

**SUPREME COURT OF NIGERIA**  
16TH FEBRUARY, 2001. SC. 146/1998  
**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, A. I. IGUH,**  
**A. I. KATSINA-ALU, U. A. KALGO, JJSC.**

(1) GLOBAL TRANSPORT OCEANICO S.A.

(2) THE OWNERS OF THE M/V ..... APPELLANTS  
"KAPETAN LEONIDAS"

AND

FREE ENTERPRISES NIGERIA LIMITED ..... RESPONDENT

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**ACTIONS** - *Locus standi* - Respondent had a right to sue - For non delivery of the pallets of paper to it - As the pallets belonged to him at all material times.

**APPEALS** - *Grounds of appeal* - Alleging error or misdirection - But fails to provide particulars of such error or misdirection - Is incompetent and liable to be struck out.

**APPEALS** - *Leave* - Supreme Court - Fresh issues - If raised without the leave of the court - Will not be considered.

**APPEALS** - *Fresh point* - Will not ordinarily be entertained - If lower court had not expressed its view - Or is better placed to deal with it.

**APPEALS** - *Notice* - Defective notice of appeal - Without any competent or valid ground of appeal - Cannot be cured by filing amended grounds out of time - And the appeal should be struck out.

**APPEALS** - *Grounds of appeal* - If framed to contain particulars of error or misdirection complained of - Without setting them out in different headings - Is competent and is rightly entertained.

**APPEALS** - *Ground of appeal* - Which has been struck out - Cannot be used as basis for a decision or judgment.

*APPEALS - Issues - Amounting to academic exercise - Will not be entertained by the court as in this case.*

*JUDICIAL PRECEDENTS - Stare decisis - Meaning of - The principle does not apply to decisions given per incuriam - And a court can depart from its earlier decision - If it was wrong.*

### **FACTS**

The Respondents as plaintiffs in the Federal High Court Lagos claimed against the appellants as defendants the sum of US \$25,332.96 as general and special damages for breach of contract and or duty in the carriage, custody and or discharge of part of the cargo of paper consigned to the respondent on board the second appellant ship. The respondent/plaintiff in its statement of claim based its claim on a Bills of lading issued by the 1st defendant acknowledging shipment on board their vessel 119 pallets of paper in good condition for carriage and delivery at Lagos, to the order of the plaintiff.. The appellants, subsequently filed an application for an order to dismiss and or strike out the action on the ground that the plaintiff not having been named as either the consignee or endorsee of the Bills of lading and if so named having endorsed the same to another party has no locus standi to institute or maintain the action.

The trial judge after hearing argument of the counsel for both parties dismissed the action for lack of locus standi to sue whereupon the respondent appealed to the Court of Appeal against the ruling. The Court of Appeal in an unanimous judgment allowed the appeal, setting aside the decision of the trial judge and ordered trial de novo before another judge of the Federal High Court. The appellants were not happy with the decision and filed their notices of appeal to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether there was a valid Notice of Appeal before the Court of Appeal on which it could properly exercise jurisdiction to determine or entertain the Respondent's appeal before it.*

*2. Assuming but without conceding that the Lower Court has the juris-*

*diction so to do, was the Lower Court entitled to proceed to determine the appeal on the singular issue of the propriety or otherwise of the 2nd Appellant filing an affidavit in support of their demurrer application before them when there was no subsisting ground of Appeal to sustain the issue before them? Etc, see p. 529*

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

***Grounds of appeal - Alleging error or misdirection***

1. The purpose of Order 3, r. 2 (2) of the Court of Appeal Rules is to inform the court and the respondent of the particulars of error in law or misdirection alleged, to enable the respondent meet the case of the appellant and the court to properly consider and determine such error or misdirection complained of. See Atuyeye v Ashamu (1987) 1 NWLR (Pt. 49) 267 at 282. Any ground of appeal which alleges error in law or misdirection but fails to provide the particulars of such error or misdirection, contravenes the provisions of Order 3 r. 2 (2) of the Court of Appeal Rules 1981 and is to that extent incompetent, and liable to be struck out. (p. 532 G)

***Appeals - Leave***

2. The issue he has raised in this ground is no doubt an issue of law and although he has not raised it in the Court of Appeal he is entitled to do so here as enunciated by previous decisions of this court but he must have obtained leave to do so see O. 6 r. 5 (1) (b) of Supreme Court Rules 1985 (as amended). There was no such leave and so the ground of appeal 9 and the issue raised relative to it cannot be considered in this appeal. (p. 533 E)

***Appeals - Fresh point***

3. Also fresh point will not ordinarily be entertained by the Supreme Court if it had not the benefit of the views of the justices of the lower court, (See Fadiora v Gbadebo (1978) 3 SC 219; or if the lower court is in a more advantageous position, as in this case, to deal with it. (See Ejiofodomi v Okonkwo (1982) 11 SC 74 at 111). (p. 533 F)

