

**SUPREME COURT OF NIGERIA**  
27TH SEPTEMBER, 1996. SC. 200/1989  
**CORAM:- M. L. UWAIJ CJN, S. M. A. BELGORE,**  
**M. E. OGUNDARE, E. O. OGWUEGBU, U. MOHAMMED, JJSC.**

NATIONAL BANK OF NIGERIA LTD. .... APPELLANT  
AND  
1. WEIDE & CO. NIGERIA LTD.  
2. UNIVERSAL ELECTRONICS LTD. .... RESPONDENTS  
3. DR. OLU ONAGORUWA  
4. OBAYOMI POPOOLA

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***APPEALS*** - Right of appeal - Is excluded under any of the three cases set out - In s. 220 (2) (a) (b) and (c) of the 1979 constitution.

***APPEALS*** - Right of appeal - Plaintiff has no right of appeal to the judgment of trial court - That granted unconditional leave to defend - Pursuant to s. 220 (2) (a) of the Constitution.

***JURISDICTION*** - Court of Appeal - Has no jurisdiction to hear and determine appeal against ruling of trial court - Granting unconditional leave to defend suit.

***PRACTICE & PROCEDURE*** - *Suo mom* issue - Raised by the Supreme Court - Whether proper.

***STATUTES*** - Interpretation of statute - S. 220(2) (c) of the 1979 Constitution - The words used therein being unambiguous - Ought to be construed according to their plain meaning.

**FACTS**

The Plaintiff (now appellant), by a Writ of Summons applied for summary judgment under Order 10 rule 1 of the High Court of Lagos State (Civil Procedure) Rules 1972. The summons which was specially endorsed and accompanied with a statement of claim, was supported by an affidavit. The appellant prayed the court for summary judgment for certain sum of money claimed against the 1st to 4th defendants (herein Respondents) and an order of court granting the appellant power to exercise its right of sale as provided in the Mortgage agreement between the appellant and the Respondents. The respondents filed a counter affidavit opposing the application of the appellant for summary judgment

while the 3rd respondent also filed a motion praying the court to strike out his name from the suit. Both motions for summary judgment and striking out the name of the 3rd respondents were taken together. The court refused both applications and granted the respondents unconditional leave to defend the suit.

Dissatisfied with the ruling of the trial court, the appellant appealed to the Court of Appeal which dismissed the appeal. The appellant aggrieved by the decision of the Court of Appeal has further appealed to the Supreme Court raising 7 issues for determination. The Supreme Court however, suo motu raised a single issue that was sufficient.

**ISSUE FOR DETERMINATION**

*Whether there was a right of appeal to the court below having regard to the provision of section 220(2) (a) of the Constitution of the Federal Republic of Nigeria, 1979.*

**HELD** (Unanimously dismissing the appeal per lead judgment of **OGWUEGBU JSC**)

***Right of appeal - Is excluded***

1. It seems to me that the legislature having set out the situations where an intending appellant can appeal to the Court of Appeal as of right in section 220(1) of the Constitution and made other provisions in section 221(1) where appeals lie with leave. It intentionally excluded any right of appeal in the three cases set out in subsections 220(2)(a), (b) and (c) of the 1979 Constitution. In fact the exclusion in my view is absolute in sub-section (2)(a) and (b) whereas sub-section 2(c) is qualified in the sense that with leave of the High Court or the Court of Appeal, the right of appeal against a decision made with the consent of the parties or as to costs only is preserved. (p. 1702 F)

***S. 220(2) is unambiguous***

2. Strictly speaking, section 220(2)(c) of the Constitution belongs to the same family of decisions governed by section 221(1). Reading sections 220 to 225 together and most importantly, sections 220 and 221, I am satisfied that the words used in section 220(2) are unambiguous and ought to receive the construction according to their plain meaning. Section 220 cannot be read and construed in isolation from section 221. While section 220(1) deals with appeals as of right, section 221(1) deals with appeals with leave. The special provision made by the legislature in section 220(2) must have been deliberate and for good reasons.

(p. 1702 H)

***No right of appeal under s. 220(2)(a) of the Constitution***

3. I am therefore in no doubt that having regard to section 220(2)(a) of the Constitution, the plaintiff possessed no right of appeal against the decision of Adeniji, J. delivered on 23:10:87. The right of appeal is created by statute or the Constitution and no court has jurisdiction to hear any appeal unless it is derived from a statutory provision. (p. 1704 D)

***Issue raised suo motu was proper***

4. It was also proper for this court to raise the issue suo motu since it is crucial to the appeal and any proceedings leading to a judgment given without jurisdiction is a complete nullity however well conducted. (p. 1704 F)

***Court of Appeal has no Jurisdiction***

5. In conclusion, I hold that the Court of Appeal had no jurisdiction to hear and determine the appeal. Its decision delivered on 9:2:89 is a nullity. The appeal before us is incompetent and it is hereby struck out. (p. 1705 B)

**NOTABLE POINTS OF INTEREST**

**OGWUEGBU JSC**

***1. Leave to defend***

Having gone through the above rules of Order 10, it is quite clear that the defendants are not permitted to defend except with the leave of the judge; leave will only be granted upon the defendants satisfying him that they have a good defence to the action on the merits or upon disclosing such facts as may be deemed sufficient to entitle them to defend generally and such facts are to be given on oath either by affidavit or by examination on oath. (p. 1701 A)

***2. Application for summary judgment - How considered***

The trial court cannot consider the application for summary judgment without considering the affidavit of the defendants showing cause where there is one and generally complying with the requirements of Order 10 rule 3. The application for summary judgment is inseparable from the affidavit showing cause. If it appears that the defendant or any of them has a good defence to or ought to be permitted to defend the action, the judge may permit him to do so either conditionally or unconditionally. (p. 1701 B)

***3. Approach of Supreme Court to constructing the Constitution***

Before construing, sub-section 220(2) of the Constitution, I have in mind the views of Udoma, J.S.C. in *Rabiu v. Kano State* supra that the ap-

proach of this court to the construction of the Constitution should be, as it has been one of liberalism and that it is not the duty of the court to construe any of the provisions as to defeat the obvious ends the Constitution was designed to serve. I should also bear in mind that where the words of the legislature are clear there is no room for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity in the statute. (p. 1702 C)

