

SUPREME COURT OF NIGERIA
15TH DECEMBER, 2000 SC. 51/1999
CORAM:- I. L. KUTIGI, A. I. IGUH, A. I. KATSINA-ALU,
U. A. KALGO, E. O. AYOOLA, JJSC

HON. EMMANUEL OSELOKA ARAKA APPELLANT
AND
AMBROSE NWANKWO EJEAGWU RESPONDENT

***ACTIONS** - Competence of action - Statute bar - Makes an action incompetent and divests Court of jurisdiction.*

***APPEALS** - Ground of appeal - Can be abandoned or deemed abandoned by the appellant - If no issue is raised to cover the ground.*

***APPEALS** - Grounds of appeal - Issues - Must be based on grounds of appeal or will not be considered by the Court.*

***APPEALS** - Grounds of appeal - Abandonment - Cannot be presumed where issues have been raised on them and arguments proffered on them.*

***APPEALS** - Suo motu issue - Where raised by the Court - Without hearing the parties - Will amount to breach of right of fair hearing.*

***ARBITRATION** - Limitation period - Setting aside an award - Is uniform and similar whether brought under s.29 or s.30 of the Act.*

FACTS

Pursuant to a deed of lease between the parties providing for revision of rent and for the appointment of an arbitrator in case of disagreement, an arbitrator was appointed and having published an award, Hon. Araka by an originating summons applied to the High Court for the recognition and enforcement of the award and payment of rent five months

after the publication of the award. Seven months after the publication of the award the respondent filed a counter-affidavit opposing the enforcement of the award and filed an application for setting aside the award or for its remittance to another arbitrator.

The trial Judge remitted the matter to the arbitrator for reconsideration. The appellant thereupon appealed to the Court of appeal and his appeal was dismissed. He has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

Were the learned majority Justices of the Court of Appeal not grossly in error in striking out Ground 2 of the Grounds of Appeal on the erroneous view that counsel for the “applicant” (meaning appellant) had in paragraph 1.7 of his “introductory Remarks” in the Appellant’s Brief of Argument made an “application” to that effect? Etc., see p. 3168

HELD (Unanimously allowing the appeal per lead Judgment of **KATSINA-ALUJSC**)

Grounds - Can be abandoned or deemed abandoned

1. An appellant is at liberty to withdraw or abandon any of his grounds of appeal. He may withdraw a ground of appeal by applying to the Court to do so. In that case the court will then strike out the ground in question. However where an appellant does not formulate an issue in his brief of argument to cover a ground of appeal, that ground would be deemed abandoned even where arguments have been proffered on it. (p. 3172 A)

Issues - Must be based on grounds of appeal

2. An issue for determination must be based on a ground of appeal. Where therefore an issue raised is not based on or does not arise from the grounds of appeal, the issue will be discountenanced by the court. (p. 3172 B)

Grounds of appeal - Abandonment

3. In the present case the appellant had indicated in his brief or argument that he would argue only the grounds of appeal which challenged the competence of the motion. Thereafter he raised issues on grounds 1 and

2 and proffered arguments and submissions on them. There were 4 grounds in all. The respondent also raised issues on grounds 1 and 2 and advanced arguments thereon. It was therefore abundantly clear that the appeal was fought on the basis of grounds 1 and 2. In other words the appellant did not abandon ground 2 of his grounds of appeal. (p. 3172 D)

Appeals - Suo motu issue

4. The court below raised the issue of abandonment of ground 2 suo motu without giving counsel for the parties an opportunity to be heard on the point. When an issue is not placed before an appellate court, it has no business whatsoever to deal with it. Also, on no account should a court of law raise a point suo motu no matter how clear it may appear to be and proceed to resolve it one way or the other without hearing the parties, particularly the party that may be adversely affected as a result of the point so raised. If it does so, it will be in breach of the parties' right to fair hearing. In the instant case, the abandonment of ground 2 was not an issue before the Court below. In fact the said ground 2 was the main thrust of the appeal. The Court of Appeal was therefore in grave error in striking out ground 2 – see Olatunji v. Adisa (1995)2 NWLR (Pt.376) 167. (p. 3172 F)

Arbitration - Limitation period

5. Indeed there is only one period of limitation prescribed under the Act. Section 29 of the Act, which I have already reproduced, provides that a party who is aggrieved by an arbitral award may within three months from the date of the award apply to the court to set aside the award. It is pertinent to point out here that the application the subject matter of this appeal, was for the setting aside of the arbitral award. Section 30 of the Act only sets out circumstances under which an application to set aside an arbitral award thereunder may be brought. This is why; I think it is absurd to suggest that section 30 should stipulate a time limit of its own for bringing the application for which section 29(1) has already provided a time frame. (p. 3174 B)

Actions - Competence of action

6. A complaint that an action is statute-barred, is unarguably a complaint against the competency of the action. In the present case, although the award was made on 8th of September, 1994, the motion to set it aside was brought on 25th April, 1995. Consequently, since the motion on notice to set aside the award was filed long after three months in violation of section 29(1) of the Arbitration and Conciliation Act, it was incompetent and the trial High Court had no jurisdiction to entertain it. (p. 3174 E / 3175 D)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Appeal Court may not allow new issue, point or question

The law is well settled that an appellate court will not allow a fresh point to be taken before it if such a point was not pronounced upon by the courts below. In the same vein, an appellant will not be allowed to raise on appeal, a question which was not raised, tried or considered by the trial court but where the question involves substantial points of law, substantive or procedural, and it is plain that no further evidence could have been adduced which would effect the decision on them, the court will allow the question to be raised and the points taken to prevent an obvious miscarriage of justice. (p. 3186 G)

2. Effect of a limitation law or act

Now, it is a basic principle of law that a Limitation Law or Act removes the right of action, the right of enforcement and the right to judicial relief and leaves the plaintiff with a bare and empty cause of action which he cannot enforce if such a cause of action is statute-barred. Accordingly, where the law provides for the bringing of an action within a prescribed period in respect of a cause of action accruing to the plaintiff, proceedings shall not be brought after the time prescribed by such a statute. (p. 3187 G)

3. *Competence of a Court and effect of incompetence*

A court is said to be competent to adjudicate upon an action when –

(i) It is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or the other; B

(ii) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction and

(iii) The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. C

Any defect in the competence of the court is fatal and the proceedings are a nullity as such defect is extrinsic to the adjudication. (p. 3188 B) D

KALGO JSC

4. *Effect of statute bar*

What then is statute bar and of what effect is it? In my interpretation “statute-barred” simply means barred by a provision of the statute. It is usually as to time i.e. the bar gives a time limit during which certain actions or steps should be taken, and one is barred from taking action after the period specified in the statute. Any action taken after or outside the specified limit or period is of no avail and has no valid effect. The bar can be lifted or the limit extended only if the statute allows it to be done. Where there was no such extensions, the action carried out will be invalid, and the court will treat it as such. (p. 3195 A) F

AYOOLA JSC G

5. *Court should seek aid of counsel in resolving ambiguities in briefs*

Where there is inconsistency or ambiguity between one part of a brief and another part, a court faced with such inconsistency or ambiguity should not try to resolve such unaided by counsel but should call the attention of the party to the inconsistency or ambiguity and ask that he resolve it. Part of the purpose of oral argument is to enable our appellate courts to resolve inconsistencies or ambiguities in briefs. (p. 3198 H)

6. *Distinction between limitation of time in contract and tort and prescription of statute*

Where limitation of action is related to torts and contract it is accepted
 B principle that the statute of limitation is a defence which can be waived.
 To that extent it cannot strictly be said that an action brought outside the
 limitation period is incompetent for lack of jurisdiction of the court.
 However after the plea of limitation has been raised and established, the
 C court lacks jurisdiction to proceed further to determine other issues of
 merit in the case. Where, however, a statute created the remedy and the
 time within which that remedy is to be sought, the position would seem
 to me to be different. There is common sense in the view that he who
 seeks a remedy created by statute must comply with the procedure (in-
 D cluding time) prescribed by the statute for seeking such remedy. It is for
 these reasons that I am not impressed by the argument proffered by
 learned counsel for the respondent that, drawing from analogy of limita-
 tion of action in regard to torts and contracts, breach of time prescribed
 E by section 29(1) of the Act is a matter of defence and that an application
 made outside the time is not incompetent. (p. 3199 G)

REPRESENTATION

F Onyechi Araka Esq., Mr. C. Enwezor with him for the appellant.
 G E. Ezeuko Esq.SAN, Mr. D.C. Ofoenyi with him for the respondent.

CASES REFERRED TO

Odiase & Anor v Vincent Agwo (1973) 11 S. C. 71, 76
 G Madukolu v Nkemdilim (1962) 2 SCNLR 34)
 London Chartered Bank of Australia v White (1897) 4 A.C. 413
 Kabaka's Government and v Attorney-General of Uganda (1966) A. C. 1
 Attorney - General of Oyo State v Fairlakes Hotels Ltd (1988) 5 NWLR
 H (part 92) 1 at 29
 Rossek v African Continental Bank Ltd (1993) 8 N. W. L . R. (part 312)
 382 at 473 and 487
 Home Development Ltd v Scancila Contracting Co. Ltd (1994) 8 N. W.