***Defective notice of appeal***

4. I entirely agree with learned counsel for 2nd appellant, and I have no doubt in my mind about it that where a notice of appeal is defective in  
B that there is no competent and valid ground of appeal in it, such defective notice of appeal cannot be cured by the filing of amended grounds out of time. See Atuyeye v Ashamu (1987) 1 NWLR (PT . 49) 267. And the Court of Appeal can strike out the appeal itself under Order 3, r. 2 (7) of  
C the Court of Appeal Rules 1981. (See Nsirim v Nsirim (1990) 3 NWLR (Pt . 138) 285. (p. 533 H)

***Ground of appeal - Framed to contain particulars***

5. The ground standing alone has all the details required, in my respect-  
D ful view, contained in it such that it was unnecessary or superfluous to add any further particulars. Locus standi simply means the capacity to sue and the ground was merely saying that the learned judge was wrong in law in holding that the appellant (now respondent) lacks the capacity  
E to sue in this case. Where the ground of appeal is couched or framed in such a way as to incorporate or contain particulars of error or misdirection complained of and their nature, (as in this case) without necessarily setting them out as usual under a separate heading of particulars, it cannot  
F be said that the appellant has failed to supply particulars of error or misdirection in such ground. See Atuyeye v Ashamu (Supra); Nsirim v Nsirim (supra).

The second ground of appeal is therefore in my view, valid and  
G proper. The notice of Appeal of the respondent in the Court of Appeal is therefore competent and that court has properly exercised its jurisdiction to entertain the appeal. (p. 534 D)

***Grounds of appeal - Which has been struck out***

H 6. In my view, the whole decision rested on ground 1 (issue 1) which was earlier struck out by the Court of Appeal, and although it purported to consider issue 2, it did not in fact do so. The question of the propriety or otherwise of filing an affidavit in support of demurrer application can

only be considered in respect of issue 1 which deals with O. 27 of the Federal High Court (Civil Procedure) Rules 1976. As this ground was earlier struck out, there is no ground of appeal upon which the decision to file a supporting affidavit in a demurrer application is based in this case. I answer issue 2 in the negative. (p. 536 A)

B

***Issues - Amounting to academic exercise***

7. It is not of any substance in this appeal and since ground I which could have brought about the consideration of Order 27 of the Federal high Court (Civil Procedure) Rules 1976, had been struck out, any consideration of this issue will in my view, amount to an academic exercise. This court has, on many occasions refrained from and refused to enter into, the intricacies of any issue which will in the end amount to an academic exercise. In the case of Nwobosi v A.C.B Ltd (1995) 6 NWLR (pt. 404) 658 at 681, this court held that where the resolution of an issue one way or the other, as in the instant appeal, will be no more than engaging in an academic exercise, this court will not entertain such an issue. (See also Ezenya v Okeke (1995) 4 NWLR (Pt. 388) 142 at 165. In my judgment as far as this appeal is concerned, the points raised in this issue are more academic than anything else. (p. 537 B)

***Judicial precedents - Stare decisis***

8. Simply put this doctrine lays down the golden rule that decisions of higher courts of the land are binding on the lower courts in the land. And decisions of courts of co-ordinate jurisdiction are, for all intents and purposes, binding as between those courts. In all cases, decisions made per incuriam are not included for obvious reasons and a court may depart from its earlier decision if it is satisfied that the decision was wrong and there is a need to reverse or alter it in the interest of justice. (p. 538A)

***Actions - Locus standi***

9. These 2 paragraphs have clearly shown the relationship between the appellants and the respondents in relation to the consignments involved ie pallets of paper which at all material times belonged to the respondent.

H

This alone gives the respondent the right to sue on the failure to deliver the pallets to it and whether or not it succeeds in proving its case is something else. I therefore find that the respondent has the capacity in this matter to sue the appellants as it did. I therefore also find that the learned trial judge was wrong in concluding that the respondent lacked the locus standi to sue the appellants. (p. 541 E)

### **NOTABLE POINT OF INTEREST**

#### **KALGO JSC**

*1. Reference to a judge in 3rd person pronoun is unethical & unpardonable*

Issue two of the respondent before the Court of appeal as seen in its brief on P. 58 of the record reads:- "*Whether she concluded correctly that the Plaintiff had no locus standi*".