**UWAIS CJN**

***4. Wordings of s. 220(2) 1979 Constitution are very clear***

C The wordings of Section 220 subsection (2) (a) of the 1979 Constitution (Cap 62 of the Laws of the Federation of Nigeria, 1990), are very clear. They simply mean that there is no right of appeal from a decision of any High Court to the Court of Appeal where the former grants a conditional leave to defend an action. In my opinion, the dissenting decision of Uwaifo, D J.C.A. in *Societe Generale Bank (Nig.) Ltd. v. Panatrade Ltd. & Ors.*, is correct. The decision of the Court of Appeal in *Nishizawa Ltd. v. Jethwani*, per Nnaemeka-Agu, J.C. A. (as he then was) appears to me, with respect, to be wrong. In reaching that decision the Court of Appeal had to import words not found in the provisions of section 220 subsection (2) E (a) of the Constitution to arrive at the decision that there can be an appeal against the granting of an unconditional leave to defend an action. The provisions of the section are very clear and unambiguous. They do not, therefore, call for additional words before they can be given their ordinary meaning. (p. 1705 D)

F

**OGUNDARE JSC**

***5. Right of appeal must be conferred in the clearest language***

The Court of Appeal in NISHIZAWA LTD. called in aid section 221(1) in its construction of section 220(2). In doing so, however, it failed to address G its mind to the opening phrase of the sub-section, that is, “subject to the provisions of section 220 of this constitution.” Thus the right of appeal with leave conferred by section 221(1) is subject to the right of appeal as of right conferred by section 220(1) and the denial of right of appeal provided in section 220(2). After all, the conferment of a right of appeal H is a curtailment of the jurisdiction of the court whose decision is being appealed from, and an extension of the jurisdiction of the court to which the appeal lies. Therefore, a right of appeal must be conferred in the clearest possible language. (p. 1713 E)

**6. Reasoning in NISHIZAWA'S case was faulty**

Indeed, if the reasoning of the court of Appeal were correct there would be no need to insert sub-section (2) of section 220 in the Constitution. With profound respect, I think the reasoning of their Lordships in NISHIZAWA LTD was faulty. (p. 1713 E)

B

**7. Appeal against incompetent appeal is incompetent**

The sum total of all I have been saying is that the Plaintiff had no right of appeal to the Court of Appeal against the order made by the learned trial Judge granting to the Defendants unconditional leave to defend this action. The appeal to the Court of Appeal was therefore, incompetent, and it is hereby struck out by me. The further appeal to this Court being predicated on an incompetent appeal is itself incompetent and it is hereby struck out by me. (p. 1714 D)

**REPRESENTATION**

D

Chief R. A. O. Oriade for the Appellant  
Razaq Okesiji for the Respondents

**CASES REFERRED TO**

Nishizawa Ltd. v. Jethwani (1984) 12 C. 234 E

E

Societe Generale Bank v. Panatrade (1994) 6 N.W.L.R. (pt. 353) 720

Nishizawa v. Jethwani (1995) 5 N.W.L.R. (Pt. 398) 668 at 670

Barrel v. Fordree (1932) A.C. 676

Rabiu v. Kano State (1980) 8-11 S.C. 130

Nabhan v. Nabhan (1967) 1 All N.L.R. 47

F

Rhondda U.D.C. v. Taff vale Rly (1909) A.C. 253 at 258

Ugwu v. Attorney-General of East Central State (1975) 6 S.C. 13

Odofin v. Agu (1992) 3 N.W.L.R. (Pt. 229) 350

Sule v. Nig. Cotton Board (1985) 2 N.W.L.R. (Pt. 5) 17

Owoniboy Technical Services Ltd v. John Holt Ltd. (1991) 6 N.W.L.R. (Pt. 199) 550

G

Attorney-General for the Province of Ontario v. Attorney-General for the Dominion of Canada (1912) AC 571, 583-584

Onitiri v. Benson (1960) 5 FSC 150. 155

H

**STATUTES & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria 1963, s. 117(2)

Constitution of the Federal Republic of Nigeria 1979 ss. 220, 221, 222, 223, 224 & 225

High Court of Lagos State(Civil Procedure) Rules 1972, Order 10, rule 1

**LEAD JUDGMENT BY OGWUEGBU JSC**

This is yet another appeal which revolves on Order 10 of the High Court of Lagos State (Civil Procedure) Rules 1972. The Rules are very often misapplied and misconstrued by some judges and practitioners. The result is that endless delays are caused while waiting for the outcome of interlocutory appeals which are the by products while the substantive cases are left in the cooler.

The plaintiff who is the appellant before this court instituted a civil action in the High Court of Lagos State in April, 1987 claiming the following reliefs from the defendants:

“1. *Judgment against the First defendant in the sum of N950,015.66 (Nine hundred and fifty thousand and fifteen naira sixty six kobo) and interest thereon at the rate of 9 1/2% per annum from the 1st day of March, 1987 until the whole debt with interest is settled.*

2. *Judgment against the Second defendant in the sum of N2,867,932.25 (Two million, eight hundred sixty seven thousand nine hundred and thirty two naira twenty five kobo) and interest thereon at the rate of 9 % per annum from the 1st day of March, 1987 until the whole debt with interest is liquidated.*

3. *Judgment against the First, Second, Third and Fourth defendants jointly and severally in the sum of N1,200,000.00 and interest thereon at the rate of 9 1/2 % per annum from the 1st day of March, 1987 until the whole debt and interest are paid.*

4. *Judgment or an order that the plaintiff can exercise its powers as an equitable mortgagee to sell any or all the landed properties of the First and Second defendant (sic) at Iganmu, Lagos. Ilupeju, Lagos and Isolo Industrial Estate, Isolo, Lagos in order to use the proceeds of such sales in liquidating all or part of the debt of N3,817,947.91 payable by the defendants as at 28th February, 1987 with interest thereon at the rate of 9 1/2% per annum from the 1st day of March, 1987,”*

The writ of summons was specially endorsed and accompanied by statement of claim. The 1st, 2nd and 3rd defendants entered an unconditional appearance by their memorandum of appearance 8:4:87. The fourth defendant could not be served with the writ of summons.

On 5:5:87, the plaintiff applied by summons to the court for summary judgment under Order 10, rule 1 of the High Court of Lagos State (Civil Procedure) Rules, 1972. The summons was supported by an affidavit deposed to by one Fidelis A. Ogunleye, the Loans Manager of

the plaintiff's Bank. Exhibits "A" - "D" were annexed to the affidavit. The defendants filed a counter-affidavit in opposition to the plaintiff's application for judgment. A statement of defence was annexed to the counter-affidavit. The 3rd defendant, Dr. Onagoruwa, also filed a motion praying the court to strike out his name from the writ of summons.

