

SUPREME COURT OF NIGERIA
8TH OCTOBER, 1999. SC. 187/1993
CORAM:- A. B. WALI, M. E. OGUNDARE, U. MOHAMMED,
O. ACHIKE, A. O. EJIWUNMI, JJSC

ICHIE JEROME ANOGHALU & 3 ORS. ... PLAINTIFFS/APPELLANTS
(For themselves and on behalf of Ubahuabu Ubahu
Village minus Umun nabala family)

AND

1. NATHAN ORAELOSI DEFENDANTS/RESPONDENTS
(For himself and on behalf of the
members of Umun nabala family of Ubahu)
2. SOLE ADMINISTRATOR
IHIALA LOCAL GOVERNMENT

***APPEALS** - Finality of a decision - Court of Appeal's decision in this matter is final - Though the High Court's decision was interlocutory - So that time to appeal is within 3 months.*

***APPEALS** - Ground of appeal - That discloses no reasonable ground of appeal - Should be struck out.*

***APPEALS** - Ground of fact - Leave not having been obtained -Ground 1 was rightly struck out.*

FACTS

This case is in respect of a Chieftaincy dispute between the parties. The plaintiffs/appellants in their action before the Anambra State High Court claimed that the 1st defendant/respondent was not entitled to be selected as the traditional ruler of Okija town. They also filed a motion ex parte and motion on notice for an interim injunction restraining the 1st defendant from being recognized as traditional ruler of Okija. The interim injunction pursuant to the ex parte motion was granted pending the motion on notice. Following an application by the 1st defendant, the trial

court discharged the ex parte Order and ordered that the words "For themselves and on behalf of Ubahuabu Ubahu village minus Umunnabala family" be struck out from the suit.

The plaintiffs appealed to the Court of Appeal unsuccessfully. Being dissatisfied, they have further appealed to the Supreme Court raising 2 issues.

ISSUES FOR DETERMINATION

"1. The 1st issue for determination is whether the ground of appeal stated thus 'The Court erred in law by making an order to strike out the words 'for themselves and on behalf of Ubahuabu-Ubahu Village minus Umunnabala family' from the title of the suit since on the authority of Otakpo v. Sunmonu the plaintiffs could sue in their personal capacities without expressing on the Writ, the capacity they have brought the action is a question of law, or of mixed law and fact.

2. The 2nd Issue for determination is whether or not the ground of appeal based on section 220(1) (g) (ii) lacks merit since the learned trial Judge based his reason on the fact that the appellants had no mandate; that mandate being on issue of fact requires leave."

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

Finality of a decision

1. Mr. Anah for the plaintiffs submitted that the decision of the Court of Appeal was final and that therefore, the time to appeal against it is three months and not fourteen days. I think Mr. Anah is right. It is correct that the decision on appeal from the High Court to the Court of Appeal was interlocutory but the decision of the Court of Appeal on that appeal is clearly final. See Azubike Ume & Others v. Alfred Ezechi & Ors. (1962) ANLR (pt. 1) 16. The decision may not be final in the proceedings before the trial High Court but so far as the Court of Appeal is concerned, it is final in that that Court has finally disposed of the issues raised in the appeal before it. (p. 2794 G)

Ground of fact

2. I agree entirely with the Court below that ground (1) before that Court raised a question of fact in an interlocutory decision. The Plaintiffs having failed to seek and obtain leave to appeal from either the High Court or the Court of Appeal, that ground of appeal was rightly struck out by the Court below. I resolve issue (1) against the Plaintiffs/Appellants. (p.2799B)

Ground of appeal

3. The issue (2) as formulated does not appear to flow from the ground of appeal on which it is predicated, either. The 1st Defendant in his written Brief objected to ground (2) on the premise that it is vague and discloses on reasonable ground of appeal. I agree with him. I have no hesitation in striking out ground (2). (p. 2800 F)

