

SUPREME COURT OF NIGERIA

15TH DECEMBER, 2000. SC. 110/1995

**CORAM:- M. L. UWAIJ CJN, A. B. WALL, I. L. KUTIGI, A. I.
KATSINA-ALU, A. O. EJIWUNMI, JJSC**

1. BIOCON AGROCHEMICALS (NIGERIA) LTD.
 2. RAYMOND ANANENU
 3. AFRICAN CONTINENTAL BANK PLC
 4. INTERATLANTIC A. B. (BY ITS ATTORNEY-
AFRICAN CONTINENTAL BANK PLC) APPELLANTS
AND
 1. KUDU HOLDING (PTY) LTD.
 2. ARK FISHING INDUSTRIES (PTY) LTD. RESPONDENTS
-

APPEALS - Issues for determination - Competence of - They must come from the grounds - And the grounds must be judgment of the court - Otherwise the issues will be incompetent as in this case.

COURTS - Discretionary powers - Will not be disturbed by appellate Court - Unless the exercise of that discretion is wrongful.

INTERLOCUTORY APPLICATIONS - Substantive issue - Will not be pronounced upon - So as not to prejudice the trial.

FACTS

The parties entered into contract for the sale of tonnes of Horse Mackerel fish by the respondents to the 1st and 2nd Appellants. 3rd appellant acted as guarantor and banker. The respondents filed an action to recover the balance of payment due from the appellants. Appellants under a summons for further directions prayed inter alia, that the writ of summons and counter Claim be amended by adding the 4th appellant/intervener as a defendant in the suit. The said intervener seems also to be laying a claim on the outstanding amount the appellants are to pay for

the tonnes of fish supplied to them. The trial Court refused to grant the appellants' prayers. Their appeal to the Court of Appeal for extension of time to appeal against the trial court's ruling was refused. They have further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

(ii) Whether the court of appeal rightly refused appellant's prayer for leave to appeal and extension of time to appeal in respect of ANY or All of the proposed grounds of appeal in Exhibit "RA2"

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

Appeals - Issues for determination

1. In all these cases, and others not mentioned here, it is manifest from their careful study that for an issue for the determination of an appeal to be sustained, it must satisfy two conditions. These are:-

(1) It must be formulated within the parameters of a ground of appeal, and

(2) the ground of appeal must be again the judgment of the court against which the appeal is lodged. These two conditions must be satisfied otherwise, the issue would be struck out as incompetent.

With the above principles in mind, I now turn to the instant appeal where the complaint is that the 3rd and 4th issues identified by the appellant as part of the issues for the determination are incompetent. As I have earlier on in this judgment set down the appellants' ground of appeal and all the issues identified for appeal by the appellants. After a careful study of the two grounds of appeal filed pursuant to the appeal, I am clearly of the view, that issues (iii) and (iv) are incompetent for they do not comply with the conditions identified above for the sustenance of issues for the determination of an appeal. The two issues, namely issues (iii) and (iv) as identified by the appellants in their brief of argument are hereby struck out. (p. 3243 B)

Interlocutory applications - Substantive issue

2. Beyond the reference to the 4th appellant as an intervener and who is

seeking to be joined as defendant "in the substantive action." I cannot for my part see the justification for the view of the appellants' counsel that the court below was wrong in its understanding of the facts disclosed by the pleadings.

Be that as it may, it is my respectful view that the learned counsel for the appellants would appear to have been unmindful of the fact that we are here concerned with an interlocutory action. With that in mind, this court cannot be invited to make pronouncements about this issue that will prejudice the trial that is still pending. It is therefore my view that issue (i) cannot be determined at this stage. See Globe Fishing v Coker, (Supra). (p. 3244 D)

Courts - Discretionary powers

3. In order therefore to overturn such decisions of the court, it is now settled law that an appellate court will not generally interfere with the exercise of discretion by a lower court unless it is shown that there has been a wrongful exercise of the discretion. Where the lower court acted under misconception of law or under a misapprehension of fact in that it either gave weight to irrelevant or unproved matter or it omitted to take into account matters that are relevant or where it exercised or failed to exercise the discretion on wrong or inadequate materials and in all other cases where it is in the interest of justice to interfere. See Enekebe v Enekebe (1964) 1 ALL NLR, 102.

After a careful consideration of the argument of learned Counsel for the appellants, it is my humble view that he has not advanced any cogent reasons to lead me to overturn the ruling of the court below. (p. 3245 H)

REPRESENTATION

A. J. Owonikoko Esq., For the appellants

O. Thomas Esq., For the respondents

CASES REFERRED TO

- Ogoyi v Umagba & anor (1995) 9 NWLR (Pt, 419) 283
Globe Fishing Industries v Coker (1990) 7 NWLR (pt. 162) 265 at 282
B A. G., Bendel State v. A. Ideyan (1989) 4 NWLR (pt. 118) 646
Buraimoh v Bamgbose (1989) 3 NWLR (pt. 109) 352
Nzekwu v Nzekwu (1989) 2 NWLR (pt. 104)
Oniah v Onyia (1989) 1 NWLR (pt. 99).
C Adeyemi v Y.R.S. Ike Oluwa & Sons Ltd (1993) 8 NWLR (pt. 309) 27

STATUTE & RULES REFERRED TO

- D High Court of Lagos State (Civil Procedure) Rules 1972, O. 13 & 19, O. 26 r. 6
Constitution of Nigeria 1979 S. 220 (i) (b), 221(1), 222(a)
Court of Appeal Rules 1981 O.3 r. 4 (1) & (2)

E

LEAD JUDGMENT BY EJIWUNMI JSC

- F The main question raised in this appeal is whether the court below was right to have refused to grant the prayers made to that court by the appellants. For ease of reference, the relief sought from the court below would be set out hereunder :-

- G *"(!) an order granting extension of time within which the applicants and the applicant intervener may apply for leave to appeal against the ruling of Honourable Justice Dolapo Akinsanya delivered in this suit on the 2nd December, 1994.*

