

SUPREME COURT OF NIGERIA
9TH FEBRUARY, 2001. SC. 139/1994
CORAM :- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
S. U. ONU, O. ACHIKE, S. O. UWAIFO, JJSC.

1. TAVERSHIMA M. HAMBE APPELLANTS
2. JOSEPH TAVERSHIMA
 AND
1. AGBER HUEZE
2. WAV SHIDI RESPONDENTS
3. KUNDE HUEZE
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***APPEALS** - Grounds of appeal - Alleging error in law and misdirection in fact - Is not ipso facto incompetent - If it otherwise complies with the rules of court.*

***APPEALS** - Ground of appeal - Competence - Since the ground complained against is clear - It is therefore competent and should not have been struck out.*

***APPEALS** - Suo motu issues - May be raised by the court - But court must not base its decision thereon - Without inviting the parties to address it on such issues.*

FACTS

The Appellants as plaintiff had sued the Respondents in the Upper Area Court of Benue State (Gboko Judicial Division) claiming ownership of a piece of land. At the conclusion of trial, the trial court found for the Appellants and entered judgment for them. The Respondents appealed to the High Court of Benue State sitting in its appellate jurisdiction. The High Court allowed the appeal and struck out Appellants' claim.

Dissatisfied with the judgment of the High Court, the appellants appealed to the Court of Appeal Jos upon two grounds of appeal, one alleging a misdirection in law and facts, and formulated issues therein.

The Court of Appeal struck out the notice of appeal and dismissed the appeal on the grounds that the grounds were incompetent and were not argued. The Appellants have further appealed to the Supreme Court raising the following issues for determination.

ISSUES FOR DETERMINATION

“1. Whether or not the Court of Appeal can suo motu raise an objection to a ground of appeal at the time of writing judgment and without calling upon the parties to address the court, deal with the issue alone and proceed to strike out the notice and ground of appeal and subsequently dismiss the appeal.

2. Whether or not in law, a ground of appeal alleging a misdirection in law and on facts, is incongruous, defective and not worthy of consideration.

3. Whether or not an appellant or a respondent cannot proffer arguments in his brief arguing two issues or more together and covering two grounds of appeal or more and whether or not when such apparent omission appears the court cannot call the parties or their counsel to address on the point.”

HELD :- (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

Appeals - Suo motu issues

1. The issue is whether the Court could decide on an issue raised by it suo motu without hearing the parties on it. And I would think the issue is beyond question that it could not do so.

It is not in dispute that the competence or otherwise of Ground (1) in the notice of appeal before the Court below was never addressed upon by the parties. Nor did the Respondents contend in that Court that the omnibus ground was not argued in Appellants’ brief. It was the Court itself that raised those points in its judgment and decided the fate of the appeal on them and this without inviting the parties to address it on the points. I think this is wrong. This Court has consistently frowned on this practice. (p. 446 C)

Grounds of appeal - Alleging error in law

2. This issue has recently been resolved by this Court in Aderounmu & Anor. v. Olowu (2000) 2 SCNJ 180. It is there decided that a ground of appeal alleging error in law and misdirection in fact is not thereby incompetent if it otherwise complies with the rules of court requiring that a ground of appeal be not vague or general in terms (save what is generally known as the omnibus ground) and discloses a reasonable ground of appeal such that the respondent is given sufficient notice of the precise nature of the appellant's complaint. (p. 447 B)

Ground of appeal - Wrongly struck out.

3. I have examined ground (1) in the appeal before the Court below, and which I have reproduced earlier in this judgment. Reading both the ground and its particulars together it cannot be decided that the complaint of the Appellants is clear. The ground is an attack on the findings of the appellate High Court that the subject matter and parties in the suits in the Amaradu Area Court and the Upper Area Court were the same thus sustaining the plea of *res judicata*. I think the Court below, with respect, was wrong to strike out that ground as being incompetent. It is competent. I, therefore, resolve Issues (2) in favour of the Appellants. (p. 449 F)

NOTABLE POINT OF INTEREST**OGUNDARE JSC**

1. A Court may either strike out notice of appeal or dismiss the appeal and cannot do both

I note that the Court below struck out the notice of appeal and at the same time dismissed the appeal. I think these are inconsistent orders. An appeal is initiated by a notice of appeal - see Order 3 rule 2(1) Court of Appeal Rules. If, therefore, a notice of appeal is struck out for being incompetent, then there can be no appeal to be dismissed. I would think this is a matter of simple logic. (p. 450 B)