L.R (part 362) 252

STATUTE REFERRED TO

Arbitration and Conciliation Act CAP 19 LFN 1990 ss. 29 & 30.

LEAD JUDGMENT BY KATSINA-ALU JSC

This is an appeal from the majority decision of the Court of Appeal which dismissed the appellant's appeal to that Court.

The facts of this case are simple and straightforward. The applicant Hon. E.O. Araka by an originating summons commenced an action for the recognition and enforcement of an award. The award was made pursuant to the Deed of Lease dated 9th October 1975. Clause 4(a) of the Deed of Lease provides for revision of the reserved rent every fifteen years while clause 4(b) provides as follows:

"If the Lessor and Lessee are unable to agree as to the rent to be paid upon revision as aforesaid, the matter shall be referred to an Arbitrator agreed upon by them or in the absence of such agreement to an arbitrator appointed by a Judge of the High Court."

Sequel to the inability of the parties to agree upon an arbitrator as provided for under Clause 4(b) of the Lease Agreement (Exhibit 1), Olike, J. of the High Court, Onitsha, on the 24th of January 1994 appointed an Arbitrator Mr. Damian Okolo, to look into the dispute and fix the rent payable. The arbitrator fixed the sum of N7,250.00 as the rent payable per annum by the respondent in respect of the appellant's property at No. 109 Upper Iweka Road, Onitsha. This award was published on the 8th of September 1994.

The appellant Hon. E.O. Araka by an originating summons filed on 6 February 1995 applied to the High Court for the recognition and enforcement of the award and for the payment of the arrears of rent pursuant to Section 31 of the Arbitration and Conciliation Act, Cap. 19 Laws of the Federation of Nigeria 1990.

Meanwhile on 21 April 1995, the respondent filed a counter affidavit opposing the enforcement of the award on the ground that the arbitrator acted outside his jurisdiction. Again, on 25 April, 1995 the

respondent filed an application under S.30(1) of the Arbitration and Conciliation Act (Cap. 19) Laws of the Federation of Nigeria 1990 praying that the award be set aside, or, in the alternative, be remitted to the arbitrator or another arbitrator.

B After hearing the submission of counsel for and on behalf of the parties, the learned trial Judge remitted the matter to the arbitrator, Mr. Damian Okolo for reconsideration, upon the terms of clause 4(c) of the Lease Agreement.

C The appellant's appeal to the Court of Appeal was dismissed. This appeal is against the decision of the Court of Appeal.

Pursuant to the Rules of this Court, the parties filed and exchanged their respective briefs of argument. In the appellant's brief the following issues are set down as calling for determination in this appeal, D to wit:

1. Were the learned majority Justices of the Court of Appeal not grossly in error in striking out Ground 2 of the Grounds of Appeal on the erroneous view that counsel for the "*applicant*" (meaning appellant) had E in paragraph 1.7 of his "*introductory Remarks*" in the Appellant's Brief of Argument made an "*application*" to that effect?

2. Were the learned majority justices of the Court of Appeal not grossly in error when they were of the view that the complaint contained in F Ground 2 of the Grounds of Appeal to wit – that the respondent's Motion on Notice for setting aside the award of the Arbitrator, which was clearly statute – barred, was not a complaint touching the competency of the Motion and thereby wrongly struck out the said Ground 2 of the Grounds of Appeal?

G 3. Were the learned majority Justices of the Court of Appeal not grossly in error when they held that Ground 2 of the Grounds of Appeal had been abandoned by appellant's counsel in his Brief of Argument?

H 4. Were the learned majority Justices of the Court of Appeal not under a duty to consider and determine all issues placed before them?

5. Were the learned majority Justices of the Court of Appeal not grossly in error when they held that the respondent's Motion on Notice for setting aside the arbitrator's award which was filed in the appellant's suit

for the recognition and enforcement of the award was not incompetent? The respondent, for his part, has formulated the following issues in his brief, that is to say –

1. Whether or not the Court of Appeal was right in holding that with the exception of ground 1 of the grounds of appeal filed before it the rest of the grounds of appeal were abandoned by the appellant as clearly stated by Counsel to the appellant. B

2. Whether or not the Court of Appeal was right to have held that the respondent's application to set aside the award was competent. C

I think the real question for determination in this appeal is whether the Respondent's motion on notice filed on 25 April 1995 for an order setting aside the arbitrator's award is competent, or not. As I already indicated the arbitrator gave his award on 8 September 1994. The motion on notice to set aside this award was brought on 25 April 1995, a little over 7 months from the date the award was published. This motion was brought under Section 30(1) of the Arbitration and Conciliation Act Cap. 19 Laws of the Federation of Nigeria 1990. After taking the submissions of counsel for the parties, the learned trial Judge in a reserved ruling found as follows: D E

"I hold that the arbitrator went outside the limits of his jurisdiction as provided for in clause 4(c) supra. To that extent the arbitrator misconducted himself It follows that the application would be brought under Section 30 of the Act, and subsequently is not statute barred." F

The learned trial Judge then remitted the matter to the arbitrator for reconsideration upon the terms of clause 4(c) of the Lease Agreement.

The plaintiff appealed to the Court of Appeal, upon 4 grounds of Appeal. Grounds 1 and 2, shorn of their particulars, read as follows: G

"1. The learned trial Judge erred in law in hearing the defendant's motion to set aside the arbitration award when the motion itself was grossly incompetent." H

2. The learned trial Judge erred in law in granting the defendant's application to set aside or remit the award when the application was statute barred."

In para. 1.7 of the appellant's brief, learned counsel for the appellant indicated that the appellant:

"... will at the hearing of the Appeal rely on the grounds of Appeal dealing with the competency of the respondent's motion on notice abandoning the rest of the grounds of Appeal as filed."

Thereafter the appellant formulated three issues for determination by the Court based on grounds 1 and 2. In other words the appellant abandoned grounds 3 and 4 of the grounds of appeal. His issue No. 1 relates to ground 2 and it reads:

"(1) Whether the learned trial Judge had not grossly erred in law when he granted the respondent motion on notice filed some (7) seven months after the publication of the award and which was clearly statute barred pursuant to sections 29 and 30 of the Arbitration and Conciliation Act 1988 Cap 19 Law of the Federation of Nigeria, and Order 29 Rule 13 of the Anambra State High Court Rules, 1988 and, or section 223 of the Anambra State Contract Law 1986 Cap. 32 Vol. 2 Revised Laws of Anambra State of Nigeria 1991."

The Court of Appeal in its judgment however, observed as follows:

"The concomitant of this application is that all the grounds of appeal are abandoned except the ground challenging the competency of the respondent's motion and are struck out: Odiase & Anor V. Vincent Agwo (1973) 11S.C. 71, 76. The appellant is, therefore, left with only one ground of appeal which calls into question the competence of the respondent's motion on the strength of which the trial Judge seemingly found for the respondent".

The only or remaining ground of appeal is ground 1, and it reads as follows:

"The learned trial Judge erred in law in hearing the defendant's motion to set aside the arbitration award when the motion itself was grossly incompetent.

PARTICULARS:

(a) The only application before the Court was the one contained in the originating summons by the Plaintiff dated January 27, 1995, for the recognition and enforcement of the Award made by the Arbitrator, Mr.

Damian Okolo on September 8, 1994.

(b) No originating summons was ever filed by the defendant nor was any motion supported by an affidavit filed by the defendant to set aside or remit the Award of the Arbitration.

(c) The only affidavit evidence before the Court was the affidavit in support or in opposition of the originating summons for the recognition and enforcement of the Award. B

(d) The motion paper filed by the defendant for setting aside the Award was most unprecedented.

(e) The said motion paper bore the court suit number 0/67/95 which is the suit number assigned to the plaintiff's originating summons when it was filed in January 1995. No court number was ever assigned to the motion paper filed by the defendant besides the court number assigned to the plaintiff's originating motions." C D

In effect the court below struck out ground 2, 3 and 4. I have, earlier on, in the course of this judgment set out ground 2 of the grounds of appeal. But for ease of reference I shall read it again. It states:

"The learned trial Judge erred in law in granting the defendant's application to set aside or remit the award when the application was statute barred." E

In discountenancing issue No. 1 which relates to this ground (i.e. ground 2) the Court of Appeal observed that:

"This formulation goes to no issue or is irrelevant to the existing ground of appeal and the appellant, having withdrawn or abandoned all the other grounds of appeal, apart from the one attacking the competence of the respondent's motion on notice. That issue for that reason is discountenanced." F G

The appellant has attacked the decision of The Court of Appeal striking out ground 2. First, it was said that the appellant never applied to have the ground struck out. Secondly, it was clearly indicated in para. 1.7 of the appellant's brief that only the grounds of appeal attacking the competence of the motion on notice would be argued. Accordingly issues were formulated on grounds 1 and 2. In effect only grounds 3 and 4 were abandoned. It was pointed out that the respondent also formu-

lated on issue based on ground 2. Both parties proffered arguments on the issues relating to ground 2 of the grounds of Appeal.

