

**SUPREME COURT OF NIGERIA**

15TH JULY, 1999. SC. 109/1993

**CORAM:- A. B. WALI, M. E. OGUNDARE, O. ACHIKE, A O.  
EJIWUNMI, E. O. AYoola, JJSC.**

ALHAJI TAHIR MAIGORO ..... APPELLANT  
AND  
ALHAJI JIBRIN GARBA ..... RESPONDENT

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***APPEALS** - Jurisdiction - Grounds of appeal - Which are only of facts or mixed law and facts - The Supreme Court has no jurisdiction to entertain such an appeal - Unless leave has been obtained.*

***APPEALS** - Competency - Grounds of appeal - How to determine whether a ground of appeal is competent - Having regard to the provisions of section 213 of the 1979 Constitution (as amended).*

***APPEALS** - Ground of appeal - Based on facts - A complaint about the general appraisal of the evidence led at the trial - Is a ground of fact.*

***APPEALS** - Ground of mixed law and fact - Where the appellate court would have to reexamine - The facts found at the trial - And which formed the basis of the judgment - It is a ground of mixed law and fact.*

***APPEALS** - Preliminary Objection - Raised in the respondent's brief - Is not in accordance with the Provisions - Of Order 2 Rule 9 of the Supreme Court Rules - But the notice of preliminary objection is not rendered ineffective.*

***APPEALS** - Preliminary Objection - Notice of - Which was included in the respondent's brief - And was duly served on the appellant - Where he failed to react to the notice - He can not be heard to complain that the appeal was determined - Upon the grounds set out in the notice.*

### **FACTS**

In the High Court of Yola, holden at Yola, the plaintiff/appellant commenced an action against the defendant/respondent claiming for an injunction against the defendant his agents, servants, privies from further false malicious prosecution, defamation or criminal allegation against him (the plaintiff) and the sum of N500,000.00 as damages. The defendant's vehicle was engulfed by fire that eventually destroyed it on the night of 21st of November, 1988. The defendant reported the incident to the police. At the station the defendant stated that he knew of no one, who could have done the act. However on further enquiry from the police he mentioned the plaintiff as his old political enemy. Following that disclosure, the police promptly arrested the defendant and detained him at the Police cell for about three days. Plaintiff was later granted bail, but subsequently he was arraigned before the Upper Area Court No. 1 Yola. That court eventually discharged him. It was after he was so discharged that the plaintiff commenced this action against the defendant.

At the end of the trial, the learned trial judge delivered a considered judgment wherein he upheld the claim of the plaintiff. Dissatisfied, the defendant appealed to the Court of Appeal. He was successful and his appeal was allowed. The plaintiff aggrieved by the decision of the Court of Appeal has now appealed to the Supreme Court. The appellant filed five grounds of appeal. Briefs of Argument were filed, served and exchange by the parties. The brief filed for the respondent includes notice of preliminary objection. The Plaintiff though duly served with the respondent's brief did not react to the notice of preliminary objection. In the preliminary objection the defendant/respondent contended that the grounds of appeal filed by the plaintiff/appellant are incompetent having regard to the provisions of section 213(3) of the 1979 Constitution as amended since no leave had been obtained and therefore urged that the appeal be struck out.

### **ISSUE FOR DETERMINATION**

*Whether appellant's grounds of appeal are incompetent as claimed by the respondent*

**HELD** (Unanimously striking out the appeal per lead judgment of **EJIWUNMIJSC**)

***Jurisdiction - Grounds of appeal***

1. It is therefore clear that the Court has no jurisdiction to entertain an appeal on a ground of fact or of mixed law and facts unless, of course, leave has been obtained. This point has been emphasized in a number of recent decisions. It is enough to refer only to the following :- Oluwole v Lagos State Development Property Corporation (1983) 5 SC1; Obijuru v Ozime (1985) 2 NWLR (Pt.6) 167 at pages 176-188; and J.B. Ogbechie & Ors. v Gabriel Onochie & Ors (1986) 2 NWLR 484. One obvious result of this state of the law is that where an appellant's grounds of appeal are only of facts or mixed law and facts, the grounds, and hence the appeal must be struck out unless leave had been obtained. On the other hand, where no leave had been obtained and some of the grounds are of law and others are either facts or mixed law and facts, only those which are grounds of law are competent. All grounds of facts or mixed law and fact must be struck out. It follows from what I have said above that all the grounds of appeal filed by the appellant are certainly not grounds of law. They are either grounds of fact or of mixed law and fact and they cannot therefore be competent grounds of appeal unless the appellant had obtained the requisite leave of this Court or that of the Court of Appeal. As it is common ground that in the instant appeal, the appellant had not sought and obtained the leave of this Court or the Court of Appeal, the grounds of appeal so filed are incompetent. As the grounds of appeal of the appellant are incompetent it follows that the appellant has no valid appeal before this Court. (pp. 2240 B/2243 D)

***Competency - Grounds of appeal***

2. In view of the fact that the life of an appeal to this Court could be extinguished peremptorily because of the nature of the grounds of appeal filed by an appellant, the judgment of this Court are replete with the reasons that have been given for determining the competency of grounds of appeal filed to this Court having regard to the law, namely, the provi-

sions of section 213 of the 1979 Constitution (as amended). In this connection, may I refer again to Ogbechie v Onochie (supra) where Eso, JSC, dealing with the approach to the determination of whether a ground of appeal is a ground of law or a ground of mixed law and fact or fact, B said at page 491, thus:-