REPRESENTATION

J. D. Moze for the Respondents

Appellants are absent and are not represented by counsel

CASES REFERRED TO

- B Nwadike v Ibekwe (1987) 4 NWLR (Pt 67) 718
Labiya v Anretiola (1992) 8 NWLR (Pt 258) p. 139
Adelaja v Sonoiki (1990) 2 NWLR (Pt 131) at p. 148
Are v Ipaye (1986) 3 NWLR (Pt. 29) p. 416
C Chukwogor v Obuora (1987) 3 NWLR (Pt. 61) p. 454
Retduwas v Jwan (1992) 8 NWLR (Pt. 259) p. 358
Nsirim v Nsirim (1990) 3 NWLR 285
Ogiamien v Ogiamien (1967) NSCC 190
Aderounmu & Anor v Olowu (2000) 2 SCNJ 180
D Ogbechie v Onochie (1986) 2 NWLR (Pt. 23) 484

STATUTES REFERRED TO

Court of Appeal Rules - Order 3 rule 2 (1).

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LEAD JUDGMENT BY OGUNDARE JSC

This is an appeal against the judgment of the Court of Appeal (Jos Division) striking out the Appellants notice of appeal to it and dismissing
F the appeal based on the said notice. The Appellants, as plaintiffs had sued the Respondents in the Upper Area Court of Benue State in the Gboko Judicial Division claiming ownership of a piece of land situated in Mbazegh in Kusuv Clan. At the conclusion of trial, the trial court found for the Appellants and entered judgment for them. The Respondents appealed to
G the High Court of Benue State sitting in its appellate jurisdiction. The High Court allowed the appeal, holding that the plea of estoppel *per rem judicatam* raised by the Respondents at the trial Upper Area Court succeeded and struck out Appellants' claim.

H Being dissatisfied with the judgment of the High Court, the appellants appealed to the Court of Appeal Jos upon two grounds of appeal which read:

“(1) That the High Court of Justice misdirected itself in law and

facts when it held that: ‘In our view the land the subject matter on which Ameradu Area Court based its decision was the same on which the two respondents based their suit before the Upper Area Court. The Claim before Ameradu Area Court was for title to that piece of land. Similarly, it was the same issue the respondents raised for decision before the Upper Area Court. The 1st respondent having amply participated as a witness to one of the outstanding parties at Ameradu Area Court on the same subject matter and issue cannot be allowed to relitigate the same matter and issue. He is estopped for he had allowed his interest to be fought for him by the side he testified for at Ameradu Area Court.’

And this occasioned a miscarriage of justice.

PARTICULARS OF MISDIRECTION:

(a) In law, a witness who has already testified in a civil suit as to his knowledge of the subject matter cannot be said to be either a party to the action nor a privy of the party for whom he has testified.

(b) No estoppel can operate against a person who has not been a party or a privy to any action.

2. That the decision of Gboko High Court in appeal No. GBD/2A/84 delivered on 4th November, 1987 is against the weight of evidence.

In their brief of argument before the Court of Appeal (hereinafter is referred to as the Court below) they posed three issues as calling for determination in the appeal, that is to say:

“(a) Whether the land the subject matter on which the Ameradu Area Court based its decision was the same land on which the appellants have now brought their suit in the Upper Area Court;

(b) Whether the parties in the proceedings before the Ameradu Area Court can be said to be the same as those in the proceedings in the Upper Area Court Gboko; and

(c) Whether the finding made by the High Court and conclusion arrived at by it is supported by the evidence before the Court.”

The Respondents in their own brief adopted the three issues raised by the Appellants. The three issues, in effect, question the findings of the appellate High Court on two of the three vital factors that must exist for a successful plea of *res judicata*, that is, that the parties in the previous

action and present action in which the plea is raised, are the same and that the subject-matters in the two actions are also the same. The parties proffered arguments in their respective briefs on these issues.

The Court below, in the lead judgment of Okezie, JCA (with which the other two Justices expressed consent) set out the two grounds of appeal and observed:

“An appeal is competent only (i) when there is a notice and grounds of appeal, and (ii) when the grounds of appeal filed in the appeal are competent grounds.