An appellant is at liberty to withdraw or abandon any of his grounds of appeal. He may withdraw a ground of appeal by applying to the Court to do so. In that case the court will then strike out the ground in question. However where an appellant does not formulate an issue in his brief of argument to cover a ground of appeal, that ground would be deemed abandoned even where arguments have been proffered on it. An issue for determination must be based on a ground of appeal. Where therefore an issue raised is not based on or does not arise from the grounds of appeal, the issue will be discountenanced by the court: See Bakare V. Lagos State Civil Service Commission & anor (1992)8 NWLR (Pt.262)641; Aja v. Okoro (1991)7 NWLR (Pt.203)260; Labiyi v. Anretulo (1992)8 NWLR (Pt.258) 139; Modupe v. State (1988)4 NWLR (Pt.87) 130.

In the present case the appellant had indicated in his brief or argument that he would argue only the grounds of appeal which challenged the competence of the motion. Thereafter he raised issues on grounds 1 and 2 and proffered arguments and submissions on them. There were 4 grounds in all. The respondent also raised issues on grounds 1 and 2 and advanced arguments thereon. It was therefore abundantly clear that the appeal was fought on the basis of grounds 1 and 2. In other words the appellant did not abandon ground 2 of his grounds of appeal.

The court below raised the issue of abandonment of ground 2 suo motu without giving counsel for the parties an opportunity to be heard on the point. When an issue is not placed before an appellate court, it has no business whatsoever to deal with it. Also, on no account should a court of law raise a point suo motu no matter how clear it may appear to be and proceed to resolve it one way or the other without hearing the parties, particularly the party that may be adversely affected as a result of the point so raised. If it does so, it will be in breach of the parties' right to fair hearing. In the instant case, the abandonment of ground 2 was not an issue before

the Court below. In fact the said ground 2 was the main thrust of the appeal. The Court of Appeal was therefore in grave error in striking out ground 2 – see Olatunji v. Adisa (1995)2 NWLR (Pt.376) 167; Oro v. Falade (1995)5 NWLR (Pt.396) 385; Oje v. Babalola (1991)4 NWLR (Pt.185) 267.

That is not all. By striking out ground 2, the Court below was of the view that that ground did not challenge the competence of the respondent's motion on notice to set aside the arbitrator's award. The complaint in this ground of appeal is that the Motion on notice to set aside the award was brought more than 7 months after the publication of the award and that being so, the application was clearly statute – barred.

It is not in dispute that the arbitrator gave his award on 8 September 1994. It is also not in dispute that the motion on notice to set aside this award was brought on 25 April 1995, a little over 7 months from the date the award was published.

Now section 29(1) of the Arbitration and Conciliation Act, Cap. 19 Law of the Federation of Nigeria, 1990 provides as follows:

“29(1) A party who is aggrieved by an arbitral award may within three months –

(a) from the date of the award, or

(b) in a case falling within section 28 of this Act from the date the request for additional award is disposed of by the tribunal, by way of an application for setting aside the award in accordance with subsection (2) of this section.”

Section 30 of the same Act provides that where an arbitrator has misconducted himself, or where the arbitral proceedings, or award has been improperly procured, the court may on the application of a party set aside the award. The present application is predicated on the misconduct by the arbitrator. The learned trial Judge in his ruling held that:

“It is clear that section 30 did not place any time limit within which an aggrieved party may recourse against the award by an arbitrator, I hold therefore that the application is not statute barred if it is proved that the arbitrator exceeded the terms under which he was to arbitrate.”

Akpabio, JCA in his dissenting judgment rightly, in my view held

as follows:

“..... I hold that the learned trial Judge Amaizu, J. was in error when he held that the application of the Respondent to set aside the award was not statute barred, merely because the application was made under S. 30(1) and not 29(1) of the Arbitration and Conciliation Act, 1990. In my view it does not matter under what section of the Act, an application is made, because there is only one period of limitation prescribed in the Act.”

Indeed there is only one period of limitation prescribed under the Act. Section 29 of the Act, which I have already reproduced, provides that a party who is aggrieved by an arbitral award may within three months from the date of the award apply to the court to set aside the award. It is pertinent to point out here that the application the subject matter of this appeal, was for the setting aside of the arbitral award. Section 30 of the Act only sets out circumstances under which an application to set aside an arbitral award thereunder may be brought. This is why; I think it is absurd to suggest that section 30 should stipulate a time limit of its own for bringing the application for which section 29(1) has already provided a time frame.

A complaint that an action is statute-barred, is unarguably a complaint against the competency of the action. In Commerce Assurance Ltd. v. Alli (1992)3 NWLR (Pt.232)710 this Court per Belgore, JSC at p.725 advised:

“Where a person affected by an arbitration award wishes to have it set aside, he must apply timeously? and before the successful party takes steps to enforce the award or have a judgment entered in his favour in terms of the award.”

See also House Development Ltd. v. Scancila Contracting Co. Ltd. (1994)8 NWLR (Pt.362) 252. This was an arbitration matter. The parties submitted this dispute to an arbitrator pursuant to an arbitration clause in their written contract. The arbitrator made and published an award on 28 August 1985. On 23 October 1985 the appellant filed an originating notice of motion at the Kaduna State High Court to set aside

the award and/or remit it to another arbitrator for reconsideration. A preliminary objection was raised by the respondent that the application was incompetent on the ground that it was statute-barred because it was filed outside the 15 days allowed by order 22 rule 12 of the Kaduna State High Court (Civil Procedure) Rules 1977. The learned trial Judge upheld B the preliminary objection and struck out the motion.

The appellant's appeal to the Court of Appeal was dismissed. The appellant further appealed to the Supreme Court. This court per Kutigi, JSC held at p.262 thus:

"I have therefore come to the conclusion that since the originating Notice of Motion herein was not filed within 15 days as stipulated by Order 22 Rule 12 of the Kaduna State High Court (Civil Procedure) Rules, it was incompetent and rightly struck out by the trial High Court and confirmed by the Court of Appeal."

In the present case, although the award was made on 8th of September, 1994, the motion to set it aside was brought on 25th April, 1995. Consequently, since the motion on notice to set aside the award was filed long after three months in violation of section 29(1) of the Arbitration and Conciliation Act, it was incompetent and the trial High Court had no jurisdiction to entertain it.

In the result this appeal succeeds and I hereby allow it. I set aside the decision of the trial Court and the Court of Appeal. Consequently I strike out the Respondent's motion on notice filed on 25th April 1995. I hereby order the trial High Court to re-list the Appellant's motion on notice filed on 6th February, 1995 for the recognition and enforcement of the award and for the payment of the arrears of rent for hearing and determination. I award costs of N10,000.00 in favour of the Appellant.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother Katsina-Alu, J.S.C. I agree with his reasoning and conclusions.

I however wish to add a few words of my own. It is not dis-

puted that the arbitration award in this case was made on 8/9/94 by the arbitrator. It is also not disputed that the plaintiff filed his application dated 27/1/95 in court for the recognition and enforcement of the award, while the Defendant filed his own application dated 24/4/95 to set aside the same award.

At the hearing of the Defendant's motion Plaintiff's Counsel raised a preliminary objection to the effect that the motion was statute barred in view of the provision of section 29 of the Arbitration and Conciliation Act Cap. 19 Laws of the Federation of Nigeria, 1990 (hereinafter referred to as the Act) which provides that a party who seeks to set aside an arbitration award must bring his application within three (3) months of making the award, and that there was no application before the court for extension of time to do so. The learned trial Judge referred to ss. 29 & 30 of the Act (see below) and overruled the objection saying that the application was not brought under section 29 which relates to aggrieved parties but under section 30 which is predicated on the misconduct of an arbitrator which has no time limit unlike section 29. The application was therefore granted and the award remitted to the Arbitrator for revision.

On appeal to the Court of Appeal by the Plaintiff, his appeal was dismissed by a majority of 2:1.

The Plaintiff has now further appealed to this court.

Now sections 29 & 30 of the Act read in part as follows:-

"RECOURSE AGAINST AWARD

29. (1) A party who is aggrieved by an arbitral award may within three months –

(a) From the date of the award, or

(b) In a case falling within section 28 of this Act, from the date the request for additional award is disposed of by the arbitral tribunal by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section

(2) (omitted).

(3) (omitted).

30 (1) Where an arbitrator has misconducted himself, or where the

arbitral proceedings, or award, has been improperly procured the court may on the application of a party set aside the award.

(2) An arbitrator who has misconducted himself may on the application of any party be removed by the court.”

Both section 29 & 30 thus provide for recourse against an award B made by an arbitrator as can be seen above. And under both sections it is an aggrieved party who must apply to have an award set aside whether because of the misconduct by the arbitrator (section 30) or because of any other thing (section 29). Will it therefore be correct and proper to say that an aggrieved party under section 29 has three months within C which to apply to set aside the award, while another aggrieved party has eternity under section 30, to apply to set aside an award? My answer must be in the negative and it is negative.