It is common ground that the trial judge in this case was a lady, and the word, "she" in issue 2 referred to the learned judge. This is a very bad way of showing discourtesy to a lady judge or infact any judge at all by referring to him or her in third person pronoun. It is absolutely unethical and unpardonable and whether the judge is a "he" or "she", reference should be made to the "learned trial judge or learned judge or even Hon. Judge." (p. 539 D)

#### **REPRESENTATION**

Adedapo Akinrele for the 1st appellant

O. Atoyebi with him Ayo Olurunfemi for the 2nd appellant

No appearance for the respondent

#### **CASES REFERRED TO**

Onwadike v Brawal Shipping (1996) 1 NWLR (pt.422) 65

Seatrade v Fiogret LTD. (1987 - 90) 3 NSC 453

H B. G. C.C v C.M.I.S (1962) 2 ANLR 563 at 572,

Lawal v G.B.O (1972) ANLR 211 at 217 - 218

Fadiora v Gbadebo (1978) 3 SC 219;

Enang v Adu (1978) 11 SC 25;

Akpene v Barclays Bank of Nig. Ltd (1977) 1 SC 47

Ejiofodomi v Okonkwo (1982) 11 SC 74 at 111

### **STATUTES REFERRED TO**

Court of Appeal Rules 1981 O. 3 r. 2 (2), O. 6 r. 10, O. 3 r. 2 (7) B

Supreme Court Rules 1985 Order 6 rule 5 (1)(b)

Federal High Court (Civil Procedure) Rules 1976 Order 27 & 33.

### **LEAD JUDGMENT BY KALGO JSC**

This case started in the Federal High Court Lagos where the respondent who was the plaintiff claimed against the appellants as defendants the sum of U- S \$25,332.96 being special and general damages for breach of contract and or/duty in the carriage, custody and/or discharge of part of the cargo of paper consigned to the respondent on board the Ship MV "KAPETANLEONIDAS", the second appellant herein. D

The respondent filed its statement of claim in the said Federal High Court, paragraph 3 of which reads thus:-

"3. By Bills of lading Nos. 251 and 226 issued by the 1st defendant and dated at Santos, Brazil, the 26th day of September 1990, and the 12th day of November 1990 respective, the Defendants acknowledged shipment on board their vessel the MV "Kapetan Leonidas" of a total of 119 pallets of paper in apparent good order and condition for carriage to and delivery at Lagos to the order of the Plaintiff. The Plaintiff shall at the trial found on the aforesaid Bills of lading and clear Reports of Findings Nos. 36019, 36020, 36173 and 36177 respectively of 9th October and 14th Nov. 1990, issued by Interlek Services International Limited." G

On the 29th of May 1992, the 2nd appellant, filed an application pursuant to order 27 of the Federal High Court (Civil Procedure) Rules 1976 (Cap. 134 of Laws of Federation 1990) for:

"An order to dismiss and/or strike out this action against the 2nd Defendant / Applicant on the ground that the Plaintiff, not having been named as either the consignee or endorsee, of the relevant Bills of lading on which their claim is based, and if so named, having endorsed the H

*same to another party has no locus standi to institute or maintain this action, as presently constituted and for further and other orders as the court may see just to make."*

The application which was by motion on notice was not supported by any affidavit but the two Bills of Lading Nos. 251 and 226 referred to by the Plaintiff in the statement of claim were attached to the motion paper as Exhibits FA1 and FA2. No counter - affidavit was filed by the respondent.

The learned trial judge heard arguments of counsel for both parties on the application and in a considered ruling delivered on the 25th day of September, 1992, granted the application of the 2nd appellant and dismissed the action of the respondent for lack of locus standi to sue.

The respondent was dissatisfied with this ruling and by its notice of appeal which was later amended appealed to the Court of Appeal on only two grounds which without particulars read:-

*"1. The learned trial judge erred and misdirected herself in law when she embarked upon an inquiry into issues of fact in a demurrer application under Order 27 of the Federal High Court (Civil Procedure) Rules, 1976."*

*2. The learned judge erred in law in holding that the appellant has no locus standi in this case."*

The 2nd appellant also cross - appealed on only one ground which without particulars reads:-

*"The learned trial judge erred in law and misdirected herself when she held that an application under Order 27 of the Federal High Court (Civil Procedure) Rules, 1976 ought to be supported by an affidavit."*

In the Court of Appeal, briefs were filed and exchanged between the parties' counsel. The Court of Appeal heard the appeal and delivered its unanimous judgment on 27th Nov. 1997, whereby it allowed the appeal, set aside the decision of Ukeje J. of the Federal High Court and ordered trial *denovo* before another Judge of that Court.

The 1st and 2nd appellants were not happy with the decision and they filed separately their notices of appeal to this Court on the 6th and



8th of January 1998 respectively.

In this court written briefs were filed and exchanged between the parties and at the hearing of the appeal, the parties' counsel adopted and relied upon the legal arguments contained in their respective briefs and urged the Court to act accordingly. B

The 1st appellant raised in its brief two issues for determination which read:-

*"1. Whether the Court of Appeal was right in law to have addressed the issue of the propriety or otherwise of filing a demurrer application without supporting affidavit when there was no ground of appeal sustaining that issue.* C

2. Whether the Court of Appeal was right in law in holding that the Respondent had "locus standi" to sue when the purported ground of Appeal on the issue of locus standi is incompetent and defective. D

The 2nd appellant which filed 9 grounds of appeal in its amended notice of appeal, formulated 8 (eight) issues for determination. They are as follows:

"1. Whether there was a valid Notice of Appeal before the Court of Appeal on which it could properly exercise jurisdiction to determine or entertain the Respondent's appeal before it. E

2. Assuming but without conceding that the Lower Court has the jurisdiction so to do, was the Lower Court entitled to proceed to determine the appeal on the singular issue of the propriety or otherwise of the 2nd Appellant filing an affidavit in support of their demurrer application before them when there was no subsisting ground of Appeal to sustain the issue before them? F

3. Whether an affidavit is mandatorily required in support of a demurrer application under Order 27 of the Federal High Court (Civil Procedure) Rules, 1976 (Supra), and did the non-filing of such an affidavit by the 2nd Appellant herein preclude the trial Court from looking at the documents (Bills of Lading) pleaded by the Respondent in their statement of Claim in the determination of the demurrer application? G H

4. Whether Order 33 of the Federal High Court (Civil Procedure) Rules aforesaid (Particularly Rules 4 & 20 thereof) is applicable to

demurrer applications brought under Order 27 of the Federal High Court (Civil Procedure) Rules (supra) so as to require the filing of a supporting affidavit by the 2nd Appellant and whether failure to file such affidavits is an incurable fundamental defect?

B 5. Were the learned justices of the Court of Appeal right to expunge the Bills of Lading (Exhibits FA1 & FA2) from the record when there was no such relief sought before them and when it was clear that these documents were in fact pleaded by the Respondent in Paragraph 3 of its Statement of Claim and therefore deemed admitted by the 2nd C Appellant for the purposes of their demurrer application?

6. Whether the learned justices of the Court of Appeal were right in their allegation of deliberate concealment of their earlier decision in ONWADIKE v BRAWAL SHIPPING (1996) 1 NWLR (Pt. 422) 65 by D the 2nd Appellant's Counsel and their subsequent attack on the person of the said Counsel especially when it was conceded by them that the issue for determination the earlier case was distinguishable from the Appeal before them?

E 7. Whether a demurrer application under Order 27 of the Federal High Court (Civil Procedure) Rules, 1976 (especially in the proceedings under appeal) could work hardship and amount to a denial of fair hearing, and if so, were the justices of the Court of Appeal justified in the circumstances to counsel a change in the position of the law?

F 8. Was it open to the Court of Appeal to refuse and /or fail to follow its earlier decision in SEATRADE v FLOGRET LTD (1987 - 90) 3 NSC 453 as well as the Supreme Court decisions in:-

- G (i) B. G. C.C v C.M.I.S (1962) 2 ANLR 563 (a) 572, and  
(ii) LAWAL v G.B.O (1972) ANLR 211 (a) 217 - 218

On the issue of whether an affidavit ought to be filed in support of a demurrer application, which decisions were actually cited before it?"

H The respondent in answer to the appeal of the 1st appellant set out in its brief, two issues for the determination to wit:-

*"1. Whether their Lordships in the Court of Appeal were right in law to have addressed the issue of the propriety of filing an application without a supporting affidavit.*

2. *Whether the alleged defect in ground 2 of the Respondent's Notice of Appeal was so fatal that the Court could not entertain the appeal.*"

And in response to the 2nd appellant's appeal the respondent also set out 4 issues for determination in his brief which are:-

"1. *What is the correct procedure to follow in a demurrer application pursuant to Order 27 of the Federal High Court (Civil Procedure) Rules 1976, and whether order 33 rules 1,2,3,4 and 7 are applicable thereto.*

2. *Whether the Court of Appeal is entitled to refuse to follow a previous decision on the same issue.*

3. *Whether the learned justices of the Court of Appeal were entitled to proceed to determine the appeal on the issue of the propriety or otherwise of filing an affidavit in support of the demurrer application; a condition precedent to the competency of the application.*

4. *Whether the Supreme Court is bound to strike out the respondent's appeal on the ground of non - compliance with Rules of Court*".

I have carefully examined the issues raised by the appellants in their respective briefs and my views are:-

Issues 1 and 2 of the 1st appellant are fully covered by issue 2 of the 2nd appellant; issue 3 and 4 of the 2nd appellant are virtually talking about the same thing (the filing of affidavit in a demurrer application); issue 5 can stand on its own, issue 6 was abandoned by the learned counsel at the hearing of the appeal; the consideration of issue 7 will lead in my opinion to an academic exercise which this court has in many of its previous decisions refused to entertain; Issue 8 can be dealt with separately too. In sum, I intend to consider the 2nd appellant's issues numbers 1,2,3,4,5 and 8.