*"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."*

See U.B.A. v GMBH (1989) 3 NWLR (Pt. 110) 374 at 391 to 392, where Obaseki, JSC, quoted the pronouncement of Eso, JSC referred to (supra). See also Obatoyinbo v Oshatoba (1996) 5 NWLR (Pt. 450) 531 at E 548. (p. 2241 E)

### ***Ground of appeal - Based on facts***

3. A careful examination by me of ground one of the appellant's ground of appeal shows that the appellant is therein complaining about the general appraisal of the evidence led at the trial. It seems to me that the complaint is mainly based on facts. (p. 2242 D)

### ***Ground - Of mixed law and fact***

4. In ground two, the appellant's complaint began with the assertion that the learned Justices of the Court of Appeal erred in law when they dismissed the appellant's case as having not been proved before the trial Court, and that the police and not the respondent caused appellant's arrest, detention, imprisonment and prosecution. This was followed by four paragraphs containing what were described as errors in law and misdirection. After a close study of this ground and its particulars, it is manifest that this Court would have to re-examine the facts that formed

the basis of the complaint of the appellant and of the facts found at the trial and which formed the basis of the judgment. The ground, therefore, is not a ground of law simpliciter. It is in my respectful view a ground of mixed law and fact, and I so hold. It is also manifest that though the appellant has alleged in grounds 4 and 5, that the learned B Justices of the Court of Appeal erred in law and misdirected themselves, the real attack of the appeal in respect of these grounds of appeal is aimed at the facts that formed the basis of the judgment of the Court below. In effect, the appellant would want this Court to re-evaluate and reconsider the facts as found by the trial Court and which had been C upheld by the Court below. It is therefore my view that these two grounds, namely grounds 4 and 5 of the grounds of appeal must be regarded at best, as grounds of mixed law and fact. (pp. 2242 D/2243 A)

D

***Appeals - Preliminary objection***

5. This appeal must therefore be struck out upon the preliminary objection of the respondent, though it was raised in the respondent's brief. Ordinarily, a respondent by Order 2 Rule 9 of the Rules of this Court E could give notice of a preliminary objection to the hearing of the appeal and shall also give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection and shall file such notice together with ten copies thereof with the Registrar within the same time. F Admittedly, the respondent did not bring the notice of this preliminary objection to the appellant in accordance with the provisions of Order 2 Rule 9 of the Rule of this Court. His failure to do so would not render ineffective the notice of his preliminary objection. (p. 2243 F)

G

***Preliminary objection - Notice of***

6. In the instant appeal, the appellant was duly served with the respondents brief and which clearly included the notice of the respondent's H preliminary objection to the appeal. He did not react to this notice, and in my respectful view he cannot be heard to complain that the appeal has been determined upon the grounds set out in the respondent's notice of preliminary objection that was included in the respondent's brief.(p.2244E)

**NOTABLE POINTS OF INTEREST**

**EJIWUNMIJSC**

*1. How not to draft a ground of appeal*

I have read and re-read ground 3 of the appellant's grounds of appeal and  
 B I must confess that its true purport eludes me. Apart from the allegation  
 that the learned Justices of the Court of Appeal erred in law and misdi-  
 rected themselves, the remaining part of it is an admixture of various  
 facts and allegations. In the end, all that can be said of this ground is that  
 C the appellant would want a re-examination of the record of proceedings.  
 Ground 3, is in my view, a classic example of how not to draft a ground  
 of appeal. It is, however, my respectful view that at best, this ground  
 may be classified as one of mixed law and fact. (p. 2242 G)

**D ACHIKE JSC**

*2. The purpose of Order 2 Rule 9 and the essence of a preliminary objec-  
 tion*

In this appeal, the Respondent's learned counsel gave Notice of Prelimi-  
 E nary objection in the Respondent's Brief. This is clearly an approach  
 outside the contemplation of Order 2 Rule 9 of the Rules of this Court  
 which enjoins a preliminary objector to give such notice of a preliminary  
 objection to the hearing of the appeal, not less than three clear days  
 F before the hearing of the appeal. Should a notice of preliminary objection  
 included in the Respondent's Brief be discountenanced because of failure  
 to comply strictly with the provisions of Order 2 Rule 9? I think not.  
 There is no doubt in my mind that the purpose of Rule 9 is to alert the  
 Appellant sufficiently of the attack the Respondent has conceived as his  
 G strategy to either partially or wholly neutralize the hearing of the appeal.  
 Thus if the objection is sustained the appeal will, as it were, be still-born  
 with its far-reaching consequences. Since the essence of a preliminary  
 objection is to bring the objection to the Appellant's notice before the  
 H appeal takes off. Once such notice of objection is incorporated in the  
 Respondent's Brief the Appellant cannot be heard to deny being aware of  
 the notice merely because it did not strictly conform with the specific  
 procedural Rule of Court. That will be taking refuge under the technical

rule of procedure. Suffice it to say that the courts for a long time have shifted emphasis from undue reliance on technicalities to doing substantial justice to the parties, having regard to the circumstances of the case. Respondent's failure to comply with the procedural provisions under Order 2 Rule 9 will not derogate from the duty of this Court to give consideration to the preliminary objection on its merit. See Ajide v Kelani (1985) 3 NWLR (Pt. 12) 248 or (1985) 2 NSCC 298. (p. 2245 E)

