

**SUPREME COURT OF NIGERIA**  
6TH. OCTOBER, 2000. SC. 169/1997  
**CORAM:- A. B. WALI, I. L. KUTIGI, S. U. ONU,**  
**O. ACHIKE, E. O. AYoola, JJSC.**

1. FRANCIS SHANU ..... APPELLANTS/RESPONDENTS  
2. NIGERIA WOLF ORGANISATION LTD.

AND

AFRIBANK NIGERIA PLC ..... RESPONDENT/APPLICANT

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***APPEALS** - Delay - To appeal within the prescribed time - Counsel's error of judgment - If reasonable - Is an acceptable explanation for such delay.*

***APPEALS** - Failure to appeal - Does not unequivocally indicate an acceptance of a decision.*

***APPEALS** - Ground of appeal - Amendment - Discretion to grant - Is liberally exercised in so far as an amendment can be made without injustice to the other party - And is not belated.*

***APPEALS** - Ground of appeal - Amendment - Refusal of - The court should refuse an amendment where such an amended ground would have itself been objectionable - For any of the reasons for which successful objection could be raised against such ground.*

***APPEALS** - Ground of appeal - Merit of - The question of the merit of a ground of appeal - Is to be distinguished from one as to the nature of question involved in the ground.*

***APPEALS** - Ground of appeal - Question of law alone - Is involved where in answering that question - The appellate tribunal can determine the issue on the admitted facts - Without going beyond a direct application of legal principles.*

***APPEALS** - Ground of appeal - Question of Law - Obligation imposed by law - Where the ground of appeal complains that the tribunal has failed to fulfil an obligation cast upon it by law - Such a ground involves a question of law*

***APPEALS** - Interlocutory appeal - Dispensing therewith pending final appeal - Under O. 8 r. 12 (4) of Supreme Court Rules - Depends on the question raised in the interlocutory decision.*

***APPEALS** - Leave to appeal - Enlargement of time - Application for - What the applicant must established - By Virtue of O. 2 r. 31 (2) of the Supreme Court Rules.*

***APPEALS** - Leave to appeal - Ground of mixed law and fact - Leave to appeal is required for ground of appeal which involves mixed law and fact.*

### **FACTS**

In the Supreme Court of Nigeria, the defendant/respondent/applicant sought : (i) leave to amend ground 2 of its grounds of appeal contained in notice of appeal dated 29th September, 1997; (ii) enlargement of time to apply for leave to appeal from decisions of the Court of Appeal delivered on 21st March, 1996 and 11th July, 1997 (iii) enlargement of time within which it may appeal against the decisions (iv) leave to appeal against the decision pursuant to section 213 (3) of the 1979 Constitution in terms of the ground of appeal contained in schedule 2 to the motion and, (v) leave to amend the brief dated and filed on 24th August 1998. By a writ issued on 11th August, 1983 in the Benin Judicial Division of the High Court of the Bendel State, the plaintiffs/appellants/respondents, claimed against the applicant and another the sum of N50 million. Hearing of the matter commenced before, Obi J. who was then a judge of the High Court of Bendel State. Before Obi J. could hear addresses of counsel and deliver judgment in the case, creation of States

intervened whereby Bendel State was split into Edo and Delta States, consequently, Obi J. was appointed a judge of Delta State and ceased to function as a judge of Edo State which had jurisdiction over the matter. The hearing of the action commenced afresh before a judge of the newly created Edo State. Thereafter counsel for the respondent brought an application praying that the High Court should admit in the suit "a certified true copy of the evidence of the plaintiffs, and their witnesses and the evidence of the defendants and their witnesses before Honourable Justice J.A. Obi in this suit ". Counsel for the applicant not opposing, the learned trial judge granted the application. Without any further evidence before the Court, counsel for the parties addressed the Court, and judgment was delivered in favour of the respondents.