The summons for judgment and the motion to strike out the B name of the 3rd defendant were for convenience taken together by the learned trial Judge who in a reserved ruling, after hearing arguments, dismissed the applications for summary judgment and to strike out the name of the 3rd defendant from the summons. The defendants were granted unconditional leave to defend the action. C

The plaintiff being dissatisfied with the ruling of the High Court appealed to the Court of Appeal and that court in a unanimous decision dismissed the appeal on 9:2:89. The plaintiff has further appealed to this court against the decision of the Court of Appeal. Five grounds of appeal D were filed and from these grounds of appeal, the following seven issues have been identified by the appellant for determination in the appeal:-

*"The first issue for determination in this appeal is whether the defendant/respondents have admitted in the letter dated 18th July, 1986 which they wrote to the plaintiffs/appellant liability to pay the loan/overdraft of N3,446,674.20 and interest thereon at the rate of 9 1/2% per E annum as at 31st May 1986.*

*The second issue for determination is whether the onus of proof was not on the defendants/respondents who admitted liability to pay the debt of N3,446,674.20 to prove that they have settled the debt instead of putting up a sharp defence that they made a mistake in making the admission. F*

*The third issue for determination is whether the third defendant/respondent who had executed a deed of guarantee to pay the debt of the first and second defendants/respondent can be heard to say that he is no longer the guarantor contrary to the provisions of the deed of guarantee which was executed under seal. G*

*The fourth issue for determination is whether the written undertaking given by the defendants/respondents to pledge the landed properties of the defendants/respondents as securities for the loan/overdrafts granted by the plaintiff/applicant has created an equitable mortgage in respect of which the Court can make an order to sell the landed properties. H*

*The fifth issue for determination is whether the mere fact that the defendants/respondents filed a Statement of defence or a counter-affidavit or both is sufficient ground for ruling that the application for judgment should be dismissed in order to adduce oral evidence without considering*

*whether or not the Statement of Defence or the Counter-Affidavit or both constituted a valid defence in law.*

*The sixth issue for determination is whether this Honourable Supreme Court of Nigeria should set aside the two concurrent findings of fact of the trial court and the Court of Appeal of Nigeria.*

**B** *The seventh issue for determination is whether this Honourable Final Appellate Court has jurisdiction to deliver judgment in favour of the plaintiff/applicant instead of sending the case back to the trial court to start the case de novo,”*

**C** The only issue which the respondents raised in their brief of argument is whether the Court of Appeal was right in up-holding the decision of the High Court granting the defendants/respondents an unconditional leave to defend the action. There is also an observation in the said brief to the effect that grounds 1 and 2 of the grounds of appeal are incompetent and should be struck out on the ground that each of the **D** grounds of appeal complained of error in law and misdirection in law.

Mr. Oriade, learned appellant’s counsel adopted the appellant’s brief of argument and all the authorities cited therein. In the course of his oral submissions, the court suo motu raised the issue whether there was a right of appeal to the court below having regard to the provision of **E** section 220(2) (a) of the Constitution of the Federal Republic of Nigeria, 1979. On this question, Mr. Oriade submitted that the appeal was not caught by the said provision of the Constitution. He relied on the case of *Nishizawa Ltd. v. Jethwani* (1984) 12 SC. 234 amongst other authorities he cited. It was his contention that the question of leave to defend does **F** not apply when the court is considering the provision of Order 10, rules 1-3 of the High Court of Lagos State (Civil Procedure) Rules. He further argued that his appeal to the court below did not complain against the unconditional leave to defend granted to the defendants but the dismissal of application for summary judgment by the learned trial judge.

**G** Mr. Okesiji for the respondents adopted the arguments contained in the respondent’s brief filed on 20:9:95. He referred to section 220(2)(a) of the 1979 Constitution and submitted that a decision of any High Court granting unconditional leave to defend an action is not appealable.

**H** He submitted further that a court which is considering an application for summary judgment may enter summary judgment for the plaintiff or grant the defendant unconditional leave to defend the action. He further contended that a complaint that the plaintiff was not granted summary judgment is also a complaint that the defendants were granted unconditional leave to defend. He referred to relief four sought from the

Court of Appeal in the Notice of Appeal. He referred the court to the two conflicting decisions of the Court of Appeal in *Societe Generate Bank (Nig) Ltd. v. Panatrade Ltd & Ors* (1994) 6 NWLR. (Pt. 353) 270 at 734 paras F-H and *Nishizawa Ltd. v. Jethwani* (1995) 5 NWLR (Pt. 398) 668 at 670.

Mr. Okesiji argued that section 220(2) (a) - (c) of the Constitution bars “any” right of appeal in each of the three situations and that section 221 thereof cannot make the decision appealable and that the two sections of the Constitution cannot be read disjunctively. He further contended that section 221 does not confer a right of appeal but a discretion on the court and when that discretion is exercised, the litigant acquires a right of appeal and not before the discretion is exercised and that the words “subject to” appearing in section 221 is a word of qualification. He finally submitted that by the clear provision of section 220(2) (a) of the Constitution, the decision of the learned trial Judge is not appealable. We were urged to dismiss the appeal on its merits, and having regard to section 220(2) (a) of the Constitution, to declare the decision of the court below null and void as there was no right of appeal to that court.

The competence of the Court of Appeal to hear and determine the appeal which is on a further appeal to this court having been raised, I will deal with that issue first and if there was want of jurisdiction in that court, any consideration of the appeal in this court will be an exercise in futility.

Section 220 of the Constitution of the Federal Republic of Nigeria, 1979 makes provision for appeals as of right from a decision of the High Court. It provides:

*“220(1) An appeal shall lie from decisions of the High Court to the Federal Court of Appeal as of right in the following cases -*

*(a) .....(b) .....(c) .....(d) .....(e) .....(f) .....(g) ..... (2) nothing in this section shall confer any right of appeal*

*(a) from a decision of any High Court granting unconditional leave to defend an action*

*(b) .....(c) .....*

Section 221 of the 1979 Constitution which was also referred to the court by both counsel provides:

*“221 (1) Subject to the provisions of section 220 of this Constitution, an appeal shall lie from the decisions of a High Court to the Federal Court of Appeal with leave of the High Court or the Federal Court of Appeal.”*

The decision of the learned trial Judge (Adeniji J.) which gave rise to this appeal is the dismissal of the plaintiff’s summons for sum-

mary judgment and the unconditional leave to defend the action granted to the defendants who are respondents in this court. The first question to be answered is whether the said decision dated 23: 10:87 comes within the provision of section 220(2) (a) of the Constitution. The learned appellant's counsel submitted that his appeal to the court below is against the dismissal of his application for summary judgment and not on the unconditional leave to defend granted to the defendants. This argument is without substance having regard to the provisions of Order 10 of the High Court of Lagos State (Civil Procedure) Rules, 1972.