In this appeal there are two grounds of appeal filed. In examining the above grounds of appeal, it is pertinent to observe that the point raised in ground 1 complains of misdirection in law and upon facts. It is very clear that such a ground is incongruous and defective and not worthy of consideration. See Nwadike v. Ibekwe (1987) 4 NWLR (pt.67) p.718 at pp.744-745. Ground 1 is hereby struck out.

With regard to ground 2 which comes under Order 3 rule 2 of the Rules of this court “that the judgment is against the weight of evidence” is permissible in law in civil appeals.”

Turning now to the three issues formulated by the Appellants and adopted by the Respondents, the learned Justice of the Court of Appeal commented:

“It is important here to comment briefly on the issues raised for determination in this appeal. The appellants filed two grounds of appeal and formulated three issues for determination. This practice of proliferation of issue for determination have (sic) been frowned at by the Supreme Court.

In Labiya v. Anretiola, (1992) 8 NWLR (pt.258) p.139 at 159 held:

“The principles governing the formulation of issues for determination is that a number of grounds could where appropriate be formulated into a single congruous issue and it is patently undesirable to split the issue in a ground of appeal. See also Adelaja v. Sonoiki (1990) 2 NWLR (PT 131) at p.148’

The purpose of issues for determination is to enable the parties

narrow the issues in the grounds of appeal filed in the interest of accuracy, clarity and brevity - Ogbunyiya No. 2 (1990) 4 NWLR p. 146 at 551"

And observed:

"The two issues 1 and 2 argued together at page 3 in the appellants' brief do not relate to ground 1 of the grounds of appeal which is an incompetent ground. All arguments proffered by the appellants and respondents on it have no foundation since ground 1 is incompetent and any issue based on such incompetent ground must be struck out. It is hereby struck out."

Turning back to the grounds of appeal, the learned Justice of the Court of Appeal continued:

"I have also read through the appellants' two grounds of appeal on which the issues for determination formulated on both sides relate. It is trite law the appellant and the respondent and indeed the court are bound by the grounds of appeal filed, though the court is not confined to the grounds set forth in the appeal."

The only valid ground is the omnibus ground of appeal set out in the notice of appeal, the appellants have not in their brief argued it.

When no argument is canvassed in a brief of argument in support of a ground of appeal, such a ground is deemed abandoned. See: Are v Ipaye (1986) 3 NWLR (pt.29) p.416; Chukwogor v. Obuora (1987) 3 NWLR (pt.61) p.454, Retduwas v Jwan (1992) 8 NWLR (pt.259) p.358."

and concluded:

"For the above reasons given by me, I hereby strike out the notice of appeal. It is a nullity."

The appeal based on it is hereby accordingly dismissed."

It is against this judgment that the appellants have now appealed to this Court upon 3 grounds of appeal which read:

"1. The learned Justices of the Court of Appeal erred in law when they suo motu raised an objection while writing judgment, that ground one of the appellants grounds of appeal was incompetent and without calling upon the parties to address them, went ahead to strike out that ground of appeal and as a result struck out the appellants Notice of

appeal.

PARTICULARS OF ERRORS

(a) The Court of appeal granted leave to the appellants to file two grounds of appeal including ground one on the 14th day of February, 1989, and it is an error in law for the same Court to turn around to strike out the same ground claiming that it was incompetent.

(b) Ground one was a ground of mixed law and facts so it was a valid ground of appeal.

(c) Ground one did not allege an error in law and a misdirection.
2. The learned Justices of the Court of Appeal erred in law when they misconstrued and misapplied the observation/opinion of Nnaemeka-Agu JSC in suit No. SC.50/1986 delivered on the 4th December, 1987 to strike out ground one of the appellants grounds of appeal on the ground that it was incompetent.

PARTICULARS OF ERROR

(a) Ground one of the appellants grounds of appeal was a ground of mixed law and fact, filed after the Court of Appeal granted leave on the 14th February, 1989.

(b) At page 744 of (1987) 4 NWLR part 67 Nnaemeka-Agu JSC observed that 'a ground of appeal cannot be an error in law and a misdirection at the same time.'