The applicant appealed to the Court of Appeal. It sought in that Court leave to raise and argue fresh points and to permit original notes of evidence given before Obi, J. to be produced and to amend the record. In a ruling delivered on 21st March, 1996 the Court refused the application. After hearing the appeal the Court of Appeal on 11th July 1997 by a majority judgment allowed it on the main ground that the evidence relied on in the case, that is evidence given in the proceedings before Obi, J. was wrongly admitted under section 34(1) of the Evidence Act. The present respondent appealed to the Supreme Court against that decision. The present applicant made an incompetent attempt to cross appeal from part of that decision. The present application as aforesaid is to enable the applicant to appeal from the interlocutory decision of 21st March, 1996 and with leave from the final judgment given on 11th July, 1996. The applicant gave counsel's error of judgment as the reason for the failure to appeal within the prescribed period. The respondents' counsel opposed the application on the ground, inter alia that granting the application would over-reach the preliminary objection raised and argued by the respondent in the reply brief filed in the appeal.

#### **ISSUES FOR DETERMINATION**

*1. Whether the ground of appeal as originally raised by the notice of appeal and the proposed amendment involve a question of law alone.*

2. *Whether leave should be granted to the applicant to appeal on ground 5 contained in the 2nd schedule to the application which raises a question of mixed law and fact.*

B **HELD** (Unanimously allowing the application per lead ruling of **AYOOLA, JSC**)

***Leave to appeal - Enlargement of time***

C 1. In terms of Order 2 Rules 31(2) of the Supreme Court Rules the applicant must disclose by its affidavit "good and substantial reasons for the failure to appeal or to apply for leave to appeal within the prescribed period" and "grounds of appeal which prima facie show good cause why the appeal should be heard." (p. 2910 E)

D ***Ground of appeal - Amendment***

2. The discretion to grant leave to a party to amend his ground of appeal is liberally exercised in so far as an amendment can be made without injustice to the other party and is not belated as to cause undue delay in the proceedings. (p. 2911 G)

***Amendment - Refusal of***

F 3. The court should not hesitate to refuse an amendment where such proposed amended ground would have, itself, been objectionable for any of the reasons for which successful objection could be raised against such ground. (p. 2911 G)

G ***Question of law - Obligation imposed by law***

H 4. Where the ground of appeal complains that the tribunal has failed to fulfill an obligation cast upon it by law in the process of coming to a decision in the case, such a ground would involve a question of law, namely: whether or not there is such an obligation or whether what the tribunal did amounted to an infraction in law of such obligation, provided that all the facts needed are there on the record and are beyond controversy.

Here, the complaint is that in the court below the applicant raised com-

plaints by its grounds of appeal which the court below failed to consider. The question that arises from the ground is whether as a matter of law the court below is under obligation to consider all complaints raised by an appellant. That the complaints raised before the court below related to matters of fact is immaterial. In this case, the flaw in the decision of the trial court complained of in the court below related, largely, to facts; thus, in the court below the issues raised by the complaint were issues of fact. The complaint before us however will not lead this court to a resolution of those issues of fact but merely to pronounce on whether the court below rightly came to a decision without resolving those complaint as to fact. (p. 2912 E/2913 A)

***Question of law alone - Uncontroversial facts***

5. A ground of appeal involves a question of law alone where in answering the question raised by the ground of appeal the appellate tribunal can determine the issue on the admitted or uncontroversial facts without going beyond a direct application of legal principles. (p. 2912 F)

***Ground of appeal - Merit of***

6. Where it is contended by the other party that the principle of law on which the complaint is based is non-existent or misconceived, that goes to the merit of the complaint and not to the threshold question as to whether or not the question involved is one of law. The question of the merit of a ground of appeal is to be distinguished from one as to the nature of question involved in the ground. (p. 2912 G)

***Appeals - Delay***

7. That counsel's error of judgment, if reasonable, is an acceptable explanation for delay to apply for leave to appeal within the prescribed time is now undoubted. In Akinyede v. The Apprasier (1971) 1 All N. L. R. 162 counsel's carelessness was held by this court to be good reason for failure to appeal within time, provided such carelessness is pardonable. In Doherty v. Doherty (1964) 1 ALL NLR 299 and Bowaye v. Adediwura (1976) 6 SC 143 pardonable inadvertence of counsel was accepted as

good and substantial reason for the delay. In Alagbe v. His Highness S. Abimbola & Ors 1978 NSCC 84 where delay was due partly to counsel and his clerk, the delay was held to be satisfactorily explained.  
(p. 2914 A)