*3. A complaint that judgment is against the weight of evidence is a ground of fact* C

Ground one makes no pretence that it is a complaint of evaluation of evidence, for it reads in part that the "judgment ..... is against the weight of evidence adduced at the trial High Court", and a complaint of such nature is traditionally, on the authorities, one of fact. (p. 2247 A) D

*4. Appellation of a ground of appeal as a ground of law does not make it such*

It is worthy of note that grounds 2, 3, 4 and 5 were respectively prefaced E that. "The learned Justices of the Court of Appeal Jos erred in law" (emphasis supplied) and each ground had subjoined to it "Particulars of Errors (sic) in law and Misdirection" (emphases supplied) showing at a glance that these are grounds of law. Experience has abundantly demon- F strated that it is not the appellation the Appellant chooses to call a ground of appeal that controls, rather it is the characterization of a ground of appeal that enures to it the appellation of a "ground of law", and "ground of mixed law and fact" or a "ground of facts" (p. 2247 B) G

*5. "Pure law" and "pure fact" in grounds of appeal - What distinguishes them*

Succinctly put, a ground of law arises where the ground of appeal shows H that the court - trial or appellate - misunderstood the law or misapplied the law to the proved or admitted facts. By way of emphasis only, it is sometimes referred to as "pure law". On the other hand, where the evaluation of facts established by the trial court before the law in respect

thereof is applied is under attack or question, this will involve a ground of mixed law and fact. Finally, where the evaluation of evidence tendered at the trial is exclusively questioned, this will be basis for a ground of fact, emphemistically referred to as "pure fact". See Ogbechie v Onochie B (1986) 2 NWLR (pt 23) 484. (2247 D)

### **REPRESENTATION**

Appellant not represented

C J. D. Moze fir the Respondent

### **CASES REFERRED TO**

- U.B.A. v GMBH (1989) 3 NWLR (Pt. 110) 374 at 391 to 392 Obatoyinbo v Oshatoba (1996) 5 NWLR (Pt. 450) 531 at 548
- D Ogbechie v Onochie (1986) 2 NWLR (pt 23) 484
- Nwadike v Ibekwe (1987) 12 SC 14 at p.54
- Ajayi v Emorogbe (1973) 7 SCNJ 168
- U.B.A. V GMBH (1989) 3 NWLR (Pt.110 374 at p.311
- E Ajibade v Pedro (1992) 5 NWLR (Pt. 241) 257 at 267
- Motunwase v Sorungbe (1988) 5 NWLR (Pt. 92) 99
- Ogbechie v Onochie (No. 1), 1986 2 NWLR (Pt. 23) 484
- Metal Construction (W.A.) Ltd v Migliore (1992) 1 NWLR (Pt.126) 299
- F Arowolo v Adimula (1991) 8 NWLR (Pt. 212) 753
- Nwadike & Ors v Ibekwe & Ors (1987) 2 NSCC 121

### **STATUTES & RULES REFERRED TO**

- G Constitution of the Federal Republic of Nigeria, 1979. s. 213 (3) (as amended)
- Supreme Court Rules, O.2 r.9

### **LEAD JUDGMENT BY EJIWUNMI JSC**

- H In the High Court of Yola, holden at Yola, the plaintiff (now appellant) commenced this action against the defendant (now respondent) in Suit No. GGSY/11/89. By paragraph 15 of his Statement of claim, dated 11th April, 1989, the appellant's claims against the defendant



were as follows:-

*"By reasons of the matters aforesaid, the plaintiff was wrongfully detained in police cell, and deprived of his liberty, and has greatly injured his credit, character, and reputation and portrayed falsely as arsenic (sic) criminal and has been put to contempt, ridicule to his family and entire public and has been put to considerable trouble, inconvenience, and anxiety.*

*(i) An injunction against the defendant his agents, servants, privies however from further false malicious prosecution, defamation, or criminal allegation however against the plaintiff.*

*(ii) And the plaintiff claims against the defendant the sum of N500,000.00 (Five hundred thousand Naira) being damages for defamation, false malicious prosecution, injury to his character and reputation, wrongful detention and false detention as a result of malicious criminal defamation and allegations made to the police at the instance of the defendant together with 10% interest from the date of judgment until payment."*

After pleadings have been filed and exchanged, the matter proceeded to hearing. At the end of the trial, the learned trial Judge, Abba, J. delivered a considered judgment wherein he upheld the claim of the appellant. As the respondent was not satisfied with that judgment, he appealed to the Court below. The respondent was successful in the Court below as his appeal was allowed. Not satisfied with the judgment and orders of the Court below, the appellant has now appealed to this Court.