- H *(2) An order granting leave to the applicant and applicants/intervener to appeal against the said ruling in terms of the proposed Notice and grounds of appeal attached to this application as "Exhibit RA2"*

- (3) an order enlarging the time within which the applicants and applicant/intervener may appeal against the said ruling.*

(4) *An order staying further proceedings whatsoever and howsoever in this suit at the court of trial pending the hearing and final determination of the appeal herein sought to be entered save power to adjourn the same from time in the court of trial unto time until the conclusion of the appeal.*

(5) *Leave to the applicants and applicant/intervener to depart from the rules of court by personally compiling the records of proceedings in the court of trial for the purpose of the appeal herein sought to be entered.*

(6) *An order deeming the records of proceedings already compiled duly certified and filed along with this application as Exhibit RA3 as the proper and sufficient records for the purpose of the appeal."*

At the hearing of the application before the court below, the learned counsel for the appellants withdrew the first prayer, and it was accordingly struck out. The court below also ordered that prayers 4, 5 and 6 be stood over to await the determination of prayers 2 and 3. After hearing arguments by learned counsel appearing for the parties, their Lordships of the court below who heard the appeal unanimously refused the said prayers 2 & 3 sought for by the applicants. In the course of the lead ruling delivered by Ayoola JCA, as he then was, his Lordship, with regard to the proposed ground of appeal of the appellants, observed thus, and I quote :-

"The grounds of appeal proposed by the defendants and intervener show clearly that they have misunderstood what the claim was about and the nature of payment by letter of credit and rights accruing therefrom. Akinsanya J., had a proper understanding of the issues when she stated thus"

"..... whatever right accrues to this applicant (i.e. the intervener) from the plaintiffs, it must await its turn as a separate contract and not be interposed over and above the contract between the plaintiffs and the defendants".

He Lordship Ayoola JCA, thereafter continued thus:

"..... it is not necessary to enter into a discourse of the legal points concerning letters of credit which counsel on behalf of the defen-

dants and intervener dwelt on at length in his oral address. It suffices to say that they have no decisive bearing on the question whether or not the intervener has a right to intervene in a claim for unpaid balance of debt. There should be no misconception of the scope of 0.13 & 19 of the High Court of Lagos State (Civil Procedure) Rules which only permit joinder of persons, as defendants, who ought to have been joined or whose presence before the court is necessary to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter."

As the applicants were not satisfied with the ruling of the court below, they have appealed to this court. Pursuant thereto, they filed two grounds of appeal.

Having regard to what I may have to say in this judgment with regard to the complaints made by the respondents respect of the issues identified for the determination of this appeal in the appellants' brief, I deem it necessary to set down the appellants's grounds of appeal. They read thus:-

"(1) The learned justices erred on the facts when they unanimously held per Ayoola JCA thus:-

"The plaintiffs action being for the balance remaining unpaid after payment effected by the letter of credit has been taken into account in favour of the 1st Defendant raises only issues concerning the unpaid balance in which the intervener has not claimed any interest" and thus dismissed the application for leave to appeal.

PARTICULAR OF ERROR OF FACT

(i) The holding is contrary to facts on the record placed before the court per exhibits c (page 37-38) of the record motion for joinder before the court of trial and attached exhibits P1 & P2 at pages (42-47) of the record exhibited before the court of appeal.

(ii) It was a common ground between the plaintiffs, the defendants and the intervener at the court of trial that plaintiffs are claiming the unpaid balance of letter of credit even though plaintiffs had assigned it to the intervener/appellants.

(iii) The total value of the letter of credit ACB/93/0020/ Broad/

002 is US\$664, 500 out of which US\$332,250 has been paid leaving 50% US\$332,250 unpaid by the defendants.

(iv) *The unpaid balance is the subject of assignment to the intervener the recovery of which it is seeking by intervening in this action because plaintiffs also claim the said unpaid balance in addition to other relief in this suit.*

(2) *The learned justices of the Court of Appeal misdirected themselves in law in failing to apply and or correctly apply the relevant principles for granting leave or extension of time to appeal thus dismissing the applicants applications for same in its entirety and other reliefs herein contained.*

PARTICULARS OF MISDIRECTION

(i) *Grounds B, C, D, E, F and G of the proposed Notice of Appeal are grounds of error and misdirection in law with sufficient particulars requiring no leave of court under S. 220 (i) (b) of the constitution of the Federal Republic of Nigeria 1979 if ground 1 of this appeal succeeds.*

(ii) *The Court of Appeal resolved the issues raised in the proposed grounds of appeal against the appellants by adopting the contrary opinion of the learned trial judge sought to be appealed against thus determining the substantive appeal for which leave had not been granted and was therefore not yet before them.*

(iii) *The ruling of the trial judge sought to be appealed centered on the rights of an assignee of a letter of credit which is a subject that has not been judicially considered by the appellate courts in Nigeria. The intervener/appellant claims to be such an assignee.*

(iv) *The proposed Notice of Appeal dismissed by the Appellate Court raised relevant, competent, arguable recondite grounds of appeal in vinas of particulars (i), (ii), and (iii) (supra).*

(v) *The learned justices of the Court of Appeal in dismissing the entire application only considered the arguments for leave to appeal and ignored all other prayers in their ruling".*

Before the consideration of the issues raised in this appeal, it is in

my respectful view needful to give some background facts that led to the instant appeal. From the record of proceedings, with particular reference to the pleadings, it is evident that the respondents and the 1st and 2nd appellants entered primarily into an agreement for the sale of Horse mackerel fish to the said appellants. The 1st respondent being a private limited liability company incorporated under the laws of Namibia with its registered office at Sanlan Centre, 154 Independence Avenue, Windhoek, Namibia. The 2nd respondent is similarly, a private limited liability company and incorporated in Namibia. Both of them are fishmerchants, and acted together to enter into this agreement with the 1st - 3rd Appellants. The 1st appellant is a private limited liability company registered under the laws of Nigeria, and it carries on its business at KM. 17 Lagos - Badagry Expressway, Ojo, Lagos. The 2nd appellant is the Chairman and Chief Executive of the 1st appellant company. The 3rd appellant, the African Continental Bank, a duly licensed Bank in Nigeria and carrying on business with its headquarters at Broad Street, Lagos acted as Banker and Guarantor to the 1st and 2nd appellants in the transaction forming the subject mater of this action.