B

***Appeals - Interlocutory decision***

8. It is easy to come to the mistaken view that these cases and others like them in which provisions substantially similar to O 8 r 12 (4) have been considered and applied, establish that, in all cases appeal from interlocutory decisions can be dispensed with and the point of complaint against such decisions canvassed in an appeal from the final decision in the case. Whether the provisions of O 8 r 12 (4) would apply or not depends on the question raised in the interlocutory decision and the impact which the resolution of that question may have on the fairness or justice of the final determination. (p. 2915 A)

***Leave to appeal - Ground of mixed law and fact***

9. The ground of objection raised to the prayer seeking such leave is that the application was an invitation to the court to "regularise" a void ground which is what ground 5 is. This ground of objection is totally misconceived. The whole purpose of the applicant's application in regard to the interlocutory decision of 21st March, 1996 was to bring an appeal from that decision into being. That is done by prayers for extension of time within which to apply for leave to appeal, extension of time to appeal and leave to appeal. It is evident that leave to appeal is required in regard to ground of appeal which involves mixed law and fact. Ground 5 is such a ground. The application is an implied concession that hitherto there had been no competent appeal from the interlocutory decision.  
(p. 2915 F)

***H Appeals - Failure to appeal***

10. Failure to appeal does not unequivocally indicate an acceptance of a decision where, as in this case, there is a clear demonstration of intention to challenge the decision although counsel had erred in his initial

choice of channel of that challenge. (p. 2916 B)

## NOTABLE POINTS OF INTEREST

### AYOOLA JSC

#### *1. Differentiating between question of law or fact*

This court in Ogbechie & Ors v. Onochie & Ors (1986) Vol 7 NSCC 443 set out the approach to the determination whether a ground of appeal involves a question of law or of fact or of mixed law and fact. Eso, J.S.C.,

"..... 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, where however the grounds are such that would question facts by the lower tribunal before the application of the law, that would amount to question of mixed law and fact".

These are useful guidelines but it is evident that they are not meant to be exhaustive. (p. 2912 B)

#### *2. Preliminary objection is without substance*

The contention that this application should not be granted because a preliminary objection has been raised showing the errors in the process of the applicant's appeal, is without substance. The applicant is not foreclosed by the preliminary objection from correcting those errors or starting the process afresh on a more appropriate footing. There is really no ground of opposition of any substance to the application. The merits of the cross-appeal still await determination. (p. 2916 C)

### REPRESENTATION

E. O. Sofunde, SAN with M. L. Hanafi for applicants

Chief M. I. Ahamba, SAN with Chudi Nwuke for the respondents

### CASES REFERRED TO

Ogbechie & Ors v. Onochie & Ors (1986) Vol 7 NSCC 443

Akinyede v. The Apprasier (1971) 1 All N. L. R. 162

Doherty v. Doherty (1964) 1 ALL NLR 299

Bowaye v. Adediwura (1976) 6 SC 143

Alagbe v. His Highness S. Abimbola & Ors 1978 NSCC 84

B Deduwa & Ors v. Amona and Anor (1979) NSCC 499

Ige v. Obiwale (1967) NSCC 267

### **STATUTE & RULES REFERRED TO**

- C Constitution of the Federal Republic of Nigeria, 1979 s. 213 (2) and (3)  
C Supreme Court Rules, O. 8 r. 12(4)

### **LEAD JUDGMENT BY AYOOLA.JSC**

D This ruling concerns an application by Afribank PLC ("the appli-  
cant") which has cross-appealed from part of the decision of the Court  
of Appeal given in an appeal to that court from a decision of the High  
Court of Edo State adjudging the applicant liable to pay damages to Francis  
Shanu and Nigerwolf Ogranisation Ltd ("the respondents"). By its appli-  
E cation the applicant seeks (i) leave to amend ground 2 of its grounds of  
appeal contained in notice of appeal dated 29th September, 1997; (ii)  
enlargement of time to apply for leave to appeal from decisions of the  
court below delivered on 21st March, 1996 and 11th July, 1997 (iii) en-  
F largement of the time within which it may appeal against the decision (iv)  
leave to appeal against the decision pursuant to section 213 (3) of the  
Constitution of the Federal Republic of Nigeria 1979 in terms of the ground  
of appeal contained in schedule 2 to the Motion, and, (v) leave to amend  
the brief dated and filed on 24th August, 1998.