I am firmly of the view that the limitation period of three (3) D months under s.29 being the only period of limitation prescribed under the Act applies to all aggrieved parties to all arbitral awards whether because of the misconduct by arbitrator or what have you. I therefore agree with the minority judgment of Akpabio, J.C.A. that the learned trial E Judge was in error when he held that the application of the Defendant to set aside the award was not statute barred, merely because the application was made under section 30 and not under section 29 of the Act. The award as said above was made on 8/9/94 while the Defendant’s applica F tion for setting aside the award was dated 24/4/95, seven (7) months after the award. And there was no application for extension of time. I therefore hold that the majority judgment of the Court of Appeal was wrong to have upheld that decision of the trial court. (See COMMERCE G ASSURANCE LTD VS. ALLI 1992 3 N.W.L.R. (PT.232) 710, B.I.P. LTD VS NIPOL LTD. (1986) 5 N.W.L.R. (PT.44) 767, HOUSE DEVELOPMENT LTD VS. SCANCILA CONTRACTS CO. LTD (1994) 8 N.W.L.R. (PT 362) 252.).

The appeal therefore succeeds and it is hereby allowed. It is ordered as follows –

(a) That Defendant’s application to set aside the award dated 24/4/95 is hereby struck-out being statute barred.

(b) Plaintiff's motion or application for recognition and enforcement of the award dated 27/1/95 is to be listed for hearing forthwith in the High Court.

(c) The plaintiff is awarded costs of this appeal assessed at N10,000.00.

B _____

IGUH JSC

C I have had the privilege of reading in draft the judgment just delivered by my learned brother, Katsina-Alu, J.S.C. and I am in complete agreement that there is merit in this appeal and that the same ought to be allowed.

D I wish, however, to add by way of emphasis only, my own views on some aspects of this appeal which concern the competence or other wise of the respondent's originating notice of motion to set aside the award of the arbitrator in these proceedings.

E In this regard, both parties have raised virtually the same questions in their respective briefs or argument as calling for the resolution of this court in this appeal. The appellant raised the questions under issues 1, 2, 3 and 5 of his brief of argument as follows –

F *“1. Were the learned majority justices of the Court of Appeal not grossly in error in striking out Ground 2 of the Grounds of Appeal on the erroneous view that counsel for the “applicant” (meaning appellant) had in paragraph 1.7 of his “Introductory Remarks” in the Appellant’s Brief of Argument made an “application” to that effect?*

G *2. Were the learned majority justices of the Court of Appeal not grossly in error when they were of the view that the complaint contained in Ground 2 of the Grounds of Appeal to wit – that the respondent’s Motion on Notice for setting aside the award of the Arbitrator which was clearly statute – barred, was not a complaint touching the competency of the motion and thereby wrongly struck out the said Ground 2 of the Grounds of Appeal?*

H *3. Were the learned majority justices of the Court of Appeal not grossly in error when they held that Ground 2 of the Grounds of Appeal had been abandoned by appellant’s counsel in his Brief of Argument?*

4.

5. *Were the learned majority justices of the Court of Appeal not grossly in error when they held that the respondent's Motion on Notice for setting aside the arbitrator's award which was filed in the appellant's suit for the recognition and enforcement of the award was not incompetent?"* B

The respondent, for his own part, formulated the questions under the only 2 issues raised in his brief or argument in the following terms

—
"1. Whether or not the Court of Appeal was right in holding that with the exception of ground 1 of the grounds of appeal filed before it, the rest of the grounds of appeal were abandoned by the appellant as clearly stated by Counsel to the appellant. C

2. Whether or not the Court of Appeal was right to have held that the respondent's application to set aside the award was competent." D

Arguing these issues, learned counsel for the appellant, Onyebuchi Araka Esq submitted in his brief of argument that the Court of Appeal was in gross error by striking out Ground 2 of the appellant's grounds of appeal. He stressed that this was because that ground of appeal was the main thrust of the appeal before the court below. He contended that no application was at any stage of the proceedings made by the appellant or counsel on his behalf to abandon the said ground of appeal on which issues were appropriately raised and arguments advanced by learned counsel on both sides. Mr. Onyebuchi Araka pointed out that his main complaint in both courts below was that the respondent's application to set aside the arbitrator's award having been filed seven months after the award was made is grossly incompetent and in violation of the provisions of section 29(1) of the Arbitration and Conciliation Act, 1988, Cap. 19, Laws of the Federation of Nigeria, 1990, Order 29 Rule 13 of the Anambra State High Court Rules, 1988 and Section 223 of the Anambra State Contract Law, Cap. 32, Revised Laws of Anambra State of Nigeria, 1991. He contended that a complaint that an action is statute-barred is a direct attack on the competence of such an action. Consequently, he submitted that both courts below were in error by failing to hold that the respondent's application to set aside the relevant award was statute-barred and there-

fore incompetent.

The respondent, in his brief of argument before this court, proffered no reply in answer to the above submissions of the appellant. His submission, and quite erroneously in my view, is that the appellant's contention that the application to set aside the award on ground of incompetence is predicted on only three grounds, namely –

- (1) The motion was not supported by an affidavit.
- (2) The application was not brought by an originating summons.
- (3) The application was not an independent proceeding from the originating summons to enforce the award.

Respondent's learned counsel, in his brief of argument, proffered elaborate reply to the perceived three grounds which the appellant relied upon in his prayer to strike out the respondent's originating notice of motion.

He concluded by submitting that the application to set aside the award under Section 30(1) of the Arbitration and Conciliation Act, 1988 was quite competent and that the court below was right to so hold.

I think I ought to observe that the respondent before the trial court fully replied to the appellant's main complaint to the effect that the respondent's application to set aside the arbitrator's award is statute-barred and consequently incompetent. It was the submission of his learned counsel, G.E. Ezeuko Esq. S.A.N. that the Arbitration and Conciliation Act, 1988, Cap. 19, Laws of the Federation of Nigeria, 1990 made a distinction between an application for setting aside an arbitration award under Section 29(1) as against a similar application under Section 30(1) of the same Act. He argued that under the latter Section, an aggrieved party may bring an application to set aside an award on ground of the misconduct of an Arbitrator and that no time limit for the presentation of such an application is therein prescribed provided the application is brought before leave to enforce the award is granted. Learned Senior Advocate contended that in as far as this application was brought under the provisions of Section 30(1) of the Arbitration and Conciliation Act, 1988 on the ground of the misconduct of the arbitrator, the provision of Section 29(1) of the Act which prescribes the three months limitation period would not apply. It was the view of the learned Senior Advocate that the

question of the application being statute-barred did not therefore arise.

The learned trial Judge, Amaizu, J. as he then was, would appear to have found favour with the above submissions of the learned Senior Advocate. Said he –

*“It is clear that section 30 did not place any limit within which B
an aggrieved party may recourse against the award by an arbitrator. I
hold therefore that the application is not statute-barred if it is proved that
the arbitrator exceeded the terms under which he was to arbitrate.”*

A little later in his judgment, the learned trial Judge concluded C
thus –

*“It is clear in my view, from the above excerpts that the arbitra-
tor took into consideration matters that he ought not to have referred to
in arriving at the revised rent. I hold that the arbitrator went outside the D
limits of his jurisdiction as provided for in clause 4C supra. To that
extent, the arbitrator misconducted himself. It follows that the applica-
tion would be brought under section 30 of the Act and consequently is not
statute barred.*

*I uphold the submission of the learned Senior Advocate. The E
application succeeds. It is the order of this court that the issue of revi-
sion of rent should be sent back to the arbitrator Damian C. Okolo for
him to be guided solely by the provisions of clause 4C of the Lease Agree-
ment.”*

Dissatisfied with this decision of the trial court, the appellant F
lodged an appeal against the same to the Court of Appeal, Enugu Divi-
sion, which court on the 25th day of November, 1998 dismissed the
appeal.

I must hasten to point out that four grounds of appeal were filed G
before the Court of Appeal. Only ground 1 was considered by that court.
The reason for this course of action was explained by the Court of Ap-
peal. This is because the appellant had in paragraph 1.7 of his brief of
argument stated as follows –

*“Being dissatisfied with the Ruling of the learned trial Judge,
the Hon Justice P.I. Amaizu, the appellant on February 12, 1996, filed a
Notice of Appeal (see pages 59 to 60) to the Court of Appeal; and will at H*

the hearing of the Appeal rely on the grounds of Appeal dealing with the competency of the respondent's Motion on Notice, abandoning the rest of the grounds of Appeal as filed."

The Court of Appeal in placing construction to the said paragraph 1.7 of the appellant's brief of argument stated thus –

"The concomitant of this application is that all the grounds of appeal are abandoned except the ground challenging the competency of the respondent's motion and are struck out: Odiase & Anor v. Vincent Agwo (1973) 11 S.C. 71, 76. The appellant is, therefore, left with only one ground of appeal which calls into question the competence of the respondent's motion on the strength of which the trial Judge seemingly found for the respondent."