The facts of this case are simple. On the night of the 21st of November, 1988 at about 2.00 a.m. one of the vehicles owned by the respondent was engulfed by fire that eventually destroyed it. The respondent then made a report to the police about the incident. At the Station, when asked if he knew who could have done the act, he confessed that anyone he could describe as his enemy, the respondent mentioned the appellant as his old political enemy. Following that disclosure, the police promptly arrested the appellant and was detained at the Police cell for about three days. Though he was later granted bail, he was arraigned before the Upper Area Court No.1 Yola, but was eventually

discharged by that Court for the offences for which he was charged. It was after he was so discharged that the appellant commenced this action against the respondent.

As I have said earlier, the appellant has appealed to this Court following the decision of the Court below. Pursuant thereto, the appellant has filed five grounds of appeal against the judgment and orders of the Court below. And in accordance with the Rules of this Court, Briefs of Argument were filed, served and exchanged by the parties. It must be noted at this point, that the brief filed for the respondent included the respondent's notice of Preliminary Objection to the appellant's brief of argument and also the respondent's brief. The appellant, though duly served with the respondent's brief did not file a reply to the said brief. That remained the position until the hearing of this appeal.

At the hearing, the appellant was not in Court and was not represented by his Legal Practitioner. As the learned counsel for the respondent was present, the appeal was heard. The learned counsel for the respondent then adopted and placed reliance on the respondent's brief and invited the Court to the notice of preliminary objection he had raised in the said brief.

I will therefore consider whether the said notice of preliminary objection has merit. The notice of preliminary objection reads, and I quote:-

*"At the hearing of this appeal, the respondent will raise a Preliminary Objection to grounds 1,2,3,4 and 5 of the Appellant's grounds of appeal upon which issues 1,2,3,4 and 5 were formulated for determination in the Appellant's Brief. See Ajide v Kelani (1985) 3 NWLR (pt. 12) at page 248."*

Grounds for Preliminary Objection :-

*"(1) It will be submitted that grounds 1,2,3,4 and 5 are at best grounds of fact or mixed law and facts, for which leave of the Court below or the Supreme Court should have been first obtained before filing same. See Section 213 (3) of the 1979 Constitution as amended, Ajayi v Omorogbe (1993) 7 SCNJ 168 especially at 182 last paragraph and Oluwole v Lagos State Dev. Property Corporation (1983) 5 SC 1.*

(2) *In addition grounds 3, 4 and 5 are patently and patently defective because the three grounds allege error in and misdirection all at the sametime. This, it will be humbly submitted for the Respondent, is contrary to law and settled authorities. The Respondent will rely on the case of Nwadike and Ors. v. Ibekwe & Ors. (1987) 12 SC 14 especially at 54 per Nnaemeka Agu JSC as he then was line 35-39.* B

(3) *Since the Supreme Court has no jurisdiction to entertain an appeal on ground of facts or no mixed law and facts, unless, of course leave has been obtained, the Respondents will humbly and respectfully urge my Lords to strike out the five grounds of appeal filed."* C

It is patent from the preliminary objection taken against the appeal by the learned counsel for the respondent that the appeal be struck out as the grounds of appeal filed by the appellant are incompetent having regard to the provisions of section 213(3) of the 1979 constitution as D amended.

The grounds of appeal which are the subject of this complaint read thus :-

"GROUND ONE E

*The Judgment of the learned Justices of the Court of Appeal in dismissing plaintiff/appellant case is against the weight of the evidence adduced at the trial High Court.*

GROUND TWO F

*The learned Justices of the Court of Appeal Jos erred in law when they dismissed the appellant's case as having not been proved before the trial High Court, and that the Police and not the Respondent caused appellant's arrest, detention imprisonment and prosecution.* G

PARTICULARS OF ERRORS (SIC) IN LAW AND MISDIRECTION

(i) *The Respondent set in motion the law for the arrest, detention and prosecution by the Police and therefore instrumental in the prosecution of the appellant leading to criminal charge.* H

(ii) *The appellant by Exh. "E" was charged before Yola Upper Area Court on charge of mischief by fire and determined in appellant's favour.*

(iii) *The Respondent's report/suspicion against the appellant to the Police at C.I.D. Yola Gongola State was completely without reasonable and probable cause.*

(iv) *The Prosecution of the appellant in case No. UACIV/ CR/ F1/135/88 was as a result of malice by the Respondent against appellant. Balogun v Amubikalun (1989) 3 NWLR (pt. 107) page 18.*

GROUND THREE

*The learned Justices of the Court of Appeal erred in law and misdirected themselves having held that the appellant was duly prosecuted, discharged on all allegations the complainant/Respondent could not be held responsible nor liable for the prosecution.*

PARTICULARS OF ERRORS (SIC) IN LAW AND MISDIRECTION

(i) *The Respondent made a report and complaint to the Police C.I.D. suspecting without probable and reasonable cause against the appellant of setting his vehicle ablaze who was arrested, detained, proffers a charge against Respondent under S. 326 of the Penal Code the Respondent is deemed to set in motion the law for the police clothed with authority to charge and arrest the appellant.*

(ii) *The complainant made a false report, complaint, maliciously without reasonable and probable cause and is therefore liable for the malicious prosecution even though technically he was not the prosecutor.*