Order 10 rule 1(a) reads:

*"(a) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Order 3 Rule 4, the plaintiff may on affidavit made by himself or by any other person who can answer positively to the facts verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed, if any, apply to a Judge in Chambers for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."*

How a defendant may show cause is provided in rule 3 of Order 10 which reads:

*"(a) The defendant may show cause against such application by affidavit, or the Judge may allow the defendant to be examined upon oath.*

*(b) The affidavit shall state whether the defence alleged goes to the whole or part of the plaintiff's claim.*

*(c) The Judge may, if he thinks fit, order the defendant, or in the case of a corporation, any officer thereof, to attend and be examined upon oath, or to produce any leases, deeds, books, or documents, or copies of or extracts therefrom."*

Order 10 rules 5 and 6 read:

*"5. If it appears to the Judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence ..... the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter ....*

*6. Leave to defend may be given unconditionally, or subject to*

*such terms as to giving security or time or otherwise as the Judge may think fit."*

Having gone through the above rules of Order 10, it is quite clear that the defendants are not permitted to defend except with the leave of the Judge; leave will only be granted upon the defendants satisfying him that they have a good defence to the action on the merits or upon disclosing such facts as may be deemed sufficient to entitle them to defend generally and such facts are to be given on oath either by affidavit or by examination on oath.

The trial court cannot consider the application for summary judgment without considering the affidavit of the defendants showing cause where there is one and generally complying with the requirements of Order 10 rule 3. The application for summary judgment is inseparable from the affidavit showing cause. If it appears that the defendant or any of them has a good defence to or ought to be permitted to defend the action, the Judge may permit him to do so either conditionally or unconditionally.

We were referred to two conflicting decisions of the Court of Appeal involving the interpretation of section 220(2) (a) of the 1979 Constitution. The two cases are *Nishizawa Ltd v. Jethwani* delivered on 31:3:82 and reported in (1995) 5 NWLR (Pt. 398) 668 and *Societe General Bank Nig. Ltd. v. Panatrade Ltd. & Ors.* delivered on 22:4:94 and reported in (1994) 6 NWLR (Pt. 353) 720. Even though *Nishizawa's* case was delivered in 1982, it was not reported until about twelve years after. The latter case must have prompted the reporting.

Be that as it may, in both cases, section 220(2)(a) was considered. In *Societe General Bank Nig. Ltd. v. Panatrade Ltd. & Ors.* supra the Court of Appeal by a majority decision, dismissed on the merits, the plaintiff's appeal against the unconditional leave to defend the action granted to the defendants therein. (Kalgo, J .C.A. and Sulu-Gambari, J.C.A. (as he then was), Uwaifo, J .C.A. also dismissed the appeal not on the merits but on the ground that the appellant therein had no right of appeal by virtue of section 220(2)(a) of the 1979 Constitution. He gave no reasons for taking that stand and I am sure if the attention of that panel had been drawn to the earlier decision of the same court in *Nishizawa Ltd. v. Jethwani* supra, he would have given reasons for his conclusion.

The panel of the Court of Appeal which decided the earlier case construed section 220 (2) (a) extensively. In the view of Nnaemeka-Agu, J.C.A. (as he then was) who wrote the lead judgment to which the other members concurred (Ademola, J.C.A. and Kutigi, J.C.A. (as he then was), an appeal lies under section 220 (2)(a) of the Constitution with

leave of the High Court or the Court of Appeal. In the course of his judgment, he considered section 221 of the 1979 Constitution, section 117(2) of the 1963 Constitution, section 31(1)(c) of the English Judicature Act, 1925, the cases of *Barrel v. Fordree* (1932) A.C. 676, *Rabiu v. Kano State* (1980) 8-11 SC 130 and *Nabhan v. Nabhan* (1967) 1 All NLR. 47 amongst others. He came to the conclusion that it is not the intendment of section 220(2) (a) of the Constitution of 1979 to bar altogether the right of appeal by a person who is a party to a decision of any High Court granting an unconditional leave to defend an action and that such an intending appellant could appeal with the leave of the High Court or the Court of Appeal.

Before construing sub-section 220(2) of the Constitution, I have in mind the views of Udoma, J.S.C. in *Rabiu v. Kano State* supra that the approach of this court to the construction of the Constitution should be, as it has been, one of liberalism and that it is not the duty of the court to construe any of the provisions as to defeat the obvious ends the Constitution was designed to serve. I should also bear in mind that where the words of the legislature are clear, there is no room for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity in the statute.

When *Nishiizawa Ltd. v. Jethwani* (1984) 12 SC 234 came before this court, the issue of section 220(2) (a) of the Constitution was not raised and this court had no opportunity of expressing its views on it. Sub-section 220(2) starts as follows:

*“Nothing in this section shall confer any right of appeal .... “*  
(Italics is for emphasis)

It seems to me that the legislature having set out the situations where an intending appellant can appeal to the Court of Appeal as of right in section 220(1) of the Constitution and made other provisions in section 221 (1) where appeals lie with leave, it intentionally excluded any right of appeal in the three cases set out in sub-sections 220(2) (a), (b) and (c) of the 1979 Constitution. Infact the exclusion in my view is absolute in sub-section (2) (a) and (b) whereas sub-section 2(c) is qualified in the sense that with leave of the High Court or the Court of Appeal, the right of appeal against a decision made with the consent of the parties or as to costs only is preserved.

Strictly speaking, section 220(2) (c) of the Constitution belongs to the family of decisions governed by section 221 (1).