The court below then went on: -

"The substance of the appellant's grouse arising from the only ground of appeal is that the respondent filed a motion which is not supported by an affidavit and in the result the motion is novel and unprecedented. The issues that may be distilled or framed from that ground of appeal is the appellant's issue 2 or 3 which issues read as follows –

"2. Whether it was competent for the learned trial Judge to have made his ruling on the respondent's motion which itself is grossly incompetent. 3. Whether the learned trial Judge had not grossly erred in law when he took the counter affidavit (which as a defence to the appellant's originating summons for the enforcement of the award) together with the respondent's motion on notice as an application to set aside the award or to remit the award for consideration."

It concluded –

"The other issue formulated by the appellant reads thus –

"(1) Whether the learned trial Judge had not grossly erred in law when he granted the respondent's motion on notice filed some (7) seven months after the publication of the Award and which was clearly statute-barred, pursuant to sections 29 and 30 of the Arbitration and Conciliation Act 1988, Cap. 19 Laws of the Federation of Nigeria, Order 29 rule 13 of the Anambra State High Court Rules, 1988 and/or section 233 of the Anambra State Contract Law, 1986, Cap. 32 Vol. 2 Revised Laws of

Anambra State of Nigeria 1991.”

This formulation goes to no issue or is irrelevant to the existing ground of appeal, the appellant having withdrawn or abandoned all the other grounds of appeal, apart from the one attacking the competence of the respondent’s motion on notice. That issue for that reason is dis- B
countenanced.”

The Court of Appeal then proceeded to consider the only issue it perceived was before it in the appeal and resolved the same in favour of the respondent. The appellant being dissatisfied with this decision of the C
court below has further appealed to this court. I propose in this judgment to deal with issues 1, 2, 3 and 5 as formulated in the appellant’s brief of argument as they concern the question of whether or not the respondent’s originating motion on notice in this case is statute-barred and/or otherwise incompetent. I will consider all 4 issues together. D

In the first place, and with profound respect to the Court of Appeal, I have carefully examined the record of proceedings in this appeal and can find no where that the appellant applied to withdraw or abandon grounds 2, 3 and 4 of his grounds of appeal which the court below E
proceeded suo motu to strike out without giving learned counsel for the appellant an opportunity to address it on the point. All that paragraph 1.7 of the appellant’s brief or argument before the court below indicated is that the appellant, at the hearing of the appeal, would rely on grounds of F
appeal dealing with the competence of the respondent’s motion and would
abandon the rest of the grounds of appeal. It is not on record that any application was subsequently made at the hearing of the appeal by the appellant for leave to abandon any grounds of his appeal.

In the second place, the appellant did expressly indicate in para- G
graph 1.7 of his brief or argument before the Court of Appeal that he was relying on the grounds of appeal dealing with the competence of the respondent’s originating notice of motion which he claimed was “*clearly* H
statute-barred”.

In the third place, it is indisputable that all but two and a half pages of the appellant’s 13 paged brief of argument before the Court of Appeal vigorously dealt with the alleged incompetence of the respondent’s origi-

nating notice of motion which was described as statute-bared in that it was filed outside the statutory period prescribed by law.

In the fourth place, it is apparent from the records that both parties before the Court of Appeal raised the issue of whether the originating motion on notice to set aside the arbitral award was incompetent and/or statute-barred. This is issue 1 in the appellant's brief or argument before that court. That issue not only covered over 80% of the arguments proffered in the appellant's brief in respect of his appeal, it constituted the main thrust of the appeal. The same issue was identified by the respondent under issues 1 and 2 of the three issues raised on his behalf in his brief of argument. The issue was also elaborately argued by the respondent in his brief of argument before the Court of Appeal.

Sixthly, and again with the greatest respect to the Court of Appeal, it cannot be right for the majority decision of that court, Salami and Tobi, J.J.C.A., with Akpabio, J.C.A. dissenting to hold that the issue of whether or not an action is statute-barred does not go to the competence or validity of such an action. It is precisely for this reason that the said Court of Appeal, with respect, erroneously struck out ground 2 of the appellant's grounds of appeal which questioned the competence of the respondent's originating motion on notice on the ground that it was statute-barred. That ground of appeal was framed thus –

“2. Error in Law

The learned trial Judge erred in law in granting the defendant's application to set aside or remit the Award when the application was statute-barred.

Particulars

(a) Section 29 (1) (a) & (b) of the Arbitration and Conciliation Act Cap. 19 Laws of the Federation of Nigeria, 1990, clearly states that a party who is aggrieved by an arbitral award may within three (3) months by way of an application for setting aside request the Court to set aside the award.

(b) The motion paper filed by the defendant for the setting aside of the award was filed some seven (7) months after the publication of the award.

(c) The learned trial Judge was erroneously of the view that section 30

of the Arbitration and Conciliation Act did not place any time limit within which an aggrieved party may have recourse against the award of an arbitrator”.

In my view, and with profound respect to the court below, the majority decision of that court was in error when it struck out ground 2 of the appellant’s grounds of appeal which in no mistaken terms concerned the competence of the originating motion on notice before the trial court. It is also clear to me that it is the said ground 2 of the appellant’s grounds of appeal, together with issues 1, 2, 3 and 5 distilled therefrom in the appellant’s brief of argument that constituted the main thrust of the appeal before this court. I find myself unable to accept that the appellant had by paragraph 1.7 of his brief of argument in that court abandoned ground 2 of his grounds of appeal. Nor can it be said with any degree of seriousness that the appellant at any time applied to the court below for leave to withdraw or abandon the said ground 2 of his grounds of appeal. It seems to me plain that it is the statement set out in paragraph 1.7 of the appellant’s brief of argument before the court below which the majority justices of that court, with respect, wrongly construed as an application to abandon ground 2 of the grounds of appeal and proceeded thereafter, again wrongly in my view, to strike out the said ground 2 of the grounds of appeal suo motu without giving counsel opportunity to address them on the issue.

In this regard, Akpabio, J.C.A. in his dissenting judgment did carefully consider the question of whether or not the appellant abandoned the main plank of his appeal to the effect that the respondent’s originating notice of motion was statute-barred. Said he:-

“My learned brothers considered the question of being statute-barred to have been abandoned by the Appellant, whereas it was not so abandoned, as an issue was formulated on it in this court, in the appellant’s brief, and arguments advanced on it. Appellant had stated at p.2 para. 1.7 of his brief that he “will at the hearing of the Appeal rely on the grounds of Appeal dealing with the competency of the respondent’s Motion on Notice abandoning the rest of the grounds of Appeal as filed”. It is my respectful view that a motion that is statute-barred is clearly incom-

petent as the Court cannot entertain it.”

A little later in his judgment, Akpabio, J.C.A. went on: -

“In my view, a complaint that a claim was statute-barred is a complaint about competency of the suit as the court will not have jurisdiction to try it. Any complaint about non-compliance with a condition precedent is a complaint about competence, and the court will have no jurisdiction to try it. (See case of Madukolu v. Nkemdilim (1962) 2 SCNLR 341). In effect, therefore, when the Appellant said “he will at the hearing of the appeal rely on grounds of appeal dealing with the competency of respondent’s Motion, and abandoning the rest of the grounds of appeal as filed”. He was abandoning only grounds 3 and 4, whilst grounds 1 & 2 were still subsisting. The three issues formulated by the appellant will therefore be considered. However, of the three, the question of being statute-barred appears to me to be the most important, as it will have the effect of determining the whole appeal if I hold that the application of Respondent was statute-barred. Issue No. 1 will therefore be considered first.”

I think the above minority opinion of Akpabio, J.C.A. is, with respect, perfectly right and I do not hesitate to endorse the same as well founded.

Turning now to the question of whether or not the respondent’s originating motion on notice is statute-barred, it is clear that the issue was not considered in any manner by the Court of Appeal. This is as a result of the erroneous position the court took when it held that ground 2 of the appellant’s grounds of appeal which challenged the competence of the respondent’s application on the ground that it was statute barred was abandoned by the appellant. The Court of Appeal consequently struck out that ground of appeal and discountenanced all the issues distilled therefrom.

The law is well settled that an appellate court will not allow a fresh point to be taken before it if such a point was not pronounced upon by the courts below. See London Chartered Bank of Australia v. White (1897) 4 A.C. 413 and Kabaka’s Government and Another v. Attorney-General of Uganda and Another (1966) A.C.1 or 1965 3 W.L.R. 512. In

the same vein, an appellant will not be allowed to raise on appeal, a question which was not raised, tried or considered by the trial court but where the question involves substantial points of law, substantive or procedural, and it is plain that no further evidence could have been adduced which would effect the decision on them, the court will allow the question to be raised and the points taken to prevent an obvious miscarriage of justice. See Attorney-General of Oyo State v. Fairlakes Hotels Ltd (1988) 5 N.W.L.R. (part 92) 1 at 29, John Bankole and others V. Mojidi Pelu and others (1991) 8 N.W.L.R. (Part 211) 523.