(iii) *The Respondent report complaint or information to the Police had no belief in the criminal culpability of the appellant, nor honesty, based on full conviction or founded upon reasonable grounds in relation to any set of facts and circumstances to lead any reasonable person to believe that the appellant set Respondent's vehicle ablaze as alleged*

(iv) *The report, complaint and prosecution of the appellant alleging setting ablaze the Respondent's vehicle had no basis not could it be conclusive that the appellant was guilty of setting ablaze the Respondent's vehicle as alleged by the Respondent to the Police. Herniman vs Smith (1938) A.C. 305.*

GROUND FOUR

The learned Justices of the Court of Appeal erred in law and misdirected themselves in law, when they held inter alia :-

*"In this case the learned trial judge made findings at page 40 of the proceedings as follows:-*

(a) PW4 said under cross-examination by defence counsel - B  
*"When I was there at CID HQS I saw the defendant come and invited one Police man by name Dandada and the defendant told PC Dandada to hold or continue to detain the plaintiff very cell."*

*This corroborates the plaintiff's testimony that he over heard defendant telling police not to give him bail while plaintiff was inside the police cell.* C

(b) PW1 the plaintiff himself in his testimony said - *"The defendant has been telling people that he has caused my arrest and detention. Even I over heard defendant telling police not to give me bail while I was in police cell."* D

*"With respect to the learned trial judge this finding was made in error."*

*Which occasioned a miscarriage of Justice and resolved the case against the appellant, whereas these findings were covered by the pleadings in the statement of claim.* E

PARTICULARS OF ERRORS (SIC) IN LAW.

(i) *This evidence was amply covered by the appellants pleadings as the plaintiff as per paragraph (11) (12) (15) (xi) and (xiii) of the Statement of Claim.* F

(ii) *The evidence adduced by PW 4 and PW1 were in supports of averments under paragraphs (11), (12) (15) (vi) and (xiii) of the Statement of Claim. Onwujuba vs Obienue (1991) 4 N.W.L.R. (Pt. 186) 16.* G

GROUND (SIC) FIVE

*The learned Honourable Justices of the Court of Appeal Jos erred in law and misdirected themselves in holding that -* H

*"The appellant will not be liable on a mere suspicion that the respondent burnt his motor vehicle what the appellant did was to put the police on enquiry to track the culprit. He was not actively responsible or*

instrumental in setting the law in motion."

Whereas in law "where a person takes a complaint against another it is incumbent (sic) upon that person to have found the true facts before making the complaint." See Seton vs. Oshinbule (1949) 19 NLR B 9, and wrongly held that -

"In the instant case the defendant had reasonable grounds for honestly believing that the plaintiff burnt his vehicle and the action therefore fails"

C PARTICULARS OF ERRORS (SIC) IN LAW

(i) The proceedings complained of where instituted in a malicious (sic) spirit, from indirect and improper motive, and not in furtherance of justice. In Abrath vs North eastern Railway Co. (1983) LR 11 QBD 440.

D (ii) The Respondent did suspect/report that the appellant with others unknown conspired to have set and burnt his vehicle to the police without reasonable and proper cause and honest belief as the Respondent nor anybody at all did not see the appellant set the said vehicle E ablaze."

Now, although it is subsection 3 of section 213 of the 1979 Constitution (as amended) that falls to be considered in this appeal, I think it is desirable to set down also subsections 1, and 2(a) of section F 213 (as amended) in order to appreciate the authoritative pronouncements derived from the decisions of this Court on the meaning and effect of the provisions of subsection 3 of section 213. They read:-

"213 (1) The Supreme Court shall have jurisdiction to the exclusion of any other Court of law in Nigeria to hear and determine G appeals from the Court of Appeal.

(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, H decisions in any civil or criminal proceedings before the Court of Appeal.

- (b) .....
- (c) .....

- (d) .....
- (e) .....
- (f) .....

(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.* B

- (4) .....
- (5) .....
- (6) .....

It is clear from a perusal of subsection (1) of Section 213 that it is only the Supreme Court that is competent to hear appeals from the Court of Appeal. See Ogoyi v Umagba (1995) 9 NWLR (Pt. 419) 283 at 293. Having made that observation, I will now examine the provisions of section 213(3) of the 1979 Constitution. In this context, it is I think useful to refer to the judgment of Nnaemeka Agu, JSC in Nwadike & Ors v Ibekwe & Ors (1987) 2 NSCC 1219 at 1234, where he analyzed the provisions of subsections 2 and 3 of the 1979 Constitution (as amended), thus :- C D E

*"Subsection (2) of course, specifies five categories of cases in which an appeal shall lie as of right from decisions of the Court of Appeal to the Supreme Court. Interpreting the above provision, the Supreme Court in the case of S.U. Ojemen & Ors v His Highness William O. Momodu II (The Ogirrua of Irrua) & Ors. (1983) 1 SCNLR 188, at page 203, stated at page 203, thus:-* F

*"The phrase "an appeal shall lie from the decisions of the Federal (sic) Court of Appeal to the Supreme Court as of right", in my view, implies that an absolute right of appeal is granted by the Constitution to an aggrieved party to challenge the decision of the Federal (sic) Court of Appeal in the Supreme Court on grounds which involve questions of law alone. On the other hand, the provision that an "appeal shall lie ..... to the Supreme Court with leave of the Federal (sic) Court of Appeal or Supreme Court" implies that only the right to apply to the Federal Court of Appeal or Supreme Court for leave to appeal is conferred by the Constitution on the aggrieved party. "Leave" G H*

