

SUPREME COURT OF NIGERIA
14TH FEBRUARY, 1997. SC 66/1996
CORAM:-I.L. KUTIGI, M.E. OGUNDARE, E. O. OGWUEGBU,
S. U. ONU, Y. O. ADIO, JJSC

ADE COKER PLAINTIFF/APPELLANT
AND
UNITED BANK FOR AFRICA PLC DEFENDANT/RESPONDENT

***APPEALS** - Enlargement of time to prepare the record - Where appellant has delayed in filing the record of appeal - Enlargement of time will be granted - Upon presentation of good reason.*

***APPEALS** - Grounds of appeal - Proposed new ground - Where they are of mixed law and fact - Leave of court must be obtained before filing the grounds.*

***APPEALS** - Grounds of appeal - Discretion of trial court - Where reviewed by the Court of Appeal - Ground questioning that exercise of discretion - Is at best one of mixed law and fact.*

***APPEALS** - Grounds of law - Appeal filed pursuant to s. 213(2) of the Constitution - The grounds can only be amended - By substituting grounds of law only.*

***APPEALS** - Competence of grounds of appeal - Grounds that are incompetent - Should be struck out.*

FACTS

The plaintiff/appellant, before the Supreme Court applied by a motion seeking enlargement of time within which to prepare records for the purpose of the appeal, and to deem the records already complied as filed and served within the enlarged time. Plaintiff also sought leave to amend his original grounds of appeal by substituting a new grounds of appeal. The plaintiff's new grounds of appeal though stated by him to be of law, some of them were found to be of mixed law and fact. The respondent opposed the application.

HELD (Unanimously granting the application in part; per lead judgment of **OGUNDARE JSC**, Kutigi JSC dissenting on Prayer 3)

Appeals - Enlargement of time

1. After considering the arguments advanced by learned counsel and going through the affidavit and counter-affidavit, I am inclined to grant prayers (1) and (2). No doubt, the applicant has been guilty of some delay in filing the record of appeal, which under Order 7 rule 7(1) should have been filed on or before 25th March 1996. But then it was filed on 3/6/96 and the reason for the delay is attributed to change of counsel. The firm of legal practitioners, Ayanlaja, Adesanya & Co. were only briefed in May 1996 when they took over from the firm of Babalakin & Co. I am satisfied with the reason for the delay and I have no hesitation in granting prayers (1) and (2). (p. 417 B)

Proposed new grounds

2. As regard prayer (3), I have perused the proposed new grounds. It would appear some of the 8 new grounds are, at best, grounds on mixed law and fact requiring leave of Court pursuant to section 213(3) of the Constitution, to appeal in them. No such leave was sought nor obtained before the filing of the appeal herein on 11th March 1996. Although the grounds are labelled “error in law” a suggestion that the appeal is of right under section 213(2) of the Constitution, they are mostly either of fact or, at best, of mixed law and fact. Only three, in my respectful view, are of law simpliciter. (pp. 417 D & 421 B)

Ground questioning exercise of court’s discretion

3. It must be borne in mind that the appeal before us arose out of a review by the Court below of the exercise of discretion by the trial High Court. In the review, the court below felt bound to interfere with that exercise and substituted thereof its own exercise of discretion. It is against the latter Court’s exercise of discretion to refuse an order of injunction that the Appellant has now come before us praying us to disturb the exercise by the Court of Appeal of its discretion in the matter. It has been held by this Court that a ground of appeal questioning the exercise of discretion by a lower court is a ground not of law but, at best, of mixed law and fact. (p. 424 F)

Grounds of law

4. It has become necessary to examine the nature of the proposed grounds of appeal sought to be substituted for the original grounds because of the nature of the appeal in this case. The appeal was brought pursuant to section 213(2) of the Constitution which provides for appeal as of right where the

grounds of appeal are of law only. Order 8 rule 2(5) of the Supreme Court Rules, which allows for amendment of the grounds of appeal, can only be invoked by the applicant herein to add or substitute grounds of law only. (p. 428 H)

Competence of grounds of appeal

5. From all I have said earlier, it is only grounds (iii), (iv) and (v) that appears to be grounds of law and are, therefore, competent. All the other grounds are, in my respectful view, incompetent and must be struck out. Consequently, I grant prayer (3) in respect of grounds (iii), (iv) and (v) only, the original grounds of appeal are hereby struck out. (p. 429 G)

NOTABLE POINTS OF INTEREST

KUTIGI JSC

1. Prayer 3 for amendment of grounds of appeal is granted in full

It is settled that once an appeal is competent, as in this case where the Notice of Appeal filed on 11/3/96 is valid, proper and competent, the existing ground of appeal may be amended by an alteration, addition or a subtraction from the original grounds of appeal filed. But where an appeal is not competent, such as where leave to appeal which ought to have been originally obtained has not been obtained, no valid amendment can be made because one cannot put something on nothing. Having held that there is a valid subsisting appeal before this Court, I have no hesitation in granting prayer (3) therefore. (p. 435 H)

2. Leave to appeal and one to amend are not the same

I venture to say that leave to appeal under section 213(3) of the Constitution is not the same thing as leave to amend a Notice of Appeal under Order 8 Rules 2(5) & 4 above and the two are not therefore inter-changeable. Section 213(3) of the Constitution will in my view, be strictly adhered to when an appellant is contemplating to appeal for the first time only, but not when he has already validly and properly appealed either on grounds of law (which requires no leave) or on grounds of facts or of mixed law and facts and where leave to appeal has already been obtained. (p. 436 D)

3. Leave to amend presumes existence of a valid appeal

Therefore leave to appeal under section 213(3) of the Constitution should not be confused with leave to amend a Notice of Appeal under Order 8 Rules 2(5) & 4, Rules of the Supreme Court (supra). One presumes absence of an appeal altogether, while the other presumes the existence of a valid and competent

appeal. I do not think the court should discriminate between grounds of law on one hand and the other grounds in its consideration of an application to amend a Notice of Appeal under the Rules above. There is no basis for the distinction. (p. 437 B)

B REPRESENTATION

B. Adesanya Esq. for the Applicant

A. Obe (Mrs.) for the Respondent

CASES REFERRED TO

C Metal Construction (W. A.) Ltd v. Migliore In Re Ogundare (1990) 1 NWLR 299

Nigeria National Supply Co. Ltd. v. Establishment Sima of Vaduz (1990) 7 NWLR 526

Ige v. Olunloyo (1984) 1 SCNLR 158 184

D Akeredolu v. Akinremi (1986) 2 NWLR 710

Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718

Awote v. Owodunni (1986) 5 NWLR (Pt. 46) 941

Bowaje v. Adediwura (1976) 10 SC. 143

Amudipe v. Arijodi (1978) 9 - 10 SC. 27

E Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484

Ojemen v. Momodu (1983) 1 S.C.N.L.R. 183

STATUTES & RULES REFERRED TO

Constitution of Nigeria 1979 ss. 213 (2) & (3)

F Supreme Court Rules 0.8 r. 2(5)

LEAD JUDGMENT BY OGUNDARE JSC

The plaintiff (who is appellant in this court) applied by motion for the following orders:

“(1) An enlargement of time within which the plaintiff shall prepare the records for the purpose of the appeal.