Issue 1, as I understand it, deals with the question whether the only one ground of appeal filed by the respondent in its original notice of appeal was valid and competent. Learned counsel for 2nd appellant argued in the brief that the ground did not comply with the requirements of Order 3, rule 2(2) of the Court of Appeal Rules, 1981, as it cannot allege

error in law and misdirection at the same time. He cited a number of cases to support the proposition. If, this is so, counsel submitted, the ground is incompetent and the notice of appeal being without any competent ground of appeal could not have been validly amended to add any other ground of appeal, as you cannot build something on nothing. Ogbechie v Onochie (1986) 2 NWLR (Pt. 23) 484 at 491. Learned counsel also argued that even if the amendment is in order, the new ground added did not have the relevant particulars to support it as required by law. Counsel finally submitted on this issue that since the Court of appeal found that the sole original ground was incompetent, the notice of appeal could not stand and the whole appeal should have been struck out pursuant to order 6, rule 10 of Court of Appeal Rules 1981. He cited Fadare v Odeyale (1995) 5 NWLR (PT . 395) 375 at 381 in support.

The respondent on the other hand maintained in its brief that there was a proper and valid notice of appeal before the Court of Appeal in that the grounds contained therein gave the appellants an indication of what the respondent was complaining about in the judgment appealed against. It does not appear to make the distinction, as the 2nd appellant did, of treating separately, the original ground in the 1st notice of appeal and the additional ground in the amended notice of appeal. Learned counsel for the respondent contended that even if there was any non-compliance with the rules in filing the grounds of appeal, the Court of Appeal can waive the non-compliance suo motu under Order 7 rule 3 of that court, and this court can do so under Order 10 rule 1 of the Supreme Court Rules, 1985 as amended.

**The purpose of Order 3, r. 2 (2) of the Court of Appeal Rules is to inform the court and the respondent of the particulars of error in law or misdirection alleged, to enable the respondent meet the case of the appellant and the court to properly consider and determine such error or misdirection complained of. See Atuyeye v Ashamu (1987) 1 NWLR (Pt. 49) 267 at 282. Any ground of appeal which alleges error in law or misdirection but fails to provide the particulars of such error or misdirection, contravenes**

**the provisions of Order 3 r. 2 (2) of the Court of Appeal Rules 1981 and is to that extent incompetent, and liable to be struck out.** See Anadi v Okoli (1977) 7 SC 57 at 63; Nta v Anigbo (1972) 5 SC 156 at 164; Osawaru v Ezeiruka (1978) 6 & SC 135. It is abundantly clear from the record of appeal that the 2nd appellant did not at any stage of the proceedings in this case, attack or challenge the competency or validity of the respondent's original ground of appeal until it appealed to this court as seen in ground 9 of his amended notice of appeal. It was only the 1st appellant who filed in the Court of Appeal a notice of preliminary objection on 1st December 1995 challenging the jurisdiction of that court to entertain the appeal on the grounds that the two grounds of appeal filed by the respondent were incompetent. At the hearing of the appeal however, he abandoned his challenge on original ground 1 although the Court of Appeal proceeded, wrongly in my view, to find that the ground was incompetent and struck it out.

This means that the complaint raised by the 2nd appellant in ground 9 of his amended notice of appeal and issue 1, would appear to be entirely new particularly on the question of the validity of the amendment of the original notice of appeal of the respondent. **The issue he has raised in this ground is no doubt an issue of law and although he has not raised it in the Court of Appeal he is entitled to do so here as enunciated by previous decisions of this court but he must have obtained leave to do so see O. 6 r. 5 (1) (b) of Supreme Court Rules 1985 (as amended).** There was no such leave and so the ground of appeal 9 and the issue raised relative to it cannot be considered in this appeal. Also fresh point will not ordinarily be entertained by the Supreme Court if it had not the benefit of the views of the justices of the lower court, (See Fadiora v Gbadebo (1978) 3 SC 219; Enang v Adu (1978) 11 SC 25; Akpene v Barclays Bank of Nig.Ltd (1977) 1 SC 47) or if the lower court is in a more advantageous position, as in this case, to deal with it. (See Ejiofodomi v Okonkwo (1982) 11 SC 74 at 111).

I entirely agree with learned counsel for 2nd appellant, and I have no doubt in my mind about it that where a notice of appeal is

defective in that there is no competent and valid ground of appeal in it, such defective notice of appeal cannot be cured by the filing of amended grounds out of time. See Atuyeye v Ashamu (1987) 1 NWLR (PT . 49) 267. And the Court of Appeal can strike out the appeal itself under Order 3, r. 2 (7) of the Court of Appeal Rules 1981. (See Nsirim v Nsirim (1990) 3 NWLR (Pt . 138) 285.

The second ground of appeal in the amended notice of appeal reads:-

*"The learned judge erred in law in holding that the appellant had no locus standi in this case".*

This ground of appeal is clear and unambiguous. The complaint being made by it is very clear and no further explanations or particulars need be given to the other side to know what is the complaint against the decision of the learned trial judge. **The ground standing alone has all the details required, in my respectful view, contained in it such that it was unnecessary or superfluous to add any further particulars. Locus standi simply means the capacity to sue and the ground was merely saying that the learned judge was wrong in law in holding that the appellant (now respondent) lacks the capacity to sue in this case. Where the ground of appeal is couched or framed in such a way as to incorporate or contain particulars of error or misdirection complained of and their nature, (as in this case) without necessarily setting them out as usual under a separate heading of particulars, it cannot be said that the appellant has failed to supply particulars of error or misdirection in such ground. See Atuyeye v Ashamu (Supra); Nsirim v Nsirim (supra).**

The second ground of appeal is therefore in my view, valid and proper. The notice of Appeal of the respondent in the Court of Appeal is therefore competent and that court has properly exercised its jurisdiction to entertain the appeal. I answer issue 1, in the affirmative.