In the case on hand, however, the point sought to be taken by this court although not pronounced upon by the court below was an issue for determination in the appeal as shown in the respective briefs of the parties before the Court of Appeal. It was infact the main thrust of the appeal before that court. It was also fully argued by the parties before the trial court which gave its decision on the point as a result of which the appellant was obliged to file his appeal against that decision to the Court of Appeal. The point which had to do with whether or not the respondent's application is statute-barred and/or otherwise incompetent was fully argued in the briefs of argument of the parties before the Court of Appeal, which court erroneously discountenanced the same and therefore failed to make any pronouncement thereupon. The question was therefore both raised and tried in both courts below, considered by the trial court but discountenanced by the court below. Without doubt, it involves substantial point of law as it touches on the issue of jurisdiction. It is also plain that no further evidence needs be adduced which would affect the determination of the issue. In these circumstances, it seems to me that this court will allow the question to be raised and the points taken to prevent an obvious miscarriage of justice.

Now, it is a basic principle of law that a Limitation Law or Act removes the right of action, the right of enforcement and the right to judicial relief and leaves the plaintiff with a bare and empty cause of action which he cannot enforce if such a cause of action is statute-barred. Accordingly, where the law provides for the bringing of an action within a prescribed period in respect of a cause of action accruing to

the plaintiff, proceedings shall not be brought after the time prescribed by such a statute. See Michael Obiefuna v. Alexander Okoye (1962) All N.L.R. 357, Fred Egbe v. Adefarasin (1987) 1 N.W.L.R. (Part 47) 1, Fred Egbe v. Adefarasin (1985) 1 N.S.C.C. 643, Savannah Bank of Nigeria Ltd V. Pan Atlantic Shipping etc. (1987) 1 N.S.C.C. 67 etc. It can thus be said that whether or not an action is statute-barred involves the vexed question of the competence of the court to determine the suit.

A court is said to be competent to adjudicate upon an action when

(i) It is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or the other;

(ii) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction and

(iii) The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in the competence of the court is fatal and the proceedings are a nullity as such defect is extrinsic to the adjudication. See Madukolu v. Nkemdilim (1962) 2 S.C.N.L.R. 341, Skenconsult v. Ukey (1981) 1 S.C. 6, Rossek v. African Continental Bank Ltd (1993) 8 N.W.L.R. (Part 312) 382 at 473 and 487. It is with the above-mentioned second condition that the present action is concerned. The question, therefore, is whether there is any feature in the application of the respondent which prevents the court from exercising its jurisdiction over the cause.

The Arbitration and Conciliation Act, Cap 19, Law of the Federation of Nigeria, 1990 provides a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation. Section 29 of the said Act provides as follows –

“29(1) A party who is aggrieved by an arbitral award may within three months –

(a) from the date of the award; or

(b) in a case falling within section 28 of this Act, from the date the

request for additional award is disposed of by the arbitral tribunal by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section.

(2) *The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only part of the award which contains decisions on matters not submitted may be set aside.*

(3) *The court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award."*

There is next section 30 of the same Act which provides thus –
 "30(1) *Where an arbitrator has misconducted himself or where the arbitral proceedings or award, has been improperly procured, the court may on the application of a party set aside the award.*
 (2) *An arbitrator who has misconducted himself may on the application of any party be removed by the court."*

It is crystal clear that the provisions of Section 29(1) (a) of the Arbitration and Conciliation Act, 1988 enjoins an aggrieved party to an arbitration award to apply for the setting aside of the same within 3 months from the date of the award.

It is not in dispute in the present case that the arbitral award sought to be set aside was made on the 8th day of September, 1994. The respondent's originating motion on notice for setting aside the award was not filed until the 25th April, 1995; a period of over 7 months after the award was made. It therefore seems to me plain that the respondent's application for setting aside the award in issue is unquestionably statute-barred and/or incompetent as it was filed outside the three-month period prescribed by the Act. See B. I. P. Ltd v. Nipol Ltd. (1986) 5 N.W.L.R. (Part 44) 767.

The learned trial Judge would appear to have appreciated the point

when after setting out the provisions of Section 29 of the Arbitration and Conciliation Act in his judgment, he rightly observed as follows: -

B *“The affidavit evidence before me is that the Arbitrator delivered on September, 8, 1994, his award. The present motion on notice was brought on 24th of April, 1995. It is clear that the application cannot be brought under the above provision.”*

He, however, added: -

C *“Section 30 of the same Act provides that where an arbitrator has misconducted himself, or where the arbitral proceedings, or award has been improperly procured, the court may on the application of a party set aside the award. The present application is predicated on the misconduct by the arbitrator..... It is clear that section 30 did not place any time limit within which an aggrieved party may D recourse against the award by an arbitrator. I hold therefore that the application is not statute-barred if it is proved that the arbitrator exceeded the terms under which he was to arbitrate.*

E *I hold that the arbitrator went outside the limits of his jurisdiction as provided for in clause 4C supra. To that extent, the arbitrator misconducted himself. It follows that the application would be brought under section 30 of the Act and consequently is not statute-barred.”*

F It is clear to me that the above conclusion of the learned trial Judge was, with respect, erroneous. The minority judgment of Akpabio, J.C.A. so held when he stated: -

G *“On the totality of the foregoing I hold that the learned trial Judge, AMAIZU, J. was in error when he held that the application of the Respondent to set aside the award was not statute-barred, merely because the application was made under section 30(1) and not 29(1) of the Arbitration and Conciliation Act, 1990. In my view it does not matter under what section of the Act an application is made, because there is only one H period of limitation prescribed in the Act. This appeal therefore succeeds and is hereby allowed. The application of the Respondent for setting aside the award, is hereby struck out as it was made outside the statutory period of three months.”*

I need only state that I agree entirely with the above observation of Akpabio, J.C.A. In my view, it would not matter whether an application to set aside an arbitral award by an aggrieved party is made under the provisions of section 29 or 30 of the Act. The time within which to make such an application under the Act remains at 3 months from the date of the award and it would make no difference that the application was made pursuant to the provisions of section 29 or 30 of the Arbitration and Conciliation Act.

It cannot therefore be right to suggest that an aggrieved party to an arbitration award may, at whatever time it pleases him after the expiration of the statutory period of 3 months from the date of the award, apply for the same to be set aside under the provisions of the Arbitration and Conciliation Act, 1988. I also find it difficult to conceive that such a proposition can be regarded as the correct position of the law. I think the prescribed time within which to make an application to set aside an arbitral award under the Arbitration and Conciliation Act, 1988 is three months from the date of the award irrespective of under what section of that Act the application is brought.

Attention must also be drawn to the provisions of Order 29 Rule 13 of the Anambra State High Court Rules, 1988 which state as follows:

“No award shall be liable to be set aside except on the ground of perverseness or misconduct of the arbitrator or umpire. Any application to set aside an award shall be made within fifteen (15) days after the publication thereof, by motion on notice to other parties to the proceedings”.

The above provisions of the Anambra State High Court Rules, 1988 appear to me crystal clear and all applications to set aside an award made pursuant thereto shall, to be competent, be made within 15 days of the publication of such an award. See the decision of this court in Home Development Ltd. v. Scancila Contracting Co. Ltd. (1994) 8 N.W.L.R. (part 362) 252 based on the provisions of Order 22 Rule 12 of the Kaduna State High Court (Civil Procedure) Rules, 1977 which is in pari materia with Order 29 Rule 13 of the Anambra State High Court Rules,

1988. See too United Nigeria Insurance Co. Ltd. v. Leandro Stocco (1973) 1 All N.L.R. (Part 1) 168, another decision of this court based on the provisions of Order 49 Rule 13 of the Lagos State High Court (Civil Procedure) Rules which are in pari materia with those of Order 22 Rule 12 of the Kaduna State High Court (Civil Procedure) Rules 1977 and Order 29 Rule 13 of the Anambra State High Court Rules, 1988. In both the Home Development Ltd. and United Nigeria Insurance Co. Ltd. cases (supra) the originating notice of motions to set aside the respective awards were pronounced incompetent and accordingly struck out as having been filed outside the period of time prescribed by the relevant Rules of Court.

There is finally the provision of section 223 of the Anambra State Contract Law, Cap. 32, Revised Laws of Anambra State of Nigeria 1991, relied upon by learned counsel for the appellant which stipulates thus: -
“S. 223. An application to the Court to remit an award under section 219 or to set aside an award under section 219(2) shall be made within six weeks after the award has been made and published to the parties”.

The above, without doubt is another mandatory provision contained in the Contract Law of Anambra State and specifically prescribes a time limit of six weeks from the date of an arbitral award within which to file applications to the court to set aside such an award.