*in this context means permission. (See Webster's New Twentieth Century Dictionary Unabridged). It is the Court i.e. the Federal (sic) Court of Appeal and the Supreme Court that are given the power to grant the permission to aggrieved persons to appeal in the class of cases falling outside those which are within section 213 (2) (a) of the Constitution."*

**It is therefore clear that the Court has no jurisdiction to entertain an appeal on a ground of fact or of mixed law and facts unless, of course, leave has been obtained. This point has been emphasized in a number of recent decisions. It is enough to refer only to the following :- Oluwole v Lagos State Development Property Corporation (1983) 5 SCI; Obijuru v Ozime (1985) 2 NWLR (Pt.6) 167 at pages 176-188; and J.B. Ogbechie & Ors. v Gabriel Onochie & Ors (1986) 2 NWLR 484. One obvious result of this state of the law is that where an appellant's grounds of appeal are only of facts or mixed law and facts, the grounds, and hence the appeal must be struck out unless leave had been obtained. On the other hand, where no leave had been obtained and some of the grounds are of law and others are either facts or mixed law and facts, only those which are grounds of law are competent. All grounds of facts or mixed law and fact must be struck out.**

It is therefore clear from what I have stated above, that where an appellant's grounds of appeal are only of fact or mixed law and fact, the grounds and hence the appeal must be struck out, unless leave had been obtained, either from the Court of Appeal, or this Court. In the instant case, and as I have said earlier, the Respondent's objection to this appeal is that the appellant's ground of appeal are of fact or mixed law and fact, and that he had not been granted the requisite leave under the provisions of subsection 3 of section 213 of the 1979 Constitution (as amended) to prosecute the appeal. I would now consider whether appellant's grounds of appeal which I have earlier reproduced are incompetent as claimed by the respondent. But before deciding whether they are incompetent as alleged, it is necessary to identify the principles that should guide a Court in its determination of that question. In that regard, it has been held that where in effect, the Court, is being invited under the



ground of appeal to investigate the existence or otherwise of certain facts upon which the award of damages to the respondents was allegedly based, such a ground of appeal without doubt, is a ground of mixed law and fact. So too, a ground of appeal which challenges the findings of fact made by the Court below or involves issue of law and fact can only be validly argued with the leave of either the Court of Appeal or the Supreme Court. See Ajibade v Pedro (1992) 5 NWLR (Pt. 241) 257 at 267; Motunwase v Sorungbe (1988) 5 NWLR (Pt. 92) 99; Ogbechie v Onochie (No. 1), 1986 2 NWLR (Pt. 23) 484; Metal Construction (W.A.) Ltd v Migliore (1992) 1 NWLR (Pt.126) 299. Arowolo v Adimula (1991) 8 NWLR (Pt. 212) 753.

It must be noted that in all these cases and other cases bearing on this point, the exercise is undertaken not only to determine whether an appellant's grounds of appeal are of fact or of mixed law and fact, but also whether some or all of them are grounds of law. Where any of the grounds of appeal are determined to be grounds of law, then the appeal could be saved by virtue of the provisions of subsection 2(a) of section 213 of the Constitution of Nigeria 1979 (as amended). **In view of the fact that the life of an appeal to this Court could be extinguished peremptorily because of the nature of the grounds of appeal filed by an appellant, the judgment of this Court are replete with the reasons that have been given for determining the competency of grounds of appeal filed to this Court having regard to the law, namely, the provisions of section 213 of the 1979 Constitution (as amended).**

**In this connection, may I refer again to Ogbechie v Onochie (supra) where Eso, JSC, dealing with the approach to the determination of whether a ground of appeal is a ground of law or a ground of mixed law and fact or fact, said at page 491, thus:-**

*"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."*

B See U.B.A. v GMBH (1989) 3 NWLR (Pt. 110) 374 at 391 to 392, where Obaseki, JSC, quoted the pronouncement of Eso, JSC referred to (*supra*). See also Obatoyinbo v Oshatoba (1996) 5 NWLR (Pt. 450) 531 at 548.

C Having identified the approach and the underlying principles that have been guiding this Court in the determination of where a ground of appeal is competent or not, pursuant to the provisions of section 213(3) of the Constitution of Nigeria 1979 (as amended) what remains is for me to consider the grounds of appeal filed in the instant appeal.

