

**SUPREME COURT OF NIGERIA**  
4TH APRIL, 1997. SC. 102/1995  
**CORAM:-A. B. WALL, I. L. KUTIGI, M. E. OGUNDARE,**  
**U. MOHAMMED, S. U. ONU, JJSC.**

COMEX LIMITED ..... PLAINTIFF/APPELLANT  
AND  
NIGERIA ARAB BANK LIMITED ..... DEFENDANT/RESPONDENT

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**APPEALS** - *Grounds of appeal - Ground complaining against exercise of lower court's discretion - Is not of necessity one of fact simpliciter.*

**APPEALS** - *Grounds of appeal - Complaint against lower courts exercise of discretion - Is not a ground of law.*

**APPEALS** - *Grounds of appeal - Leave to appeal - Not obtained in respect of grounds 1&2 that are not of law simpliciter - Those grounds will be struck out.*

**APPEALS** - *Merit - Where the only competent ground - Has no issue raised in respect thereof - That ground of appeal is deemed abandoned - And the appeal will be dismissed.*

**FACTS**

Before the High Court Lagos, plaintiff/appellant obtained judgment against the defendant /respondent in the sum of N11,380,000.00 plus N30,000.00 substantial cost. To arrive at this decision, the trial court abruptly closed the defendant's case, took plaintiff's counsel's address and delivered the judgment aforesaid. Defendant appealed to the Court of Appeal and also applied for stay of execution of the trial court's judgment. The Court below granted an unconditional stay of execution.

Being dissatisfied, the plaintiff has now appealed to the Supreme Court on three grounds which were found to be of facts or mixed law and facts.

**HELD** (Unanimously dismissing the appeal per lead judgment of **OGUNDARE JSC**, Kutigi JSC concurring on a different ground)

**Ground complaining against discretion - Is not one of fact simpliciter**

1. It will be seen from these dicta that there is no school of thought generalizing that a ground of appeal complaining against a decision where a lower court has exercised its discretion, is of necessity a ground of mixed law and fact or

fact simpliciter. In each of these two cases, the grounds were examined to discern their true nature. (p. 664 B)

### **Complaint against exercise of discretion - Is not a ground of law**

2. When, therefore, the appellant complains in Ground One of an error by the Court below in making the order it made on the ground that the grant of such unconditional stay would make the status quo "more perfect" between the parties, the Appellant is, in fact, complaining against the exercise of its discretion by that Court. That Court had power to grant a stay of execution either conditionally or unconditionally. It cannot be a ground of law to complain that the Court was wrong in the exercise of its discretion when it granted unconditional stay. (p. 665 E)

### **Leave not obtained in respect of grounds 1 & 2**

3. The conclusion I arrive at is that Grounds One and Two are not grounds of law simpliciter.<sup>5</sup> As leave to appeal has not been sought nor obtained, these two grounds are incompetent and are, therefore, struck out. As Ground Three, in my respectful view, is a ground of law the appeal is to that extent competent. (p. 666 C)

### **Appeals - Merit**

4. I shall now proceed to determine the merit of the appeal in the light of Ground Three. I have examined the issues set out for determination, and argued, in the Appellant's Brief. I can see no issue raised that is predicated on Ground Three. That being so, it must be presumed that that ground of appeal has been abandoned by the appellant. The result, of course, is that no argument has been advanced in support of the appeal. And as there is a presumption of correctness in favour of the decision appealed against, this appeal, therefore fails and it is hereby dismissed by me. (p. 666 D)

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<sup>5</sup> It seems established that distinction between grounds of appeal that are of fact, mixed law and fact and of law is very thin, see Ogundare JSC p. 665 G. The fact that Kutigi JSC dissents (see p. 668 H) on the issue of the grounds in question not being of law simpliciter tends to suggest that this issue of nature of grounds of appeal may not easily be determined by any legal scientific yard stick. We suggest that counsel should always obtain leave to appeal even if they are very sure that their grounds of appeal are of law simpliciter to avoid their being struck out. This issue of nature of grounds of appeal also arose in the cases of - Nwosu v. Offor p. 272, Nyambi v. Osadim p. 281 and Olanrewaju v. Ogunleye p. 225 all of (1997) 1 KLR (Pt 47); Coker v. UBA PLC (1997) 2 KLR (Pt 48) 413; Yusuf v. Union Bank (1996) 6 KLR (Pt 42) 1249; Ojo v. Ighodalo (1996) 5 KLR (Pt 41) 874.