It can thus be said that from whatever angle one looks at the respondent's originating notice of motion for setting aside the arbitral award in issue, the only conclusion one must reach is that the same is statute-barred and consequently incompetent in that it was not filed within the period of: -

- (i) Three (3) months as prescribed under section 29(1) of the Arbitration and Conciliation Act, 1988.
- (ii) Fifteen (15) days as stipulated under Order 29 Rule 13 of the Anambra State High Court Rules, 1988 and
- (iii) Six (6) weeks pursuant to the provisions of section 223 of the Anambra State Contract Law, Cap. 32, Revised Laws of Anambra State of Nigeria, 1991.

In the present case, however, the originating notice of motion

was expressly filed pursuant to the provisions of section 30(1) of the Arbitration and Conciliation Act, 1988. Having been filed outside the three months limitation period prescribed under section 29(1) of the said Act, I think the majority decision of the court below was, with respect, in error when they pronounced the application as competent. In my B view, the same was statute-barred and incompetent and ought to have been struck out both by the trial High Court and the Court of Appeal.

In the circumstance, issues 1, 2, 3 and 5 as formulated in the appellant's brief of argument are hereby resolved in favour of the appel- C lant.

It is for the above and the other reasons contained in the leading judgment of my learned brother that I, too, allow this appeal. I set aside the judgment and orders of both courts below and declare the respondent's D originating notice of motion dated the 24th day of April, 1995 and filed at the High Court of the Onitsha Judicial Division on the 25th day of April, 1995 for an order to set aside the arbitral award in issue statute-barred and incompetent by virtue of its being in violation of the provisions of section 29(1) of the Arbitration and Conciliation Act, 1988, Cap. 19, Laws E of the Federation of Nigeria, 1990.

In the result, the respondent's originating motion on notice is hereby struck out. It is further ordered that the trial court proceeds to hear and determine, with expedition, the appellant's originating summons F dated the 27th day of January, 1995 and filed on the 6th February, 1995 for the recognition and enforcement of the award in issue. I abide by the order for costs made in the leading judgment.

G

KALGO JSC

I have had the privilege of reading in draft the judgment of my learned brother Katsina-Alu JSC in this appeal and I entirely agree with him that there is merit in the appeal and it ought to be allowed. H

It is pertinent to mention first that there was split decision in the case at the Court of Appeal; majority decision by Salami and Tobi JJCA and the minority one by Akpabio JCA. This appeal was of course against

the majority decision.

The main issues to be considered by this court in my respectful view, are (i) whether the Court of Appeal was right to hold that the appellant's ground of appeal number 2 was abandoned and proceed to strike it out, and (ii) whether the respondent's application filed on 25/4/95 was statute-barred or not.

The Court of Appeal relying on what the learned appellant's counsel said in his brief before that court, held that all the grounds of appeal were abandoned except the ground challenging the competency of the respondent's motion. It then struck out all the grounds of appeal including ground 2, and considered only 2 issues which related to the only remaining ground of appeal concerning the competency of the respondent's application aforesaid. The Court of Appeal finally found that the respondent's application was proper and competent and in substantial compliance with the provisions of Section 30 (1) of the Arbitration and Conciliation Act (cap.19 Laws of Federation of Nigeria, 1990). The Court of Appeal, by majority decision dismissed the appeal. Hence this appeal.

My first port of call is to consider whether the Court of Appeal was right in striking out ground of appeal 2 which raised the issue of statute bar. A careful look at the relevant wording of paragraph 1.7 of the appellant's brief in the Court of Appeal (page 66 of the record) will show that the appellant spoke of relying on the "grounds" of appeal dealing with competency. He did not say one single ground of appeal. The relevant part of the said paragraph, for the avoidance of doubt, reads:-

"..... and will at the hearing of the Appeal rely on the grounds of Appeal dealing with the competency of the respondent's Motion on notice abandoning the rest of the grounds of Appeal as filed." (underlining mine)

The 2nd ground of appeal as shown in the notice of appeal to the Court of Appeal without particulars also reads thus:

"The learned trial Judge erred in law in granting the defendant's application to set aside or remit the award when the application was statute-barred." (underlining mine)

It appears to me very clear from the relevant part of paragraph 1.7 of the appellant's brief quoted above that ground 2 attacked the respondent's application as being statute-barred. What then is statute bar and of what effect is it? In my interpretation "statute-barred" simply means barred by a provision of the statute. It is usually as to time i.e. the bar gives a time limit during which certain actions or steps should be taken, and one is barred from taking action after the period specified in the statute. Any action taken after or outside the specified limit or period is of no avail and has no valid effect. The bar can be lifted or the limit extended only if the statute allows it to be done. Where there was no such extensions, the action carried out will be invalid, and the court will treat it as such.

In this appeal what the appellant was saying was that since the respondent filed his motion outside the three months provided by the relevant statute, the application is incompetent and the court must treat it as such. See U.N.I.C. Ltd, V. Leandro Stacco (1973) 1 All NLR 168. To this extent learned counsel submitted in his brief, that ground 2, also dealt with incompetency and should not have been struck out or deemed abandoned. I also agree with Akpabio JCA when he said in his dissenting judgment on page 121 of the record:-

"In my view, a complaint that a claim was statute-barred is a complaint about incompetency of the suit as the court will no have jurisdiction to try it."

I therefore, come to the conclusion that the Court of Appeal was wrong in striking out ground 2 of the appellant's ground of appeal before that court including the issues related to it.

The next point I shall consider is whether the respondent's application to set aside was made under Section 29 or Section 30 of the Arbitration and Conciliation Act. Under Section 29 (2) the application to set aside can be made where the arbitrator in making the award decided "on matters which are beyond the scope of the submission" made to him. And in case of an application under Section 30, the application can be made where the arbitrator misconducted himself or where the award has been improperly procured. The main ground upon which the application

may be made under Section 29 (2) is that the award contains decisions on matters not covered by the submission to arbitration i.e. outside the reference. If the arbitrator makes an award on a matter which the parties have not asked him to arbitrate upon, the arbitrator would then be acting beyond his powers and his decision may be set aside. But although under Section 30, “*misconduct*” has not been defined, it has been taken to denote irregularity and would also cover cases where there is breach of natural justice. See William V. Wallis & Cox (1914) 2 KB 497 at 485.

In the instant case, the respondent in his motion on pages 36-37 of the record, moved the trial court to set aside the award on the ground that the arbitrator “*abandoned the submission of the parties*” and “*proceeded to arbitrate outside the limits of the parties*” submission and consequently exceeded his jurisdiction. Although the word “*misconduct*” was used in the application, the main complaint in the grounds of the application was that the arbitrator decided on matters outside the parties’ submission. It is my considered view therefore that the application of the respondent to set aside the award must come under Section 29 (2) and not under Section 30 (1) of the Act. If it is under Section 29 (2) then it is caught by the three months prescribed period within which the application must be made. The application was made 7 months after the award was made. It must therefore be statute-barred and the trial court would have no jurisdiction to entertain it. See Madukolu V. Nkemdilim (1962) 2 SCNLR 341. I therefore hold that the application of the respondent for setting aside the award in the trial court was statute-barred and is hereby struck out. The application of the appellant in the trial court for recognition and enforcement of the award, which is still pending in the trial court should now proceed to be determined on the merits.

For the reasons given by me and those fully articulated by my learned brother Katsina-Alu JSC, I allow this appeal and abide by the consequential orders made in the leading judgment.

H

I agree that this appeal should be allowed. There are two main issues in the appeal. First, whether an application to set aside the award of an arbitrator on the ground of misconduct must be brought within the 3 months period prescribed by section 29(1) of the Arbitration and Conciliation Act, Cap 19 Laws of the Federation of Nigeria (“the Act”) or whether there is no limitation of time within which such application should be brought. Secondly, whether a plea that an application brought to set aside an award is out of time is a plea to the competence of the application.

The background facts which led to these issues have been well stated in the judgment of my learned brother, Katsina-Alu JSC., with whose views and conclusions I am in agreement. The present appellant resisted an application to set aside the award of an arbitrator on the ground, among other grounds, that the application was time barred. The trial Judge being of the view that the time prescribed by section 29(1) of the Act did not apply to an application to set aside an award by reason of misconduct of the arbitrator, rejected the appellant’s objection and proceeded to determine the application on its merits. On the appellant’s appeal to the Court of Appeal, that court by a majority decision held that the appellant’s counsel having indicated that he would abandon all grounds of appeal other than those relating to the competency of the respondent’s application could not argue that the application was time barred. The majority of the Court of Appeal were of the view that ground 2 of the grounds of appeal which complained that the trial Judge was in error to have held that the respondent’s application was not time barred, was not one dealing with competency of the application. In the result, the majority of the court below refused to consider arguments proffered on that ground and affirmed the decision of the trial Judge on the merits of the respondent’s application.

On this further appeal by the appellant, it was argued by counsel on his behalf that the majority of the Court of Appeal were in error not to have considered the ground dealing with the question of time bar. That ground reads:

“The learned trial Judge erred in law in granting the defendant’s

application to set aside or remit the award when the application was statute barred."