The 1st consignment of 1,500 metric tonnes packaged in 20kg and 30kg cartons for the sales price of US\$664, 500.00. The 2nd consignment of 1,826.02 metric tonnes was also to be packaged in 20kg cartons for the sales price of US\$808, 926.86.

With regard to the further agreement reached with regard to the payments for the products, I think it is better to quote paragraph 10, 11, 12 of the respondents' pleadings.

"para.10: It was agreed that payment for the first consignment of 1, 500 metric (sic) amounting in total value to US\$664,500 was to be made under a letter of credit for 50% (US\$332,250.00) of the total order, while the balance of 50% (US\$332,250.00) was to be made under a local bank guarantee from African Continental Bank Plc (the 3rd defendant) for the Naira equivalent amounting to N8,385,957.77 at the time of the transaction".

"Para.11: It was also agreed that payment for the 2nd consignment of 1,826.02 metric tonnes would be made by payment of 50% of the

value within ten days of the arrival of the Ship in Lagos and the balance of 50%, forty five days after the bill of lading."

"Para.12: It was a condition of the sales agreement that payment for the second consignment of the fish were ceded to kudu Holding."

Pursuant to these agreements the 3rd appellant caused to be issued an irrevocable letter of credit N. ACB/93/0020/BROAD/002 in favour of the 2nd respondent (Ark Fishing Industries (PTY) Limited) for US\$332,250 representing 50% invoice value of the 1, 500 metric tonnes of fish, and a Bank Guarantee dated 24th March 1993 in favour of kudu Holdings (PTY) Ltd. for the sum of N8,385,956.77 being the 50% balance cost of 1, 500 metric tonnes ordered. It is part of the case of the respondents that the appellants duly took delivery of the total amount of 3,326.02 metric tonnes of Horse Mackerel packed in 20kg and 30kg cartons. But it is claimed that the respondents have failed to pay the balance 50% of the 1,500 metric tonnes despite repeated requests and demands made on them. Similarly, it is alleged that the appellant have not also paid for the second consignment of 1,826.02 metric tonnes of Horse Mackerel that they duly received.

The appellants by their pleadings denied for the part, the claims of the respondents against them. And it is further the claim of the appellants per paragraphs 13 and 14 of their pleadings

"Para.13: That the respondents lacked the financial capacity or technical facilities to discharge the obligations they had assumed under their contract with the 1st defendant. The plaintiffs were mere commission agents/intermediary who had no direct access to procure catch fish".

"Para.14: Following the above, the plaintiffs July, 1993 has to approach Messrs. Interatlantic A.B (a Swedish fishing company) who then had a consignment on board M.V. Mathias These already in the west African Coast to assign the same to the 1st defendant".

The appellants as part of this defence also pleaded losses which they suffered as a result of their transactions with the respondents and for which they laid claims against the respondents. It is also part of their defence, per paragraph 28 of their pleadings which reads:-

B *"The 1st defendant in further answer to paragraphs 16 to 30 of the Statement of Claim avers that immediately after delivery of the 1st and 2nd consignment which commenced on or about the 3rd of August, 1993 and concluded about 3 weeks thereafter Messrs. Interatlantic approached the 1st defendant to register their interest in the proceed of sale on the 1st consignments. Defendant shall rely on the letter dated 14th July 1993 issued to Interatlantic by Standard bank of Namibia on the instructions of plaintiffs assigning proceeds of the letter of credit to Interatlantic."*

C It would appear then that the appellants, having regard to their perceptional of the state of the pleadings, decided to take out a summons for further directions pursuant to order 26 Rule 6 High Court of Lagos State (Civil procedure) Rules, 1972 and under the inherent jurisdiction of D the Court. The purpose of this application are as follows:

E *"(1) An order that the Applicant/Intervener through its Attorney African Continental Bank Plc of 106/108 Broad Street, Lagos be added as a Defendant in this action and that the writ of summons and counterclaim in this suit be amended accordingly by adding its name a Defendant.*

(2) An order in addition to being joined allowing the Applicant/Intervener to file and serve a counterclaim in this suit against the plaintiffs/Respondents.

F *(3) An order deeming as properly filed and served along with this application.*

G As I have previously stated, the learned trial judge who heard the application refused the prayers and made the following pertinent observation in the course of her ruling. It reads:-

H *"As I have mentioned earlier Ex P2 expressly stated where the proceed of the letter of credit assigned to the Applicant is to be paid. It is payable outside this country. The plaintiffs have come to Nigeria because the Defendants are resident in Nigeria parties are bound by their contract. A counterclaim is another suit, the plaintiffs are not consenting to be tried in Nigeria, and the court cannot assume jurisdiction where it does not possess one. It all revolves round the fact that whatever*

right accrues to the Applicant from the plaintiffs, it must await its turn as a separate contract and not be interposed over and above the contract between the plaintiffs and the Defendants".

Thereafter, the learned trial judge dismissed the applications of the Intervener accordingly. The defence and counterclaim of the Applicant/Intervener as the 4th Defendant dated 20th October, 1994 was also struck out.

Being dissatisfied with that ruling, The appellants then brought the application to the Court below which I have referred to earlier in this judgment. That application was refused. It is for this reason that the appellants have further appealed to this Court.

Pursuant thereto, the parties have filed and exchanged their Briefs of Argument; the appellant also filed and served a reply Brief. As learned counsel for the respondents was absent, the Brief prepared on their behalf was deemed to have been duly argued. See Order 6 Rule 6 of the Supreme Court Rules 1985.