(2) That the records already compiled, filed and served along herewith be deemed to have been filed and served accordingly within the enlarged time.

(3) Leave to amend the grounds contained in Notice of Appeal dated 11th March, 1996, by substituting therefor the grounds contained in the Notice of appeal attached herewith to the affidavit in support and marked Exhibit “RS4”.

(4) *Directions for the filing of briefs in connection with the appeal.*

(5) *Granting accelerated hearing of the said appeal.*”

The application is supported by an affidavit to which is exhibited a Notice of Appeal containing the proposed substituted grounds of appeal, Exhibit RS4. There is a counter-affidavit sworn to on behalf of the defendant/ B respondent.

At the hearing of the application learned counsel for the parties advanced arguments for and against the granting of the prayer.

After considering the arguments advanced by learned Counsel and going through the affidavit and counter-affidavit, I am inclined to grant prayers C (1) and (2). No doubt, the applicant has been guilty of some delay in filing the record of appeal, which under Order 7 rule (1) should have been filed on or before 25th March, 1996. But then it was filed on 3/6/96 and the reason for the delay is attributed to change of counsel. The firm of legal practitioners, Ayanlaja, Adesanya & Co. were only briefed in May 1996 when they took over D from the firm of Babalakin & Co. I am satisfied with the reason for the delay and I have no hesitation in granting prayers (1) and (2).

As regard prayer (3), I have perused the proposed new grounds. It would appear some of the 8 new grounds are, at best, E grounds of mixed law and fact requiring leave of court pursuant to section 213(3) of the Constitution, to appeal in them. No such leave was sought nor obtained before the filing of the appeal herein on 11th March, 1996. The proposed grounds read:

“(i) The Court of Appeal erred in law in using the fact that the F plaintiff has a house in U.S. as a justification in disturbing the exercise of the discretionary power of the High Court in granting the injunction sought when the reason of oppressiveness of the plaintiff by the institution of the foreign action by the defendant is potent enough with the other reasons rendered by the learned trial Judge to justify the discretionary order of G injunction made.

The Court of Appeal erred in law in setting aside the exercise of the discretion of the learned trial Judge in granting an injunction against the defendant from the further prosecution of the New York action on the ground that the issues before the home court and the foreign court are not the same H when from the facts in the affidavit evidence before the home court and in the pleadings filed it is apparent that the issues are the same in both actions namely, the facts pleaded in defence of the claim in the home action are the facts relied upon in instituting the foreign action.

(iii) *The learned Justices of the Court of Appeal erred in law in using irrelevant considerations in disturbing the judgment of the learned trial Judge when in the lead judgment of Pats-Acholonu, J.C.A, concurred in by the two other learned Justices, the court held that:-*

“The applicant here is the plaintiff who is not seeking for an injunction or stay of proceedings of a case that is proceeding in the court in Nigeria. How would a restraint order made here affect that appellant. I think a court faced with this type of the case must weigh the implication of making an order that would not be seen by a foreign court as being queer, juridically insipid and revolting to a civilised mind. The issue of vexation or oppression will, I think arise if the plaintiff in Nigeria is also the plaintiff in U.S. and an application may be made for him to elect as in *Peruvian Guano Company v. Woldt* (1888) 23 Ch. D225, 235. In any other case, the court would and I dare should indeed be slow to interfere.”

Particulars

(a) *The applicant herein who is the plaintiff in the proceedings in Nigeria can only ask for an injunction against the defendant (which he did) to stop the action in the foreign court.*

(b) *A restraining order against the defendant herein in respect of the foreign action as sought is addressed to the plaintiff in the foreign action who is here in Nigeria and not to the foreign court.*

(c) *A proper order as made by the learned trial Judge is not vitiated by how it is seen by any foreign court.*

(d) *The Court of Appeal appeared to have been influenced in its decision by what the New York court might think of it if the appeal was dismissed.*

(e) *When two actions are begun by different parties one within jurisdiction and the other in a foreign country and both parties are within the jurisdiction of the home court as to make the plaintiff in one the defendant in the other as in the case on appeal, the home court will grant an injunction against the plaintiff in the foreign court when it is satisfied that continuance of the foreign action is unjust to the plaintiff because it would be oppressive and vexatious to him.*

(iv) *Having held that:-*

It would seem to me that jurisdiction to restrain a pending action in a foreign country is not a velvet one conferring unassailable and rampaging power. It must take cognizance of the nature of the case.

the Court of Appeal misdirected itself when it held that:-

“The action in New York cannot be interposed with the suit in Lagos High Court.”

When:

(a) *The issues in both actions are basically the same.*

(b) *The facts used as a defence to the home case by the defendant herein are the same set of facts used to launch the foreign suit in New York.*

(c) *The home court and the foreign court each have jurisdiction to entertain an action, the potent principle in deciding which one should entertain, the matter is “forum non conveniens”*

(d) *Both parties are domiciled in Lagos Nigeria but it is only the defendant who has an existing branch office in New York, U.S.A. having transferred the plaintiff (who now resides in Nigeria) back to Nigeria from New York since 1991.*

(e) *The personal and judicial advantages of the suit of the defendant in the foreign court (if any) are preserved and can still be enforced in the home court if so advised*

(v) *The Court of Appeal misdirected itself in law and thereby came to a wrong conclusion when it held as follows:-*

“The effect of any restraining order could produce some unexpected results (a) The court in New York could completely strike out or dismiss the action in all its entirety in which case the appellant would have lost immeasurably. (b) The case in Lagos may go on for a long time as is usually the case. This could result in the action in New York atrophying and perhaps being abandoned, and forgotten. In such a case the respondent would enjoy all the juice.”

Particulars of Misdirection

(a) *It was not the case of the defendant that its case could be struck out or dismissed in all its entirety.*

(b) *When the Court of Appeal with all due respect appeared to have gone on a voyage of speculation on issues which were not brought before it to the detriment of the plaintiff.*

(c) *When the plaintiff never advocated that he should not be sued and the only point of dispute is the proper venue for such action against him.*

(d) *When the issue of how long the plaintiff’s case might take to be determined was never an issue taken up by the defendant.*

(e) *When the length of time the matter might take in Nigeria was not canvassed at any time by the defendant and the Court of Appeal was thereby making a case for the defendant which it did not make for itself.*

(f) *When from the passage quoted above pointed to the fact that the Court of Appeal appeared to have based its decision on totally extraneous matters to the detriment of the plaintiff.*

The Court of Appeal erred in law when it held that “what is the respondent afraid of if he is innocent”.

Particulars of Error

(a) When the issue of innocence or otherwise of the plaintiff herein was totally immaterial to the matter before the court below.