G The background facts as are relevant to the application can be  
briefly stated. In the High Court the respondents, as plaintiffs, claimed  
against the applicant and another the sum of N50 million. The action was  
commenced by writ issued on 11th August, 1983 in the Benin Judicial  
H Division of the High Court of what was then Bendel State. It came for  
trial before Obi, J., who was then a judge of the High Court of Bendel  
State. Obi, J., commenced hearing of the action and, indeed, took evi-  
dence of the parties and their witnesses, whereon the parties closed their



respective cases. Before Obi, J., could hear addresses of counsel and deliver judgment in the case, creation of states intervened, whereby Ben-del State was split into Edo and Delta States. Consequently, Obi, J., was appointed a judge of Delta State and ceased to function as a judge of Edo State which had jurisdiction over the matter. The hearing of the action B had to commence afresh before a judge of the newly created Edo State. It thus came before Edokpayi, J.

Before Edokpayi, J., counsel for the respondent brought an application praying that the High Court should admit in the suit " a certified C true copy of the evidence of the plaintiffs, and their witnesses and the evidence of the Defendants and their witnesses before Honourable Justice J.A. Obi in this Suit". Counsel for the applicant not opposing, Edokpayi, J., granted the application in terms admitting the evidence of the parties and their witnesses as prayed. Thereafter, without any fur- D ther evidence before Edokpayi, J., counsel for the parties addressed the High Court whereon Edokpayi, J., gave judgment for the respondents. The applicant appealed to the Court of Appeal. It sought in that court to raise fresh points of law not raised in the court below; to amend its notice E and ground of appeal; and orders directing that "the original notes of Obi, J., of the evidence of Henry Ama Ugoji who testified as DW9 before him be produced" and that "page 112:30-32 of the record of appeal" be amended by substituting , in material terms, "we have no records" for F "we have records" in relation to book of account for the receipt of a sum of 25 million U.S. dollars. In a ruling delivered by Akintan, JCA on 21st March, 1996 (with which Nsofor and Ige JJ.C.A. concurred) the court below refused leave to raise and argue fresh points and to permit original G notes of evidence given before Obi, J., to be produced and to amend the record.

By a majority judgment (Akintan and Nsofor, JJ. C. A; Akpabio JCA, dissenting) the Court of Appeal on 11th July, 1997 allowed the present applicant's appeal on the main ground that the evidence relied on H in the case, that is evidence given in the proceedings before Obi, J., was wrongly admitted under section 34 (1) of the Evidence Act. Akintan, JCA, was of the opinion, therefore, that "the learned trial judge took into

consideration in coming to the conclusion he reached in the judgment in this case, evidence that was not before him." Nsofor, JCA, agreed with him. In the event, the court below allowed the appeal and ordered that the suit be reheard before another judge of Edo State High Court.

B The present respondent on 9th September, 1997 appealed from the decision and by their appeal sought a restoration of Edokpayi, J's judgment. The applicant also cross-appealed on 6th October, 1997 by their notice dated 29th September, 1997, from part of the decision. On the notice of cross-appeal the portions complained of were stated to be  
C the portion relating to:

*"The failure to evaluate the evidence before the court and dismiss the action on the merits. The refusal to grant the defendant leave to raise the issue of the admissibility of evidence received at the previous  
D trial which was aborted. The failure to permit an amendment to the record of proceedings. The failure to dismiss the action rather than ordering a retrial."*

As earlier stated, the applicant's application is now to enable it to  
E appeal from the interlocutory decision of 21st March, 1996 and, with leave, from the final judgment given on 11th July, 1997.