REPRESENTATION

C. O. Anah for the appellants

Joy C. Anyamene-Ezugu (Mrs.) for the respondent

2nd respondent absent and not represented

CASES REFERRED TO

Ume v. Ezechi (1962) ANLR (pt. 1) 16

Otapo v. Sunmonu (1987) 5 SC 228; (1987) 2 NWLR 587

Ojemen v. Momodu (1983) N.S.C.C. 135

Akwivu Motors Ltd v. Sangonuwa (1984) 5 SC. 184

LEAD JUDGMENT BY OGUNDARE JSC

This is an appeal from the judgment of the Court of Appeal (Enugu Division) which dismissed the appeal to it from the Ruling of the High Court of Anambra State (Nnewi Judicial Division). At the said High Court the Plaintiffs who are now appellants before us had sued (for themselves and on behalf of Ubahuabu Ubahu village minus Umunnabala family) Nathan Oraelosi (for himself and on behalf of the members of Umunnabala family of Ubahu) and the Sole Administrator Ihiala Local Government, as defendants, claiming

"1. A declaration that it is not the exclusive prerogative of Umunabala family in Ubahu Okija to select and present a candidate for recognition as the traditional ruler of Okija on the demise of a reigning Igwe or traditional ruler of the town.

B 2. A declaration that the purported 'Okija Chieftaincy constitution and Code of Conduct' was not prepared and approved by the Okija Community including the plaintiffs and is ultra vires, null and void and of no effect.

C 3. A declaration that if there is any existing Chieftaincy Constitution the Okija Community through the Okija Progressive Union is entitled to review the said Constitution before a candidate is selected and presented to succeed the demised Igwe or traditional ruler.

D 4. An injunction to restrain the 1st defendant and his family, their servants and/or agents from electing and installing the first defendant or any one else from their family as a candidate to be presented to the 2nd defendant for recognition by the Government of Anambra State as the traditional ruler of Okija town.

E 5. An injunction to restrain the 2nd defendant from receiving the 1st defendant if presented to him or anyone else who may be presented to him for recognition by the Government of Anambra State as the traditional ruler of Okija.

F 6. A further injunction to restrain the 1st defendant from continuing to parade himself as the person to succeed the demised Igwe or the traditional ruler of Okija and to be presented to the 2nd defendant for recognition by the Governor of Anambra State as the traditional ruler of Okija."

G Filed along with the Writ is a Statement of Claim and two motions, one of which is ex parte for an interim injunction restraining the 1st defendant et cetera from presenting himself to the 2nd defendant et cetera as a step for being recognized as a traditional ruler of Okija pending the determination of substantive motion on notice in the case of the ex parte motion or pending the determination of the action in the case of the motion on notice. The learned trial Judge granted the ex parte motion. On being served with the Writ, the Statement of Claim, the motion on notice and

the Order made on the ex parte motion, the 1st defendant filed a motion on notice praying the Court "for an order striking out the word 'for themselves and on behalf of Ubahuabu Ubahu village minus Umunnabala family' from the title of the above suit AND for an order discharging the ex parte order made on 11th January 1990". The motion was supported by B an affidavit sworn to by the 1st defendant as Applicant. Exhibited to this affidavit are the affidavit of one Thomas Anamene who referred to himself as the Okpala of Ezieke village, one of the group of villages in Okija. There is also an affidavit of Ichie Madueke Nwin, the Ichie of Etiti Ubahu C another part of Okija. There are also other documents annexed to the affidavit of the 1st defendant all tending to show that the plaintiffs were not authorized by the people they claimed to represent, to represent them in the action and also that the 4th named plaintiff never gave authority for his name to be included as a party in the action. D

The motion came up for hearing and after arguments have been advanced by learned counsel for the parties the learned trial Judge Ugwu J. granted the application. He found:

1. *"As I have no reason to doubt the authenticity of the affidavit E (Exhibit E) and as no one can be forced to sue and prosecute a case I think I am bound to act on his affidavit, although the best thing he should have done was to file a formal motion asking that his name be withdrawn from the suit as he actually deposed to at paragraph 8 of his F said affidavit. However, to save time and expense, I accept his affidavit Exhibit E and in the circumstances his name is hereby struck out of the suit."*

2. *"I think that since the 1st defendant has decided to challenge G the plaintiffs representative capacity immediately or from the on-set the plaintiffs should have done something at once too. For example the plaintiffs should have quickly got some of those they represent to swear to an affidavit to this effect and bring in application to the court for H approval to sue in a representative capacity exhibiting the affidavit of those they represent. Exhibiting or producing to the court the Written authority to sue in a representative capacity is the best answer to the 1st defendant's contention. In as much as the plaintiffs have failed to do*

this I have no choice than to accept the submissions of the learned Senior Advocate for the 1st defendant who has stated the law correctly."