B *(b) When such consideration quoted above is totally irrelevant when the law has provided a remedy.*

The Court of Appeal erred in law when it held as follows:-

“I am afraid I cannot subscribe (sic) to the view expressed by the learned trial court as to the reason for making the order I do not C buy his reason and conclusion.”

Particulars of Error

(a) When the decision of the court of first instance was based on an exercise of its discretion.

D *(b) When any exercise of discretion on the part of a court of first instance can only be overturned by an appeal court if such decision was perverse.*

(c) When the Court of Appeal in this matter did not hold or make any specific finding that the ruling of the High Court was perverse.

E *(d) When the Supreme Court has held times without number that any appeal court should not overturn the exercise of discretion by a Lower Court merely because it would have come to a different conclusion if sup- planted in the place of the court of first instance.*

(e) When the consideration of the Court of Appeal cannot be sup- ported by the law in the circumstances.

F *(viii) The Court of Appeal erred in law when it held that as fol- lows:*

How would the continued prosecution of the case in New York operate oppressively against the respondent who from the Statement of Claim (sic) and the affidavit owns (sic) a house in U.S.

G *Particulars of Error*

(a) When nowhere in the Statement of Claim did the plaintiff herein state that he owns a house in the United States.

H *(b) When the issue of whether or not the plaintiff owns a house in the United States was introduced by the defendant herein in its counter- affidavit dated 29th April, 1994.*

(c) When from facts mutually agreed by the parties, the plaintiff has been resident in Nigeria since his recall by the defendant and his subse- quent resignation from the employment of the defendant.

(d) When even if the plaintiff owns a house in the United States, he

is not thereby precluded from complaining of oppression if he is now resident in Nigeria.

(e) When the consideration of the Court of Appeal does not, with due respect, show an appreciation of the necessary consideration in an application of the *lis pendens akibi* nature.”

Although the grounds are labeled “error in law” a suggestion that the appeal is of right under section 213(2) of the Constitution, they are mostly either of fact or, at best, of mixed law and fact. Only three, in my respectful view, are of law simpliciter.

This Court, in *Ogbechie v. Onochie* (1986) 2 NWLR (Pt.70) 370 and *Nwadike v. Ibekwe* (1987) 4 (pt.67) NWLR 718 has laid down the test to be applied in determining whether a ground of appeal is one of law alone or of mixed law and fact. In *Ogbechie v. Onochie* at page 491, this court per Eso, JSC, prescribed the following test:

“There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. The issue of pure fact is easier to determine.”

Eso, J.S.C. at pages 491-492 approved the following postulations made by the learned authors of the article titled: “Error of Law in Administrative Law” contained in the October 1984 issue of the Law Quarterly Review:

(i) *If the tribunal purports to find that particular event occurred although it is seised of no admissible evidence that the events did in fact occur, it is a question of law. But where admissible evidence has been led its assessment is entirely for the tribunal; in other words it is a question of fact. But where admissible evidence has been led its assessment is entirely for the tribunal; in other words, its a question of facts.*

(ii) *If the tribunal approached the construction of a legal term of art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning - it is a question of law.*

(iii) *If the tribunal approaches the construction of a statutory word or phrase bearing an ordinary meaning erroneous basis that it is a legal term of art - it is a question of law.*

(iv) *If the tribunal though correctly treating a statutory word or*

phrase as a legal term of arts errs in elucidation of the word of phrase, it is a question of law.

(v) *If the tribunal errs in its conclusion (that is, in applying the law to the facts) in a case where this a process requires the skill of trained lawyer. It is error in law.*

B (vi) *If, in a case where a conclusion can as well be drawn by a layman (properly instructed on the law) as by a lawyer, the tribunal reaches a conclusion which cannot reasonably be drawn from the facts as found. In that event, the superior court has no option but to assume that there has been some misconception of the law. But the issue may admit of more than one possible resolution. The inferior tribunal's conclusion may be one of the possible resolutions; yet it may be a conclusion which the superior court (had it been seised of the issue) would not have reached. Nevertheless, the inferior tribunal does not err in law. The matter is one of degree; and a superior court with jurisdiction to correct only errors of law will not inter-*
D *vene."*

The learned Justice of the Supreme Court went on, at p. 493, to say:

"Where therefore a trial court fails to apply the facts, which it has found, correctly to the circumstances of the case before it, and there is an appeal to a Court of Appeal which alleges a misdirection in the exercise of
E *the application by the trial court, the ground of appeal alleging the misdirection is a ground of law and not of fact. When the court of appeal finds such application to be wrong and decides to make its own findings such findings made by the court of appeal are issues of fact and not law. Where the Court of Appeal interferes in such case and there is a further appeal to a higher*
F *court of appeal on the application of the facts, the ground of appeal alleging such misdirection by the lower court of appeal is a ground of law and not of fact. It is only where there is an appeal against the finding made by the Court of Appeal in this exercise that issues of fact arise and leave will be required.*

G *Care must be taken to distinguish a circumstance of this nature from a complaint simpliciter, that the decision of the trial court is either against evidence or weight of evidence or contains unresolved contradictions in the evidence of the witnesses. For in this latter set of circumstances what is being alleged is purely a ground of fact that requires leave for an*
H *appeal to a court of appeal or a further court of appeal. See s.213(3) and s.214(3) of the Constitution of the Federation 1979."*

And in *Nwadike v. Ibekwe* (supra), Nnaemeka-Agu J.S.C. at pages 743-744 opined:

".....it is a recognised fact that the line of distinction between

law simpliciter and mixed law and fact is a very thin one. But one does not convert a ground of mixed law and fact into a ground of law by simply christening it "error in law" or "misdirection in law". It is always necessary to construe the ground with particulars thereof.

Because of the problem that has arisen in this particular appeal, and the frequency of its occurrence in many other appeals of recent, I B deem it necessary to attempt some re-examination of some principles which can serve as useful guides in this rather difficult question of grounds of law on one hand and of fact and of mixed law and fact on the other. In this regard, I shall refer to and adopt the very illuminating judgment of Eso, J.S.C. In Ogbechie v. Onochie (supra) at pages 490-493. From this C and other decisions on the point, it appears to me that a ground which complains that the judgment is against the weight of evidence is a ground of fact. [See Ogbechie v. Onochie (supra) at page 491]. And findings of fact are matters within the province of the court of trial Clark v. Edinburgh, etc Tramways (1919) SC. (H.L.) 35, Fatoyinbo v. Williams (1956) 1 D F.S.C. 87. In general terms, it can be said that all grounds of appeal which raise facts which warrant some determination either way are grounds of fact: Edwards (Inspector of Taxes) v. Bairstow & Anor (1955) 3 All ER p. 277, Currie v. Inland Revenue Commissioners (1912) 2 K.B. at p. 536. Where, however, the question raised by the ground is one of law as E applied to disputed facts; or the ground raises partly law and partly facts it is a ground of mixed law and fact. The ground with its particulars ought to be regarded as a whole."