**In terms of Order 2 Rules 31(2) of the Supreme Court Rules the applicant must disclose by its affidavit "good and substantial  
F reasons for the failure to appeal or to apply for leave to appeal within the prescribed period" and "grounds of appeal which prima facie show good cause why the appeal should be heard."**

The applicant gave counsel's error of judgment as the reason for the failure to appeal within the prescribed period. It was explained that  
G failure to appeal or seek leave to appeal within the prescribed time was solely because counsel for the applicant had interpreted the provisions of Or 8 r 12 (4) of the Supreme Court Rules (SCR) as empowering this court to reverse an interlocutory ruling notwithstanding a failure to ap-  
H peal from such ruling. In regard to the final decision of 11th July, 1997 the delay, it was explained, emanated from counsel's hesitation as to the true nature of the ground of appeal, that is to say, whether it raised a question of law alone or of mixed law and fact.

In regard to the second of the two requirements, it was submitted that there was good cause why the appeals should be heard. Counsel for the applicant proffered in some details the arguments he would advance if the applicant is granted in an effort to show that the grounds of appeal are arguable.

For his part, respondents' counsel, in opposition to the application, argued that there was no mistake but a decision of counsel. It was submitted that a party is not bound by the mistake of his counsel but is bound by his counsel's decision; by deciding not to appeal against the decision of 21st March, 1996 before proceeding with the appeal in the court below, the appellant was taken to have accepted the decision. Further, it was argued: ground 5 of the cross appeal as contained in schedule 2 to the application which the applicant seeks to regularise is a void ground; the ground of appeal contained in schedule 1 to the application being of mixed law and fact is incompetent; the relief sought on the motion was for leave to appeal on a ground of mixed law and fact and not for leave to appeal from an interlocutory decision; and granting the application would "over-reach" the preliminary objection raised and argued by the respondent in the reply brief filed in the appeal.

It is convenient to consider the prayer for leave to amend ground 2 of the grounds of appeal first. The ground sought to be amended complained that "the Court of Appeal erred in law in failing to consider several complaints of the defendant and come to a decision on them". In the particulars the complaints which it was alleged were not considered were in regard to the trial judge's appreciation of and conclusion of fact on the evidence before him.

**The discretion to grant leave to a party to amend his ground of appeal is liberally exercised in so far as an amendment can be made without injustice to the other party and is not belated as to cause undue delay in the proceedings. However, the court should not hesitate to refuse an amendment where such proposed amended ground would have, itself, been objectionable for any of the reasons for which successful objection could be raised against such ground.** In this case the respondent objects to the proposed amendment on the

ground that the ground sought to be amended is one of mixed law and fact and leave not having been obtained to argue such ground the amendment could not be granted. In terms of section 213 (2) and 3 of the 1979 Constitution leave of the court is required to argue a ground of fact or of mixed law and fact.

The question is whether the ground of appeal as originally raised by the notice of appeal and the proposed amendment involve a question of law alone. This court in Ogbechie & Ors v. Onochie & Ors (1986) Vol 7 NSCC 443 set out the approach to the determination whether a ground of appeal involves a question of law or of fact or of mixed law and fact. Eso, J.S.C.,

*"..... 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, where however the grounds are such that would question facts by the lower tribunal before the application of the law, that would amount to question of mixed law and fact".*

These are useful guidelines but it is evident that they are not meant to be exhaustive. **Where the ground of appeal complains that the tribunal has failed to fulfill an obligation cast upon it by law in the process of coming to a decision in the case, such a ground would involve a question of law, namely: whether or not there is such an obligation or whether what the tribunal did amounted to an infraction in law of such obligation, provided that all the facts needed are there on the record and are beyond controversy. A ground of appeal involves a question of law alone where in answering the question raised by the ground of appeal the appellate tribunal can determine the issue on the admitted or uncontroversial facts without going beyond a direct application of legal principles. Where it is contended by the other party that the principle of law on which the complaint is based is non-existent or misconceived, that goes to the merit of the complaint and not to the threshold question as to whether or not the question involved is one of law. The question of**

the merit of a ground of appeal is to be distinguished from one as to the nature of question involved in the ground.