## NOTABLE POINTS OF INTEREST

### **OGUNDARE JSC**

*1. Whether there are 2 schools of thought as to nature of grounds of appeal*  
Mr. Akinrele is of the opinion that going by the previous decisions of this Court, there are two schools of thought as to the test to be applied in determining whether a ground of appeal is one of law or mixed law and fact or of fact simpliciter. Mr. Akinyemi is of the contrary view. I agree with Mr. Akinyemi that there are no two schools of thought. The decisions of this Court lay it down that to determine the nature of the ground of appeal, one must make an examination of the ground. The two decisions of this Court cited by Mr. Akinrele in support of his opinion as to the first school of thought do not support that opinion. (p. 662 B)

*2. Distinction between ground of law and fact is very thin*

The particulars given to Ground one would not, in my respectful view, convert what otherwise is a ground of fact simpliciter to a ground of law. True enough the line of distinction between law simpliciter and law and fact is a very thin one, but I do not think that one could convert a ground of mixed law and fact or fact simpliciter into a ground of law by providing particulars suggesting that certain decisions of this Court were ignored. (p. 665 F)

### **KUTIGI JSC**

*3. Appellants three grounds are all of law*

In ground (1) the allegation is that the Court of Appeal granted the unconditional stay of execution because it thought that the grant would make the status quo more perfect between the parties". That the Court of Appeal also failed to consider relevant authorities cited to it. This to me is a ground of law. Ground (2) also complains that the Court of Appeal granted the unconditional stay when there was no proper appeal before it because the grounds of appeal were not related to the judgment. That again is a question of law in my view. Ground (3) complains that a denial of fair hearing cannot be a ground for granting an unconditional stay of execution. This one too is a ground of law. It is an error in law if the court took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or if although applying the correct criteria, it gave wrong weight to one or more of the relevant factors. (p. 668 H)

*4. Applicant to show special circumstance to warrant stay of execution*

It is trite that an unsuccessful litigant applying for a stay of execution must show special or exceptional circumstance and that what will qualify as special

or exceptional circumstance will certainly depend on the facts and circumstances of each particular case. The onus is therefore always on an applicant to satisfy the court that he or she is entitled to the exercise of the discretion in his favour. (p. 670 C)

**B** *5. Court of Appeal rightly granted unconditional stay of execution*

I must emphasize that all the observations of facts above were clearly based on the affidavit evidence before the Court of Appeal in the application which were neither challenged nor appealed. And having regard to the principles governing the grant of stay of executions as laid down in decided cases some of which are referred to above, I believe the Court of Appeal was right in its decision to have granted an unconditional stay of execution of the judgment of the trial High Court in this case. The Respondent clearly in my view, discharged the onus placed on it by showing that the balance of justice weighed in favour of a stay of execution. (p. 671 A)

**D**

**REPRESENTATION**

A.A. Akinyemi for Appellant.

Admola Akinrele for Respondent.

**E** **CASES REFERRED TO**

Mohammed v. Olawunmi (1993) 5 KLR 37

Ogbechei v. Onochie (1986) 2 NLWR 488,

A.C.B. v. Brick & Stone (Nigeria) Limited (1993) 6 KLR 143

U.B.A. v Gmbh & Co. (1989) 3 NLWR 374,414;

**F** Metal Construction Ltd., v. Migliore (1990) 1 NLWR 299 at 325.

Ade Coker v. U.B.A. Plc. SC. 66/1996 .

Nwadike v. Ibekwe (1987) 4 NLWR 718 744-745

Okafor v. Nnaife (1987) A.N.L.R 517

Balogun v. Balogun (1969) 1 ANLR 341

**G** Mohammed v. Olawunmi (1993) 4 NWLR (pt. 287) 254

Union Bank v. Fajebe Foods (1994) 5 NWLR (pt. 344) 325

**LEAD JUDGMENT BY OGUNDARE JSC**

**H** This appeal is against an interlocutory decision of the Court of Appeal granting to the Respondent an unconditional stay of execution of the judgment of the High Court of Lagos State delivered on 16th May, 1995. The Plaintiff who is the Appellant before us had sued the defendant (now the Respondent) claiming various declarations, an order directing the return of the title deed, N12 million damages and interest on the damages claimed.

Pleadings were ordered, filed and exchanged. At the trial before Akande J, the plaintiff led evidence and closed its case. In the course of the evidence of the 1st witness for the defence, defence counsel sought to tender a document. On the objection of plaintiff's counsel, the document was rejected by the trial court. At that stage defence counsel intimated that he was appealing against the court's ruling rejecting the document in evidence and applied that further proceedings be stayed. The trial court rejected the application for stay of further proceedings and the defence counsel refused to continue to lead DW1 in evidence. The trial court thereupon closed the defendant's case and called on the plaintiff's counsel to address it. After the address of plaintiff's counsel the case was adjourned for judgment. In the judgment delivered on the 16th of May, the learned trial judge adjudged as follows:

*"I hereby hold that the Plaintiff, by the unchallenged testimony of PW1 in proof of the facts in the further amended Statement of Claim has established the claims of the Plaintiff as contained in paragraph 49(1) (b), (2), (3), (4) (a) and (b) of the further amended Statement of Claim. The claim for general damages hereby succeeds to the extent that the sum of N5,500,000.00 is assessed as claim for same. In the circumstances, the judgment of this Court shall be as follows:-*

*1. The relief in paragraph 49(1) (a) of the further amended Statement of Claim hereby fails for the reason stated earlier on in this judgment.*