To the question: When then is a ground of appeal that of law? the learned Justice of the Supreme Court answered at pages 744-745 thus: F

"I shall deal with five particular classes, although by its very nature, the categories of errors in law are not closed.

(i) It is an error in law if the adjudicating tribunal took in account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if although applying the correct criteria, it gave G wrong weight to one or more of the relevant factors; See O. Kelly v. Trusthouse Forte P.L.C. (1983) 3 All ER at p. 468 .

(ii) Several issues that can be raised on legal interpretation of deeds, documents, terms of art, words or phrases and inferences drawn therefrom are grounds of law: Ogbechie v. Onochie (supra) at pp. 491- H 492.

(iii) Where a ground deals merely with a matter of inference, even if it be an inference of fact, a ground framed on it is a ground of law; provided it is limited to admitted or proved and accepted facts. Edwards v. Bairstow

(supra) at p. 55; *H.L. For*, for many years, it has been recognized that inferences be drawn from a set of proved or undisputed facts, as distinct from primary facts, are matters upon which an appellate court is as competent as the court of trial. See *Benmax v. Austin Motor Co. Ltd.* (1945) All ER 326, at p. 327.

B (iv) Where a tribunal states the law on a point wrongly, it commits an error in law.....

(v) Lastly, I should mention one class of grounds of law which have the deceptive appearance of grounds of fact *id est*, where the complaint is that there was no evidence or no admissible evidence upon which C a finding or decision was based. This is regarded as a ground of law, on the premises that in a jury trial there would have been no evidence to go to the jury. Before a Judge sitting with a jury could have left a case to the jury there ought to have been more than a scintilla of evidence, upon which a decision or finding was based has always been regarded as a D ground of law. See *Odgers: On Pleading & Practice* (20th Edn.) p. 375; also the decision of the House of Lords in *Edwards (Inspector of Taxes) v. Bairstow* (supra) at P .53; In *Ogbechie v. Onochie* (supra) at p. 491, para. 14, my Lord, Eso, J.S.C., citing with approval an article by C.T. Emery in Vol. 100 L.Q.R. held:

E ‘If the tribunal purports to find that a particular event occurred although it is seised of no admissible evidence that the event did in fact occur, it is a question of law.’ See: *Metal Construction (W A.) Ltd. v. Migliore*, In *Re Ogundare* (1990) 1NWLR (Pt.126) 299, particularly the judgment of Obaseki, J.S.C.

F See also: *Abio Abbey & ors. v. Chief Alhaji Ibrahim Fubara Alex* (1991) 6 NWLR (Pt.198) 459 where the Court of Appeal, per Ogundare, J.C.A., reviewed the authorities on the issue.

It must be borne in mind that the appeal before us arose out of a review by the court below of the exercise of discretion by G the trial High Court. In the review, the court below felt bound to interfere with that exercise and substituted thereof its own exercise of discretion. It is against the latter court’s exercise of discretion to refuse an order of injunction that the appellant has now come before us praying us to disturb the exercise by the Court of H Appeal of its discretion in the matter. It has been held by this court that a ground of appeal questioning the exercise of discretion by a lower court is a ground not of law but, at best, of mixed law and fact. See: *Nigeria National Supply Co. Ltd. v. Establishment Sima of Vaduz* (1990) 7 NWLR (Pt.164) 526 where the two grounds of appeal being examined read:

“(A) The learned trial Judge erred in law in failing to exercise his discretion properly on the materials before him in granting the plaintiff’s application for re-listing the suit.

Particulars

(i) The motion for relisting the suit was filed seven months after it was struck out;

(ii) No reason was given by the plaintiff for the delay in its affidavit.

(B) The learned trial Judge erred in law in not giving adequate consideration to the contention of the defendant that it will be prejudiced if the suit is relisted when that is one of the conditions precedent to the granting of an application to relist a suit struck out.

Particulars

The defendant in its counter-affidavit averred that the officers who will be needed for prosecution of its case are no longer on its staff list.

Obaseki J.S.C. observed at 538-539.

“The guiding principle is that a ground of appeal must be given its most liberal interpretation to ascertain the questions it involves.

If a ground of appeal is not limited by its own terms and particulars, the court has no justification in adopting a narrow view of the questions the ground involves. Taking ground A, the question involved are:

(1) Did the learned trial Judge fail to exercise his discretion properly?

(2) Did the learned trial Judge examine the facts or material before him?

(3) Does an examination of the facts justify the grant of the application to relist the suit?

There is no agreement between the parties on the appellant’s allegation that there was an improper exercise of discretion by the learned trial Judge. Therefore, to ascertain whether there was or was not a proper exercise of discretion, the Court of Appeal is being called upon to review the facts before the learned trial Judge and determine whether he carried out a proper judicial exercise of assessment of facts, ascription of probative values and making of findings of fact before making his choice which discretion involves between granting the application and refusing the application to relist. This ground therefore involve questions of fact in addition to questions of law.

Ground B of the grounds of appeal to the Court of Appeal involves question of (1) whether the difficulty in securing the defendants witnesses sworn to in the counter-affidavit because they have left the defendant’s ser-

vices is a fact and whether that should justify a refusal of the application to relist.

This question is a pure question of fact and the ground of appeal only seeks from the Court of Appeal reversal of the finding that the fact that the officers are no longer on the defendant's staff - list does not amount to a
B prejudice to warrant the refusal of the application to relist.

From the analysis above, it is clear that the two grounds of appeal set out in the notice of appeal to the Court of Appeal are at best grounds of mixed law and fact and at worst grounds of fact alone which require leave of the Federal High Court or Court of Appeal to give constitutional validity to
C the notice of appeal."

Karibi-Whyte, J.S.c., for his part, said at 546-547:

"The issue of the exercise of discretion in this case is not founded on any dispute as to the period for which the suit remained struck out before the application to relist was made. It is
D not disputed that this was seven months. The real issue in dispute, which is material to the exercise of discretion to relist the suit is whether the period of seven months before the application to relist amount to an undue delay. The learned Judge found on the material before him that there was no undue delay before the applica-
E tion to relist was made. As the learned Judge put in this ruling.

"I do not consider the delay of the plaintiff inordinately long and I found that they have a good excuse to be absent in court the day they were, the application is therefore granted."

This is an exercise of his discretion founded on the consideration
F that the delay of seven months before the application to relist the suit was not inordinately long. It depends on the attitude by each Judge to what he consider inordinate. There could be unanimity as to the inordinacy of delay to constitute a wrong exercise of discretion. But within certain acceptable minima, the question whether delay has been too long may depend upon the
G assessment of the particular Judge. The period of seven months falls within this mean, and the trial Judge after considering other circumstances associated with the striking out of the suit, and the making of the application did not consider the delay inordinate. He is within his judicial discretion so to find. The issue is undeniably one of fact.

H It seems to me therefore that the Court of Appeal was right to have summarily upheld the objection that the grounds of appeal filed and sought to be relied upon by the appellant without leave, having been sought and obtained were not grounds of law, and therefore, required leave of that court. Leave of the court having not been sought and obtained, the applica-

tion was incompetent.