The issue whether this ground was or was not one as to the competency of the application arose because counsel for the appellant in his brief in
B the Court of Appeal had prefaced the argument of the issues in the appeal with a statement that he would "*at the hearing of the appeal rely on the grounds of appeal dealing with the competency of the respondent's motion on notice abandoning the rest of the grounds of appeal as filed.*"

Notwithstanding that the appellant's counsel proceeded immediately thereafter to argue issues formulated on ground 2 and that the respondent fully replied thereto in the respondent's brief without demur, the majority of the court below struck out that ground together with two other grounds of appeal. They discountenanced the issue formulated on
D that ground and the argument proffered thereon on the view they held that the formulation went to no issue or was irrelevant to the only remaining ground of appeal since the appellant had "*withdrawn or abandoned all the other grounds of appeal, apart from the one attacking the*
E *competence of the respondent's motion on notice.*"

The prefatory statement of the appellant's counsel which engendered confusion in the court below was unnecessary. The practice whereby counsel would specify to which ground or grounds of appeal
F issues relate is to be encouraged. Had the appellant's counsel followed that practice there would have been no doubt which of the grounds were abandoned. Be that as it may, it cannot be over-emphasised that the approach which best satisfies the demand of justice is for an appellate court to consider issues argued on an appeal as long as they relate to a
G ground or grounds of appeal properly filed. Where, as in this case, counsel refers to the grounds of appeal that he would abandon not by number but by a general description, and proceeds to argue issues formulated on particular grounds of appeal, the appellate court should not proceed to
H ignore those issues, particularly where there is doubt as to what grounds are covered by the description.

Where there is inconsistency or ambiguity between one part of a brief and another part, a court faced with such inconsistency or ambiguity

ity should not try to resolve such unaided by counsel but should call the attention of the party to the inconsistency or ambiguity and ask that he resolve it. Part of the purpose of oral argument is to enable our appellate courts to resolve inconsistencies or ambiguities in briefs.

In this case it is clear from the case presented by the parties on B their brief that counsel for the parties had not proceeded on the footing that the brief was inconsistent or ambiguous, but, rather, on the footing that the ground of appeal in question fell within the ground which the appellant's counsel had described as grounds of incompetency. On that C footing the appellant fully argued the issue formulated on that ground and the respondent also fully responded thereto. Barring cases in which the court will ignore the express or implied consent of the parties, such as where the question related to jurisdiction of the court or where the question is as to principles of law, the parties are very much at liberty to agree D on the issues in the case. Where they have so agreed, either expressly or by implication, it is consistent with the umpire role of the court, in our adversarial system, to yield to the agreement of the parties. Where, on very rare occasions, the court does not feel comfortable to so yield, the E appropriate course is for the Judge to request counsel to address him on the point.

It is not really necessary in this case to delve at much length into the question whether a question of limitation of time is one of compe- F tence of the court or of jurisdiction or otherwise. I venture to think that the provisions of the statute prescribing the time within which an application can be made or proceedings commenced and the construction placed on them would determine which view to take in each case. Where G limitation of action is related to torts and contract it is accepted principle that the statute of limitation is a defence which can be waived. To that extent it cannot strictly be said that an action brought outside the limitation period is incompetent for lack of jurisdiction of the court. However H after the plea of limitation has been raised and established, the court lacks jurisdiction to proceed further to determine other issues of merit in the case. Where, however, a statute created the remedy and the time within which that remedy is to be sought, the position would seem to me to be

different. There is common sense in the view that he who seeks a remedy created by statute must comply with the procedure (including time) prescribed by the statute for seeking such remedy. It is for these reasons that I am not impressed by the argument proffered by learned counsel
 B for the respondent that, drawing from analogy of limitation of action in regard to torts and contracts, breach of time prescribed by section 29(1) of the Act is a matter of defence and that an application made outside the time is not incompetent.

C Even if there was a doubt as to the grounds of appeal described by the appellant's counsel as grounds of incompetency, such doubt has been cleared by the issues argued by the parties which reflected the common understanding of the parties as to what grounds have been abandoned.

D For these reasons, I hold that the majority of the Court of Appeal were in error in rejecting ground 2 of the grounds of appeal, quoted above, and in discountenancing issues formulated thereon. The law is now clear that it is the duty of appellate court from which further appeal
 E lies to a higher court to consider all issues rightly submitted for determination, except when it is clear beyond peradventure that the issues considered are conclusive of the matter. Where an appellate court has in error shut out an important issue for determination the fairness of the hearing is grievously affected.

F However, the issue which has been wrongly discountenanced by the majority of the court below is one of law which this court can deal with. The issue had been fully argued in the respective briefs filed in the court below. It is common ground that although the award sought to be
 G set aside was made on September 8, 1994, the respondent's application to set it aside was made by notice of motion filed about seven months later.

Section 29(1) of the Act provides as follows;

H *"A party who is aggrieved by an arbitral award may within three months –*

(a) from the date of the award; or

(b) in a case falling within section 28 of the Act, from the date of the request for additional award is disposed of by the arbitral tribunal by a

way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of the section.”

Sub-section (2) of section 29 provides that:

“The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.”

Section 30 of the Act provided that:

“(1) Where an arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on the application of a party set aside the award.

(2) An arbitrator who has misconducted himself may on the application of any party be removed by the court.”

The addition of the words “in accordance with subsection (2) of the section” in section 29(1) is the source of the confusion in these matters. Subsection 2 of the section 29 relates to an application to set aside an arbitral award on the ground that “the award contains decisions on matters which are beyond the scope of the submission to arbitration.” Section 30 on the other hand relates to an application to set aside an award on the ground that the arbitrator had misconducted himself or the arbitral proceedings, or award, have been improperly procured. The combined effect of sections 29 and 30 is that an arbitral award can be set aside:

- (i) where the award contains decisions on matters which are beyond the scope of the submission to arbitration; or
- (ii) where an arbitrator has misconducted himself; or
- (iii) where the arbitral proceedings, or award, has been improperly procured.

Implied in subsection 3 of section 29 of the Act is the power of the court to remit award. That subsection provides that:

“The court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate,

suspend proceedings for such period as it may determine to afford the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award.”

B Notwithstanding the apparent confusion engendered in the drafting of section 29 (1), it seems clear that against the background of general principles, sections 29 And 30 have to be read together to discern the ambit of the court’s powers and the circumstances in which it can exercise such powers in relation to an arbitral award. Reading the two sections in isolation, one of the other, may lead to absurdity and may grossly limit the powers of the court in a way not intended by the legislature. C The relevant general principles have been stated thus in Halsbury’s Law of England (4th Edition) Vol. 2 paragraph 693:

D “*The question whether an award should be remitted or set aside altogether is one for the court’s discretion, which will be exercised with regard to all circumstances of the case. However, award will normally be set aside, rather than remitted, where there has been a serious miscarriage of justice. Thus in the case of misconduct, the appropriate remedy depends on the nature of the misconduct and upon the surrounding circumstances. Where the arbitrator has so conducted himself that a reasonable person would think that there was a real likelihood that the arbitrator could not or would not fairly determine the issues on the basis of* E *the evidence and argument to be adduced before him, the award should be set aside, not remitted. It is also likely to be set aside where it has been* F *improperly procured, for example, by fraud.”*

G “*On the other hand, in the case of the arbitrator’s admitted mistake, remission is the normal remedy. In most cases it will be appropriate to remit where further findings are required, or where the error is inadvertent.”*

H The term “misconduct” in arbitration law is a term of wide import. It has been described, “*as such mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice.*” (See Halsbury’s (op cit) paragraph 694.) Deciding on matters which are beyond the scope of the submission to arbitration will amount to miscon-

duct (see Halsbury's (op cit) paragraph 694). The distinction which the learned trial Judge sought to draw between misconduct in the wide sense and the misconduct specified in section 29(1) is illusory. The trial Judge himself impliedly so confirmed when he said: "*I hold that the arbitrator went outside the limits of his jurisdiction as provided for in clause 4C supra. To that extent, the arbitrator misconducted himself.*" However, without advertng to the fact that it was exactly that nature of misconduct that was specified in section 29(2) he, nevertheless, held that the application was brought under section 30 of the Act.

I feel no hesitation in holding that the time within which an application could be made to set aside an award, prescribed in section 29(1), applies whether the misconduct alleged is of the nature specified in section 29(2) or generally as contained in section 30. The view held by the trial Judge to the contrary is erroneous.

But even if, as held by the learned judge, an application brought under section 30 is not subject to any time bar, I would still have rejected his conclusion. When an application is made to set aside an award it is the substance of the ground of the application that is material and not how counsel for the appellant described it. Thus, where the ground of the application is specified in section 29(2), that counsel for the applicant described it, as misconduct will not make the application one brought outside section 29(2).

For these reasons, I am in entire agreement with the conclusion arrived at by my learned brother, Katsina-Alu, JSC., that this appeal be allowed. I too would allow the appeal and abide by the consequential orders made by my learned brother, Katsina-Alu, J.S.C.