Reading sections 220 to 225 together and most importantly, sections 220 and 221, I am satisfied that the words used in section 220(2) are unambiguous and ought receive the construction accord-

**ing to their plain meaning. Section 220 cannot read and construed in isolation from section 221. While section 220(1) deals with appeals as of right, section 221 (1) deals with appeals with leave. The specific provision made by the legislature in section 220(2) must have been deliberate and for good reasons.**

At this Stage, I will consider section 117 of the Constitution of the Federal republic of Nigeria, 1963 and the case of Nabhan v. Nabhan (1967) All NLR ... (1990 Reprint).

Section 117(2) provides:

*“(2) An appeal shall lie from the decision of the High Court of a territory to the Supreme Court as of right in the following cases C  
.....”*

It proceeded to mention six situations where appeals lie as of right:

*“2(a) final decisions in any civil proceedings before the High Court sitting at first instance;*

*(b) .....(c) .....(d) ..... D*

*(e) ..... (f) such other cases as may be prescribed by any law in force in the territory.*

*Provided that nothing in paragraph (a) of this subsection shall confer any right of appeal -*

*(i) from any order made ex-parte; (ii) from any order relating only to costs; (iii) from any order made with the consent of the parties; or (iv) in the case of a party to proceedings for dissolution or nullity of marriage who, having had time and opportunity to appeal from any decree nisi in such proceedings, has not so appealed, from any decree absolute founded upon such a decree nisi.” F*

Nabhan v. Nabhan supra revolved around S.117 (2) of the 1963 Constitution and proviso (iv) to the said sub-section dealing with decree nisi. As a result of various issues which might arise (such as status, property, alimony and custody of children) if section 117(2)(a) did not confer a right of appeal from a decree nisi, this Court construed section 117(2) (a) of the 1963 Constitution to include a decree nisi Nabhan v. Nabhan supra. G

It is in recognition of those issues which might arise that this court in the said case treated a decree nisi as a final decision under section 117(2) (a). The peculiar situation was recognised by the court when Brett, J.S.C who wrote the lead judgment observed at page 61 as follows: H

*“To sum up, we hold that it is open to the Court on the wording of section 117 (2)(a) of the Constitution to treat the decision appealed from in this case as a final decision for the purposes of that paragraph, and that a consideration both of the history of such appeals in Nigeria,*

*und of the consequences to innocent persons which might follow if no appeal could be brought until after a decree absolute had effected a change in the matrimonial status of the parties ..... ”*

It should be remembered that there was no intermediate appellate court when the 1963 Constitution came into force and appeals from the High Courts went to the Supreme Court.

The 1979 Constitution to some extent altered the language and the arrangement of the sub-sections where an intending appellant can appeal as of right and with leave as well as the proviso from what they were in the 1963 Constitution. Section 220(2) which is a clause of exception in the section may in exceptional circumstances have the effect of a substantive enactment but the natural presumption is that, but for the proviso, the enabling part of the section would have included the subject matter of the provision and in this case, the right to appeal against the grant of an unconditional leave to defend the action. See *Rhondda U.D.C. v. Taff Vale Rly Co.* (1909) A.C. 253 at 258.

As I said earlier the legislature when it inserted section 220(2) did so deliberately having regard to the history of appeals in such cases and the peculiar nature of the three cases covered by the proviso.

**I am therefore in no doubt that having regard to section 220(2) (a) of the Constitution, the plaintiff possessed no right of appeal against the decision of Adeniji, J. delivered on 23:10:87. The right of appeal is created by statute or the Constitution and no court has jurisdiction to hear any appeal unless it is derived from a statutory provision.** See *Ugwu v. Attorney-General of East Central State* (1975) 6 SC 13, *Adigun & ors v. Attorney-General of Oyo State & ors* (1987) 2 NWLR (Pt. 56) 197, *Ajomale v. Yaduat No.1* (1991) 5 NWLR (Pt. 191) 257 and *Odofin & ors v. Agu & ors.* (1992) 3 NWLR (Pt. 229) 350.

**It was also proper for this court to raise the issue suo motu since it is crucial to the appeal and any proceedings leading to a judgment given without jurisdiction is a complete nullity however well conducted.** See *Sule v. Nig. Cotton Board* (1985) 2 NWLR (Pt.5) 17, *Onyema & ors. v. Oputa & or.* (1987) 3 NWLR (Pt.60) 259, *Ojokolobo & Ors. v. Alamu & Ors.* (1987) 3 NWLR (Pt. 61) 377, *Moses v. Ogunlabi* (1975) 4 SC 81 and *Petrojessica Enterprises Ltd. & Or. v. Leventis Technical Co. Ltd.* (1992) 5 NWLR (Pt.244) 675 at page 693 where Belgore, J.S.C. observed as follows:

*“Jurisdiction is the very basis on which any tribunal tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity ..... This importance of jurisdiction is the reason why it can be raised at any*

*stage of the case, be it at the trial, on appeal to the Court of Appeal or this Court, a fortiori the court can suo motu raise it."*

See also Osadebay v. Attorney-General Bendel State (1991) 1 NWLR (Pt.169) 525, Owoniboys Technical Services Ltd. v. John Holt Ltd. (1991) 6 NWLR (Pt. 199) 550 and Kano v. C.B.N. (1991) 9 NWLR (pt.214) 126 and Osafire v. Odi (No.1) (1990) 3 NWLR (Pt. 137) 130. B

**In conclusion, I hold that the Court of Appeal had no jurisdiction to hear and determine the appeal. Its decision delivered on 9:2:89 is a nullity. The appeal before us is incompetent and it is hereby struck out** with N1,000.00 costs to the respondents.

C

### UWAIS CJN

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

The wordings of Section 220 subsection (2) (a) of the 1979 D Constitution (Cap. 62 of the Laws of the Federation of Nigeria, 1990), are very clear. They simply mean that there is no right of appeal from a decision of any High Court to the Court of Appeal where the former grants an unconditional leave to defend an action. In my opinion, the dissenting decision of Uwaifo, J.C.A. in Societe General Bank (Nig.) Ltd. E v. Panatrade Ltd. & Ors. (1994) 6 NWLR (PL.353) no at p. 734 is correct. The decision of the Court of Appeal in Nishizawa Ltd. v. Jethwani, (1995) 5NWLR (PL.398) 668 at p. 670 per Nnaemeka-Agu, J.C.A. (as he then was) appears to me, with respect, to be wrong. In reaching that decision the Court of Appeal had to import words not found in the provisions of section 220 subsection (2) (a) of the Constitution to arrive at the decision that there can be an appeal against the granting of an unconditional leave to defend an action. The provisions of the section are very clear and unambiguous. They do not, therefore, call for additional words before they can be given their ordinary meaning. F

G

The submission by Chief Oriade that the appeal in the Court below was against the dismissal of the application by the plaintiff for summary judgment and not against the grant of unconditional leave to defend the action is ingenious but not convincing. The dismissal of the application for summary judgment was consequential to the grant of the unconditional leave to defend the action. It is not, therefore, possible to pursue one without the other. To allow an appeal against the dismissal of the application, the grant of the unconditional order will have to be set aside and that can only come about where there is an appeal against the latter. H

It is for these and the reasons contained in the judgment of my learned brother Ogwuegbu, J .S.C. that I too hold that the appeal before the Court below was incompetent and should not have been heard. A foritori the appeal to this Court is incompetent. It is hereby struck out with N1,000.00 costs to the respondents.