The appellants in their brief raised the following issues for the determination of the appeal:

"i) Whether the unpaid balance of US\$332,250 under letter of credit No. ACB/93/002/BROAD/002 sought to be claimed by the 4th Appellant/Intervener in this suit is also being claimed by the Respondents.

ii) Whether the court of appeal rightly refused appellant's prayer for leave to appeal and extension of time to appeal in respect of ANY or All of the proposed grounds of appeal in Exhibit "RA2"

iii) Whether the order dismissing prayers which had not been argued in an application before the Court of Appeal is a nullity.

iv) If issue No. (iii) is answered "yes" whether the Supreme Court should grant those prayers in this appeal".

In the brief filed on behalf of the respondents by their learned counsel A. Simon - Hart Esq., took the view that the 1st and 2nd issues formulated in appellants' brief were not properly formulated. He therefore formulated the following as the proper issues for the determination of the appeal. They read:-

FIRST ISSUE

"(1) *Whether the Learned Justices of the Court of Appeal erred in fact in finding that the intervener had not claimed any interest in the unpaid balance claimed by the plaintiffs in the action, after payment effected by the letter of credit has been taken into account; and whether the said finding constituted the ratio decidendi upon which the Appeal Court dismissed the Appellants application for leave to appeal.*

SECOND ISSUE

(2) *Whether the Appellants had in their proposed grounds of Appeal (at pages 53-57 of the Record) and in their arguments canvassed in support of their application for leave to appeal, disclosed a prima facie good cause why the appeal should be heard."*

While this effort is commended in that regard, this appeal will, nevertheless, be considered in accordance with the issues raised in the Appellants' brief.

On issues (iii) & (iv), it is, however, contended for the respondents that these issues are incompetent in that they do not arise from nor do they relate to any of the two grounds of appeal filed by the appellants. In support of that contention, he cited the case of Ogoyi v Umagba & Anor. (1995) 9 NWLR (pt. 419) 283.

In the reply brief filed on behalf of the appellants, their learned counsel contended that this Court had approved issues formulated upon both the grounds of appeal and the relief sought in the appeal. For that proposition reference was made to Globe Fishing Industries v Coker (1990) 7 NWLR (pt. 162) 265 at 282. Before going any further, I must immediately state that I have read and re-read the passage of that judgment and I cannot find how learned counsel could have sought to prop up his argument for the sustenance of the 3rd and 4th issues on that authority. This is because what Karibi-Whyte JSC, said in that passage of his judgment, at page 282 reads thus.

"Here again this Court is faced with the formulation of issues which are not in the least relevant to the determination of the appeal before it. This Court has on numerous occasions advised counsel to formulate the issues for determination within the parameters of the grounds

of appeal filed and the judgment appealed against."

If there be any need for further authority, the settled view of this court is that issues for the determination of an appeal must be formulated upon the grounds of appeal filed against the judgment on appeal, may I refer to the following cases:- A. G., Bendel Stated v A. Ideyan B (1989) 4 NWLR (pt. 118) 646; Buraimoh v Bamgbose (1989) 3 NWLR (pt. 109) 352; Nzekwu v Nzekwu (1989) 2 NWLR (pt. 104); Oniah v Onyia (1989) 1 NWLR (pt. 99).

In all these cases, and others not mentioned here, it is manifest from their careful study that for an issue for the determination of an appeal to be sustained, it must satisfy two conditions. These are:- C

(1) It must be formulated within the parameters of a ground of appeal, and D

(2) the ground of appeal must be again the judgment of the court against which the appeal is lodged. These two conditions must be satisfied otherwise, the issue would be struck out as incompetent. E

With the above principles in mind, I now turn to the instant appeal where the complaint is that the 3rd and 4th issues identified by the appellant as part of the issues for the determination are incompetent. As I have earlier on in this judgment set down the appellants' ground of appeal and all the issues identified for appeal by the appellants. After a careful study of the two grounds of appeal filed pursuant to the appeal, I am clearly of the view, that issues (iii) and (iv) are incompetent for they do not comply with the conditions identified above for the sustenance of issues for the determination of an appeal. The two issues, namely issues (iii) and (iv) as identified by the appellants in their brief of argument are hereby struck out. F G

Having disposed of issues (iii) and (iv) as above, issues (i) and (ii) will now be considered. The appellants in respect of issue (i) are asking whether the unpaid balance of US\$332,250 under letter of credit No. ACB/93/002/BROAD/002 sought to be claimed by the 4th appellant/ H

intervener in this suit is also being claimed by the respondents. Learned counsel for the appellants then contended that the court below was not right when it held that :-

B *"the plaintiffs action being for the balance remaining unpaid after payment effected by the letter of credit has been taken into account in favour of the first defendant raises only issues concerning the unpaid balance in which the intervener had not claimed any interest"*

C Learned counsel for the appellant then proceeded to submit at page 14 of the appellants brief of argument to state paragraph 5.05 thereafter that:

*"What the 4th appellant/intervener seeks to claim in this action by way of counter-claim
4th appellant/intervener seeks to join as a co-defendant in this action to
D enable her claim for herself the sum of US\$332,250.00 claimed by respondents as a special damage in their statement of claim reproduced above"*

**Beyond the reference to the 4th appellant as an intervener
E and who is seeking to be joined as defendant "in the substantive action." I cannot for my part see the justification for the view of the appellants' counsel that the court below was wrong in its understanding of the facts disclosed by the pleadings.**

F **Be that as it may, it is my respectful view that the learned counsel for the appellants would appear to have been unmindful of the fact that we are here concerned with an interlocutory action. With that in mind, this court cannot be invited to make pronouncements about this issue that will prejudice the trial that is still pending. It is therefore my view that issue (i) cannot be determined at
G this stage. See Globe Fishing v Coker, (Supra).**

H With regard to issue (ii), it is manifest that the appellants are there challenging the exercise of the discretionary powers of the Court below. By the exercise of that power the Court below had refused the appellants prayers for leave to appeal and extension of time to appeal to that court. It would appear from the argument advanced in the appellants' brief that the premises upon which the appeal is predicated are two

fold. The first premise being whether the Intervener, who is regarded as the 4th appellant, is entitled to obtain leave to appeal as an interested party. The second premise is whether all the other appellants have not made out a case to entitled them for leave and extension of time to appeal.