*2. The reliefs in paragraph 49(1) (b), (2) and (3) hereby succeed. It is further ordered that the Title Deed dated 28th November, 1977 and registered as No. 43 at page 43 in Vol. 1669 at the Land Registry, Lagos being the title deed of the property situate, lying and being at Plot 170, Gbagada Estate which is being wrongfully detained by the Defendant shall be returned to the Plaintiff immediately as the consideration for which same was deposited has totally failed.*

*3. The relief in paragraph 49 (4) (a) and (b) hereby succeeds and the sum of N5,880,000.00 is hereby awarded as special damages in favour of the Plaintiff.*

*4. The relief in paragraph 49 (4) (c) of the further amended Statement of Claim hereby succeeds in that the sum of N5,500,000.00 is hereby awarded as general damages in favour of the Plaintiff.*

*The total sum of N11,380,000.00 (Eleven Million, three hundred and eighty thousand Naira) is hereby awarded as damages in favour of the plaintiff against the Defendant. Interest shall be at the rate of 6% per annum on the judgment debt until the whole debt shall be liquidated. I have to award substantial costs against the Defendant in this case. In so doing, I shall be guided by the principles laid down in the case of Onabanjo v.*

*Ewetuga (1993) 4 NWLR (Part 288) 450 and by the fact that costs follow events. The Plaintiff and counsel herein deserve to be compensated for the expense, time and energy which they incurred and expended respectively in the litigation from 1990 when the Writ of Summons was filed and matter was parheard before Balogun J. (rtd.) after which it started de novo before me in (1993) when same was transferred till date. If the Court had not resisted the various ploys employed by the Defendant to delay the conclusion of this case, this Court will not be delivering this judgment today. This would have amounted to delayed justice. Although this amount I shall be awarding cannot in my view repay the whole outlay which the Plaintiff and its counsel must have been compelled to make. But all the same, I hereby award Costs of N30,000.00 in favour of the Plaintiff against the Defendant herein."*

On 17/5/95, the defendant, being dissatisfied with the judgment of the 16th of May, filed an appeal to the Court of Appeal and on 18th May, filed 2 motions, one, on notice, praying for stay of execution of the judgment delivered by the High Court on the 16th of May pending the hearing and determination of the appeal filed against it and the second, ex-parte, staying execution of the judgment delivered by the lower court on the 16th of May pending the hearing and determination of the motion on notice for stay of execution filed contemporaneously with the motion ex-parte. The application on notice came before the Court of Appeal on 26th June 1995 and after addresses by learned counsel for the parties the court, in a unanimous decision, granted the application as prayed. It is against this decision that the plaintiff has appealed to this Court upon 3 grounds of appeal which read as follows:

"1. The learned Justices of the Court of Appeal erred in law when they proceeded to grant an unconditional stay of execution in favour of the Defendant/Respondent on the ground that the grant of such unconditional stay would make the status quo more perfect between the parties.

**PARTICULARS OF ERROR**

a. The decision of the Supreme Court in Union bank of Nigeria v. Odusote Bookshop Limited (1994) 3 NWLR (Pt. 331) at 129 which was cited to the Court of Appeal and which was relevant to the question of grant or refusal of unconditional stay was completely ignored.

b. The unreported decision of the Court of Appeal in LSDPC v. CityMark (W.A.) Limited was also ignored.

c. There is nothing in law like granting unconditional stay in order to create a perfect status quo between the parties.

2. The learned Justices of the Court of Appeal erred in law in proceeding to grant a stay of execution to the Defendant/Respondent.

**PARTICULARS OF ERROR**

a. *The grounds of Appeal did not relate to the judgment of 16th of May 1995 which was sought to be stayed.*

b. *The Court of Appeal in exercising its discretion relied only on the grounds of Appeal whilst ignoring all other circumstances that would in law have assisted the court in determining whether or not to grant a stay.*

3. *The learned Justices of the Court of Appeal erred in law when they held as follows:*

*"The grounds of complaint of the Applicant in some of the grounds of appeal are to the effect that it was not given a hearing. That seems complaint upon the facts so far known. In my view, it is idle to talk of a judgment fit for execution in a situation like this. Besides, it cannot be easily forgotten that the lower Court ignored the pending application in this Court for stay of further proceedings where it was brought to its notice much against the Supreme Court's pronouncements in Mohammed v. Olawunmi (1993) 4 NWLR (PT. 287) 254. I think this (is) a proper case to grant a stay of execution."*

#### PARTICULARS OF ERROR

a. *It is not the law that once denial of fair hearing is alleged in a ground of appeal, such complaint without more would compel a grant of stay of execution.*

b. *The application to stay further proceedings was properly ignored as it was predicated upon a void appeal i.e. a notice of appeal to the Court of Appeal from an interlocutory decision of the High Court containing grounds of fact of grounds of mixed law and fact without leave of either the High Court or the Court of Appeal.*

c. *The case of Mohammed v. Olawunmi relied on by the Court of Appeal was (with due respect) misconstrued and misapplied."*

Pursuant to the rules of this Court the parties filed and exchanged their respective Briefs of argument. The appeal came before us on the 11th November, 1996 for oral argument. Learned counsel for the parties addressed us and judgment was reserved to 31st of January 1997. It was discovered at conference however, that having regard to the grounds of appeal it would be necessary to hear counsel for the parties on the competence of the appeal. Learned counsel for the parties appeared before us on 18th January 1997 and addressed extensively on the issue of the competence of the appeal.