D A careful examination by me of ground one of the appellant's ground of appeal shows that the appellant is therein complaining about the general appraisal of the evidence led at the trial. It seems to me that the complaint is mainly based on facts. In ground two, E the appellant's complaint began with the assertion that the learned Justices of the Court of Appeal erred in law when they dismissed the appellant's case as having not been proved before the trial Court, and that the police and not the respondent caused appellant's arrest, detention, imprisonment and prosecution. This was followed F by four paragraphs containing what were described as errors in law and misdirection. After a close study of this ground and its particulars, it is manifest that this Court would have to re-examine the facts that formed the basis of the complaint of the appellant and of G the facts found at the trial and which formed the basis of the judgment. The ground, therefore, is not a ground of law simpliciter. It is in my respectful view a ground of mixed law and fact, and I so hold. I have read and re-read ground 3 of the appellant's grounds of H appeal and I must confess that its true purport eludes me. Apart from the allegation that the learned Justices of the Court of Appeal erred in law and misdirected themselves, the remaining part of it is an admixture of various facts and allegations. In the end, all that can be said of this ground is

that the appellant would want a re-examination of the record of proceedings. Ground 3, is in my view, a classic example of how not to draft a ground of appeal. It is, however, my respectful view that at best, this ground may be classified as one of mixed law and fact. **It is also manifest that though the appellant has alleged in grounds 4 and 5, that the learned Justices of the Court of Appeal erred in law and misdirected themselves, the real attack of the appeal in respect of these grounds of appeal is aimed at the facts that formed the basis of the judgment of the Court below. In effect, the appellant would want this Court to re-evaluate and reconsider the facts as found by the trial Court and which had been upheld by the Court below.**

It is therefore my view that these two grounds, namely grounds 4 and 5 of the grounds of appeal must be regarded at best, as grounds of mixed law and fact.

It follows from what I have said above that all the grounds of appeal filed by the appellant are certainly not grounds of law. They are either grounds of fact or of mixed law and fact and they cannot therefore be competent grounds of appeal unless the appellant had obtained the requisite leave of this Court or that of the Court of Appeal. As it is common ground that in the instant appeal, the appellant had not sought and obtained the leave of this Court or the Court of Appeal, the grounds of appeal so filed are incompetent.

As the grounds of appeal of the appellant are incompetent it follows that the appellant has no valid appeal before this Court. This appeal must therefore be struck out upon the preliminary objection of the respondent, though it was raised in the respondent's brief. Ordinarily, a respondent by Order 2 Rule 9 of the Rules of this Court could give notice of a preliminary objection to the hearing of the appeal and shall also give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection and shall file such notice together with ten copies thereof with the Registrar within the same time. Admittedly, the respondent did not bring the notice of this preliminary objection to the appel-

lant in accordance with the provisions of Order 2 Rule 9 of the Rule of this Court. His failure to do so would not render ineffective the notice of his preliminary objection. Such a situation arose in Ajide v Kelani (1985) 2 NSCC 1298 where Bello, JSC (as he then was) explained the reasons for the rule at P. 1306 when His Lordship said:-

*"The object of the rule is not give an appellant before the hearing of his appeal notice and grounds of any preliminary objection to the hearing of the appeal in order to enable him to meet the objection at the hearing of the appeal. The rule is a safeguard against embarrassing an appellant ad taking him by surprise. Although no form has been prescribed for taking a preliminary objection under the rule, the fact that the rule requires the notice and the grounds of objection to be filed with the Registrar implies that the notice and the grounds of objection must be in writing."*

His Lordship, Bello JSC, then went further to uphold the submission of Chief Williams that he had complied with Order 2 Rule 2 by including the Respondent's preliminary objection in the respondent's brief.

**In the instant appeal, the appellant was duly served with the respondents brief and which clearly included the notice of the respondent's preliminary objection to the appeal. He did not react to this notice, and in my respectful view he cannot be heard to complain that the appeal has been determined upon the grounds set out in the respondent's notice of preliminary objection that was included in the respondent's brief.**

In the result as I have found that the appellant's grounds of appeal are incompetent, it follows inexorably that the appeal is not valid, and it is hereby struck out.

The respondent is awarded costs in the sum of N10,000.00 only.

**WALI JSC**

I have had the privilege of reading in advance, a copy of the lead judgment of my learned brother Ejiwunmi, JSC and I agree with the reasons he gave for striking out the appeal.

For the same reasons, I also hereby strike out the appeal with N10,000.00 costs to the Respondent.

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**OGUNDARE JSC**

I agree with my learned brother Ejiwunmi JSC that all the grounds of appeal contained in the Appellant's Notice of Appeal are of fact or mixed law and facts; none is of law simpliciter. Leave of the Court below or of this Court not having been obtained pursuant to section 213(3) of the 1979 Constitution in force at the time the appeal was purportedly lodged, the appeal is incompetent. I consequently strike it out with N10,000.00 costs to the Respondent.

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**ACHIKE JSC**

I entirely agree with the leading judgment of my learned brother, Ejiwunmi, JSC but I wish to say a word or two with respect to the appeal, by way of emphasis.