B 3. *"I have read the affidavits of those who said that the plaintiffs do not represent them. I have no reason to doubt the authenticity of their averments. Since they were not served with the order. I do not quite see what is wrong in the method they adopted in bringing their positions to the court although it is possible that there is a better way of doing this."*

C 4. *"On the issue of discharging the ex-parte order made by this court on 11th January, 1990, this order was made on the representation of the plaintiffs that they were five plaintiffs and that they brought the action for themselves and on behalf of Ubahuabu Ubahu village minus Umunnabala family. The 4th plaintiff has repudiated his position as one D of the plaintiffs and his name accordingly struck out. Although the five or the remaining four plaintiffs can sue individually or together, there is no doubt that their claim to represent some groups of people or villages affected the mind of the court when the order was made."*

E The learned Judge adjudged as follows:

"In the result, this application succeeds and the words "for themselves and on behalf of Ubahuabu-Ubahu village minus Umunnabala family is hereby struck out from the title of this suit the interim F order made by this court is this suit on 11th January, 1990 is hereby discharged."

G Being dissatisfied with the decision of the trial Court, the remaining four plaintiffs, that is, 1st, 2nd, 3rd and 5th appealed to the Court of Appeal on six grounds of appeal and in their written Brief of Arguments set out four issues as calling for determination in the appeal. These were:

"1. Whether there were irreconcilable conflicts in the affidavits of the parties and if so whether there was a need for the Judge to reconcile them.

H 2. *Whether there were a misdirection and a non-direction on the part of the learned trial Judge on the exhibits before him and if so, whether the misdirection and non-direction occasioned a miscarriage of justice.*

3. *Whether the learned trial Judge was right in setting aside the ex-parte order.*

4. *Whether the learned Judge was right in striking out the words, 'for themselves and on behalf of Ubahuabu-Ubahu Village minus Umunnabala family'".*

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The Court of Appeal in its judgment dismissing the appeal found:

1. *"Applying this test to the instant case, there is no doubt that the decision of the lower court deleting the representative capacity in which the plaintiffs' action was brought must be only interlocutory order because by its nature, the rights of the parties which were the subject matter of the action have not been disposed of. It was still pending and the action could still be prosecuted to final judgment after the order deleting the representative capacity, albeit in their personal capacities."*

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2. *"Although the first ground of appeal alleges error of law in that the trial Judge did not follow the decision in Otapo v. Sunmonu & Ors. (1987) 5SC. 228 that 'the plaintiffs could sue in their personal capacity without expressing on the writ the capacity they have brought the action, but that aspect can be considered only when the appeal is properly before this court."*

D

3. *"What was in issue in the instant appeal was the revocation of an interim injunction granted by the trial court on an ex-parte application. The interim injunction was to last until the determination of a substantive motion on notice. The injunction was therefore interim and interlocutory since it has not in any way decided the issues in dispute between the parties. The injunction envisaged under section 220(1) (g) (ii) of the 1979 Constitution is definitely one that determines the controversy or dispute between the parties and not one made as an interim or interlocutory measure."*

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G

4. *"What was in issue in the instant appeal was the revocation of an interim injunction granted by the trial court on an ex-parte application. The interim injunction was to last until the determination of a substantive motion on notice. The injunction was therefore interim and interlocutory since it has not in any way decided the issues in dispute between the parties. There is no doubt that sect. 220(1) (g) confers a*

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right of appeal without leave on revocation of injunction as in this case. The appeal in respect of that issue is therefore properly before this court."