For the first premise the contention for the appellant/intervener, is that by virtue of the provisions of section 220 (i) (b) of the Constitution of the Federal Republic of Nigeria, 1979, the intervener required no leave to appeal where the ground of appeal involves a question of law. He thereafter repeated in his brief the elaborate grounds of appeal upon which he proposed to found his appeal. In a nutshell, therefore, it is the submission of learned counsel for the appellants that the intervener ought to have been granted his prayer by the court below. In support of his submission, reference was made to:-

Adeyemi v Y. R. S. Ike Oluwa & Sons Ltd. (1993) 8 NWLR (pt. 309) 27. And arguing in the alternative, he urged that if the grounds of appeal were not ground of law, and leave was required, the appellant/intervener had fulfilled the conditions required by order 3 rule 4(1) and (2) of the court of Appeal Rules, 1981, (as amended) and S.221 (1) of 1979 Constitution, to be granted leave to appeal against the decision of the High Court. He cited the case of Obikoya v Wema Bank Ltd. (1981) 1 NWLR (pt. 96) 157 at 178 in support of his argument. He also referred to Section 222 (a) of the Constitution of the Federal Republic of Nigeria, 1979, and kalu v Odili (1992) 5 NWLR (pt. 240) 130 at 194.

He therefore has argued that as the court below fell into palpable error in refusing the prayers of the appellant/intervener, this court is urged to reverse the decision of the court below. Similarly, the learned counsel for the appellants also argued that the decision of the court below as it affected the other appellants should also be reversed.

For the respondent, their learned counsel, Simon-Hart Esq., has argued in the respondents' brief, that there is no merit in the appeal and that it should be dismissed.

Now, in the determination of this appeal it must be remembered that this court is being invited to overturn the exercise of the discretionary power that is unquestionable vested in the court below. **In order**

therefore to overturn such decisions of the court, it is now settled law that an appellate court will not generally interfere with the exercise of discretion by a lower court unless it is shown that there has been a wrongful exercise of the discretion. Where the lower court acted under misconception of law or under a misapprehension of fact in that it either gave weight to irrelevant or unproved matter or it omitted to take into account matters that are relevant or where it exercised or failed to exercise the discretion on wrong or inadequate materials and in all other cases where it is in the interest of justice to interfere. See Enekebe v Enekebe (1964) 1 ALL NLR, 102 and Saffiedine v C.O.P. (1965) 1 ALL NLR 54; Demuren v Asani (1977) 3 SC 91; Ntudidem v Oke (1986) 5 NWLR (pt.45) 909; Oyeyemi v Inewole Local Govt. (1993) 3 NWLR (pt. 270) 462; Oduosote v Oduosote (1971) All NLR 329; University of Lagos v Aigoro (1985) 1 NWLR (pt. 1) 143; C.C. B (Nig.) Ltd. v Ogwuru (1993) 3 NWLR (pt. 284) 630.

After a careful consideration of the argument of learned Counsel for the appellants, it is my humble view that he has not advanced any cogent reasons to lead me to overturn the ruling of the court below. The appeal is therefore dismissed with costs to the respondents in the sum of N10,000.00.

F —————

UWAIS CJN

The Appellants in this case had by motion on notice to the Court of Appeal, Lagos Division, sought leave of that court in respect of the following prayers -

"1. An order granting extension of time within which the Applicants and Applicant/Intervener may apply for leave to appeal against the ruling of her Ladyship Honourable justice Dolapo Akinsanya delivered in this suit on the 2nd day of December, 1994.

2. An order granting leave to the Applicants and Applicants/Intervener to appeal against the said ruling in terms of the proposed Notice and Grounds of Appeal attached to this application as "Exhibit

RA2".

3. *An order enlarging the time within which the Applicants and Applicant/Intervener may appeal against the said ruling.*

4. *An order staying further proceedings whatsoever and howsoever in this suit at the court of trial pending the hearing and final determination of the appeal herein sought to be entered save power to adjourn the same from time to time in the court of trial until the conclusion of the appeal.*

5. *Leave to the Applicants and Applicant/Intervener to depart from the rules of court by personally compiling the records of proceedings in the Court of trial for the purpose of the appeal herein sought to be entered.*

6. *AN ORDER deeming the Records of proceedings already compiled duly certified and filed along with this application as Exhibit RA3 as the proper and sufficient records for the purpose of the Appeal."*

The motion was supported by an affidavit sworn to by the 2nd Appellant and a copy of the proposed notice of appeal containing seven grounds of appeal was exhibited to it. A counter-affidavit to the Appellants' affidavit was filed by the Respondents.

The motion came up for hearing on 16th March, 1995 before kalgo, Ayoola JJCA (as they were then) and I. T. Mohammad, JCA. It was moved and opposed by counsel for the Appellants and the Respondents respectively. In a considered leading ruling, delivered on the 7th day of June, 1995, Ayoola JCA (as he then was) alluded to the principles applicable to an application seeking enlargement of time to appeal in the following words -

"An applicant seeking an enlargement of time within which to appeal must explain the delay in appealing within the prescribed period and must also disclose the grounds of appeal which Prima facie show good cause why the appeal should be heard - (see) Order 3 rule 4 (of the) Court of Appeal Rules"

and went further to observe:-

"Circumstances which would justify the grant of leave to appeal if time to appeal had not expired most often would justify an extension of

time to appeal, if the delay has been properly explained. Such circumstances are: where a *Prima facie* error is disclosed or where a question is disclosed of general importance in an area in which the law has not been clear or on which further argument and decision of the appellate court is desirable."

In considering and refusing to grant the application before them, learned justice stated:-

"The affidavit in support of the application before us shows that the main purpose for which a joinder of the intervener was sought was to litigate whatever rights the intervener claims by virtue of the assignment of the proceeds of the Letter of Credit to it. Akinsanya J. Considered these and other facts put before her and concluded that the intervener was not a necessary party because the intervener would not be directly affected by the judgment of the court by curtailing or interfering with the enjoyment of his legal rights.