Here, the complaint is that in the court below the applicant raised complaints by its grounds of appeal which the court below failed to consider. The question that arises from the ground is B whether as a matter of law the court below is under obligation to consider all complaints raised by an appellant. That the complaints raised before the court below related to matters of fact is immaterial. In this case, the flaw in the decision of the trial court complained of in the court below related, largely, to facts; thus, in the C court below the issues raised by the complaint were issues of fact. The complaint before us however will not lead this court to a resolution of those issues of fact but merely to pronounce on whether the court below rightly came to a decision without resolving those D complaint as to fact. The applicant, rightly, by the brief filed on its behalf in the appeal was not going to argue that this court intervenes on the facts should the ground succeed but that since the Court of Appeal did not consider the complaints and pronounce on them, a miscarriage of E justice had been occasioned and the appeal should be reheard by the court below.

In my judgment, the ground of opposition to the prayer for leave to amend ground 2 of the grounds of appeal contained in the notice of F appeal filed on 6th October, 1997, is misconceived.

I now turn to that part of the application which relates to the decision of 21st March, 1996. By its notice of appeal filed on 6th October, 1997 the applicant made an incompetent attempt to appeal from that G decision when in that notice whereas the judgment appealed from was that delivered on 11th July, 1997, in the column relating to part of the decision complained of reference was made to decision of the court below contained in the ruling delivered on 21st March, 1996.

The decision given on 21st March, 1996 was an interlocutory H decision which should have been appealed from within 14 days. Failure to appeal within the prescribed period has been explained, as earlier said, in the affidavit and brief in support of the application. Counsel's error

was cited as reason.

That counsel's error of judgment, if reasonable, is an acceptable explanation for delay to apply for leave to appeal within the prescribed time is now undoubted. In Akinyede v. The Appraiser (1971) 1 All N. L. R. 162 counsel's carelessness was held by this court to be good reason for failure to appeal within time, provided such carelessness is pardonable. In Doherty v. Doherty (1964) 1 ALL NLR 299 and Bowaye v. Adediwura (1976) 6 SC 143 pardonable inadvertence of counsel was accepted as good and substantial reason for the delay. In Alagbe v. His Highness S. Abimbola & Ors 1978 NSCC 84 where delay was due partly to counsel and his clerk, the delay was held to be satisfactorily explained.

Counsel for the respondents sought to draw a distinction between a counsel's decision not to appeal and mistake in failing to appeal. Such distinction may be valid where a decision not to appeal evinces an unmistakable intention to accept the judgment or not to complain by appellate process against it. It is not valid where, in a case like the present, counsel believed that he could challenge the interlocutory decision on an appeal from the final decision. The basis of his belief is 0.8 r 12 (4) of the SCR which provides that:

*"The powers of the court in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been an appeal".*

Substantially similar provisions, with slightly different wording, were contained in Order VII rule 25 of the 1961 Rules which was pronounced upon by this court, composed of seven Justices, in Deduwa & Ors v. Amona and Anor (1979) NSCC 499. In that case this court said per Alexander, C J N at 505:

*"..... we hold that Order VII, rule 25, would prevent any such interlocutory judgment, decision, determination or order from which there has no appeal from operating so as to bar or prejudice this Court from giving a just decision on any appeal before us".*

In the earlier case of Ige v. Obiwale (1967) NSCC 267 this court was of the same view.

It is easy to come to the mistaken view that these cases and others like them in which provisions substantially similar to O 8 r 12 (4) have been considered and applied, establish that, in all cases appeal from interlocutory decisions can be dispensed with and the point of complaint against such decisions canvassed in an appeal from the final decision in the case. Whether the provisions of O 8 r 12 (4) would apply or not depends on the question raised in the interlocutory decision and the impact which the resolution of that question may have on the fairness or justice of the final determination. I venture to think, by way of example only, that where the interlocutory application is to the effect that the record of appeal is inaccurate, an interlocutory decision of the court below that the appeal should proceed on such record, unamended, should not preclude a party from complaining on a further appeal that the court below had proceeded on an inaccurate record and that its decision is thereby flawed.

In my view, the opinion initially held by counsel for the applicant that he did not need to appeal separately from the decision of 21st March, 1996 is understandable, although it is of doubtful validity. In these circumstances, the reason given for failure to appeal from that decision within the prescribed period is good, substantial and acceptable.