Counsel should not assume that the mere description of a ground of appeal as one of law is sufficient to enable it scale the constitutional hurdle of seeking leave if it is in substance a ground of mixed law and fact, or of facts simpliciter - See Metal Construction (WA.) Ltd. v. Migliore (1990) 1 NWLR (Pt.126)299; Oghechie v. Onochie (1986) 2 NWLR (Pt. 23) 484; Ifediorah v. B Ume (1988) 2 NWLR (Pt. 74) 5; Ohijuru v. Ozims (1985) 2 NWLR (Pt. 6) 167.

Grounds of appeal sought to be filed in the Court of Appeal founded other than on law requires leave of that court - See S.221(1) and (2) - See also Oluwole v. L.S.D.P.C. (1983) 5 S.C.1; State v. Omeh (1983) 5 SC 20; C Nwadike v. Ihekwe (1987) 4 NWLR (Pt. 67) 718.

The grounds of appeal relied upon in this case are based on the exercise of the learned Judge's discretion which involve the ascertainment of the facts on which the exercise of such discretion was based. The exercise of discretion must be in a judicial manner, that is on recognised and accepted principles. This is at best an issue of mixed law and fact, which is caught by section 221 (1) of the Constitution 1979."

And Belgore, J.S.c. in his lead judgment in the case said at page 536:

"Where a party by way of motion seeks court's discretion, as in this case, asking for stay of execution, the evidential vehicle in the main will be the supporting affidavit or affidavits and where the motion is opposed, the counter-affidavit. Affidavit contains nothing more than facts a person swearing to it believes to be true, even though not necessarily the truth, and as such it is not law but facts. The facts contained in such affidavit will sway the Judge one way or the other in deciding where justice of the case demands his discretion should go. Thus in deciding to relist a matter struck out, the court look at the affidavit to see if there was justified delay, whether it is in the interest of justice to hear the substantive case and do justice by hearing both sides. In short, where a court is called upon by a party to the proceedings to exercise its discretion, it looks at the matter through its own peculiar circumstances by what are the facts disclosed in the affidavit to arrive at its discretion. This is essentially matter of fact. It is therefore inappropriate to address such matter of discretion as matter of law; the facts leading to the consideration of the discretion are mere facts, even though law will be applied to those facts."

With the principles laid down in the above cases in mind I now examine the proposed grounds of appeal.

Ground (i), in my respectful view, deals with assessment of evidence, that is, that the court below, in reaching its verdict considered the fact that plaintiff

had a house in the U.S.A. This, on the authorities, cannot be a ground of law but of fact.

Ground (ii)

The first part of this ground would suggest that it is a ground of law but the particulars given in the 2nd part show that there is an element of B assessment of facts to be made in order to determine the complaint. This, in my respectful view, makes the ground one of mixed law and fact.

Ground (iii)

This ground illustrates the difficulty sometimes encountered in distinguishing between a ground of law and a ground of fact. Giving the ground C a liberal interpretation, I think I can pass it as a ground of law.

Ground (iv)

I think this ground too is a ground of law as it boils down to an interpretation of the statement of defence of the defendant in the Lagos State action vis-a-vis its statement of claim in the New York action to determine D whether the facts pleaded by it in both actions are the same.

Ground (v)

I would also pass this as a ground of law as the main complaint here is that the court below suo motu made a case not set up by the defendant. This can only be a matter of law as it touches on the jurisdiction of a court to make E a case for the parties.

Ground (vi)

An appeal is usually against a ratio and not normally against an obiter except in cases where the obiter is so clearly linked with the ratio as to be deemed to have radically influenced the latter. But even there, the appeal is F still against the ratio See: Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387 at 431. What is complained of in this ground is a chance remark made in passing by Pats-Acholonu J .C.A.; it does not in any way attack to the issue in the appeal before the court below. This ground, to my mind, is incompetent.

Ground (vii)

G This is clearly a ground of, at best, mixed law and fact. It would entail an assessment of the facts and law before the trial court.

Ground (viii)

Like ground (vi) above the part of the judgment complained of is another chance remark not linked to the issue before the court. It is not a ratio H in the matter and cannot form the basis of an appeal. I hold that the ground is incompetent'.

It has become necessary to examine the nature of the proposed grounds of appeal sought to be substituted for the original grounds because of the nature of the appeal in this case. The appeal

was brought pursuant to section 213(2) of the Constitution which provides for appeal as of right where the grounds of appeal are of law only. Order 8 rule 2(5) of the Supreme Court Rules, which allows for amendment of the grounds of appeal, can only be invoked by the applicant herein to add or substitute grounds of law only. That is why it is obligatory on the court to examine the proposed B new grounds to ensure they come within this group, and are therefore competent, before the application is granted. Any ground of appeal that raises an issue of mixed law and fact or facts simpliciter can only be competent where the appeal is brought under section 213(3) of the Constitution which requires leave, either of the court below or of this Court, of Appeal. And C unless such leave has been obtained, no ground of appeal of mixed law and fact or of fact simpliciter can be added or substituted pursuant to Order 8 rule 2(5) on the pretext that there is an appeal pending. The appeal under section 213(2) is different to an appeal under section 213(3). although it is permissible (and indeed the practice) to bring the two by one notice of appeal, where the D required leave is sought and obtained in respect of the second category of appeal. See: Ige v. Olunloyo (1984) 1 SCNLR 158,184; Oke v. Eke (1982) 12 SC. 218; Akpasubi v. Umweni (1982) 11 SC 132; Ojemen v. Momodu (1983) 1 SCNLR 188,203; Azeez Akeredolu & ors v. Lasisi Akinremi (1986) 2 NWLR (Pt.25) 710.

Where an appeal is brought under section 213(3) with leave, it E does not require, in my humble view, another leave to, appeal whenever it is sought to bring additional or substituted grounds of appeal under Order 8 rule 2(5) for there is in existence a competent appeal in respect of which an application under the rule can be anchored. But where an appeal is brought under section 213(2) and the appellant intends to add or F substitute a ground of appeal of mixed law and fact or of fact simpliciter he must first seek and obtain leave of Court of Appeal on grounds other than of law and, if he is out of time, he must in addition seek extension of time both to seek that leave and to appeal.

From all I have said earlier, it is only grounds (iii), (iv) and (v) that G appears to be grounds of law and are, therefore, competent. All the other grounds are, in my respectful view, incompetent and must be struck out. Consequently, I grant prayer (3) in respect of grounds (iii), (iv) and (v) only, the original grounds of appeal are hereby struck out.

Sufficient facts have not been disclosed in the affidavit in support to H persuade me to grant prayers (4) and (5). Briefs are yet to be filed. Consequently I will refuse these prayers.

