lock-up stores before the substantive suit is finally determined.'*

The second leg of this appeal concerns the determination of the appeal in the Court of Appeal by that Court when no oral addresses by either the parties or their counsel were heard. Both the 1979 Constitution of the Federal Republic of Nigeria. Cap. 62, at section 33 subsection (1) and Order 6 rule 9 of the Court of Appeal Rules, Cap 62 when read together enjoin that at the hearing of an appeal before the Court below, apart from the filing of briefs of arguments, the parties must be given the opportunity to address the Court for at least one hour each. This important condition was not met when the Court of Appeal proceeded to determine the appeal. There can be no doubt that the Court below committed a serious error. Since the parties were denied the right of fair hearing as guaranteed by the Constitution, the determination of the appeal before that Court is a nullity and I have no hesitation to declare it null and void.

In the result, this appeal succeeds. The decision of the Court of Appeal is hereby set aside. I too hereby remit the case to the Court of Appeal for the preliminary objection to be properly considered and determined on its merit by a panel other than that which delivered judgment on the 11th day of May, 1992. Furthermore, if after considering the preliminary objection the appeal subsists, it should be heard by the new panel in the normal course of events. I adopt the order as to costs as contained in the judgment of my learned brother Kutigi JSC.

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### WALI JSC

I have read before now the lead judgment of my learned brother Kutigi. J.S.C. in draft, and I agree with the reasons he gave for allowing the appeal. I hereby adopt them as mine.

In a situation where the competence of an appeal is challenged, the Appeal Court is duty bound to rule on the issue. If it holds the view that the appeal is competent, it shall pronounce so and may reserve stating its reasons in the judgment where the preliminary objection is taken along with

the main appeal. What the Court or Appeal did in this case was to hear arguments on the preliminary objection to the competence of the appeal, and without ruling on the issue, proceeded to determine the substantive appeal on briefs filed without giving learned counsel a chance of being heard on their respective briefs. The situation was made worse when the Court of Appeal considered the substantive appeal after which it dismissed the substantial issue of the competence of the appeal without considering it. It stated thus:

*"The preliminary objection to the grounds of appeal is with respect, flimsy. It could hamper the early determination of this matter and in the end consolidate the position of the plaintiffs/respondents in respect of possession of the lock-up stores before the substantive suit is finally determined."*

This cannot by any stretch of imagination be construed as stating that the appeal before it is competent. The Court of Appeal can only assume jurisdiction where the appeal before it is competent. Since it is silent on this crucial issue, the decision it reached on the substantive appeal is incompetent, null and void.

The appeal is allowed and the preliminary objection and the appeal are remitted to the Court of Appeal for hearing by a different panel.

N1,000.00 costs is awarded to the appellants against the respondents.

### **OGWUEGBU JSC**

I am in agreement with the reasoning and conclusion reached by my learned brother Kutigi, J.S.C. that the appeal be allowed. The facts of the case have been admirably set out by him and I will not repeat them here.

The following three issues were submitted for determination by the court:

*"1. Was the objection taken against the competence of the appeal in the court below proper?"*

*2. Was the Court of Appeal right in not deciding whether the appeal before it was competent or not?"*

*3. Was the Court of Appeal right in deciding the substantive appeal without giving the appellants hearing on same*

The first issue for determination will not be gone into at this stage bearing in mind the order which the court will make in the appeal. This is to avoid making a pronouncement that will tend to pre-judge the very issue which the court below may be called upon to decide.

On 26/2/92 when the appeal came before the Court of Appeal, Port Harcourt Division. Mr. Nwaiwu, learned plaintiffs/respondents' counsel informed the court that he be heard first on the preliminary objection to the competence of the appeal. There was no objection either from the court or the counsel appearing for the applicants/appellants or the defendants/respondents. Counsel made submissions on the objection. Mr. Nwaiwu closed his submission thus:

"Urge the court to strike out the appeal as being incompetent."

Mr. Uwazuruonye for the applicants/appellants ended his own argument as follows:

"Urges court to sustain our appeal and dismiss the preliminary objection ..."

Mr Ojiako, learned counsel for the defendants/respondents was recorded as saying:

"Urges court to dismiss the preliminary objection and allow the appeal to be argued." (Underlining is for emphasis only).

The above excerpts from the record of appeal, leave no one in any doubt that was argued on 26/2/92 was the preliminary objection and the court reserved its ruling to 27/4/92. On 27/4/92, the ruling was further reserved to 11/5/92 when it was eventually delivered. In the lead ruling, Ndoma-Egba, J.C.A. held as follows:

*"The preliminary objection to the grounds of appeal is, with respect, flimsy. It could hamper the early determination of this matter and in the end consolidate the position of the plaintiffs/ respondents in respect of possession of the lock-up stores before the substantive suit is finally determined .....*

*In conclusion, this appeal succeeds. It is hereby allowed. The Ruling of the Court below is hereby set aside. The appellants shall be joined in the substantive suit No. HOW/1970/9, as co-defendants."*

To say that the preliminary objection is flimsy, the court below must be understood as saying that the objection is weak or lacking in strength or not carefully thought out. This is far from a ruling on the competence of the appeal which is the basis of the preliminary objection. The court below abdicated from its sacred duty of carefully considering and ruling on whether the appeal was competent or not before proceeding to determine the substantive appeal without any hearing.

Whether the grounds of appeal are found to be incompetent, the Court of Appeal will lack the jurisdiction to entertain the appeal. The issue of jurisdiction is fundamental to the question of the competence of the court adjudicating. It is therefore crucial for any court adjudicating first to determine the issue. The issue cannot be taken for granted as the court

below did in this appeal. See: Kalio v. Daniel Kalio (1975) 2 SC 15; Barclays Bank of Nigeria v. Central Bank of Nigeria (1976) 6 SC 175 and Odojin v. Agu (1992) 2 NWLR (Pt.229) 350.

I am satisfied from the record of appeal that the court below neither ruled on the preliminary objection nor heard arguments on the substantive appeal before it proceeded to determine the same. This is a breach of the constitutional right of the parties enshrined in section 33 of the Constitution of the Federal Republic of Nigeria 1979.

It is settled that any breach of the provisions of the fundamental right provisions renders the act subsequent to that breach a nullity. See: Adigun v. Attorney-General, Oyo State (1987) 1 NWLR (Pt. 53) 678. Obodo v. Olomu (1987) 3 NWLR (Pt.59) 111 and Okafor & ors. v. Attorney-General, Anambra State & on. (1991) 6 NWLR (pt. 200) 659.

Accordingly, the appeal is allowed. The ruling of the Court of Appeal. Port Harcourt Division delivered on 11/5/92 and the Orders made therein are hereby declared null and void and of no effect. The case is remitted to the court below for a different panel to hear and determine the preliminary objection and if need be hear the substantive appeal. I abide by the order as to costs in the lead judgment.

**ADIO JSC**

I have had the advantage of reading in advance, the judgment of my learned brother. Kutigi JSC, and I agree that the appeal succeeds. Rules of court are meant to be obeyed. If a party fails to observe the rules of court it is perfectly legitimate for the other party to raise a preliminary objection. Where a preliminary objection is raised and argued before the court, there should be a formal ruling on the preliminary objection by the court particularly in a case like this in which the case was adjourned for a ruling.

I allow the appeal and abide by the consequential orders made by my learned brother, Kutigi J.S.C. including the order for costs.

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