B

### BELGORE JSC

The purport of section 220(2) of the Constitution of Federal Republic of Nigeria 1979 is so clear that its interpretation should present no problem. There is no right conferred to appeal in the three instances mentioned therein. Section 221 (supra) is made subject to section 220 (supra) and I cannot find where the right to appeal the unconditional right to defend exists in the present suit now on final appeal to this Court. The right to appeal from High Court to Court of Appeal is not ambiguous and section 220(2) (a), (b) and (c) set out situations that are not appealable as of right. To bring in the effect of section 221 of the Constitution is to do mischief to the intendment of section 220(2). I therefore agree with my learned brother, Ogwuegbu, J.S.C. that the Court of Appeal lacked jurisdiction to hear the appeal on this matter and their foray into the merit of the appeal is a nullity and their decision is therefore void. I therefore come to the same conclusion that the appeal is incompetent and it is hereby struck out with N1,000.00 costs to the respondents.

### OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Ogwuegbu J.S.C. with which I agree. I however wish to add a few words of my own.

The plaintiff sued the defendants claiming as per paragraph 27 of the statement of claim attached to the writ of summons -

“1. *Judgment against the First defendant in the sum of N950,015.66 (Nine hundred and fifty thousand und fifteen Naira sixty-six kobo) and interest thereon at the rate of 9 1/2% per annum from the 1st day of March, 1987 until the whole debt with interest is settled.*

(2) *Judgment against the Second defendant in the sum of N2,867,932.25 (Two million, eight hundred und sixty-seven thousand, nine hundred and thirty two Naira, twenty five kobo) und interest thereon at the rate of 9 1/2% per annum for the 1st day of March, 1987 until the whole debt with interest is liquidated.*

(3) *Judgment against the First, Second, Third and Fourth de-*

*fendant jointly and severally in the sum of N1,200,000.00 and interest thereon at the rate of 9 1/2% per annum from the 1st day of March, 1981 until the whole debt and interest are paid.*

*(4) Judgment or an order that the plaintiff can exercise its powers as an equitable mortgagee to sell any or all the landed properties of First and Second Defendant at Iganmu Lagos, Ilupeju. Lagos and Isolo B Industrial Estate, Isolo, Lagos, in order to use the proceeds of such sales in liquidating all or part of the debt of N3,817,947.91 payable by the defendants as at 28th February, 1987 with interest thereon at the rate of 9 1/2% per annum from the 1st day of March, 1987.”*

The 1st, 2nd and 3rd defendants entered unconditional appearance to the C suit. The 4th defendant was not served with the writ of summons. The plaintiff brought a summons asking for the following reliefs:

*“1. An order for leave to enter judgment against the First defendant/respondent in the sum of N950,015.66 (Nine hundred and fifty thousand and fifteen Naira sixty six kobo) and interest thereon at the rate of D 9 1/2% per annum from the 1st day of March, 1987 until the whole debt with interest is settled.*

*2. An order for leave to enter judgment against the Second defendant/respondent in the sum of N2,867,932.25 (two million, eight hundred and sixty-seven thousand, nine hundred and thirty two Naira and E twenty five kobo) and interest thereof at the rate of 9 1/2% per annum from the 1st day of March, 1987 until the whole debt with interest is liquidated.*

*3. An order for liberty to enter judgment against the First, Second and Third defendants/respondents in the sum of N1,200,000.00 (one F million and two hundred thousand Naira) being part of the loan and overdraft granted to the First and Second defendants/respondents in respect of which the Third defendant stood as a Guarantor and interest thereon at the rate of 9 1/2% per annum from the 1st day of March, 1987 until the whole debt with interest is settled.*

*4. An order granting leave to the plaintiff/applicant to sell the land and buildings of the First and Second defendants situate at and known as Plot 2, Block J, Isolo Industrial Estate, Isolo, Lagos, Nigeria in order to use the proceeds of sale in liquidating the whole or part of the loans/overdrafts amounting to N3,817,947.91 and interest thereon at the H rate of 9 1/2% per annum from the 1st day of March 1987.*

*5. Any further order or other orders as this Honourable Court may consider necessary to grant in favour of the plaintiff/applicant in the interest of justice.”*

The summons was supported by an affidavit sworn to by one Fidelis Adekola Ogunleye and annexures thereto. The 1st, 2nd and 3rd defendants (hereinafter are referred to as the defendants) filed a counter-affidavit sworn to by one Olanrewaju Akinyemi and a joint statement of defence. The 3rd defendant also filed a motion praying the trial court to strike out his name from the action.

Both the plaintiff's summons and the 3rd defendant's motion were heard together. In a ruling delivered by the learned trial Judge on 23rd October 1987, he granted the defendants an unconditional leave to defend the action and dismissed plaintiffs application for summary judgment. The learned Judge also dismissed 3rd defendant's application. The plaintiff appealed to the Court of Appeal (Lagos Division) against the decision in so far as the decision affected its (plaintiff's) application for summary judgment. The appeal was dismissed. The plaintiff has further appealed to this Court. Pursuant to the rules of this Court both parties filed and exchanged their respective briefs of argument.

At the oral hearing of the appeal on 1st July 1996, we drew learned counsel's attention to the provisions of section 220(2)(a) of the Constitution and invited counsel to address us on the question whether there was right of appeal to the Court of Appeal and, if there was no such right, whether the proceedings of that Court were not a nullity.