Notwithstanding the elaborate grounds of appeal raised by the proposed notice of appeal, which may necessitate a discussion of the rights of the assignee/beneficiary of a letter of credit, I am of the firm view that the (proposed) appeal is manifestly unsustainable. A ground of appeal does not become substantial merely because it raises a general issue of law or interest if such issues are unrelated to the issues raised by the judgment the applicant seeks to appeal from and is of no decisive relevance. The grounds of appeal proposed by the defendants (i.e. Appellants here) and intervener show clearly that have misunderstood what the claim (before the trial judge) was about and the nature of payment by letter of credit and rights accruing therefrom." (interpolations are mine).

The application was dismissed in its entirety by the learned Justices of the Court of Appeal. Aggrieved by this, applicants (now Appellants) have appealed to this court from the ruling.

Four issues, for our determination, were filed by the Appellants and they read thus-

"(i) Whether the unpaid balance of U. S. \$332,250 under letter of credit No. ACB/93/0020/BROAD/002 sought to be claimed by the 4th Appellant/intervener in this suit is also being claimed by the Respon-

dents.

(ii) *Whether the Court of Appeal rightly refused Appellant's prayers for leave to appeal and extension of time to appeal in respect of ANY or ALL of the proposed grounds of appeal in Exhibit "RA2".*

(iii) *Whether the order dismissing prayers which had not been argued in an application before the court of appeal is a nullity.* B

(iv) *If issue No. (iii) is answered "yes" - whether the Supreme Court should grant those prayers in this appeal."*

For their part, the Respondents disagreed with the manner in which the Appellants' issues were formulated. They, therefore, decided to formulate their own issues for determination which are two fold, viz- C

"FIRST ISSUE

(I) *Whether the Learned Justices of the Court of Appeal erred in fact in finding that the Intervener had not claimed any interest in the unpaid balance claimed by the plaintiffs in the action, after payment effected by the letter of credit has been taken into accounts; and whether the said finding constituted the ratio decidendi upon which the Appeal Court dismissed the Appellants application for leave to appeal.* D E

SECOND ISSUE

(ii) *Whether the Appellants had in their proposed grounds of Appeal (at pgs. 53 - 57 of the Record) and in their arguments canvassed in support of their application for leave to appeal, disclosed a prima facie good cause why the appeal should be heard."* F

Now to return to the Appellants' issues for determination, the question or prayers before the Court of Appeal concerned the grant of leave by that Court to the Appellants to appeal against the ruling of the learned trial judge refusing the 4th Appellant leave to be joined in the action as intervener. If focus is kept on that, it is clear to me that issues no. (i), formulated by the Appellants relates more to the substance of the action in the High Court, which is yet to be decided upon by that court, than the application before the Court of Appeal which was simply for enlargement of time to appeal and other ancillary prayers. It is true that in examining the proposed grounds of appeal exhibited to the application the Court of Appeal adverted to the reason why the 4th Appellant wanted G H

to intervene in the action by being joined. But such examination could not be said to be proper if it proceeded to determine the substance of the claim in the action. It would to per-empting the decision to be taken by the trial court and would therefore be prejudicial to the parties. I do not
B consider it necessary that we should determine the issue for the purpose of this appeal.

On Appellant's issue no. (ii), which queries whether the Court of Appeal was right to refuse their application for extension of time to
C apply for leave to appeal and granting the leave to appeal; it seems to me the Appellants are challenging the exercise of discretion by the Court of Appeal. I have quoted earlier in this judgment the consideration by the Court below of the two prayers in the application by the Appellants. I do not see where the ruling can be faulted or has gone astray. I do not
D therefore see any merit in the issue.

Appellant's issue No. (iii) complains that the Court of Appeal erred in dismissing prayers which were not moved before them, namely prayers nos. 4 (on stay of further proceedings in the High Court), 5 (on
E leave to be granted by the Court of Appeal to 4th Appellant to compile the record of proceedings in the High Court) and 6 (for an order to deem the record of proceeds of the High Court compiled by the 4th Appellant as proper and sufficient for the purpose of the proposed appeal to Court
F below). It is true that at the end of his ruling Ayoola, JCA dismissed these prayers when he stated.

"In my view, a prima facie good cause why the appeal should be heard has not been shown and I would dismiss the application in its entirety."
G

All the prayers in question could only have been granted had the Court of Appeal granted the proceeding prayers. No stay of proceedings could have been granted when there was no pending appeal. Similarly no record of proceedings needed be compiled for the purpose of appeal
H when the leave to appeal had been denied and such record of proceedings could not have been deemed to be proper record for an appeal that does not exist by the reason of the refusal of the Court of Appeal. This issue appears to me to be academic and of no use to the Appellants' since it will

not serve any purpose. I, therefore, see no merit in the issue.

Issue no (iv) is predicated on issue no (iii). It is only when the latter issue has merit that the former issue can be granted. At any rate issue no (iv) is not based on any of the grounds of appeal filed by the Appellants and so it goes to issue. Furthermore, how can this Court grant the three prayers in question when there is no appeal pending in the Court of Appeal. B

To grant prayer no. (iii) is to stall the proceedings pending in the High Court, which will not be in the interest of the Appellants, as plaintiffs. This issue too is devoid of merit. With regard to the Respondent's issue no. (1), this issue touches on a question that concerns the substance of the action before the High Court which is yet to be determined by that Court. It will not be proper for this Court nor the Court of Appeal to determine the issue. C D

On issue no. (2), I have already stated that I agree with the decision of the Court of Appeal that the proposed grounds of appeal exhibited by the Appellants in support of that application did not establish prima facie good cause to grant the application. E

On the whole, I too do not see merit in this appeal and I will dismiss it as done by my learned brother Ejiwunmi, JSC, whose draft judgment I had read in advance. I adopt the orders, including the order as to costs, contained in the said judgment. F

WALI JSC

I have read in advance a copy of lead judgment of my learned brother Ejiwunmi, JSC and I agree that the appeal lacks merits and be dismissed. G

The crux of the matter before the Court of Appeal was an application for leave to appeal and extension of time within which to do so against the Ruling of the trial court. I think it is pertinent to reproduce the H application which reads-

"TAKE NOTICE that this Honourable Court of Appeal may be moved on the day of 1995 at the hour of 9 0' clock in the afternoon or

soon thereafter as Counsel on behalf of the Applicants can be heard to pray this court for the following orders:

1. An order granting extension of time within which the Applicants and applicant/Intervener may apply for leave to appeal against the
B ruling of her Ladyship Honourable Justice Dolapo Akinsanya delivered in this suit on the 2nd day of December, 1994.