(c) No where at pages 744 and 745 of the judgment, the Supreme Court Justice said that a ground of appeal which alleges a misdirection in law and on facts is incongruous and defective.

3. The learned Justices of the Court of Appeal erred in law when they held that ground two of the appellants grounds of appeal was a competent ground but went ahead to strike it out on the ground that no argument was canvassed in the appellants brief of argument in support of it without calling upon the appellants to address the court on this point before declaring the Notice of Appeal a nullity.

PARTICULARS OF ERROR

(a) Right of appeal of the appellants is constitutional, therefore, where the appellants filed a competent ground of appeal, the Court has no powers to raise an objection of its own and then go ahead to dismiss the

appeal for non-compliance with the Rules of Court without calling upon the appellants to address the court on this point.

(b) Issue three of the appellants brief covered ground two and issues one and three were argued together at pages three and four of the appellants brief.”

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In their brief of argument they formulate the following three issues for determination:

“1. Whether or not the Court of Appeal can suo motu raise an objection to a ground of appeal at the time of writing judgment and without calling upon the parties to address the court, deal with the issue alone and proceed to strike out the notice and ground of appeal and subsequently dismiss the appeal.

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2. Whether or not in law, a ground of appeal alleging a misdirection in law and on facts, is incongruous, defective and not worthy of consideration.

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3. Whether or not an appellant or a respondent cannot proffer arguments in his brief arguing two issues or more together and covering two grounds of appeal or more and whether or not when such apparent omission appears the court cannot call the parties or their counsel to address on the point.”

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The Respondents’ three issues are similar to the Appellants though differently worded.

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In their brief of argument the Respondents raised a preliminary objection which objection was, however, withdrawn at the oral hearing of the appeal and was accordingly struck out.

The Appellants were absent at the oral hearing and were not represented by counsel. Being satisfied that their counsel was served with hearing notice we took arguments from learned counsel for the Respondents who was in Court. Mr. Moze adopted Respondents’ brief and proffered a short oral address. On issue (1) he cited, in addition to authorities contained in the brief, an additional authority, to wit, Nsirim v. Nsirim. (1990) 3 NWLR 285. He submitted that ground (1) in the appeal before the Court below was incompetent. Learned counsel conceded that the omnibus ground was argued in the Appellants’ brief and added

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that the Court below was in error when it observed that the ground was not argued. Learned counsel further conceded that in the circumstance the appeal must succeed. He, however, urged the Court to order a retrial of the appeal before the Court below.

Issue (1)

The Appellants' contention here is that the Court below was in error to suo motu take up the issue of the competence of their appeal and decide on it without hearing the parties on the issue. The Respondents, on the other hand, argued that the Court below had power to do what it did and relied on Nsirim v. Nsirim (supra), among other authorities, in support.

The issue here is not whether or not the Court below has power to suo motu raise any issue relevant to the appeal before it. **The issue is whether the Court could decide on an issue raised by it suo motu without hearing the parties on it. And I would think the issue is beyond question that it could not do so.**

It is not in dispute that the competence or otherwise of Ground (1) in the notice of appeal before the Court below was never addressed upon by the parties. Nor did the Respondents contend in that Court that the omnibus ground was not argued in Appellants' brief. It was the Court itself that raised those points in its judgment and decided the fate of the appeal on them and this without inviting the parties to address it on the points. I think this is wrong. This Court has consistently frowned on this practice. In Ogiamien v. Ogiamien (1967) NSCC 190, 192; (1967) NMLR 245, 248-249; Sir Ademola CJN observed:

"We note also that these objections were never raised by counsel and that they were formulated by the learned Judge himself in his judgment. No opportunity was given to counsel to argue the points, and throughout the various appeals on the case (exhibit D), the constitution of the court was never challenged. This court has pointed out on several occasions that it is wrong for a Judge to give a decision on a point on which opportunity was not afforded counsel to argue at the hearing and particularly a point which throughout the hearing was not raised."

Again in Onwunalu & Ors. v. Osademe (1971) ANLR 15 at p.17, Coker JSC delivering the judgment of this Court observed:

“As a general rule this Court has always regarded with disfavour the practice of a court giving a decision on a point not argued before it.”