The four plaintiffs with leave of the Court below have now further appealed to this Court upon three grounds of appeal. In their written Brief of Argument, they have formulated two issues for determination in this appeal, that is to say:

"1. *The 1st issue for determination is whether the ground of appeal stated thus 'The Court erred in law by making an order to strike out the words 'for themselves and on behalf of Ubahuabu-Ubahu Village minus Umunnabala family' from the title of the suit since on the authority of Otakpo v. Sunmonu the plaintiffs could sue in their personal capacities without expressing on the Writ, the capacity they have brought the action is a question of law, or of mixed law and fact.*

2. *The 2nd Issue for determination is whether or not the ground of appeal based on section 220(1) (g) (ii) lacks merit since the learned trial Judge based his reason on the fact that the appellants had no mandate; that mandate being on issue of fact requires leave."*

In the written Brief of Argument of the 1st Respondent it is contended that the appeal is not properly before the Court in that the decision of the Court of Appeal was interlocutory and the appeal was not filed within fourteen days of that decision. It is stated in the Brief that the decision of the Court of Appeal was given on the 14th June 1993 but the Notice of Appeal was not filed until 12th of July 1993, more than fourteen days from the date of the decision appealed from. The plaintiffs did not file a reply Brief in answer to this contention. Learned counsel for the parties however, addressed us on the point at the oral hearing of the appeal. **Mr. Anah for the plaintiffs submitted that the decision of the Court of Appeal was final and that therefore, the time to appeal against it is three months and not fourteen days. I think Mr. Anah is right. It is correct that the decision on appeal from the High Court to the Court of Appeal was interlocutory but the decision of the Court of Appeal on that appeal is clearly final. See Azubike Ume & Others v. Alfred Ezechi & Ors. (1962) ANLR (pt. 1) 16. The decision may not be final in the proceedings before the trial High**

Court but so far as the Court of Appeal is concerned, it is final in that that Court has finally disposed of the issues raised in the appeal before it.

Having thus disposed of the preliminary objection raised by the 1st Defendant/Respondent I now turn attention to the appeal itself. B

ISSUE (1):

Issue (1) is predicated on ground (1) of the grounds of appeal which reads:

(1) The learned Justices of the Court of Appeal erred in law by taking the principle of law applied by the lower Court of striking out the representative capacity of the Plaintiffs as a question of fact or at least that of mixed law and fact. C

PARTICULARS OF ERROR

(a) The lower court stated that the principle of law was that the Plaintiffs, should have quickly got some of those they represent to swear to an affidavit to this effect and bring in application to the court for approval. D

(b) The Court of Appeal says that was a question of fact or at least a question of mixed law and fact." E

To begin with, particular (a) above does not, in my respectful view, relate to the ground. Neither does the said particular correctly reflect the judgment of the Court below appealed against. This ground of appeal complains against the view held by the Court below that ground (1) of the grounds of appeal before it was one of fact or, at best, of mixed law and fact. That ground reads; F

"1. The court erred in law by making an order to strike out the Words 'for themselves and on behalf of Ubahuabu-Ubahu Village minus Umunnabala family' from the title of the suit since on the authority of Otakpo v. Sunmonu (1987) 5 SC 228 the plaintiffs could sue in their personal capacities without expressing on the writ the capacity they have brought the action. G

(i) By striking out the words 'for themselves' the Court had denied the plaintiffs their right to sue in their personal capacities. H

(ii) The Court failed to advert its mind to the principle that in

the face of recent authorities capacity need not be expressed but inferred from the pleading and the evidence."

It is not in dispute that the decision of the trial High Court appealed against is an interlocutory decision. And an appeal against it as of right could only relate to questions of law simpliciter - see section 220 (1) (b) of the 1979 Constitution. If the plaintiffs must appeal on grounds other than law only they must first seek and obtain leave of either the High Court or the Court of Appeal pursuant to section 221(1) so to do. No such leave was sought nor obtained in this case. At the Court of Appeal an objection was taken to the competence of ground (1), among others, for the reason that it was not a ground of law alone, notwithstanding that it was so labelled.