Mr. Akinyemi learned counsel for the plaintiff/appellant concedes it that the Appellant did not seek nor obtain leave of either the Court below or this Court before lodging his appeal dated 5th July 1995. He admits also that the appeal is against the exercise of discretion by the Court of Appeal. He submits that nevertheless the appeal is competent. He says that leave to

appeal is not required as all the grounds of appeal are of law. He submits that the complaint in ground 1 is that there is no principle of law which makes grant of unconditional stay "more perfect" and that the court below applied a non-existent legal principle. Learned counsel submits that ground 2 complains that the Court below did not consider the legal principle that in determining an application for stay of execution it has to consider all the circumstances of the case and not the grounds of appeal along. He further submits that Ground 3 is a ground of law. He submits that in none of the grounds is the evaluation of facts by the Court below being challenged neither did the appellant challenge the manner of the exercise of discretion. He submits that the complaints in the 3 grounds of appeal have to do with either wrong application of legal principle or non application of legal principle of misconception of law. He submits that the grounds are of law and the appeal, therefore, is competent. He relies for his submissions on the following cases - Ogbechei v. Onochie (1986) 2 NWLR 488 at 491; A.C.B. v. Brick & Stone (Nigeria) Limited (1993) 5 NWLR 399 at 412; U.B.A. v. Gmbh & Co. (1989) 3 NWLR 374, 414; Ifediora v. Ume (1988) 2 NWLR 5 at 16 and N.N.S.C. v. Baduz (1990) 7 NWLR 526 at 542.

Mr. Akinrele learned counsel for the defendant/Respondent in his submission contends that all the 3 grounds filed are incompetent. He submits that the appeal calls for a review of the manner of the exercise of discretion by the lower court, that is, whether it would be conditional or unconditional stay and this must involve the examination of the facts. He says that on this ground alone, all the grounds of appeal must fail. This submission, learned counsel opines, is based on the first school of thought arising from the decisions of this Court in A.C.B. v. Brick & Stone (Nig.) Ltd. (supra) and Metal Construction Ltd. v. Migliore (1990) 1 NWLR 299 at 325. Mr. Akinrele opines that there is a second school of thought which calls for an examination of each ground of appeal. He submits that, according to the latter school of thought, where the facts are in contention it must involve, at best, issues of law and fact. Where the facts are not in dispute, learned counsel further opines but the nature of the discretion involved calls into question the opinion of the lower court, moral judgment and determination of where the justice of the case lies, it enters the realm of fact. Learned counsel cites in support for this second school of thought, the decisions of this Court in U.B.A. v. Gmbh & Co. (supra) at page 414 (per Agbaje JSC); at page 399 (per Karibi-Whyte JSC) at page 388 (per Obaseki JSC) and Metal Construction Ltd. v. Migliore (supra) at pages 313E and 314F (per Karibi-Whyte JSC). Learned counsel submits that looking at the 3 grounds from the point of view of the second school of thought, ground (1) is a complaint against an expression of opinion; ground (2) is one of mixed law and fact in that the conflicting affidavit evidence will



have to be considered and ground (3) is a complaint against expression of opinion. He submits that an application for stay of execution involves a consideration of the equity of the court, moral judgment etc. He urges the Court to hold that the 3 grounds of appeal are incompetent and that the appeal is equally incompetent. Mr. Akinrele is of the view that the first school of thought is rather too wide and suggests that the safest approach is to look at the particular grounds of appeal.

Mr. Akinyemi, in reply, debunks the theory of there being two schools of thought as suggested by Mr. Akinrele. He submits that there is only one school of thought going by the decisions of this Court and this involves an examination of the grounds of appeal.

In view of the importance of the issue of the competence of the appeal, I will first consider this question and it is only if I hold that the appeal is competent that the need would arise for a consideration of the submissions made by learned counsel of the merit of the appeal.

Sub sections (2) and (3) of section 213 of the Constitution which provide:

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

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

*(b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;*

*(c) decisions in any civil or criminal proceedings on question as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be, contravened in relation to any person;*

*(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court;*

*(3) Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court."*

give to a party a right of appeal from the decision of the Court of Appeal to the Supreme Court. Subsection (2) of section 213 gives to a party who is aggrieved by the decision of the Court of Appeal a right of appeal as of right where the ground or grounds of appeal are of law only. Where, however, the ground or grounds of appeal are not of law alone but of mixed law and fact or fact simpliciter the right of appeal from the Court of Appeal to the Supreme Court can only be exercised where the aggrieved party has first sought and obtained the leave of either the Court of Appeal or the Supreme Court. Mr.

akinyemi concedes it that the appeal here was filed without leave of either the Court below or this Court and contends that the 3 grounds of appeal are of law. It is clear, therefore, that the appeal was brought under subsection (2) of section 213. For it is be competent the three grounds or any of them must be of law only. Any ground of appeal that is not of law simpliciter will not support an appeal under subsection (2) of section 213 and will, therefore, be incompetent.