What the Court below did in this case is clearly wrong and cannot be supported. I resolve Issue (1) in favour of the Appellants. B

Issue (2)

This issue has recently been resolved by this Court in Aderounmu & Anor. v. Olowu (2000) 2 SCNJ 180. It is there decided that a ground of appeal alleging error in law and misdirection in fact is not thereby incompetent if it otherwise complies with the rules of court requiring that a ground of appeal be not vague or general in terms (save what is generally known as the omnibus ground) and discloses a reasonable ground of appeal such that the respondent is given sufficient notice of the precise nature of the appellant’s complaint. Ayoola JSC in his lead Judgement said, at pages 190 - 191 of the Report - C D

“The second main branch of the appellants’ case is that the court below was in error in striking out three of their thirteen grounds of appeal. The court below was of the view that those grounds of appeal were incompetent because, as the truth was, in each of them were alleged error in law and misdirection in fact. As earlier stated, each of those grounds had, subjoined to it, particulars stating what was alleged to be the error in law, or, as the case may be, the misdirection of fact or error in fact, complained of. Thus, any careful reader of the grounds would not be misled or left in any reasonable doubt as to what the appellants were complaining of and the nature of their complaints. Notwithstanding that fact, the court below relied on the cases of T.A.S. Ltd., v. I.A.S. Cargo Airlines (Nig.) Ltd. [1991] 7 NWLR (pt.23) 156, 175; and Ogbechie v. Onochie (1986) 2NWLR (pt.23) 484, 493. Those cases are of course no authority for the step taken by the court below since they do not deal with incompetence of ground of appeal. The court below mentioned in their judgment, as did counsel for the respondent, the case of Nwadike v. Ibekwe (1987) 4 NWLR (pt.67) 71, 744 where Nnaemeka-Agu, JSC. expressed E F G H

an opinion that:

‘... a ground of appeal cannot be an error and a misdirection at the same time as the appellants ground clearly postulates. By their very nature one ground of appeal cannot be two.’

B The rules of our appellate procedure relating to formulation of grounds of appeal are primarily designed to ensure fairness to the other side. The application of such rules should not be reduced to a matter of mere technicality whereby the court will look at the form rather than the substance. The prime purpose of the rules of appellate procedure, both C in this court and in the Court of Appeal, that the appellant shall file a notice of appeal which shall set forth concisely the grounds which he intends to rely upon on the appeal and that such grounds should not be vague or general in terms and must disclose a reasonable ground of ap- D peal is to give sufficient notice and information to the other side of the precise nature of the complaint of the appellant and, consequently, of the issues that are likely to arise on the appeal. Any ground of appeal that satisfies that purpose should not be struck out, notwithstanding that it E did not conform to a particular form.

The learned Justice of the Supreme Court concluded thus:

“In this case notwithstanding the formulation of the grounds of appeal that were struck out, the detailed statement of the particulars of F error and the clear statements of what the appellants conceived to be errors in law and misdirection on facts in the judgment of the trial judge satisfied the requirement of the rule as to formulation of grounds of appeal. To hold otherwise will be a tantamount to insistence on form rather than substance. I come to the view that the court below was wrong in G striking out grounds 2, 6 and 10 on the ground that they were incompetent.”

In my judgment in the case, after setting out the rules of court, I did say at page 198:

H “These provisions spell out what are required of a ground of appeal and the purpose is to ensure that the respondent is not taken by surprise. Once, therefore, a ground of appeal clearly states what the appellant is complaining about and there is compliance with the rules of

court, I cannot describe such a ground as bad and therefore incompetent. The dictum of Nnaemeka-Agu JSC in Nwadike v. Ibekwe (*supra*) did not go as far as some of their Lordships of the Court of Appeal made it to look. The learned Justice of the Supreme Court advised against lumping together in a ground of appeal complaints that ought better to have been split into different grounds of appeal. I commend his wise counsel to all legal practitioners engaged in drafting notices of appeal. I do not think, however, that non-adherence to this wise counsel will necessarily render incompetent any ground of appeal that otherwise complies with the requirements of the rules. And it is in this regard that I am of the view that Olanrewaju v. Bank of the North (1994) 8 NWLR 622 was correctly decided by the Court of Appeal.