The Court of Appeal, in the lead judgment of Akintan JCA to which the other Justices that sat with him agreed, observed:

"Although the first ground of appeal alleges error of law in that the trial Judge did not follow the decision in Otakpo v. Sunmonu & Ors. (1987) 5SC. 228 that 'the plaintiffs could sue in their personal capacity without expressing on the writ the capacity they have brought the action, but that aspect can be considered only when the appeal is properly before this court. Even though the decision of the lower court could be wrong, but in coming to that decision, the trial court considered several matters of fact. The court's decision appealed against was therefore one of fact or at least of mixed law and fact. The plaintiffs/appellants ought therefore to have obtained leave to bring the grounds of appeal. (See Akwiwu Motors Ltd. & Anor. v. Dr. B. O. Sangonuwa (1984) 5SC. 184 at 186 per Obaseki JSC)."

The question that arises in this appeal is whether the Court below is right in its view that ground (1) before it is a ground of fact or of mixed law and fact and not of law alone. I do not think we need concern ourselves with the issue whether the learned trial Judge was right in striking out the representative capacity of the plaintiffs, an issue to which Mr. Anah, learned counsel for the plaintiffs addressed us at length rather on the real question before us. It is my considered view that all arguments advanced by learned counsel both in the written brief and in oral argument do not

go to address the question raised by Ground (1).

Learned counsel is however right in one regard. In his written brief, he defined what is error in law as follows:

"An error in law is where the appellant is complaining of the failure of the Court to apply the correct principles of law to established and undisputed facts or that the Court has come to a conclusion on admitted or proved facts which no reasonable tribunal would have come to.

It could also mean a question which the Court is bound to answer in accordance with a rule of law. In this sense, a question of law is one predetermined and authoritatively answered by the law."

In Metal Construction (West Africa) Ltd. v. D. A. Migliore & Ors. In re Miss C. Ogundare (1990) ANLR 142; (1990) 1 NWLR 299 - this Court examined, at length, the phrases: "a question of law" and "a question of fact" and referred to a number of cases on the point.

On question of law, this Court in that case, per Karibi-Whyte JSC at pages 149-150 of the former report had this to say:

"Generally considered, the term 'question of law' is capable of three different meanings. First it could mean a question the Court is bound to answer in accordance with a rule of law. This excludes the exercise of discretion in answering the question as the court thinks fit in accordance with what is considered to be the truth and justice of the matter. Concisely stated a question of law in this sense is one predetermined and authoritatively answered by the law.

The second meaning is as to what the law is. In this sense an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. The question of law in this sense arises out of the uncertainty of the law. A question of the construction of statutory provision falls within this meaning.

The third meaning is in respect of those questions which are committed to and answered by the authority which normally answers questions of law only. Thus any question which is within the province of the Judge instead of the jury is called a question of law, even though in actual sense it is a question of fact. The cases which readily come to

mind are the interpretation of documents, often a question of fact, but is within the province of a Judge. Also the determination of reasonable and probable cause for a prosecution in the Tort of malicious prosecution, which is one of fact, but is a matter of law to be decided by the Judge."

And on question of fact the learned Justice of this Court, at page 150, said:

"Now turning to what is a question of fact? It is easy to postulate that it is anything which fails outside and the meaning of question of law. They will not be entirely correct, because there are exceptions. Like question of law, question of fact has more than one meaning. The first meaning is that a question of fact is any question which is not determined by a rule of law. Secondly, it is any question except a question as to what the law is. Thirdly, any question that is to be answered by the jury instead of by the Judge is a question of fact.

A matter is generally held to be one of fact if it is one on which reasonable men may arrive at discrepant conclusions on the same evidence before them. When perception and evaluation of primary findings result in the conclusions in which a layman as well as a person instructed in the law give an acceptable opinion, it is a matter of fact. What are to persons trained in the law matters of fact, are often to laymen matters of opinion. In a narrow and more specific sense a question of fact does not include all questions that are not questions of law, but only some of them. It is opposed to a question of judicial discretion which is one of the exceptions."