Mr. Akinrele is of the opinion that going by the previous decisions of this Court, there are two schools of thought as to the test to be applied in determining whether a ground of appeal is one of law or mixed law and fact or of fact simpliciter. Mr. Akinyemi is of the contrary view. I agree with Mr. Akinyemi that there are no two schools of thought. The decisions of this Court lay it down that to determine the nature of the ground of appeal, one must make an examination of the ground. The two decisions of this Court cited by Mr. Akinrele in support of his opinion as to the first school of thought do not support that opinion. In Metal Construction (W.A.) Ltd. v. Migliore (supra) this Court examined the only ground of appeal filed in that case before arriving at its conclusion that it was not a ground of law simpliciter. The dictum of Nnamani JSC at page 325 relied on by Mr. Akinrele in support of his opinion of there being two schools of thought runs thus:

*"In this concurring ruling, I shall limit my brief comments to particulars 1 and 3 in the ground of appeal. I think it is obvious that the ground of appeal as framed cannot be divorced from the particulars as otherwise it could hardly be a recognizable ground of appeal. One would therefore have to take the ground and particulars together to resolve the issue in contention. From all the cases in which this Court has considered this issue of ground of appeal, certain matters appear not to be in controversy. No one can now argue that where facts are not disputed and the only complaint is as to the way the lower court has applied the law to those established, undisputed facts the ground of appeal is anything but one of law. Nor can it be disputed that whenever the decision of a court is perverse in the sense that no reasonable tribunal could on the evidence before it have reached such a decision, or that there was no evidence to support the decision reached by the Court, a complaint against such a decision can raise any questions other than questions of law. The grey area, or better the area of persistent conflict appears to be around exercise of discretion by Courts. A discretion is exercised by a court in the context of certain circumstances placed before that court. If the exercise of that discretion is challenged before an appellate court, that Court, in my view, is bound to look at the surrounding circumstances to determine whether the lower court exercised the discretion*

*judiciously or judicially or arbitrarily. That is why I am of the view that such questions necessarily raise issues of mixed law and fact. I adopt the opinion I expressed on this in Ifediora v. Ume (supra) where at page 17 I said inter alia:*

*"To examine the manner in which the learned trial Judge exercised his discretion, one has to look at the facts and the circumstances. It is against that background that one determines whether the right principles of law have been applied."* B

But then the learned Justice of the Supreme Court proceeded to examine the particulars of the grounds of appeal there concerned and concluded that they were grounds of mixed law and fact. In A.C.B. v. Brick & Stone (supra) which is the other case relied on by Mr. Akinrele for his proposition, particularly what I said in that case at page 412, I do not think that Mr. Akinrele is right. Although I did remark in that case at page 412: C

*"The Court of Appeal had a discretion whether or not to grant applicant leave to appeal. It exercised that discretion against the applicant. It would therefore appear that the appeal to this Court relates to the exercise by the Court below of its undoubted discretionary power to grant or refuse leave to appeal. Since the exercise of the discretion involves a consideration of the completing facts relied on by each party, it follows that an examination of the manner in which a discretion is exercised must necessarily involve at least questions of mixed law and fact."* D E

but I proceeded to remark -

*"But is the applicant questioning the manner of the exercise of the discretion of the court below? Or what is the applicant really questioning in his appeal? The answers to these questions are to be found in the grounds of appeal. It is not disputed that the applicant would only have a right of appeal to this Court as of right only if his grounds of appeal raise questions of law alone. See section 213(2) (a) of the 1979 Constitution."* F

I then set out what, in my respectful view, was proper test to be applied when I said: G

*"What constitutes a ground of law or mixed law and fact or of facts only has been the subject of judicial decisions by this Court in a number of cases, notably, in recent times, Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484; (1986) 3 SC. 54; Nwadike v. Ibekwe (supra) and Ifediora v. Ume (supra). Bearing in mind the principles laid down in these cases and other similar cases, I now proceed to consider the nature of the grounds of appeal filed by the applicant in its notice of appeal to this Court against the decision of the Court of Appeal. The grounds are already set out. I need to point out that it is not how a ground is christened that matters but what it complains about."* H

*I have examined carefully the three grounds of appeal and in my respectful view, they all raise issues of law. They do not relate to an examination of the manner in which the court below exercised its discretion to grant or refuse leave to appeal, but rather complain of a misconception of the application before it. This, in my respectful view, would amount to an error of law."*

**B It will be seen from these dicta that there is no school of thought generalizing that a ground of appeal complaining against a decision where a lower court has exercised its discretion, is of necessity a ground of mixed law and fact or fact simpliciter. In each of these two cases, the grounds were examined to discern their true nature.**

C What is a ground of law has been the subject of decision by this Court in numerous cases. Some of such authorities have been cited by learned counsel in their arguments. In a recent case Ade Coker v. U.B.A. PLC, SC. 66/1996 in a ruling delivered by me on 14th of February 1997 I had cause to follow the dictum of Nnaemeka-Agu JSC in Nwadike v. Ibekwe (1987) 4 NWLR 718 at D 744-745 wherein the learned Justice of the Supreme court said:

*"When then is a ground of appeal that of law? 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 into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if although applying the correct criteria, it gave wrong weight to one or more of the relevant factors; See O'Kelly v. Trusthouse Forte P.L.C. (1983) 3 all E.R. 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. 491-492.