Anyaoke v. Adi (1986) 3 NWLR 731 and Ogbechie v. Onochie (1986) 2 NWLR 484 relied on by the court below in the instant case are just not apposite. The latter case lays down the tests to be applied in determining whether a ground of appeal is one of law, mixed law and fact or fact simpliciter. The former case deals with a number of issues none of which is relevant to the issue arising in the instant appeal.

Examining grounds 2, 6 and 10 placed before the court below, I am of the humble view that they complied with the rules of that court. The particulars required by the rules were given and the grounds in no way, could be described as vague, general in terms or disclose no reasonable ground or mislead the respondent. With respect to their Lordships of that court, I think they were wrong in striking them out. It may be that prudence dictates that they could have been split into more grounds of appeal but that is not the same as saying that they are incompetent."

I have examined ground (1) in the appeal before the Court below, and which I have reproduced earlier in this judgment. Reading both the ground and its particulars together it cannot be decided that the complaint of the Appellants is clear. The ground is an attack on the findings of the appellate High Court that the subject matter and parties in the suits in the Amaradu Area Court and the Upper Area Court were the same thus sustaining the plea of *res judicata*. I think the Court below, with respect, was wrong to strike

out that ground as being incompetent. It is competent. I, therefore, resolve Issues (2) in favour of the Appellants.

Issues (3)

Learned counsel for the Respondents has gallantly conceded this
 B issue in favour of the Appellants. Reading through the Appellants' brief in
 the Court below, learned counsel is right in saying that the omnibus ground
 was argued in the brief along with the issues raised on ground (1). Here
 again, their Lordships of the Court below, with profound respect to them,
 C were in error when they held that "*the appellants have not in their brief*
argued" the omnibus ground.

I note that the Court below struck out the notice of appeal and at
 the same time dismissed the appeal. I think these are inconsistent orders.
 An appeal is initiated by a notice of appeal - see Order 3 rule 2(1) Court of
 D Appeal Rules. If, therefore, a notice of appeal is struck out for being
 incompetent, then there can be no appeal to be dismissed. I would think
 this is a matter of simple logic.

All the issues raised in this appeal having succeeded, the appeal,
 E therefore, succeeds and it is hereby allowed by me. I set aside the judg-
 ment of the Court below. As the appeal brought by the Appellants to that
 Court has not been resolved I agree with learned counsel for the Respon-
 dent that the proper order to make is one remitting the appeal to the Court
 F below to be heard and determined by a panel of that Court differently
 constituted to the one that first dealt with it.

I award to the Appellants 10,000.00 costs of this appeal. The
 costs in the Court below are to abide the result of the retrial of the appeal
 in that Court.

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KARIBI-WHYTE JSC

I have read the leading judgment of my learned brother Ogundare,
 H JSC in this appeal. I agree with his reasoning and conclusion allowing
 the appeal. I abide by the consequential orders made in the leading judg-
 ment.

ONU JSC

I was privileged to read before now the judgment of my learned brother Ogundare, JSC just delivered. I am in complete agreement with him that the appeal be and is hereby allowed. It is accordingly declared incompetent and remitted to the Court below to be heard and determined by a panel of that Court differently constituted to the one that first dealt with it.

Costs of 10,000.00 are awarded to the Appellants in this appeal with costs in the Court below to abide the result of the retrial of the appeal thereat.

ACHIKE JSC

I have had the privilege of reading in advance the judgment of my learned brother, Ogundare, JSC. I entirely agree with him that the appeal has merit and the same should be allowed. The leading judgment covers in great detail the path traversed by this case in its long journey from the Upper Area Court of Benue State to this Court. The complaints by the Appellants herein, as stated in their three grounds of appeal, have also been set out verbatim in the leading judgment. From the three grounds of appeal the Appellants identified these three issues for determination:

“1. Whether or not the Court of Appeal can suo motu raise an objection to a ground of appeal at the time of writing judgment and without calling upon the parties to address the court, deal with the issue alone and proceed to strike out the notice and ground of appeal and subsequently dismiss the appeal.

2. Whether or not in law, a ground of appeal alleging a misdirection in law and on facts, is incongruous, defective and not worthy of H consideration.

3. Whether or not an appellant or a respondent cannot proffer arguments in his brief arguing two issues or more together and covering

two grounds of appeal or more and whether or not when such apparent omission appears the court cannot call the parties or their counsel to address on the point.”