Turning now to ground (1) before the Court of Appeal, in striking out the representative capacity of the Plaintiffs, the learned trial Judge had reasoned thus:

"I have read the affidavits of those who said that the plaintiffs do not represent them. I have no reason to doubt the authenticity of their averments. Since they were not served with the order. I do not quite see what is wrong in the method they adopted in brining their positions to the court although it is possible that there is a better way of doing this. In the result, this application succeeds and the words 'for themselves and on

behalf of Ubahuabu-Ubahu village minus Umunnabala family is hereby struck out from the title of this suit."

Clearly any complaint against this decision can only be a question of fact. Even the case of Otapo v. Sunmonu (1987) 5 SC 228; (1987) 2 NWLR 587 relied on by the Plaintiffs' counsel was decided on its own facts. B The learned trial Judge arrived at his decision based on his view of the facts disclosed in the affidavit evidence before him.

I agree entirely with the Court below that ground (1) before that Court raised a question of fact in an interlocutory decision. The Plaintiffs having failed to seek and obtain leave to appeal from either the High Court or the Court of Appeal, that ground of appeal was rightly struck out by the Court below. I resolve issue (1) against the Plaintiffs/Appellants. C

ISSUE (2): D

This issue presumably is predicated on ground (2) of the grounds of appeal contained in the notice of appeal to this Court.

"2. The learned Justices of the Court of Appeal erred in law by holding that the facts relied on by the trial Judge to discharge the ex-parte order lends no merit to the ground appealing against the said discharge. E

PARTICULARS OF ERROR

(a) The Court of Appeal held that the appeal against the discharge order does not require leave. F

(b) The trial Judge ruled against the representative capacity of the Plaintiffs.

(c) The trial Judge stated that that affected him mind.

(d) The trial Judge then went on to state that 'it necessarily follow that the order they obtained with a sort of misrepresentation must also go'. G

(f) The Court of Appeal nonetheless adjudged that the learned trial Judges discretion to revoke the said ex-parte order had not been impugned." H

I find some difficulty in discerning the complaint in this ground of appeal, particularly when the particulars of error are read along with the

ground itself. This is more so when the judgment appealed against is considered.

Akintan JCA in his lead judgment, after setting out section 220(1) (g) (ii), had said:

B *"What was in issue in the instant appeal was the revocation of*
an interim injunction granted by the trial court on an ex-parte applica-
tion. The interim injunction was to last until the determination of a
substantive motion on notice. The injunction was therefore interim and
interlocutory since it has not in any way decided the issues in dispute
C *between the parties. There is no doubt that section 220(1) (g) confers a*
right of appeal without leave on revocation of injunction as in this case.
The appeal in respect of that issue is therefore properly before this court.
However is there is definitely no merit in that ground of appeal having
D *regard to the facts relied on by the learned trial Judge in coming to the*
conclusion to vacate it. In the result the appeal is dismissed in respect of
the grounds dealing with the vacation of the interim injunction and struck
out in respect of the other grounds."

E One may now ask: what are the Plaintiffs complaining about? Is it the
 decision of the Court below that their ground (4) before the Court of
 Appeal challenging the discharge of the interim injunction was properly
 before the Court? Or is it the reason for dismissing their appeal against
 the discharge of the order of interim injunction? **The issue (2) as for-**
 F **mulated does not appear to flow from the ground of appeal on which**
it is predicated, either.

The 1st Defendant in his written Brief objected to ground
(2) on the premise that it is vague and discloses on reasonable ground
 G **of appeal. I agree with him. I have no hesitation in striking out**
ground (2).

The conclusion I finally reach is that I find no merit in this ap-
 peal which I dismiss with N10,000.00 costs in favour of Respondent,
 H only.

WALI JSC

The facts involved in this case have been sufficiently stated in the lead judgment of my learned brother Ogundare, JSC which I have had the privilege of reading and agree with in its entirety.