The remaining question is whether leave should be granted to the applicant to appeal on ground 5 contained in the 2nd schedule to the application which raises a question of mixed law and fact. The ground of objection raised to the prayer seeking such leave is that the application was an invitation to the court to "regularise" a void ground which is what ground 5 is. This ground of objection is totally misconceived. The whole purpose of the applicant's application in regard to the interlocutory decision of 21st March, 1996 was to bring an appeal from that decision into being. That is done by prayers for extension of time within which to apply for leave to appeal, extension of time to appeal and leave to appeal. It is evident that leave to appeal is required in regard to ground of appeal which involves mixed law and fact. Ground 5 is such a ground. The application is an implied concession that hitherto there had been

**no competent appeal from the interlocutory decision.**

The respondents have not argued that the proposed grounds of appeal have not disclosed prima facie good grounds why the appeal from the decision should be heard. They contended that the applicant by allowing the substantive appeal before the lower court to proceed without appealing from the interlocutory decision had consented to the decision. **Failure to appeal does not unequivocally indicate an acceptance of a decision where , as in this case, there is a clear demonstration of intention to challenge the decision although counsel had erred in his initial choice of channel of that challenge.**

The contention that this application should not be granted because a preliminary objection has been raised showing the errors in the process of the applicant's appeal, is without substance. The applicant is not foreclosed by the preliminary objection from correcting those errors or starting the process afresh on a more appropriate footing.

There is really no ground of opposition of any substance to the application. The merits of the cross-appeal still await determination. It would have been more profitable for the respondents to direct their effort more in that direction than in seeking to prevent the applicant from appealing. A deeper reflection on the nature of the application decided in the ruling sought to be appealed from would have shown that the appeal is capable of throwing up, if duly raised, one or two questions of law of some interest. For instance, does the power to amend a record of appeal include a power to amend exhibits tendered in a case. Be that as it may, there is merit in the application and I would grant it.

In the result, I order as follows:

- (1) Leave is granted to the applicant to amend ground 2 of its grounds of appeal contained in notice of appeal dated 29th September, 1997 as contained in the 1st schedule to the motion paper dater 6th April, 1999.
- (2) Time within which to apply for leave to appeal against the decision of the Court of Appeal delivered in the case on 21st March, 1996 and 11th July, 1997 (hereinafter called 'the decision') is extended till 6th April, 1999.



(3) Time within which to appeal from the decision is enlarged till today.

(4) Leave is granted to the applicant to appeal against the decisions in terms of the ground of appeal contained in the 2nd schedule to the motion paper. B

(5) Leave is ground to the applicant to amend its brief dated and filed on the 24th day of August, 1998 in terms of the proposed amendment contained in the 3rd schedule to the motion paper.

(6) The applicant shall file a single fresh notice of appeal in regard to the two decisions in which shall be incorporated the ground of appeal as amended by this order and other grounds of appeal relied on by it within 14 days. C

The respondents are entitled to cost of the proceedings in the sum of N1000.00. D

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#### **WALI JSC**

I have read before now the Ruling of my learned brother Ayoola, JSC, and I agree with his Reasoning and conclusion for granting the application. I adopt them as mine. The application Succeeds and it is granted. E

I adopt the consequential orders made in the lead ruling, that of costs inclusive. F

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#### **KUTIGI JSC**

I read in draft the Ruling just delivered by my learned brother Ayoola, J.S.C. I agree with his conclusion to grant the application. Although the application was vigorously opposed by learned counsel for the Respondents, I am really unable to find any substance in the opposition. On the other hand I find merit in the application and I grant it accordingly. I endorse the orders made in the said Ruling. G H

**ONU JSC**

Having had the opportunity to read before now the leading Ruling of my learned brother Ayoola JSC just read, I am in entire agreement with him that the application has merit. Accordingly, I too grant it and make similar consequential orders as to costs.

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**ACHIKE JSC**

I have had the privilege of reading, in advance, the Ruling just delivered by my learned brother, Ayoola, J.S.C. I agree with the reasoning and conclusions whereupon he granted the application in terms set out in the said Ruling. I abide by the consequential orders made in the leading Ruling including the order for costs.