The Respondents on their part identified their issues for determination which are identical to those of the Appellants and therefore I need not reproduce them in this judgment as I prefer the formulation in the Appellants’ brief for the resolution of the conflict in this appeal.

Issue 1

The complaint of the Appellant under the first issue is whether the Justices of the Court of Appeal can suo motu while writing their judgment raise an issue of considerable importance, deal with it alone without inviting the parties to address the Court in respect thereof and thereafter base its decision thereon. Perhaps, it is important to state at the outset that generally an appellate court cannot suo motu raise issues at the judgment stage which the parties did not raise without the perilous risk of stepping into the arena of conflict. Nevertheless, the appellate court, in its discretion, in special circumstance involving issues of fundamental nature, may raise issues on its own part. In such circumstances the court cannot found its decision on such new issues without first affording both parties or their counsel opportunity to address the court on the new issues. So, an appeal would succeed on a point taken by the appellate court ex proprio motu. See Aburime v N.P.A. (1978) 4 SC 111, Odiase v Agho 1 SC 53, Olusanya v Olusanya (1983) 1 SC NLR 134. Therefore, an appellate court must be wary to raise issues not raised and fully contested by the parties in the trial otherwise it may fall into the error of making a case that the parties themselves neither contemplated nor contested. See A.G. Anambra State v Onuselogu Enterprises Ltd (1987) 4 NWLR (Pt.66) 549.

The procedure adopted by the lower court in raising an issue and disposing of same in its judgment without affording the Appellant the opportunity of reacting to that issue that was clearly unfavourable to it smacked of lack of fair hearing. It also runs foul of the principle of audi alteram partem. This approach is fundamentally erroneous and fatal to the judgment of the lower court. It cannot be allowed to stand. The

resolution of this issue alone in favour of the Appellant is sufficient to found judgment in Appellants' favour.

Issue No. 2

As stated above, my decision on issue one would have concluded this appeal. But I wish to say a word on issue two because of the apparent mix-up or confusion in which similar complaint has long been shrouded. The issue is whether or not in law, a ground of appeal alleging a misdirection in law and on facts, is incongruous, defective and not worthy of consideration. The issue being contested has its tap-root in the dictum of Nnaemeka-Agu, JSC in Nwadike v Ibekwe (1987) 11-12 SCNJ 72, at pp 99-100, where the learned Justice of the Supreme Court stated:

"Let me pause here to observe that a ground of appeal cannot be an error in law and a misdirection at the same time, as the appellants grounds postulate. By their very nature one ground of appeal cannot be the two. For, the word "misdirection" originated from the legal and constitutional right of every party to a trial by jury to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of the tribunal. (See Bray vs. Ford (1895) A.C. 44, at p.49). In our system in which the Judge is Judge and jury, a misdirection occurs when the Judge misconceives the issues, whether of facts or of law, or summarizes the evidence inadequately or incorrectly. See Chidiak vs. Laguda (1964) NMLR 123, at p. 125. He may commit a misdirection either by a positive act or by non-direction. But when his error relates to his finding it cannot properly be called a misdirection: it could be error in law. This is why the Appellant's grounds 4, 5, 7 and 8 said to be "error in law and misdirection" are, above all other defects, obvious incongruities."

A precis of the above observation is that a ground of appeal that alleges "*an error in law and misdirection at the same time*" is incongruous. This observation, on its own, may not ordinarily be easily faulted. My understanding of what the learned Justice was saying is that such approach in framing a ground of appeal is not very elegant. I cannot agree more with him. Unfortunately, that innocuous and prudent observation has been misconstrued and blown out of context by both legal

practitioners and the bench. The result is that once a ground of appeal is couched in that rather inelegant form under reference the adversary party has invariably urged the appellate court to strike it out on the ground of incompetence. This ought not to be the case. Always, as in the case on
 B hand and in Nwadike v Ibekwe (supra) the authorities of Anyaoke v Adi (1986) 3 NWLR 731, and Ogbechie v Onochie (1986) 2 NWLR (Pt. 23) 484 are referred to in support of the contention. Those cases are, with respect, of no moment with regard to the specific issue of lumping together complaints of “*error of law and misdirection of facts*” in one
 C ground of appeal. As a matter of fact, Anyaoke v Adi (supra) deals with several issues none of which has any relevance to the issue under consideration while Ogbechie v Onochie (supra) is the oft cited authority on the acid test of whether a ground of appeal is one of pure law or mixed
 D law and fact or fact alone.