Issue 2 asked the question of whether the Court of Appeal was right in delving into the propriety of the 2nd appellant filing an affidavit in support of the demurrer application when there was no ground of appeal on

the issue.

The only two grounds of appeal in the amended notice of appeal in the Court of Appeal as seen p. 53 of the record are :-

*"1. The learned trial judge erred and misdirected herself in law when she embarked upon an enquiry into issues of fact in a demurrer application under order 27 of the Federal High Court (Civil Procedure) Rules, 1976. (Particulars omitted)."* B

*2. The learned judge erred in law in holding that the appellant had no locus standi in this case."*

The Court of Appeal in its judgment per Onalaja JCA on page 171 of the record said:- C

*"For the foregoing reasons ground one of the amended ground of appeal is struck out (sic) issue one of appellant's brief of argument built upon it is hereby struck out."* D

The Court of Appeal then considered the preliminary objection of the 1st appellant on ground 2 ie failure to supply particulars of error as required by order 3 r. 2 (2) of the Court of Appeal Rules, 1981. It decided that "the error of law complained about was incorporated and embedded in the said ground of appeal" and it rejected and overruled the objection. It then said on P. 173 of the record that :- E

*"This appeal is therefore going to turn out on the consideration of issue 2 as formulated and distilled by the appellant".* F

I entirely agree with this finding from P. 58 of the record, issue 2 as formulated by the appellant reads:-

*"Whether she concluded correctly that the plaintiff had no locus standi".*

This issue is properly related to ground of appeal 2 in the amended notice of appeal, but unfortunately the Court of Appeal did not decide this appeal on that issue. A clear reading of the lead judgment of Onalaja JCA supported by Musdapher JCA and Ayoola JCA (as he then was) would seem to rely on the provisions of orders 27 and 33 of the Federal High Court (Civil procedure) Rules 1976 and held that an affidavit in support of the motion for demurrer is essential. Nothing was said about the issue of locus standi of the respondent as in ground 2 and issue 2, except to G H

say that the denial of locus standi to the respondent was a misconception of the law and that the proper order the learned trial judge could have made was to strike out the case and not dismiss it. **In my view, the whole decision rested on ground 1 (issue1) which was earlier struck out by the Court of Appeal, and although it purported to consider issue 2, it did not in fact do so. The question of the propriety or otherwise of filing an affidavit in support of demurrer application can only be considered in respect of issue 1 which deals with O. 27 of the Federal High Court (Civil Procedure) Rules 1976. As this ground was earlier struck out, there is no ground of appeal upon which the decision to file a supporting affidavit in a demurrer application is based in this case. I answer issue 2 in the negative.**

If it was not open to the Court of Appeal to consider the issue pertaining to the demurrer application under Order 27 of the Federal High Court (Civil Procedure) Rules, 1976, then there is no point in raising any point touching on the question of whether there is any necessity to file a supporting affidavit or whether the bills of lading attached to the motion paper as Exhibits FA1 and FA2 are properly expunged or not. This is because all these points must of necessity stem from ground of appeal 1 which was struck out together with the issue arising from it by the Court of Appeal and no appeal was filed on that decision. I do not therefore find that there is any need to consider issues 3, 4 and 5 in the 2nd appellant's brief.

Issue 6 bears no relationship to the merit or otherwise of this appeal. It merely deals with the comments made by the Court of Appeal in its judgment that the learned counsel for the appellant being fully aware of the decision in the case of Onwadike v Brawal Shipping (1996) 1 NWLR (Pt. 422) 65, deliberately refused to cite it in this case even though the facts of this case and Onwadike's case are similar but distinguishable. Learned counsel was very unhappy with this comment especially the implications thereof, but after this court explained certain issues to him on this matter, he decided respectfully to abandon the issue and say no more about it. I do not intend therefore to say anything more about it either and I consider the issue as closed.