2. An order granting leave to the Applicants and Applicants Intervener to appeal against the said ruling in terms of the proposed
C Notice and Grounds of Appeal attached to this Application as "Exhibit RA2"

3. An order enlarging the time within which the Applicants and Applicant/Intervener may appeal against the said ruling.

4. An order staying further proceedings whatsoever and howso-
D ever in this suit at the court of trial pending the hearing and final determination of the appeal herein sought to be entered save power to adjourn the same from time in the court of trial unto time until the conclusion of the appeal.

5. Leave to the Applicants and Applicant/Intervener to depart
E from the rules of court by personally compiling the records of proceedings in the Court of trial for the purpose of the appeal herein sought to be entered.

6. ANORDER deeming the Records of proceedings already com-
F piled duly certified and filed along with this application as Exhibit RA3 as the proper and sufficient records for the purpose of the appeal.
AND for such other order or further orders as this Honourable Court may deem fit to make in the circumstance."

G The application was accompanied by the proposed grounds of appeal and affidavit. The application was opposed and a counter-affidavit in support was also filed. There were some other documents also filed in support of the parties' contentions. After oral submissions by the
H parties, the Court of Appeal, in a considered Ruling delivered by Ayoola JCA [as he then was] refused it. The learned Justice concluded-

"In my view a prima facie good cause why the appeal should be heard has not been shown and I would dismiss the appeal in its entirety."

With the leave of the Court of Appeal, the appellants have appealed to this Court.

The main and determining issue in this appeal is the question of the Court of Appeal's refusal of using its discretionary power to grant the appellants leave to appeal against the considered Ruling of the trial court where it refused the 4th Appellant's application to be joined as Intervener in the action in the capacity as 4th Defendant. Before the learned trial judge refused the application she made the following observation on submissions made before her-

"The Applicant's case is that as an assignee of the Letter of Credit as per Exhibit P.2, it has an interest which ought to be protected being the same subject matter of the dispute between the plaintiffs and the 1st & 3rd Defendants, it has acquired a right to the proceed of the sale. Both counsel cited Akinsanya v. UBA Ltd. (supra) on the International Commercial Transactions by documentary credit, which by convention involve four interrelated contracts. The case further stated that although four contracts are involved in International Commercial Transactions by documentary credit, each contract must be separately considered for the purpose of determining the liability of the parties. The interest of the Intervener is based on Exhibit P.2, a letter of Standard Bank Namibia of 14/7/93 informing the Intervener that a portion of the proceeds of letter of Credit opened in favour of the 2nd plaintiff assigned to 1st plaintiff has been transferred to the Intervener. It also stated where the proceed would be paid, i.e. to the Intervener at SE Banken P. O. Box 1333 S. 25113 Helsenberg, Sweden in the two installments as stated on Exhibit P.2. This document is not a Letter of credit, it is a chose in action, actionable at the location where effect should have been given to it for value.

The issue of whether the Intervener is a necessary party to this suit, and whether this Court has jurisdiction to hear the counter-claim appear to be called into question. The writ of Summons and Statement of Claim of the plaintiffs relate to a transaction of sale of fish to the 1st & 3rd Defendants, which the Defendants have admitted. The basic principle is that a person should not be joined as a Defendant against whom

where is no claim by the plaintiff - see Olujitan v Oshatoba (1992) 5 NWLR (pt. 24) 326 at 329. So it is that where all the facts before the court are sufficient for the effectual and complete determination of the claim between the parties before the court, the Applicant cannot be a necessary party and his application for joinder ought to be refused see: In Re Mogaji (1986) 1 NWLR (pt. 19) 759."

Thereafter the learned trial judge made the following findings-

"The test to be applied for the joinder of an Intervener is whether he will be directly affected by the judgment of the Court in the suit by curtailing or interfering with the enjoyment of his legal right - because the only reason which makes it necessary to make a person a part to an action is that he should be bound by the result of the action and the question to be settled therefore must be a question in the action which cannot be effectual and completely settled unless is a party. Upon the affidavit evidence presented on behalf of the Intervener, I do not consider it be a necessary party. I do hold therefore that this suit can be conveniently and effectual resolved without the joinder of the Applicant. There is much force in the submission of Mr. Simon - Mart on jurisdiction. As I have mentioned earlier Exhibit P.2 expressly stated where the proceed of the letter of Credit assigned to the Applicant is to be paid. It is payable outside this country. The plaintiffs have come to Nigeria Because the Defendants are resident in Nigeria. Parties are bound by their contract - A counter claim is another suit, the Plaintiffs are not consenting to be tried in Nigeria, and the court cannot assume jurisdiction where it does not possess one. It all revolves round the fact that whatever right accrues to the Applicant from the plaintiffs, it must await its turn as a separate contract and not be interposed over and above the contract between the plaintiffs and the Defendants.

The application of the Intervener therefore lacks merit and it is accordingly dismissed. The Defence and counterclaim of the Applicant/ Intervener as the 4th defendant dated 20th October, 1994 is of no effect and it is hereby struck out".