The appellant raised two issues in his brief for this court's determination. I only want to comment on Issue I by way of emphasis to what has been stated in the lead judgment. The issues reads thus:-

"The 1st issue for determination is whether the ground of appeal stated thus "The Court erred in law by making an order to strike out the words "for themselves and on behalf of Ubahuabu - Ubahu Village minus Umannabala family" from the title of the suit since on the authority of Otakpo v. Sunmonu the plaintiff could sue in this personal capacities without expressing on the Writ the capacity they have brought the action." Is a question of law, or of mixed law and fact."

The bulk of learned counsel's arguments have no relevance to the question as to whether the ground of appeal filed in the Court of Appeal against the Ruling of the trial court given on 5th April, 1990 is a pure ground of law or of mixed law and fact. This ground, with its particulars, reads-

"The court erred in law by making an order to strike out the words "for themselves and on behalf of Ubahuabu - Ubahu village minus Umannabala family" from the title of the suit since on the authority of Otakpo v. Sunmonu (1987) 5 SC 228 the plaintiffs could sue in their personal capacities without expressing on the writ the capacity they have brought the action."

PARTICULARS

(I) By striking out the words "for themselves" the Court has denied the plaintiffs their right to sue in their personal capacities.

(ii) The court failed to advert its mind to the principle that in the face of recent authorities capacity need not be expressed but inferred from the pleading and the evidence."

The particulars in support of the ground supra, particularly, particular (ii) hereof, clearly demonstrate that the ground is at best a ground of mixed law and fact. In trying to find out whether a ground described

as a ground of law is otherwise than it is couched, the ground with its particulars must be read as a whole. As I indicated earlier you cannot make the inference referred to in particular (ii) without delving into the evidence and the pleadings. This will involve issues of fact. See Ojemen v. Momodu (1983) N.S.C.C. 135. Applying this principle to the ground of appeal under consideration, resort must be made to the affidavit evidence presented before the trial court and this involves facts. The Court of Appeal was therefore right in my view when it stated thus.

"The other point is whether the ground of appeal raised issues of facts and/or of mixed law and fact. It is very clear from the grounds of appeal that what was being queried was that the lower court had decided upon the affidavit evidence before it that the plaintiffs did not show that they had the authority of the persons or villagers on whose behalf they purported to bring the action before they sued. The trial court therefore set aside the ex parte order it made because it found as a fact that the plaintiffs did not have the authority of the villagers to bring the suit The court's decisions appealed against was therefore one of fact or at least of mixed law and fact. The plaintiffs/appellants ought therefore to have obtained leave to bring the grounds of appeal.

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The trial court based its decision to vacate the interim injunction on the facts disclosed in the affidavit in support of the motion, viz that the plaintiffs did not have the mandate of the people on whose behalf they claimed to have instituted the action. The appeal in respect of that issue is therefore based on facts or at best on mixed law and facts. The Appellants therefore need to obtain leave of the lower court or this court before filing the appeal."

The 1st issue formulated by the appellants contained ground 1 without its particulars filed in the Court of Appeal. Ground 1 read along with its particulars cannot be taken and considered without falling back on the affidavits and counter-affidavit evidence adduced in the trial court. The decision in Otakpo v. Sunmonu (supra) was decided on its own facts and is not on all fours with this case.

Issue 1 of the appellants' brief is therefore, resolved in favour of

the respondent.

It is for this and the elaborate reasons contained in the lead judgment that I also hereby dismiss this appeal. I affirm the judgment of the Court of Appeal with N10,000.00 costs to the respondents.

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MOHAMMED JSC

I entirely agree that this appeal lacks merit and ought to fail. My learned brother, Ogundare, JSC. in his judgment found that the lower court was right to strike out ground 1 before it and I also agree that ground two in the notice of appeal to this court is vague. I have looked at those grounds and without hesitation I concur with the opinion of my learned brother in dismissing this appeal. I award N10,000.00 costs in favour of the 1st respondent.