Chief Oriade, learned leading counsel for the plaintiff submitted that plaintiff's appeal to the Court of Appeal was against the dismissal of its application for summary judgment and not against the grant of unconditional leave to the defendants to defend the action and, therefore, the appeal was not caught by section 220(2) (a) of the Constitution. He observed that none of the grounds of appeal to the Court below complained against the grant of unconditional leave to defend. He submitted that the question of leave to defend did not arise under Order 10 rules 1 -3 High Court Rules 1972 of Lagos State, under which he brought the application for summary judgment but under Order 9 rule 3.

Mr. Okesiji, of counsel for the defendants submitted that there was no right of appeal against a decision of the High Court granting an unconditional leave to defend an action. Learned counsel submitted that plaintiff's appeal from the High Court to the Court of Appeal was, in effect, an appeal against the decision of the High Court granting to the defendants an unconditional leave to defend the action.

Learned counsel drew our attention to two conflicting decisions of the Court of Appeal on the issue. He cited (i) *Societe Generale Bank (Nig.) Ltd. v. Panatrade Ltd. & Ors.* (1994) 6 NWLR (Pt.353) 720, 734

where, without giving reasons, it was held that a decision of the High Court granting an unconditional leave to defend was unappealable and (ii) Nishizawa Ltd. v. Jethwani (1995) 5 NWLR(Pt.398) 668, 670 where it was held that such a decision was appealable. Learned counsel urged the Court to approve the decision in Societe General Bank and to hold that the plaintiff had no right to appeal to the Court of Appeal from the High Court decision granting unconditional leave to the defendants to defend the action and dismissing plaintiff's application for summary judgment.

Section 220(2) (a) of the Constitution provides:

*"Nothing in this section shall confer any right of appeal -*

*(a) from a decision of any High Court granting an unconditional leave to defend an action;"*

I should think this provision is clear and unambiguous; it denies a right of appeal to a party (usually the plaintiff) aggrieved by a decision of a High Court granting to the other party (usually the defendant) unconditional leave to defend the action. Our attention has however, been drawn to two conflicting decisions of the Court of Appeal on the subject. In Societe Generale Bank (Nig.) Ltd. v. Panatrade Ltd. & Ors. (supra) in an appeal brought against a High Court decision granting the defendants in that case unconditional leave to defend the action, Uwaifo, J.C.A. in a minority decision given on 22nd April, 1994, had this to say:

*"In the only ground of appeal filed by the plaintiff against the decision it is plain that it has questioned the rightness of that decision of unconditional leave. The ground, without the particulars, reads:-*

*'The learned High Court Judge erred in law in granting the defendants unconditional leave to defend the action.'*

*I have no hesitation in saying that the entire appeal was a waste of time. The plaintiff has no right of appeal at all by virtue of section 220(2) (a) of the 1979 Constitution which reads:-*

*'(2) Nothing in this section shall confer any right of appeal -*

*(a) from a decision of any High Court granting unconditional leave to defend an action.'*

*I will disallow this appeal and make an order striking it out as being incompetent."*

In 1982 the Court of Appeal had had to face a similar problem. In Nishizawa Ltd. v Srichang Jethwani (supra) in a decision given by the Court on 31st March, 1982 but not reported until July 1995, Nnaemeka-Agu J.C.A. (as he then was) delivering the lead ruling of the Court (with which Ademola J.C.A. and Kutigi J.C.A. as he then was agreed), held at page 676 of the Report:

*"In my view, it is not the intendment of section 220(2) of the Constitution to bar a litigant from appealing altogether, even with leave. If it was so intended the sub-section should have said "Nothing in this Constitution shall confer any right of appeal, etc." but it does not say so. It appears to me that the opening line of the sub-section already referred to is designed to bar only appeal as of right in the three cases enumerated in section 220(2) (a) - (c). It follows that they are appealable by leave under section 221(1) of the Constitution which provides for appeal with leave in all cases in which there is no appeal as of right under section 220(1)".*

In coming to this conclusion, the learned Justice had observed at pages 675-676:

..... *"it would be necessary, as Chief Williams has suggested to read section 220 of the Constitution as a whole. Every other principle apart, that approach was envisaged by the draftsman is, in my view, shown by the opening words of sub-section (2) of the section 220. It says:*

*'Nothing in this section shall confer any right of appeal .....'*  
*It does not say "nothing in this Constitution ....."*

*And the marginal note and, indeed, the clear wordings of section 220(i) deal with "Appeals as of right from a High Court," After all marginal notes have sometime, though not always, been used as aids to construction. It appears to me therefore that the full rendering of the opening line of section 220(2) could be stated thus:*

*'Nothing in this section conferring the right of appeal as of right from a decision of a High Court shall confer any such right in the following cases ....."*

In further elucidation of the conclusion he reached, the learned Justice at page 676 explained:

*"If the sub-section is open to two possible constructions, I have a duty to adopt a form of construction which will avoid the injustice of depriving a litigant of his right of appeal. So, if ordinarily the sub-section were open to two interpretations, one allowing appeal with leave and the other barring such a right I should, on the principles I have mentioned, have inclined to the former; but, in my view the opening words of the sub-section do not leave open at all the more restrictive interpretation suggested by Mr. Cole. Besides to give it such an interpretation will produce a conflict between the opening sentence of S.220(2) which, if so interpreted, postulates that one shall not have a right of appeal with leave and section 220(2) (c) which expressly provides that one could appeal with leave of the High Court or of the Federal Court of Appeal from a decision of the High Court made with the consent of the parties or as to costs only. It would be*

*incongruous to hold that the opening sentence of the sub-section was designed to bar appeal with leave in paragraphs (a) - (c) of the sub-section and then turn round to hold that appeal could lie with leave in paragraph (c). Admittedly the construction I have given the sub-section makes it unnecessarily inelegant draftsmanship to repeat the words "without the leave of a High Court or of the Federal Court of Appeal" in section 220(2) (c): but this unnecessary repetition is preferable to a construction which produces a conflict between the opening sentence of S.220(2) and section 220(2) (c). Ut res magis Valeat quam pereat is after all, a well known maxim. I ought to avoid a construction which will introduce a conflict in the system of appeals under the sub-section. Besides, the law does not very much mind a repetition ex abundantia cautella."* and concluded at page 677 thus:

*"In conclusion I am satisfied that it is not the intendment of section 220(2) (a) of the Constitution of 1979 to bar altogether the right of appeal by a person who is party to a decision of any High Court granting an unconditional leave to defend an action. Such an intending appellant could appeal with the leave of the High Court or of the Federal Court of Appeal under section 221 of the Constitution of the Federal Republic of Nigeria, 1979."*