In this appeal, the Respondent's learned counsel gave Notice of Preliminary objection in the Respondent's Brief. This is clearly an approach outside the contemplation of Order 2 Rule 9 of the Rules of this Court which enjoins a preliminary objector to give such notice of a preliminary objection to the hearing of the appeal, not less than three clear days before the hearing of the appeal. Should a notice of preliminary objection included in the Respondent's Brief be discountenanced because of failure to comply strictly with the provisions of Order 2 Rule 9? I think not. There is no doubt in my mind that the purpose of Rule 9 is to alert the Appellant sufficiently of the attack the Respondent has conceived as his strategy to either partially or wholly neutralize the hearing of the appeal. Thus if the objection is sustained the appeal will, as it were, be still-born with its far-reaching consequences. Since the essence of a preliminary objection is to bring the objection to the Appellant's notice before the appeal takes off. Once such notice of objection is incorporated in the Respondent's Brief the Appellant cannot be heard to deny

being aware of the notice merely because it did not strictly conform with the specific procedural Rule of Court. That will be taking refuge under the technical rule of procedure. Suffice it to say that the courts for a long time have shifted emphasis from undue reliance on technicalities to doing substantial justice to the parties, having regard to the circumstances of the case. Respondent's failure to comply with the procedural provisions under Order 2 Rule 9 will not derogate from the duty of this Court to give consideration to the preliminary objection on its merit. See Ajide v Kelani (1985) 3 NWLR (Pt. 12) 248 or (1985) 2 NSCC 298.

The notice of preliminary objection states as follows:

*"At the hearing of this appeal, the respondent will raise a Preliminary Objection to grounds 1, 2, 3, 4 and 5 of the Appellant's grounds of appeal upon which issues 1, 2, 3, 4 and 5 were formulated for determination in the Appellant's Brief. See Ajide v Kelani (1985) 3 NWLR (Pt. 12) at page 248".*

Grounds for Preliminary Objection go no to state:

*"(1) It will be submitted that grounds 1, 2, 3, 4 and 5 are at best grounds of fact or mixed law and facts, for which leave of the Court below or the Supreme Court should have been first obtained before filing same. See section 213 (3) of the 1979 Constitution as amended. Alhaji v Omorogbe (1993) 7 SCNJ 168, especially at 182 last paragraph and Oluwole v Lagos State Dev. Property Corporation (1983) 5 SC 1.*

*(2) In addition grounds 3, 4 and 5 are patently and patently defective because the three grounds allege errors in and misdirection all at the same time. This, it will be humbly submitted for the Respondent, is contrary to law and settled authorities. The Respondent will rely on the case of Nwadike and ors v Ibekwe & ors (1987) 12 SC 14, especially at p. 54 per Nnaemeka-Agu JSC as he then was line 35-39.*

*(3) Since the Supreme Court has no jurisdiction to entertain an appeal on ground of fact or on mixed law and facts, unless, of course leave has been obtained, the Respondents will humbly and respectfully urge my Lords to strike out the five grounds of appeal filed."*

The five grounds of appeal under attack have been reproduced verbatim in the leading judgment and there is no urgent reason to set them down in

my judgment. I shall now examine the grounds of appeal. Ground one makes no pretence that it is a complaint of evaluation of evidence, for it reads in part that the "judgment ..... is against the weight of evidence adduced at the trial High Court", and a complaint of such nature is traditionally, on the authorities, one of fact.

It is worthy of note that grounds 2, 3, 4 and 5 were respectively prefaced that. "The learned Justices of the Court of Appeal Jos erred in law" (emphasis supplied) and each ground had subjoined to it "Particulars of Errors (sic) in law and Misdirection" (emphases supplied) showing at a glance that these are grounds of law. Experience has abundantly demonstrated that it is not the appellation the Appellant chooses to call a ground of appeal that controls, rather it is the characterization of a ground of appeal that enures to it the appellation of a "ground of law", and "ground of mixed law and fact" or a "ground of facts". Succinctly put, a ground of law arises where the ground of appeal shows that the court-trial or appellate - misunderstood the law or misapplied the law to the proved or admitted facts. By way of emphasis only, it is sometimes referred to as "pure law". On the other hand, where the evaluation of facts established by the trial court before the law in respect thereof is applied is under attack or question, this will involve a ground of mixed law and fact. Finally, where the evaluation of evidence tendered at the trial is exclusively questioned, this will be basis for a ground of fact, emphemistically referred to as "pure fact". See Ogbechie v Onochie (1986) 2 NWLR (pt 23) 484, Nwadike & ors v Ibekwe & ors (1987) 12 SC 14 at p.54, Ajayi v Emorogbe (1973) 7 SCNJ 168 and U.B.A. V GMBH (1989) 3 NWLR (Pt.110 374 at p.311).

Notwithstanding the appellation given to grounds 2, 3, 4 & 5. I proceeded to have a hard look both of the grounds and their particulars of error and misdirection. My examination reveals that these grounds of appeal are, at best, grounds of mixed law and facts.

Having now characterized the five grounds of appeal, I am satisfied that, not being grounds of law alone, they were filed in violation of section 213(3) of the 1979 Constitution of Nigeria, as amended, in that the Respondents failed to obtain either the leave of the Court of Appeal or

leave of this Court before they were filed. In the result, I hold that the five grounds of appeal are incompetent, not being grounds of law alone and the appropriate leave required for their validity not having be obtained.

B           The end result is that I uphold the preliminary objection. Accordingly, for the reasons set out in the leading judgment and in this judgment, I strike out the appeal and award N10,000. costs to the Respondent.

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**AYOOLA JSC**

I have read in advance the judgment delivered by my learned brother, Ejiwunmi, JSC. I agree with him that all the grounds of appeal  
D raised by the appellant are incompetent. The appellant having not obtained the requisite leave to appeal, the appeal is incompetent and should be struck out. I too would strike out the appeal with N10,000.00 costs to the respondent.

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