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ACHIKE JSC

This short appeal again brings to focus the perennial controversy as regards the nomenclature given to a ground of appeal by the Appellant in the main appeal or the Respondent in the cross-appeal. Often, in the past, the Appellant or the Cross-appellant got away, with ease in the controversy by hoodwinking the ground of appeal with the tag "Ground of Law". Such prefatorial tag was rarely questioned by the adversary counsel. Today, however, there is a shift in the matter because the characterization of a ground of appeal in terms of 'law', 'fact' or 'mixed law and fact' is a matter of considerable seriousness and viewed as a jurisdictional issue which automatically questions the competence or otherwise of the appellate court to adjudicate on the issue raised on appeal. Basically, a ground of law is adjudicable as of right at the instance of the appellant without further ado whereas the other types of ground of appeal, that is, ground of fact or mixed law and fact, can only be entertained where prior leave of the lower court or the appellate court is sought and obtained before the ground is filed. Failure to obtain such leave renders the ground of appeal incompetent; and if that was the only ground

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of appeal contained in the Notice of Appeal, the consequence is fatal because the appeal would be struck out. This short-cut of rendering an appeal incompetent has gained greater attention in legal practice and consequently the appellation tagged to a ground of appeal qua 'ground of law'

B is no longer full-proof or controlling nor is it viewed as cosmetic; on the contrary, it is a pivotal issue on which complex controversies have raged and have become high fliers to the apex Court. See Metal Construction (West Africa) Ltd v D.A. Migliore & Ors.; In re Miss c. Ogundare (1990) ANLR 142.

C Let us now turn to the ground of appeal in the lower court which the first issue herein is targeted. It states;

"(1) *The learned Justices of the Court of Appeal erred in law by taking the principle of law applied by the lower Court of striking out the*
D *representative capacity of the Plaintiffs as a question of fact or at least that of mixed law and fact.*

PARTICULAR OF ERROR

(a) *The lower court stated that the principle of law was that the*
E *Plaintiffs, should have quickly got some of those they represent to swear to an affidavit to this effect and bring in application to the court for approval.*

(b) *The Court of Appeal says that was a question of fact or at*
F *least a question of mixed law and fact."*

It is useful to bring to focus the aspect of the judgment of the trial Judge that this ground of appeal before the Court of Appeal seeks to impugn. It runs thus:

"I have read the affidavits of those who said that the plaintiffs
G do not represent them. I have no reason to doubt the authenticity of their averments. Since they were not served with the order. I do not quite see what is wrong in the method they adopted in brining their positions to the court although it is possible that there is a better way of doing this. In
H the result, this application succeeds and the Words 'for themselves and on behalf of Ubahuabu-Ubahu village minus Umunabala family' is hereby struck out from the title of this suit."

I am bound to observe that particular (a) in the 'Particulars of Error' is

inelegantly couched and cannot be seriously said to be predicated on ground one of the Grounds of Appeal as set out above. Be that as it may, a close perusal of the excerpt of the trial Judge's decision against which the complaint is levelled under ground one of the Grounds of Appeal is resoundingly focused on factual content of affidavits considered by the learned trial Judge. Unquestionably, this is an exercise deeply rooted on question of facts as evaluated by the trial Judge from the maze of affidavit evidence placed at his disposal by the parties. I am clearly of the view that the Court of Appeal was on good wicket when it held that the ground one of the Grounds of Appeal before it involved a consideration of fact of an interlocutory decision. In the result, it was compelling for the Appellant to obtain the statutory leave to appeal. This he failed to do. The court below was therefore right to have struck out ground one of the Grounds of Appeal since no leave was obtained. See Akwiwu Motors Ltd & anor v Dr. B. O. Sangonuwa (1984) 5 SC. 184.

Issue No. 2 calls for a brief comment. 1st Respondent raised an objection that Ground (2) of the Grounds of Appeal was vague and disclosed no reasonable ground of appeal. Clearly, it seems to me that the submission of learned counsel for 1st Respondent is properly founded. I am also of the considered view that the ground of appeal is nebulous and the Respondents cannot be expected to speculate on the true meaning of this ground of appeal. The ground of appeal deserves to be struck out and it is accordingly struck out.

It is for the above reasons and the fuller reasons set out in the leading judgment of my learned brother, Ogundare, JSC, that I, too would dismiss this appeal as lacking in merit. I award N10,000.00 costs to 1st Respondent.

EJIWUNMI JSC

Also agreed with the lead judgment

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