Jurisprudentially, I am to observe that this point under reference was not one of the issues for determination in Nwadike v Ibekwe (supra); it was neither considered in the leading judgment of Agbaje, JSC
 E nor in the concurring judgments of Eso, Kawu and Oputa, JJSC. Thus, the bindingness of the dictum credited to Nnaemeka-Agu, JSC in the context of the ratio decidendi of Nwadike v Ibekwe (supra) may, at best, be a respectable obiter. In a recent decision of this Court, i.e. Aderounmu & anor v Olowu (2000) 2 SNJ 180, Ogundare JSC, after considering the
 F Rules of Court with regard to the formulation of valid grounds of appeal and, in specific reference to the controversy in which the dictum of Nnaemeka-Agu, JSC has unwittingly polarised the bench and legal practitioners, emphatically stated what I respectfully believe to be the true
 G state of the law.

He said:

“Once, therefore, a ground of appeal clearly states what the appellant is complaining about and there is compliance with the rules of
 H court, I cannot describe such a ground as bad and therefore incompetent. The dictum of Nnaemeka-Agu JSC in Nwadike v Ibekwe (supra) did not go as far as some of their Lordships of the Court of Appeal made it to look. The learned Justice of the Supreme Court advised against lumping

together in a ground of appeal complaints that ought better to have been split into different grounds of appeal. I commend his wise counsel to all legal practitioners engaged in drafting notices of appeal. I do not think, however, that non-adherence to this wise counsel will necessarily render incompetent any ground of appeal that otherwise complies with the requirements of the rules." B

To Ayoola, JSC, who delivered the leading judgment in Aderounmu case, notwithstanding that the ground of appeal complained of embraced errors of law and misdirection, that was of no moment so long as the ground of appeal under fire satisfied the requirement of the rules as to formulation of grounds of appeal. To insist otherwise, according to the learned Justice, is to place undue reliance on form rather than substance. C

In the matter under controversy, it appears to me that the fulcrum of the matter is whether an appellant, having regard to the Rules of Court has reasonably formulated his grounds of appeal in substantial compliance with the said Rules of Court, notwithstanding the defects or inelegance in the formulation, but so long as the adversary party, from reading the formulated grounds of appeal, is duly notified of the complaint sought to be made by the appellant. The reason for such objective approach is to ensure that any questioning of the validity of a ground of appeal is not simply predicated on form but rather on substance. Afterall, it is beyond peradventure that today the application of the rules of court and attainment of justice is generally no longer allowed or tolerated to be controlled by strict adherence to technicalities but rather to substance. D E F

Against the background of what I have stated above, I have closely examined ground (1) in the appeal before the lower court together with its particulars. The ground of appeal, as I understand it, expresses dissatisfaction with the findings of the High Court, sitting in exercise of its appellate jurisdiction, on the plea of res judicata regarding the sameness or otherwise of the subject matters and the parties in the suits in the Amaradu Area Court and the Upper Area Court. The lower court had struck out this ground of appeal on the ground that it was incompetent relying on the vexed dictum in Nwadike case. With respect, I disagree with the conclusion of the lower court. On the contrary, I think that that G H

ground of appeal is neither vague nor general nor misleading to the Respondent and ought not to have been struck out on ground of incompetence. Again, I resolve the second issue in Appellants' favour.

I find that the third issue is unanswerable and must also be resolved in favour of the Appellants. It is to be noted that the Court of Appeal not only struck out the notice of appeal because of its view on the incompetence of the ground of appeal but it went further to dismiss the appeal outright. This is bizarre as it is erroneous. This order cannot be allowed to stand.

The three issues having been resolved in favour of the Appellants, the appeal succeeds and the same is allowed. The effect of the success of the appeal is that the appeal must be remitted to the lower court for consideration and determination by an entirely different panel.

There will be 10,000.00 costs in favour of the Appellants.

UWAIFO JSC

I agree with the judgment of my learned brother Ogundare JSC. I, too, allow the appeal and consider that the proper order is to remit the appeal to the court below to be heard by another panel. I abide by the order for costs made by Ogundare, JSC.