

SUPREME COURT OF NIGERIA

4TH MAY, 2001. SC. 81/1995

**CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH, S. O.
UWAIFO, A. O. EJIWUNMI, JJSC.**

1. NNANYELUGO L. A. ORAKOSIM APPELLANTS
2. CHARLES OWNES ADUBA
3. LAWRENCE O. OKWUEZE

(For themselves and on behalf of Ogbolu Family of
Iyiau Village Onitsha)

AND

FRANCIS IFEANYICHUKWU MENKITI RESPONDENT

***APPEALS** - Ground of appeal - Ground of law - How to determine a ground of law (H 1)*

***APPEALS** - Ground of appeal - Nature of - In determining the nature of a ground of appeal - The ground and its particulars must be read together (H 2)*

***APPEALS** - Grounds of appeal - Competence of - Where they are incompetent - Effect on the additional ground - The additional ground will have no appeal to be anchored on (H 3)*

FACTS

In the High Court of Anambra State, sitting at Onitsha, the plaintiffs/Respondents sued the Defendant/Respondent claiming for a declaration of title under native law and custom of all that piece and parcel of land situate at Onitsha and more commonly called "EKE OBAMKPA" land; damages for trespass; and perpetual injunction. The three plaintiffs had sued in a representative capacity for themselves and on behalf of OGBOLU FAMILY of Iyiau village Onitsha. Pleadings were ordered and filed. Both in their original statement of claim and further amended statement of claim, they pleaded inter alia, that they are the descendants

and Successors-in-title of one OGBOLU of Iyiwu village of Onitsha and that they have the authority of the members of the said Ogbolu family to prosecute the action in a representative capacity. The Defendant in his statement of defence joined issues with the plaintiffs. However, Akunwata Ernest Obiozor Aduba and George Okey Aduba sought and obtained an order of the trial court to be joined as co-defendants in the action. The co-defendants filed a statement of defence which was virtually on all fours with the plaintiffs' amended statement of claim. In it they claimed to be defending the suit in a representative capacity, that is, as representing the OGBOLU FAMILY. They also counter-claimed against the original Defendant.

The Defendant in reaction, successfully challenged the defence of the co-defendants as an abuse of the process of the court. The defence was accordingly struck out. At the conclusion of trial, the learned trial judge, in a reserved judgment found plaintiffs' case not proved and dismissed same with costs. The plaintiffs appealed unsuccessfully to the Court of Appeal and have now further appealed to the Supreme Court upon four original and one additional grounds of appeal. The parties filed and exchanges their respective briefs of argument. In the Respondent's brief the Defendant raised a preliminary objection to the effect that the appeal is incompetent in that the grounds of appeal not being grounds of law simpliciter, leave to appeal ought to have been obtained and that no such leave was sought nor obtained before the plaintiffs filed their appeal. The plaintiffs in their reply brief argued strenuously that the grounds of appeal are competent.

HELD (Unanimously striking out the appeal as per lead judgment of **OGUNDARE JSC**)

Ground of appeal - Ground of Law

1. This Court has in a number of cases considered the question: what is a ground of law? and has laid down guidelines to follow in answering this question. See in particular the lead judgment of Eso JSC in **OGBECHIE V. ONOCHIE** (1986) 2 NWLR 484 where the learned Justice of the Supreme Court observed:

“There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the ground of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted in which case it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. The issue of pure fact is easier to determine.” (p. 1407 B)

Ground of appeal - Nature of

2. In determining the nature of a ground of appeal the ground and its particulars must be read together. For it is only by reading the ground as a whole that it can be determined what the appellant is complaining about in the judgment. The body of the ground is not to be considered in isolation of its particulars (p. 1407 F)

Grounds of appeal - Where they are incompetent

3. All the four grounds contained in the Notice of Appeal being incompetent, the appeal itself is also incompetent. And being incompetent, the additional ground will have no appeal to be anchored on. (p. 1408 F)

NOTABLE POINT OF INTEREST

OGUNDARE JSC

1. Whose duty it is to amend a ground of appeal

Learned counsel for the Appellants has urged us to disregard some of the particulars to the grounds of appeal in order to save them. I do not think that is the duty of the Court. It is for an appellant to move the Court in the appropriate manner to amend his grounds of appeal, if he thinks they do not correctly convey the complaints he has against the judgment on appeal (p. 1407 G)

CASES REFERRED TO

Aderohunmu v. Olowu (2000) 4 NWLR 253 at 265-266 & 267

Aniekwe v. Okereke (1996) 6 NWLR 60 at 71

Ogbechie v. Onochie (1986) 2 NWLR 484

Obijuru v. Ozims (1985) 2 NWLR (pt.6) 167

Erisu v. Iduka (1984) 4 NWLR (pt.66) 51

B Chinwendu v. Mbamali (1980) 3-4SC 31

Idundun v. Okumagba (1978) 1 NMLRL 200

Odi v. Osafire (1987) 2 NWLR (pt.57) 310

Howell v. Derring 1915 1 KB at 62

C

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979; s. 213 (2) (a) and (3)

Supreme Court Rules, O. 8 r. 2(4)

D

LEAD JUDGMENT BY OGUNDARE JSC

The Appellants, as Plaintiffs had on 24th February, 1978 sued
E the Respondent, as Defendant, claiming –

“(a) Declaration of title under Native Law and Custom of all that piece and parcel of land situate at Onitsha and more commonly called ‘EKE OBAMKPA’ land.