In the Court of Appeal learned counsel on both sides filed and

exchanged briefs of argument which they orally elaborated on at the hearing. In a unanimous judgment of the Court of Appeal, Ayoola JCA [as he then was] after painstaking and meticulous consideration of the issues involved also came to the following conclusions-

"The affidavit in support of the application before us shows that the main purpose for which a joinder of the intervener was sought was to litigate whatever rights the intervener claims by virtue of the assignment of the proceeds of the Letter of Credit to it. Akinsanya J. Considered these and other facts put before her and concluded that the intervener was not a necessary party because the intervener would not be directly affected by the judgment of the Court by curtailing or interfering with the enjoyment of his legal rights.

Notwithstanding the elaborate grounds of appeal raised by the proposed notice of appeal which may necessitate a discussion of the rights of the assignee/beneficiary of a letter of credit, I am of the firm view that the appeal is manifestly unsustainable. A ground of appeal does not become substantial merely because it raises a general issue of law of interest if such issues are unrelated to the issues raised by the judgment the applicant seeks to appeal from and is of no decisive relevance. The grounds of Appeal proposed by the defendants and intervener show clearly that they have misunderstood what the claim was about and the nature of payment by letter of credit and rights accruing therefrom. Akinsanya J. had a proper understanding of the issues when she stated that:

".....Whatever right accrues to this applicant (i.e. intervener) from the plaintiffs, it must await its turn as a separate contract and not be interposed over and above the contract between the plaintiffs and the defendants".

In my view, it is not necessary to enter into a discourse of the legal points concerning letters of credit which counsel on behalf of the Defendants and intervener dwelt on at length in his oral address. It suffices to say that they have no decisive bearing on the question whether or not the intervener has a right to intervene in a claim for unpaid balance of a debt. There should be no misconception of the scope of 013 r 19 of the High Court of Lagos State (Civil Procedure) Rules which only

permit joinder of persons, as defendants, "who ought to have been joined or whose presence before the Court is necessary to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter". Under the English rules (RSC 015 r 62 (b) the power of the courts are much wider but the High Court Rules have not conferred such wide powers as in England on the Lagos High Court."

I find these findings by the Court of Appeal fully justified and unimpeachable and I also agree with them. It seem to me that the appellants are applying delaying tactics to abort the substantive case being heard on its merit. The court should not use its discretionary power of granting leave to appeal in interlocutory matters to an applicant whose manifest intention is to delay the disposal of the substantive case.

It is for this and other reasons in the lead judgment of my learned brother Ejiwunmi JSC which I have had the privilege of reading in advance, that I also dismiss the appeal and adopt of costs made in the lead judgment

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KUTIGI JSC

This is an appeal by the Defendant against the Ruling of the Court of Appeal, refusing them extension of time to seek leave to appeal against the Ruling of the High Court dismissing the Defendant's application to join the Applicant/intervener as a Defendant, the High Court holding amongst others that it was not a necessary party.

It is clear to me that the Court of Appeal in its Ruling said that the Defendants had not explained the delay in failing to appeal within the time prescribed by law and that the proposed Grounds of Appeal did not show prima facie good cause why the appeal should be heard. The application was therefore dismissed in its entirety.

The Defendants have set out in their brief of argument four issues for determination in this appeal. I have read the brief. None of the issues actually addressed the two grounds above on which the Court of Appeal dismissed the application before it. The Defendants rather dwelt on the merit of their case before the High Court which is yet to be de-

cided, as well as on the merit of their appeal to the Court of Appeal, which appeal too is yet to materialise. I find no merit in the appeal.

It is for the above reasons and others contained in the lead judgment of my learned brother Ejiwunmi, JSC, that I dismiss the appeal with costs as assessed.

B

KATSINA-ALU JSC

I agree with my learned brother Ejiwunmi JSC, that this appeal must fail.

C

The main issue in this appeal relates to the refusal of the Court of Appeal to grant the appellants leave to appeal from the ruling of the trial court whereby it refused the 4th appellant's application to be joined as Intervener in the capacity as 4th Defendant. The learned trial judge in his ruling held as follows:-

D

"The test to be applied for the joinder of an Intervener is whether he will be directly affected by the judgment of the court in the suit by curtailing or interfering with the enjoyment of his legal right - because the only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party. Upon the affidavit evidence presented on behalf of the Intervener, I do not consider it to be a necessary party. I do hold therefore that this suit can be conveniently and effectually resolved without the joinder of the Applicant. There is much force in the submission of Mr. Simon Hart on jurisdiction. As I have mentioned earlier Exhibit P.2 expressly stated where the proceed of the Letter of Credit assigned to the Applicant is to be paid. It is payable outside this country. The plaintiffs have come to Nigeria because the Defendants are resident in Nigeria. parties are bound by their contract - A counter claim is another suit, the plaintiffs are not consenting to be tried in Nigeria, and the Court cannot assume jurisdiction where it does possess one. It all revolves round the fact that whatever right accrues to the Applicant from the plaintiffs, it must await

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its turn as a separate contract and not be interposed over and above the contract between the plaintiffs and the defendants.

The application of the Intervener therefore lacks merit and it is accordingly dismissed. The defence and counter claim of the Application/Intervener as the 4th Defendant dated 20th October, 1994 is of no effect and it is hereby struck out".

In refusing to grant the application the court of appeal per Ayoola JCA, (as he then was) stated as follows:

"The affidavit in support of the application before us shows that the main purpose for which a joinder of the intervener was sought was to litigate whatever rights the intervener claims by virtue of the assignment of the proceeds of the Letter of credit to it . Akinsanya J. Considered these and other facts put before her and concluded that the intervener was not a necessary party because the intervener would not be directly affected by the judgment of the court by curtailing or interfering with the enjoyment of his legal rights."

It does appear that the lower court delved into the facts of the case. What was before that court was an application for leave to appeal and extension of time within which to appeal against the ruling of Akinsanya J. The determination of this application does not call for the consideration of the facts of the main case. The lower court however held:

"In my view, a prima facie good cause why the appeal should be heard has not been show and I would dismiss the application in its entirety."

This conclusion has not been faulted.

For this and the fuller reasons given by my learned brother Ejunmi, JSC, I would also dismiss the appeal with costs of N10,000.00 to the Respondents.

H