With profound respect to the learned Justice I do not share his views. Subsection (1) of section 220 of the Constitution confers right of appeal as of right from the High Court to the Court of Appeal in certain prescribed instances. Sub-section (2) takes away right of appeal in three cases, to wit:

(a) *from a decision of any High Court granting unconditional leave to defend an action;*

(b) *from an order absolute for the dissolution or nullity of marriage in favour of any party who, having had time and opportunity to appeal from the decree nisi in which the order was founded, has not appealed from that decree nisi; and*

(c) *without the leave of a High Court or of the Court of Appeal, from a decision of the High Court made with the consent of the parties or as to costs only.*

Then comes section 221(1) which confers right of appeal with leave. Sub-section (1) of section 221 reads:

Subject to the provisions of section 220 of this Constitution, an appeal shall lie from decisions of a High Court to the Court of appeal with the leave of that High Court or the Court of Appeal. (Underlining is mine)

The principle to be applied in the construction of provisions of our Constitution has been laid down by this Court in *Nafiu Rabiu v. The*

State (1980) 8-11 SC. 130, 149 where Sir Udoma J.S.C. observed:

“My Lords, it is my view that the approach of this Court of the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim *ut res magis valeat quam pereat*. I do not conceive it to be the duty of this Court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.”

The learned and noble Justice of the Supreme Court quoted with approval the dictum of the Privy Council in *Attorney-General for the Province of Ontario & Ors. v. Attorney-General for the Dominion of Canada* (1912) AC 571, 583-584 which runs thus:

“In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself ..... or otherwise is clearly repugnant to its sense.”

Bearing in mind the approach expounded in the passages above, I now consider section 220. Sub-section (1) lists out cases where right of appeal as of right is conferred. Sub-section (2) bars right of appeal in three cases. In my respectful view, the text of sub-section (2) is explicit enough and is therefore, conclusive in what it forbids, that is, a right of appeal. To suggest, as was done by the Court of Appeal in *Nishizawa G Ltd. v. Jethwani* (supra), that the words “conferring the right of appeal as of right from a decision of a High Court” be inserted between the words “section” and “shall” in the opening sentence of the sub-section, only leads to absurdity. If the construction placed on the sub-section was right it would mean a party in a matrimonial case who, having had time and opportunity to appeal from a decree nisi but failed to do so, would have a right to appeal, with leave, to appeal against the order absolute founded on that decree nisi. That, in my respectful view, could not be the intendment of the Constitution. Similarly, if the intention is to prohibit appeals as of right only in those three instances there would be no need to

provide for leave of the High Court or the Court of Appeal in the third class of cases coming under section 220(2).

The Court of Appeal in *Nishizawa Ltd* called in aid section 221(1) in its construction of section 220(2). In doing so, however, it failed to address its mind to the opening phrase of the sub-section, that is, “subject to the provisions of section 220 of this Constitution.” Thus the right of appeal with leave conferred by section 221 (1) is subject to the right of appeal as of right conferred by section 220(1) and the denial of right of appeal provided in section 220(2). After all, the conferment of a right of appeal is a curtailment of the jurisdiction of the court whose decision is being appealed from, and an extension of the jurisdiction of the court to which the appeal lies. C Therefore a right of appeal must be conferred in the clearest possible language. See *Onitiri v. Benson* (1960) SCNLR 314 at 319 (1960) 5 FSC 150,155 where Sir Ademola, CJ (as he then was) observed:

*“it is a well known principle of law that the conferment of rights of appeal limits the jurisdiction of the Court whose decision is sought to be D appealed, and extends the jurisdiction of the court to which the appeal lies, and it is also a cardinal principle that the curtailment of the jurisdiction of any Court must be effected clearly and definitely, not necessarily perhaps by express words, but at least by the clearest possible implication.”*

Indeed, if the reasoning of the Court of Appeal were correct E there would be no need to insert sub-section (2) of section 220 in the Constitution. With profound respect, I think the reasoning of their Lordships in *Nishizawa Ltd* was faulty.

The conclusion I finally reach on the construction of section 220(2) of the Constitution is that it bars a right of appeal, whether as of F right or with leave, in the two cases listed in paragraphs (a) and (b) thereof. Consequently, I hold that there is no right of appeal to the Court of Appeal from a decision of any High Court granting unconditional leave to defend an action.

Chief Oriade has argued that the plaintiff’s appeal, in the instant G case, to the Court of Appeal was against the dismissal of the application for summary judgment and not against the grant of unconditional leave to defend the action. I see no merit in this submission. Plaintiff’s application for summary judgment was brought under Order 10 of the High Court of Lagos State (Civil Procedure) Rules, 1972. Rule 1(a) thereof provides - H

*“Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Order 2, rule 4, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount*

*claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed. if any, apply to a Judge in Chambers for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant shall satisfy him that he has a*  
 B *good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."*

The Judge before whom an application for summary judgment is  
 C made under this rule may, in his discretion (which discretion must be exercised judicially and judiciously) either empower the plaintiff to enter such judgment as may be just or may grant conditional or unconditional leave to the defendant to defend the action - See: rule 6 of Order 10. An appeal against the  
 D Judge's refusal to empower the plaintiff to enter summary judgment where he has granted the defendant unconditional leave to defend the action is an appeal against the grant of the unconditional leave to defend. The refusal is not independent of the order of unconditional leave.

The sum total of all I have been saying is that the plaintiff had no  
 right of appeal to the Court of Appeal against the order made by the  
 E learned trial Judge granting to the defendants unconditional leave to defend this action. The appeal to the Court of Appeal was therefore, incompetent, and it is hereby struck out by me. The further appeal to this Court being predicated on an incompetent appeal is itself incompetent and it is hereby struck out by me.

F I abide by the order for costs made in the judgment of my learned brother Ogwuegbu, J.S.C.

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### MOHAMMED JSC

G I have had the privilege of reading the draft judgment of my learned brother Ogwuegbu, J.S.C. and I entirely agree that section 220(2) (a) of 1979 Constitution makes it abundantly clear that a decision of the High Court granting unconditional leave to defend is not appealable. The decision of the Court of Appeal is therefore a nullity because that Court  
 H had no jurisdiction to hear an appeal from the decision of Adeniji. J. of Lagos High Court granting the respondents unconditional leave to defend the action filed against them by the appellant. I also award N1,000.00 costs to the respondents. Appeal struck out.