(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* G (supra) at p. 55; H.L. For, for many years, it has been recognized that inferences to 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 E.R. 326, at p. 327.

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

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(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 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. So, for this rather historical reason, a ground of appeal complaining that there was no evidence, or no admissible evidence, upon which a decision or finding was based has always been regarded as a 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, JSC., citing with approval an article by C.T. Emery in vol. 100 L.Q.R. held:*

*'If the tribunal purports to find that a particular event occurred although it is seized of no admissible evidence that the event did in fact occur, it is a question of law.'*

I now examine the grounds of appeal in this case.

#### Ground One:

I may mention at this stage that the position taken by the appellant both in the court below and in this Court is to the effect that if a stay of execution is to be granted at all, it should be a conditional stay. The court below, for reasons advanced by it in its ruling, adhered to the plea of the defendant/Respondent to grant unconditional stay. **When, therefore, the appellant complains in Ground One of an error by the Court below in making the order it made on the ground that the grant of such unconditional stay would make the status quo "more perfect" between the parties, the Appellant is, in fact, complaining against the exercise of its discretion by that Court. That Court had power to grant a stay of execution either conditionally or unconditionally. It cannot be a ground of law to complain that the Court was wrong in the exercise of its discretion when it granted unconditional stay.** The particulars given to Ground one would not, in my respectful view, convert what otherwise is a ground of fact simpliciter to a ground of law. True enough the line of distinction between law simpliciter and law and fact is a very thin one, but I do not think that one could convert a ground of mixed law and fact or fact simpliciter into a ground of law by providing particulars suggesting that certain decisions of this Court were ignored. What would make a situation "more perfect" is a question on which men may arrive at different conclusions on the same evidence before them. It entails an exercise of an examination of the competing evidence adduced and the conclusion reached is a reflection of one's perception of what is right, just, equitable or reasonable.

#### Ground Two:

Again the complaint here is that the Court below, in exercising its discretion to grant unconditional stay, did not consider all the circumstances that would, in law, have assisted the court in determining whether or not to grant the stay. It is not stated what circumstances the Court ignored. Such circumstances obviously must be facts. This ground to my mind questions the manner the court below exercised its discretion and that can only be an issue of fact or, at best, mixed law and fact, but not of law simpliciter.

Ground Three:

This ground would appear in my respectful view to be a ground of law. I say this having regard to the particulars given to this ground. This is a case where the particulars must be read along with the ground to determine its nature.

**The conclusion I arrive at is that Grounds One and Two<sup>6</sup> are not grounds of law simpliciter. As leave to appeal has not been sought nor obtained, these two grounds are incompetent and are, therefore, struck out. As Ground Three, in my respectful view, is a ground of law the appeal is to that extent competent.**

I shall now proceed to determine the merit of the appeal in the light of Ground Three. I have examined the issues set out for determination, and argued, in the Appellant's Brief. I can see no issue raised that is predicated on Ground Three. That being so, it must be presumed that that ground of appeal has been abandoned by the appellant. The result, of course, is that no argument has been advanced in support of the appeal. And as there is a presumption of correctness in favour of the decision appealed against, this appeal, therefore fails and it is hereby dismissed by me. I award N1,000.00 costs of this appeal to the defendant/Respondent.

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**WALI JSC**

I have had a preview of the lead judgment of my learned brother Ogundare, JSC and I entirely agree with the way and manner he dealt with the issues, inclusive of the one raised by this court relating to the competence or otherwise of the appeal and I also agree with the reasons he gave for arriving at his conclusions. I adopt these reasons as mine.

I need only emphasize that ground 3 of the grounds of appeal is by its nature a ground of law and also by the provision of sub-section (2) (c) of s. 213 of the 1979 Constitution, it saved the Notice of Appeal from being entirely incompetent. But since no issue was formulated on this ground, it is deemed

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<sup>6</sup>See p. 658 E for grounds 1 & 2

to have been abandoned. This means that the appellant did not offer any argument in support of his Appeal. It would be dismissed for want of prosecution as provided for in order 6 rule 3(2) of the Supreme Court Rules, 1985 (As amended). See also Godwin Chime v. Nelson Ude & Ors. (1996) 7 SCNJ 81 in which the sub-rule (supra) was interpreted by this court.

It is for these and the more detailed reasons in the lead judgment of my learned brother ogundare JSC, which I have already adopted, that I also hereby dismiss the appeal with N1,000.00 costs to the respondents.

### KUTIGI JSC

On the 16th day of May, 1995 an Ikeja High Court delivered judgment in favour of the Respondent/Appellant for the sum of N11,380,000.00 and also granted it some declaratory reliefs.