Issue number 7 also does not advance the case of the 2nd appellant any further. This issue is asking this court to say whether demurrer procedure under O. 27 of the Federal high Court (Civil procedure) Rules 1976 could work hardship and amount to a denial of fair hearing to litigants and whether the Court of Appeal is justified in counselling a change in the position of the law. **It is not of any substance in this appeal and since ground I which could have brought about the consideration of Order 27 of the Federal high Court (Civil Procedure) Rules 1976, had been struck out, any consideration of this issue will in my view, amount to an academic exercise. This court has, on many occasions refrained from and refused to enter into, the intricacies of any issue which will in the end amount to an academic exercise. In the case of Nwobosi v A.C.B Ltd (1995) 6 NWLR (pt. 404) 658 at 681, this court held that where the resolution of an issue one way or the other, as in the instant appeal, will be no more than engaging in an academic exercise, this court will not entertain such an issue. (See also Ezenya v Okeke (1995) 4 NWLR (Pt. 388) 142 at 165; Overseas Construction Co. Nig. Ltd v Creek Enterprises Nig . Ltd (1985) 3 NWLR (pt. 13) 407; Fawehinmi v Akilu (1987) 4 NWLR (Pt. 67) 799. In my judgment as far as this appeal is concerned, the points raised in this issue are more academic than anything else.**

There is no doubt however that under our Constitution, the three arms of government in both the Federation and the States, are distinct and separate, and each has its functions and powers clearly set out. The judicial powers of the Federation and the States are vested in the courts established for the Federation and the State respectively. And although the traditional function of the courts is to interpret, uphold and pronounce what the law is and not what it ought to be, very often judges make useful comments in the course of interpreting a law which later turn out to influence an amendment to that law. That is all I can say for now on this issue as it does not affect the merit of this case in any way.

Issue 8, as it stands, does not in anyway improve the merit of the appellants' case in this appeal whichever way it is decided. It deals

with the question of the application of the doctrine of precedents or what is normally referred to as stare decisis. **Simply put this doctrine lays down the golden rule that decisions of higher courts of the land are binding on the lower courts in the land. And decisions of courts of co-ordinate jurisdiction are, for all intents and purposes, binding as between those courts. In all cases, decisions made per incuriam are not included for obvious reasons and a court may depart from its earlier decision if it is satisfied that the decision was wrong and there is a need to reverse or alter it in the interest of justice.** In the case of Eperokun v University of Lagos (1986) 4 NWLR (Pt. 34) 162 this court stated the main benefits of following previous decisions per Oputa JSC on page 193 of the report that:

*"Standing by a previous decision which has not been proved to be perverse, or to have been decided per incuriam or proved to be faulty legally or procedurally has a lot of advantages. It fosters stability and enhances the development of a consistent and coherent body of law. In addition, it preserves continuity and manifest respect for the past. It also assures equality of treatment for litigants similarly situated. It likewise spares the judges the task of re-examining rules of law, or principles, with each succeeding case, and finally it affords the law a desirable measure of predictability."*

I entirely agree with this statement and wish to add that it also helps to maintain some legal order within the judicial systems.

On this issue learned counsel cited the cases of Sea Trade v Fiogret Ltd (1987 - 90) 3 NSC 453; B. G. C. C v C. M. I. S (1962) 2 AUNLR 563 at 572; Lawal v G. B. O (1972) AUNLR 211 at 217 - 218 which were previous decisions of the Court of Appeal and Supreme Court on the issue of filing an affidavit in support of a demurrer application and which he said the Court of Appeal refused to follow after they were cited before it.

I have earlier explained the circumstances under which a court bound by a decision may not follow it. In this case, the Sea Trade's case was a Court of Appeal decision and the other 2 cases are decisions of the Supreme Court. I have examined all the 3 decisions and I find that in

none of them was any categorical decision reached to the effect that an affidavit in support of a demurrer application was necessary. They all deal with issues of fact and the contents of the pleadings in a demurrer application but not anything on supporting affidavits. They are therefore in my view not relevant to the issue of filing a supporting affidavit in a demurrer application under order 27 of the Federal High Court (Civil Procedure) Rules. My answer to this issue 8 is therefore in the affirmative.

On the whole, this appeal does not appear to have any merit at all. All the appellants issues considered have failed but that is not the end of the matter. It appears to me very clearly that the question of the locus standi of the respondent as in its ground 2 in the amended notice of appeal and issue 2 of its brief in the Court of Appeal has not been determined by the Court of Appeal. As I found earlier in this judgment the Court of Appeal only considered fully, issue I of the respondent which issue it found to be incompetent and struck it out.

Issue two of the respondent before the Court of appeal as seen in its brief on P. 58 of the record reads:-

*"Whether she concluded correctly that the Plaintiff had no locus standi".*

It is common ground that the trial judge in this case was a lady, and the word, "she" in issue 2 referred to the learned judge. This is a very bad way of showing discourtesy to a lady judge or infact any judge at all by referring to him or her in third person pronoun. It is absolutely unethical and unpardonable and whether the judge is a "he" or "she", reference should be made to the "learned trial judge or learned judge or even Hon. Judge."

I was very disturbed and disappointed to observe that this brief was coming from the chambers of a respectable Senior Advocate of Nigeria. I hope this type of thing will never happen again.

Coming back to issue two above, since the Court of Appeal has failed to consider it in its judgment, this court can either send the case back to the same panel of the Court of Appeal to consider that issue or this court to deal with it especially as the issue touches on locus standi

which is an issue of law. It appears to me that in the circumstances of this case, the second option is more appropriate. I shall now deal with the issue.