In conclusion, I order as prayed in prayers (1) and (2). Time to file the record of appeal is extended till today and the record filed in the registry of this

court on 3/6/96 is deemed to be properly filed and served. Leave is granted to the plaintiff to amended the grounds contained in the Notice of Appeal dated 11th March, 1996, by substituting therefore grounds (iii), (iv) and (v) contained in the Notice of Appeal attached to the affidavit in support of plaintiff's motion and marked Exhibit "RS4" Prayers (4) and (5) are refused. I award B N100.00 costs to the defendants.

KUTIGIJSC

The appellant/applicant by Motion on Notice prayed for the following orders -

"(1) An enlargement of time within which the plaintiff shall prepare the records for the purpose of the appeal.

(2) The record already compiled and served along herewith be deemed to have been filed and served accordingly within the enlarged time.

D *(3) Leave to amend the ground contained in the Notice of Appeal dated 11th March, 1996 by substituting therefor the grounds contained in the Notice of Appeal attached herewith to the Affidavit in support and marked Exhibit "RS4".*

E *peal.*
(4) Directions for the filing of briefs in connection with the ap-

peal.
(5) Granting accelerated hearing of the said appeal. AND for such further and or other orders as this Honourable Court may deem fit to make in the circumstances."

The motion was supported by an affidavit. Paragraphs 2-11,13 & 15 F read thus -

"2. That our O. Ayanlaja Esq. SAN was briefed about the middle of May, 1996 to lead O. Oladejo Esq. of Babalakin & Co., who are the Counsel on the record for the plaintiff.

G *3. That after the perusal of the appeal processes passed on to O. Ayanlaja Esq. SAN by Mr. O. Oladejo, the leading Counsel informed me and I verily believe him that he discovered that the time within which the records of appeal ought to have been filed as required by the Rules of the Supreme Court, had already expired over two months ago in view of the fact that the appeal to the Supreme Court was lodged on the 11th day of March, H 1996.*

4. That consequent upon the instructions received from O. Ayanlaja Esq., SAN of Counsel to the plaintiff I have compiled the records for the use of the justices and for the purpose of the appeal and same have been filed along herewith.

5. *That the leading counsel also formed the view that the grounds of appeal contained in the Notice of Appeal dated the 11th day of March, 1996 and contained at page 172 to 181 of the records ought to be amended so that the complaint of the plaintiff against the judgment of the Court of Appeal, Lagos Division could be properly brought into focus.*

6. *That O. Ayanlaja Esq., SAN of Counsel informed me and I verily believe him that the proposed new grounds of appeal have been formulated and same are contained in the Notice of Appeal now produced and shown to me marked Exhibit "RS4".*

7. *That the plaintiff who is the appellant before this Honourable Court has a pending claim in Suit No. LD/2256/93 (out of which this appeal arose) before the High Court of Lagos State against the defendant who also as plaintiff in a New York U.S.A. District court Docket No. 94 GO 0655 caused another claim to be filed against the plaintiff herein as defendant thereof.*

8. *That consequent upon an application made by the plaintiff in the Lagos State suit an injunction was issued by the learned trial Judge - Obadina, J. restraining the defendant from pursuing proceedings in the New York suit against the plaintiff herein.*

9. *That the defendant being aggrieved by the said Order of the Lagos State High Court appealed against same to the Lagos Division of the Court of Appeal which allowed the said appeal by its judgment dated 28th of February, 1996.*

10. *That the plaintiff being aggrieved by the judgment of the Court of Appeal has now appealed to this Honourable Court complaining in its grounds of appeal in the main against the violation of the discretionary power of the trial court by the Court of Appeal.*

11. *That in view of the judgment of the Court of Appeal appealed against, herein the New York suit against the plaintiff for a claim of \$58 Million which is equivalent of N4,640 Million has been kept alive and may proceed to trial anytime hereafter.*

13. *That the plaintiff informed me and I verily believe him that he has no means to employ the services of an American Counsel to defend himself in the civil action brought against him in New York by the defendant herein for alleged torts committed when the plaintiff was in the employment of the defendant in New York up till 1991 but can adequately defend himself in Nigeria if the claim in the US action is filed in Nigeria.*

15. *To the best of my knowledge, information and belief it is in the best interest of both parties to this appeal to determine same as quickly as possible."*

Mr Adesanya learned counsel for the applicant moving the motion said he relied entirely on the affidavit in support. He said he is prepared to file appellant/applicant's brief within 30 days if ordered to do so in order that the hearing of the appeal may be accelerated. In answer to the question by the court about the competency of the appeal having regard to the provisions of B section 213(3) of the Constitution, learned counsel referred to the original Notice of Appeal on pages 172- 181 of the record, and submitted that all the original twelve grounds of appeal contained therein are all grounds of law and required no leave except perhaps grounds 7 & 10 which might as well be viewed as grounds of mixed law and facts. He said that the eight grounds now C contained in the Notice of Appeal, Exhibit "RS4" attached to the motion, and which are now to be substituted for the original twelve grounds are also all grounds of law and require no leave. That the substitution or amendment was necessary in order to properly bring into focus the complaint of the applicant against the judgment of the Court of Appeal. He said he is new in the case. The D court was urged to grant the application.

Learned counsel for the respondent Mrs Obe in reply, opposed the application. She referred to the Counter-Affidavit filed by her Chambers. She also referred to the motion she filed in court on 30/9/96, in which she sought for an order dismissing the appeal herein for want of E prosecution for the reasons amongst others, that the appellant/applicant had failed to file a record for the purposes of the appeal within the time limited by the Rules of this Honourable Court. She said the 14 days permitted by the Rules for filing the record had expired even before the applicant changed his counsel in the case. There was therefore no reason F for the delay. She said the record as presently compiled by the applicant is not complete because the briefs filed by the parties in the Court of Appeal have been omitted.

On the competence of the appeal, learned counsel said that of the 12 original Grounds of Appeal on pages 172 -181 of the record, only G Ground 10 is a ground of law, and that all the others are either of facts or of mixed law and facts. Leave to appeal on those grounds except ground 10 was therefore necessary. She also said that all the 8 Grounds of Appeal in Exhibit "RS4", now sought to be substituted for the original grounds are also of mixed law and facts and require leave. We were urged to H dismiss the application.

Mr Adesanya in reply said the omission of the parties Court of Appeal briefs was an oversight and promised to include them in the record of appeal forthwith.

I say straight away that I have no difficulty in granting prayers (1)

& (2). It was clearly not the fault of the present counsel that the records have not been prepared in time. And litigants should not ordinarily be punished for the offence of counsel.

As for prayer (4), I say that the time has already been prescribed under the Rules of Court for the filing of briefs. Further directions will therefore be unnecessary except in exceptional circumstances. There is none here. B But if the appellant/applicant files his brief within 30 days as suggested, the other side may respond in the same way thereby reducing the time permitted by the Rules. This prayer is therefore refused.

Prayer (5) is also refused because the briefs of the parties are not yet ready. As soon as the briefs are filed, a fresh application for acceleration of the appeal may be brought. Not before then. The problem prayer is really prayer C (3) which I shall now proceed to consider.