F *(b) N500.00 (Five Hundred Naira) damages for trespass committed by the defendant on the said land on or about the month of February, 1978.*

(c) perpetual injunction restraining the defendant his servants and/or agents from further trespass on the said land.”

G

The three Plaintiffs had sued in a representative capacity for themselves and on behalf of OGBOLU FAMILY of Iyiawu Village Onitsha. Pleadings were ordered and filed. Both in their original statement of claim and further amended statement of claim, they pleaded in paragraph 1 respec-

H tively as follows:

“1. The Plaintiffs are the descendants and successors-in-title of one OGBOLU of Iyiawu Village of Onitsha. The Plaintiffs have the authority and mandate of the members of Ogbolu Family of Iyiawu Vil-

lage of Onitsha to prosecute this action in a representative capacity.

The Defendant in his statement of defence joined issue with the Plaintiffs.

By a rather strange twist in the action, Akunwata Ernest Obiozor Aduba and George Okey Aduba sought and obtained an order of court given on 27/6/86 by Obiesie J, to be joined as co-defendants in the action. The co-defendants filed a statement of defence which was virtually on all fours with the Plaintiffs' amended statement of claim. In it they claimed to be defending the suit in a representative capacity, that is, as representing the OGBOLU FAMILY – see paragraph 1 of their statement of defence where they pleaded thus:

“1. The co-defendants are members of Ogbolu family, Iyiawu Village Onitsha and were joined by order of this Honourable Court.

They are defending this action as accredited representatives of the said Ogbolu family.”

They also counterclaimed against the original Defendant as per paragraph 24 thereof –

“24. Wherefore the co-defendants claim against the defendant as follows:

(a) A declaration that Ogbolu family is entitled to statutory right of occupancy of that piece and parcel of land which forms part of the family land known as Eke Obamkpa/verged pink and in the said survey plan MEC/665/86

(b) N1,000.00 (One thousand Naira) damages for trespass committed by the defendant on the said land.

(c) Perpetual injunction restraining the Defendant, his servants and/or agents from further trespass on the said land.”

The Defendant in reaction, moved the trial Court for an order –

“Dismissing the above suit as having been brought by the Plaintiffs/respondents in collusion with the co-defendants in abuse of the process of the court.

OR

Dismissing the defence of the co-defendants as being incompetent, vexatious and embarrassing and an abuse of the process of the court.

OR

Granting leave to the defendant/applicant to amend his statement of defence in view of the statement of defence of the co-defendants and the Further amended statement of claim...

B After hearing arguments, the learned trial Judge Obiesie J in a reserved ruling observed thus:

C *"It seems to me that the Plaintiffs/respondents and co-defendants/respondents are one and the same party. Co-defendants applied originally to be joined but from pleadings filed, they are seeking a remedy not embodied in the original motion of joinder. The process of the court must be used bona fide and properly and not to be abused. As decided in CASTRO V. HURRAY (1975) 10 Ex. 213, (sic) the court will prevent the improper use of its machinery from being used as a means of oppression*
D *in the process of litigation."*

He concluded thus:

E *"What then is to be done? Will the Statement of Defence of co-defendants be struck out as being embarrassing and an abuse of the process of court? The power to strike out a pleading is not mandatory but permissive. Such power being discretionary will only be exercised if it is required by the very essence of justice. Action has been brought by the Ogbolu Family against 1st defendant/applicant. The other members of*
F *the same family under the subtle guise of joining as co-defendants to challenge the right of representation 'counterclaim' as it appears against the same applicant. No court of justice will entertain same as this amounts to bringing the same claim by two different members of the same family against a defendant. In such circumstances, the 'defence' filed by 2nd set*
G *of defendants will be struck out as being an abuse of process of court.*

Motion requesting for dismissal of the defence of co-defendants is hereby granted. The Statement of Defence filed by co-defendants is hereby struck out. Defendant/Respondent is hereby given 30 days to file
H *his amended statement of Defence and serve same on the plaintiffs/respondents within 21 days after filing.*

I make no order as to costs as co-defendants are no longer parties to this case."

They subsequently made an unsuccessful attempt to appeal to the Court of Appeal. Undaunted, and after trial had commenced, they again applied to be joined as co-defendants in the action. This application was again dismissed.

As if this abuse of the process of the Court by the Ogbolu Family was not enough, the 2nd Plaintiff in June 1988 filed an application for an order “granting leave to the 2nd Plaintiff/applicant to file a separate statement of claim and be represented by a separate counsel in the above suit”. This application was filed following the death of the 1st Plaintiff. The application was opposed by the 3rd Plaintiff and the Defendant. It would appear that the application was refused as the trial proceeded without any separate pleading being filed by 2nd Plaintiff.