The Applicant/Respondent dissatisfied with the judgment appealed to the Court of Appeal, Lagos Judicial Division. It then filed an application for stay of execution of the judgment of the High Court.

On 26th June, 1995 the Court of Appeal heard the application and delivered its Ruling granting an unconditional stay of execution of the said judgment.

Aggrieved by the decision of the Court of Appeal granting an unconditional stay of execution of the judgment of the High Court, the Respondent/Appellant has now appealed to this Court. Three Grounds of appeal were filed as follows -<sup>7</sup>

*This appeal was in fact, heard on 11/11/96 and judgment was reserved till 31/1/97. It was later discovered that the three (3) Grounds of Appeal above, were probably caught by the provisions of section 213(3) of the Constitution and that the necessary leave to appeal had not been sought or obtained. Notices were therefore sent to the parties for them to come and further address us on the requirement for leave under section 213(3) of the Constitution. Counsel on both sides complied and we were further addressed accordingly on 16/1/97.*

*Making his submissions, learned counsel for the Appellant, Mr. Akinyemi, said the appeal before this Court is competent. That all the three grounds of appeal are grounds of law which needed no leave of this Court or of the Court of Appeal. He referred to pages 72 - 75 of the record. He said grounds (1) & (2) both complain about the proper principles for grant of unconditional stay of execution not being followed and instead,*

<sup>7</sup>See p. 658 E for the three grounds of appeal

*non-existent principles were adopted. He said that will be a ground of law. He said ground (3) is also a complaint against the application of a wrong principle*

*to the grant of the application because the absence of a fair hearing in the High Court could not be one of those things to be considered in granting a stay of execution. That stay of execution is only granted on "special circumstances".*

The Court of Appeal therefore must have applied wrong principles of law in arriving at its decision to grant an unconditional stay of execution. That also is a question of law. The following cases, amongst others, were cited in support -

OGBECHE V. ONOCHIE (1986) 2 NWLR (pt. 23) 484 at 491 A.C.B. V. OBMAMI BRICK & STONE (NIG) LTD (1993) 5 NWLR (Pt. 294) 399 at 412. U.B.A. V. G M B H (1989) 3 NWLR (PT. 110) 374 at 414. He said the grounds of appeal herein are essentially to do with the application of legal principles or non-application of legal principles or a misconception of law. That the grounds of appeal being competent, the appeal is therefore competent.

Responding Mr. Akinrele, Learned Counsel for the Respondent, submitted that all the three grounds of appeal are incompetent because the Appellant is asking this Court to review the manner in which the Court of Appeal exercised its discretion in granting the unconditional stay of execution and that is a question of mixed law and fact. Leave to appeal was therefore necessary. He said grounds (1) & (3) are not proper grounds of appeal because they are mere expressions of opinion by the Court of Appeal. He said ground (2) involved an evaluation of affidavit evidence. This also requires leave. He referred to the following cases - A.C.B. V. OBMAMI BRICK & STONE (NIG) LTD (supra) METAL CONSTRUCTION LTD V. MIGLIORE (1990) 1 NWLR (PT. 126) 299 U.B.A. V. G M B H (supra).

Now, I have carefully looked at the three Grounds of Appeal above, and I am inclined to agree with Mr. Akinyemi, Learned Counsel for the Appellant, that a thorough examination of the grounds will certainly reveal that they are complaining about the non-application or non-consideration of the proper legal principles and the application or consideration of non-legal principles and or irrelevant materials by the Court of Appeal in its treatment of the application for a stay of execution before it. In ground (1) the allegation is that the Court of Appeal granted the unconditional stay of execution because it thought that the grant would make the status quo more perfect between the parties". That the Court of Appeal also failed to consider relevant authorities cited to it. This to me is a ground of law. Ground (2) also complains that the



Court of Appeal granted the unconditional stay when there was no proper appeal before it because the grounds of appeal were not related to the judgment. That again is a question of law in my view. Ground (3) complains that a denial of fair hearing cannot be a ground for granting an unconditional stay of execution. This one too is a ground of law. It is an error in law if the court took into account some wrong criteria in reaching its conclusion or applied some B wrong standard of proof or if although applying the correct criteria, it gave wrong weight to one or more of the relevant factors. (See NWADIKE v. IBEKWE (1987) 4 NWLR (PT. 67) 718.

The conclusion I have arrived at is therefore that all the three grounds of appeal above, are grounds of law. They are therefore not caught by section C 213(3) of the Constitution. The grounds are competent. The appeal is therefore competent.

The Applicant has in his brief submitted two issues for determination in the appeal. It is clear to me that issue (2) is amply covered by issue (1) which reads -

*"Whether the Defendant/Respondent has shown special or exceptional circumstance to warrant the grant of their prayer for stay of execution of the judgment of the High Court pending the determination of its appeal and even so if such could have necessitated the grant of unconditional stay."*

Summarily stated the Appellant contended that the application for E stay of execution before the Court of Appeal did not contain anything showing special or exceptional circumstance why stay should be granted. That the principles for the grant of stay of execution laid down in many decisions of this Court were not followed. The following cases were cited in support - OKAFOR v. NNAIFE (1987) A.N.L.R. 517 BALOGUN v. BALOGUN (1969) 1 F ANLR 341 MARTINS v. NICANNARA FOODS CO. LTD & ANOR (1988) 2 NWLR (PT. 74) 75.