I must first draw attention to a decision of this Court in Brawal Shipping (Nigeria) Ltd v F. I Onwadike Co Ltd (2000) 11 NWLR (Pt. 678) 387 which dealt exhaustively, in a case on all fours with the present one, with the issue of locus standi to sue on a bill of lading on the alleged ground that it had been endorsed to a third party. Mr Atoyebi was counsel for the appellant in that appeal which was decided on 30th June, 2000 well before the present appeal was heard. It is surprising that he failed to draw our attention to that case. He had a duty to do that. This court reiterated in that case that in demurrer proceeding, a defendant is neither permitted to file a statement of defence nor to rely on it, neither is he allowed to tender evidence. He is taken to have accepted all the facts pleaded by the plaintiff as established but that he relies on some point of law to argue that notwithstanding those facts the plaintiff must be denied a hearing.

In the Brawal case (supra), Uwaifo JSC, referring to the alleged endorsement of the bill of lading in that case, observed at page 410 as follows:-

*"The obvious implication of the mere endorsement of a bill of lading is that a court should be slow to reach a decision in limine as to what the result or consequence of that endorsement is. Such an endorsement without more cannot lead inexorably to a conclusion that property in the goods has thereby passed to the endorsee or that the consignee or endorser has ceased to have a right to institute action upon the bill of lading. It may be necessary to examine the pleadings to see what indeed might have transpired between the parties particularly if there are admissions that could clearly indicate; or it may be expedient or even requisite that evidence be allowed to guide the course of event. The intention of the parties may be quite crucial."*

It was finally held in that case that it was improper to end the case upon demurrer proceedings and that the plaintiff had the necessary locus standi.

In deciding whether the respondent has locus standi to sue the appellants in this case, it is necessary to examine the statement to claim of the respondent filed in the trial court. That alone will determine its locus standi in the case. It must be remembered at this stage that the question of a demurrer application does not arise and it must be pointed B out that the appellants did not file any defence. Paragraphs 3 and 4 of the statement of claim read:-

5. Bill of lading Nos 251 and 226 issued by the 1st Defendant and dated at Santos, Brazil, the 26th day of September 1990, and the 12th /11/1990 respectively, the defendant acknowledge shipment on board their C vessel the MV "Kapetan Leonides" of a total of 119 pallets of paper in apparent good order and condition for carriage to and delivery at Lagos, to the order of the plaintiff . The plaintiff shall at the trial found on the aforesaid Bills of lading and Clean Reports of Findings Nos 36019, 36020, D 36173, and 36177 respectively of the 9th October and 14th Nov. 1990, issued by Interlek Services International Limited.

4. The plaintiff was at all material times the owner of the said pallets of paper, or alternative the endorsee of the aforesaid Bills of Lad- E ing to whom the property in the aforesaid paper passed upon and by reason of the endorsement.

(Underlining mine)

**These 2 paragraphs have clearly shown the relationship F between the appellants and the respondents in relation to the consignments involved ie pallets of paper which at all material times belonged to the respondent. This alone gives the respondent the right to sue on the failure to deliver the pallets to it and whether or not it succeeds in proving its case is something else. I therefore G find that the respondent has the capacity in this matter to sue the appellants as it did. I therefore also find that the learned trial judge was wrong in concluding that the respondent lacked the locus standi to sue the appellants.** H

For all what I have said above, I find that this appeal has no merit . It has failed and is accordingly dismissed. I affirm the consequential order of the Court of Appeal that the parties return to the Federal

High Court before another judge not being Ukeje J. for trial.

I make no order as to costs.

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**BELGORE JSC**

B I read in advance the judgment of my learned brother, Kalgo JSC with which I am in full agreement. I also find no merit in this appeal and for reasons advanced by Kalgo JSC, which I entirely agree with, I dismiss it with N10,000.00 cost to respondent.

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C **KUTIGI JSC**

I read in advance the judgment just delivered by my learned brother Kalgo JSC. I agree with him that the appeal lacks merit and ought to be dismissed. It is accordingly dismissed. The judgment and  
D orders of the Court of Appeal are hereby affirmed.

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**IGUH JSC**

I have had the privilege of reading in draft the judgment just  
E delivered by my learned brother, Kalgo, JSC. and I agree entirely that this appeal is without substance and ought to be dismissed.

For exactly the same reasons as are therein contained, I, too, dismiss this appeal as unmeritorious and affirm the decision of the court  
F below.

The case is remitted to the Federal High Court, Lagos for hearing and determination before another Judge of that court.

I make no order as to costs.

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G **KATSINA-ALU JSC**

My Lords, I have had the benefit of reading in advance the judgment of my learned brother Kalgo, JSC. I agree with it and would also dismiss the appeal. The appellants shall pay costs of N10, 000.00 to the  
H respondents