Now, the original Grounds of Appeal as contained in the Notice of Appeal dated 11th March, 1996 (see pages 172 -181 of the record) read thus D

GROUND OF APPEAL

(1) The Court of Appeal misdirected itself in law and thereby came to a wrong conclusion when it held as follows -

"I think a court faced with this type of the case (sic) must weigh the implication of making an order that would not be seen by a foreign court as being queer, juridically insipid, and revolting to a civilised mind." E

Particulars of Misdirection

Omitted.

(2) The Court of Appeal misdirected itself and thereby came to a wrong conclusion when it held as follows - *"The issue of vexation or oppression, I think arise if the plaintiff in Nigeria is also the plaintiff in U.S. and an application may be made for him to elect."* F

Particulars of Error

Omitted.

(3) The Court of Appeal erred in law when it failed to review and G consider the affidavit evidence and the authorities placed before it in arriving at his decision.

Particulars of Error

Omitted.

(4) The Court of Appeal erred in law when it failed to appreciate the H nature of the application before it and apply the relevant principle governing the grant of injunctions of the specie *lis alibi pendens*.

Particulars of Error

Omitted

(5) The Court of Appeal misdirected itself in law and thereby came to a wrong conclusion when it held as follows

"The effect of any restraining order could produce some unexpected results (a) the court in New York could completely strike out or dismiss the action in all its entirety (sic) in which case the appellant would have lost immeasurably. (b) The case in Lagos may go on for a long time as is usually the case. This could result in the action in New York atrophying and perhaps being abandoned, and forgotten. In such a case the respondent would enjoy all the juice."

Particulars of Misdirection

C Omitted.

(6) The Court of Appeal erred in law when it held that

"What is the respondent afraid of if he is innocent?"

Particulars of Error

Omitted.

D (7) The Court of Appeal erred in law when it held as follows:

*"I am afraid I cannot subscribe (sic) to the view expressed by the learned trial court as to the reasons for making the order.
I do not buy his reasons and conclusions."*

Particulars of Error

E Omitted.

(8) The Court of Appeal erred in law when it held as follows

"How would the continued prosecution of the case in New York operate oppressively against the respondent who from the Statement of Claims (sic) and the affidavit own (sic) a house in U.S."

F Particulars of Error

Omitted.

(9) The Court of Appeal erred in law when it refused to take two applications filed by the appellant herein for committal of the respondent for contempt of court and thereby denying the appellant his constitutional right

G to be heard, and fair hearing.

Particulars of Error

Omitted.

(10) The Court of Appeal erred in law when it refused to strike out certain incompetent grounds of appeal filed by the respondent complaining of

H error in law and on facts.

Particulars of Error

Omitted.

(11) The Court of Appeal erred in law when it held that the two actions are not based on the same subject matter.

Particulars of Error

Omitted.

(12) The Court of Appeal erred in law when it held that the Court of first instance was (sic) when it held that ‘the action filed in New York by the defendant is designed to make it uneasy if not impossible for the plaintiff to prosecute the case in this action. I am therefore of the view that the case B instituted in New York would to say the least be oppressive of the plaintiff.

Particulars of Error

Omitted.

I have deliberately omitted to state the particulars of error or C misdirections from each of the above grounds of appeal because to me, most of them are not what they claim to be. They are merely arguments or reasons in support of the grounds contrary to Order 8 Rule 2(3) of the Supreme Court Rules 1985 (as amended). See also *Nwadike & ors v. Ibekwe & ors* (1987) 4 NWLR (Pt.67) 718.

Be that as it may, carefully looking at the 12 Grounds of Appeal D above, grounds 1,2, 3, 4, 5, 6, 7, 8, 11 & 12, all appear to me to complain against matters “relevant” and “irrelevant” which the Court of Appeal considered and took into consideration in interfering with the decision of the High Court granting them the order of injunction sought. And in fact, all of them may E probably be argued together because as I said, they are all related in one way or another to the proper or relevant principles governing the grant of the injunction, subject matter of the appeal herein. They are therefore in my view grounds of law. Some of the grounds which might appear as mere remarks or F expressions of opinion, would clearly again fall to be considered amongst others, as matters taken into consideration and which ought not to have been taken into consideration by the Court of Appeal in arriving at its decision. That will again be a point of law.

Grounds 9 & 10 which respectively complain about failure by the G Court of Appeal to take two motions for committal for contempt and refusal to strike out grounds of appeal which were of mixed law and facts, are clearly in my view, grounds of law as well.

My conclusion therefore is that all the 12 original Grounds of Appeal H filed on 11/3/96 above, are grounds of law and are in no way caught by the provisions of section 213(3) of the Constitution for leave to appeal. The appeal was also properly filed within time, the judgment of the Court of Appeal being delivered on 28 February, 1996. There is therefore as at today, a valid subsisting appeal.

It is settled that once an appeal is competent, as in this case where

the Notice of Appeal filed on 11/3/96 is valid, proper and competent, the existing ground of appeal may be amended by alteration, addition or a subtraction from the original grounds of appeal filed (see *Awote & Ors v. Owodunni & Anor* (1986) 5 NWLR (Pt. 46) 941. But where an appeal is not competent, such as where leave to appeal which ought to have been originally obtained has not been obtained, no valid amendment can be made because one cannot put something on nothing. Order 8 Rules 2(5) & Supreme Court Rules, 1985 (as amended) provide thus-

“2(5) The appellant shall not without the leave of the court urge or be heard in support of any ground of appeal not mentioned in the Notice of Appeal, but the court may in its discretion allow the appellant to amend the grounds of appeal upon payment of the fees prescribed for making such amendment and upon such terms as the court may deem just.

4. A notice of appeal may be amended by or with the leave of the court at any time.”

Having held that there is a valid subsisting appeal before this Court, I have no hesitation in granting Prayer (3) therefore.

I venture to say that leave to appeal under section 213(3) of the Constitution is not the same thing as leave to amend a Notice of Appeal under Order 8 Rules 2(5) & 4 above and the two are not therefore inter-changeable. Section 213(3) of the Constitution will in my view, be strictly adhered to when an appellant is contemplating to appeal for the first time only, but not when he has already validly and properly appealed either on grounds of law (which requires no leave) or on grounds of facts or of mixed law and facts and where leave to appeal has already been obtained.