OKOYA v. SANTILLI (1990) 2 NWLR (PT. 131) 172 TUKUR v. GOVERNMENT OF GONGOLA STATE (1989) 4 NWLR (PT. 117) 592.

The Court was asked to allow the appeal.

The Respondent on the other hand submitted that the granting of a stay of execution is a matter of discretion and as such, any conduct which tends to stifle the exercise of such discretion must be frowned at by the Court. Based on this principle courts are enjoined whenever they have notice of an application for stay of proceedings pending in an appellate court, not to do H anything which may render the said application useless or stifle the exercise of the appellate court's discretion in respect of the application as was done by the trial High Court in this case. He referred to the affidavits filed by the parties in the Court of Appeal and the findings of facts made by the court on

pages 69 - 70 of the record and which findings have not been challenged by the Appellants. That after the High Court had ignored the Application for stay of proceedings pending in the Court of Appeal, it proceeded to judgment without allowing the Appellant to present its defence. And that where as in this case a judgment appealed may be declared a nullity, it would constitute B special circumstance for the grant of a stay of execution. The following cases were cited amongst others -

VASWANI v. SAVALAKH & CO (1972) ANLR 922 MOHAMMED v. OLAWUNMI (1993) 4 NWLR (PT. 287) 254 UNION BANK v. FAJEBO FOODS (1994) 5 NWLR (PT. 344) 325 MARTINS v. NICANNAR FOOD CO. LTD. (supra)

C We are asked to dismiss the appeal.

It is trite that an unsuccessful litigant applying for a stay of execution must show special or exceptional circumstance and that what will qualify as special or exceptional circumstance will certainly depend on the facts and circumstances of each particular case. The onus is therefore always on an D applicant to satisfy the court that he or she is entitled to the exercise of the discretion in his favour (see VASWANI v. SAVALAKH (supra), OKAFOR v. NNAIFE (supra), MARTINS v. NICANNAR FOODS CO. LTD & ANOR (supra).

Courts of law therefore have the discretion of whether or not to grant an application for a stay and which discretion they exercise both judicially and E judiciously.

Now, guided by the above principles the Court of Appeal in its Ruling on pages 69 - 70 of the record observed -

*"The Defendant sought to amend its Statement of Defence of the lower court. This was refused. The Defendant appealed and asked for stay F of further proceedings. Stay of further proceedings was refused by the lower court. A similar application was filed in this Court and counsel for the Plaintiff was duly put on notice ..... The application for stay of further proceedings in this Court was brought to the notice of the learned trial Judge. This was conveniently ignored by her and the trial proceeded G by the learned judge calling on defendant's counsel to get on with his case. The said counsel could not ..... The learned trial judge then closed the case for the defendant and called on the plaintiff's counsel to address the court. This was done. The defendant's counsel became merely an onlooker in a claim involving several millions of naira ..... The grounds H of complaint of the applicant in some of the grounds of appeal are to the effect that it was not given a hearing. That seems an undeniably substantial complaint upon the facts so far known ..... I think this is a proper case to grant a stay of execution."*

I agree with the reasoning and conclusion above. If the narration

above does not constitute special or exceptional circumstance, I do not know what would!

I must emphasize that all the observations of facts above were clearly based on the affidavit evidence before the Court of Appeal in the application which were neither challenged nor appealed. And having regard to the principles governing the grant of stay of executions as laid down in decided cases some of which are referred to above, I believe the Court of Appeal was right in its decision to have granted an unconditional stay of execution of the judgment of the trial High Court in this case. The Respondent clearly in my view, discharged the onus placed on it by showing that the balance of justice weighed in favour of a stay of execution.

The appeal therefore fails.

It is for the reasons stated above (and none other) that I agree with the conclusion reached in the lead judgment of my learned brother Ogundare, J.S.C to dismiss the appeal. The appeal is therefore dismissed with costs of N1,000.00 to the Respondents.

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#### **MOHAMMED JSC**

I also agree that only ground three of the three grounds filed by the appellant is a ground of law. Grounds one and two are grounds of facts or mixed law and fact and since no leave was obtained before filing them they are incompetent. Grounds one and two are therefore struck out. Ground three is a ground of law but the appellant failed to raise any issue against that ground. Accordingly it is taken as abandoned. The appeal could have been ripe through this ground of appeal. However since no submission or argument has been made in respect of the averment in that ground I will also agree that this appeal fails and it is dismissed. I abide by all the orders made in the lead judgment of my learned brother, Ogundare, JSC., whose opinion I adopt as mine.

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#### **ONU JSC**

I had the privilege of a preview of the judgment just read by my learned brother ogundare, J.S.C. before now. I agree with all that is contained therein that I have nothing further to add thereto. I adopt the same as mine H and make the same consequential orders inclusive of those relating to costs.