It is settled law that where an appellant requires leave to appeal, such leave must be obtained within the time allowed for appealing and before filing the Notice of Appeal vide *Bowaje v. Adediwura* (1976) 6 Sc. 143: *Amudipe v. Arijodi* (1978) 9 -10 SC 27. It is therefore not proper for this court in an application to amend a Notice of Appeal as in this case, to demand or insist that it be satisfied that the additional grounds do not fall to be considered under section 213(3) of the Constitution as if there is no competent appeal already lodged in the court. Clearly, if that demand persists it would in my view, render useless the provisions of Order 8 Rules 2(5) & 4 above. In addition, insisting that no additional ground shall fall under section 213(3) of the Constitution means that an applicant who wants to amend his/her Grounds of Appeal out of time, will have to seek for (1) extension of time to appeal, (whether the proposed ground is a ground of law alone or of facts or mixed law and facts), (2) extension of time to seek leave (only grounds of facts or mixed law and

facts) and (3) leave to appeal, (only grounds of facts or mixed law and facts). So it is just not even sufficient to say that because the new or additional ground of appeal is a ground of law only, it must therefore be allowed. That is untenable because if the time within which to appeal has expired and there is no prayer for extension of time to appeal, the application will have to be struck out as incompetent. Therefore leave to appeal under B section 213(3) of the Constitution should not be confused with leave to amend a Notice of Appeal under Order 8 Rules 2(5) & 4, Rules of the Supreme Court (*supra*). One presumes absence of an appeal altogether, while the other presumes the existence of a valid and competent appeal. I do not think the court should discriminate between grounds of law on C one hand and the other grounds in its consideration of an application to amend a Notice of Appeal under the Rules above. There is no basis for the distinction.

But let me be cautious and examine the nature of these new grounds of appeal as contained in the Notice of Appeal (Exhibit 'RS4 ') to ascertain D whether or not they are grounds of law or of mixed law and facts or facts only. It contains eight (8) grounds only. They are in my respectful view once again, all complaining in one way or another, about the relevant and or proper principles to be applied or considered as governing the grant of the injunction in E this case. And to me it makes no difference that some of the quotations from the lead judgment of the Court of Appeal are mere remarks or expressions of opinion, in so far as these remarks or opinions were taken into consideration by that court in arriving at its decision. If the allegations are correct, then the Court of Appeal would be found to have erred in law when it applied the F wrong principles or took into consideration irrelevant materials or matters in setting aside the decision of the learned trial Judge; or if although applying the correct principles, it gave wrong weight to one or more of the relevant factors. That will also certainly be an error of law. (See generally *Ogbechie v. Onochie* (1986) 2 NWLR (Pt. 23) 484; *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 18. G

From all I have said above, the conclusion is irresistibly that in which-ever way one looks at it, prayer (3) succeeds.

In summary, I order as follows -

1. Prayers (1), (2) & (3) are hereby granted. Time within which to H prepare and file the records for the purpose of the appeal is extended up to today. The records already compiled, filed and served are deemed to have been properly compiled, filed and served. Provided that the applicant shall take steps immediately mid incorporate the briefs of the parties filed in the Court of Appeal as part of the records. Leave is also hereby granted for the

applicant to amend the Notice of Appeal dated 11/3/96 by substituting there-
fore the new Notice of Appeal marked Exhibit 'RS4' attached to the Affidavit in
support.

2. Prayers (4) & (5) are refused.

3. The respondent is awarded costs of One Hundred (N100.00)Naira

B only.

OGWUEGBUJSC

I agree with the ruling which has just been read by my learned brother
C Ogundare, J.S.C. a preview of which I had. I agree with his reasoning and
conclusion.

The plaintiff/applicant has brought this application praying for the
following orders:

*"(1) An enlargement of time within which the plaintiff shall pre-
D pare the records for the purpose of the appeal.*

*(2) That the records already compiled, filed and served along here-
with be deemed to have been filed and served accordingly within the en-
larged time.*

*(3) Leave to amend the grounds contained in the Notice of Appeal
E dated 11th March, 1996, by substituting therefor the grounds contained in
the Notice of Appeal attached herewith to the affidavit in support and marked
Exhibit "RS4".*

(4) Directions for filing of brief in connection with the appeal.

(5) Accelerated hearing of the said appeal."

F The application is brought pursuant to Order 2 Rule 3(1), Order
8 Rule 4 and Order 6 Rule 10 of the Supreme Court Rules. On 28/2/96,
the Court of Appeal, Lagos Division allowed the appeal of the defendants
to that court against an order of injunction granted in the Lagos State
High Court restraining the defendant from pursuing the proceedings they
G instituted in New York, United States against the plaintiff herein. The
plaintiff on 11/3/96 appealed to this court against the said decision. The
notice of appeal containing twelve grounds of appeal was filed pursuant
to section 213(2) (a) of the Constitution of the Federal Republic of Nige-
ria, 1979 which provides that:

H *"(2) An appeal shall lie from decisions of the Federal Court of
Appeal to the Supreme Court as of right in the following cases -*

*(a) Where the grounds of appeal involves questions of law alone,
decisions in any civil or criminal proceedings before the Federal Court of
Appeal;*

- (b)
- (c)
- (d)
- (e)
- (f)

The plaintiff by this application is seeking the leave of this court in B his prayer (3) to amend the original grounds of appeal filed on 11/3/96 by substituting eight grounds of appeal set out in Exhibit “RS4” annexed to the affidavit in support of the motion. He relies on Order 8 Rule 4 of the Supreme Court Rules which reads:

“Rule 4. A notice of appeal may be amended by or with leave of the C court at any time.”

My understanding of the above rule is that the court has the discre- D tion to grant an application properly brought before it to amend a notice of appeal. In the case in hand, the original notice of appeal was filed as of right on questions of law alone under section 213(2) of the Constitution. Rule 4 of Order 8 presupposes that the amendment will encompass grounds of law alone and where the amendment involves questions of fact or mixed law and facts, it will be governed by section 213(3) of the Constitution.

This court lacks jurisdiction to entertain appeals from decisions of E the Court of Appeal on grounds which involve questions of fact or mixed law and fact without leave either of the Court of Appeal or of this court and since no earlier leave was granted to the plaintiff by the Court of Appeal or this court to appeal on questions of fact or mixed law and fact, he cannot without leave urge or be heard in support of any such ground of appeal. See *Akeredolu & ors v. Akinremi & ors* (1986) 2 NWLR (Pt. 25) 710 and *Ojemen v. Momodu F* (1983) 1 SCNLR 183.

This is so because an examination of the grounds of appeal set out in Exhibit “RS4” shows that the grounds are not grounds of law alone and the original notice of appeal cannot therefore simply be amended by substituting Exhibit “RS4” as the plaintiff has prayed the court to do. G

For the above reasons and the fuller reasons set down in my learned brother’s ruling earlier referred to, I will grant prayers (1) and (2) and refuse prayers (4) and (5). I also grant prayer (3) to the extent indicated in the ruling of my learned brother Ogunbare, J.S.C. I also endorse the order as to costs made in the lead ruling. H

ONU JSC

Having been privileged to read before now the Ruling just delivered by my learned brother Ogundare, J.S.C. I am in complete agreement with him that prayers I and 2 be and are hereby granted as prayed and that prayers 3, 4 and 5 be and are hereby refused. I subscribe to the consequential orders made
B inclusive of those as to costs.

ADIO JSC

I have had a preview of the ruling just delivered by my learned brother,
C Ogundare, J.S.C., and I agree that the application succeeds to the extent stated in the ruling. I abide by the consequential orders.
Application granted in part

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