At the conclusion of trial, the learned trial judge, in a reserved judgment, found Plaintiffs’ case not proved and dismissed same with costs. The Plaintiffs appealed unsuccessfully to the Court of Appeal and have now further appealed to this Court upon four original and one additional grounds of appeal. Because of the preliminary objection raised by the Defendant to the competence of this appeal, I set out the grounds in this judgment. They read:

“(1) *ERROR IN LAW*

The Court below erred in law and thereby came to a wrong conclusion when it held that ‘Exhibit H is a public Notice by Walter Odigwe Aduba, then head of the Plaintiffs family, in which he stated that the Bridge-Head Road was the Southern boundary of his land, which he called Ani-awada’.

PARTICULARS OF ERROR

a. There are no evidence on record before the Court below that Odigwe Walter Aduba was ever head of the Plaintiffs family.

b. Evidence before the Court below showed conclusively that the said Walter Odigwe Aduba had a pending dispute over the Eke-Obamkpa land part of which is now in dispute with the Appellants family at the time of the alleged publication.

c. The Respondent was fully aware of the dispute between the said Walter Odigwe Aduba but was content to stand by and let the fight rage

between the said Walter Odigwe Aduba and the Appellants family.

d. The Appellants case before the Court below was that there was no evidence to justify the finding that the approach road to Niger bridge forms the boundary between the Eke-Obamkpa land of the Appellants and the land of the Respondent.

(ii) ERROR IN LAW

The Court below erred in law and occasioned a great miscarriage of justice when having found that the Record of proceedings in Suit No. 0/67/77 was wrongly rejected by the trial court, it suo muto (sic) admitted the said record of Proceedings and proceeded to act on the same without any hearing from the parties.

PARTICULARS OF ERROR

(a) The court below on its own considered the extent to which the Record of proceedings may have affected the decision in the instant appeal.

(b) The Appellants case in the courts below was that the land now in dispute was part of the land in dispute in Suit No. 0/67/77 and 0/59/79 and that the respondent was fully aware of the litigation over the land but was content to do nothing to assert the title which he now claims.

(c) In exhibit J (which was completely ignored by the court below) the Respondent admitted that the land now in dispute was subject of the litigation between the Appellants and Walter Odigwe Aduba (suit No. 0/67/77).

(d) The Respondent's contention in the court below was that no evidence whatsoever was led in suit no 0/67/77 before the trial court in that case reached its decision to strike out the suit on the concession of Walter Odigwe Aduba that the land belongs to the Appellants.

(e) The court below found that the trial court was wrong to have rejected the admissibility of the said Record of Proceedings in the determination of their case.

(f) The Appellants contention was that the inaction of the Respondent constitutes estoppel by standing by against the respondent and NOT that the decision in those earlier suits amount to estoppel per rem judicatam

(iii) *ERROR IN LAW*

The court below erred in law and thereby reached a wrong conclusion when it stated that ‘In the instant appeal, it is the defendants in 0/67/77 who claim estoppel and want to use it to obtain judgment against the present defendant. On the above authority, they can only use it as a defence.’ B

PARTICULARS OF ERROR

(a) *The court below relied on its postulation of law on HOWELL V. DERRING 1915 1 K B at 62.*

(b) *The authority of the Supreme Court decision in CHINWENDU V. MBAMALI (1980) 3-4SC 31 and other decisions conclusively establish that although the plea of estoppel is a shield for the protection of a defendant, it can also validly be employed as a sword by the plaintiff in an action.* C D

(c) *The inaction of the Respondent during the pendency of suit No. 0/67/77 which he admitted in exhibit J was over the land now in dispute amounts to estoppel by standing by and the Appellants can validly use same as a weapon of offence.* E

(iv) *The decision is against the weight of evidence.”*

(v) *ERROR IN LAW*

The Court below erred in law when it held that ‘The plaintiffs should have led evidence of a root of title prior in time to that claimed by the defendant’ in considering the appellant’s Root of title based on acts of possession and the Respondent’s assertion of traditional history as the basis of his claim to the land in dispute. F

PARTICULARS

1. *The Appellants case is that they are the owners in possession from time immemorial and as such owners have always exercised acts of possession therein.* G

2. *The appellants root of title is clearly based on acts of possession (sic) authority of:* H

1. *IDUNDUN V. OKUMAGBA (1978) 1 NMLRL 200*

2. *ODI V. OSAFILE (1987) 2 NWLR (pt.57) 310.*

3. *Contrary to the position adopted by the Courts below, the Appel-*

lants did not base their case on any claim to traditional history.

4. *The Court below failed to dispassionately consider the case of the appellants.*

5. *The Court below did not adhere to the fundamental principle that title to land may be proved by any of the five recognised ways laid down by the Supreme Court case of IDUNDUN V. OKUMAGBA (supra).*

6. *Proof of title by act of possession is not inferior/subordinate to a claim of title based on traditional history."*

The parties filed and exchanged their respective briefs of argument. In the Respondent's brief the Defendant raised a preliminary objection to the effect that the appeal is incompetent in that the grounds of appeal not being grounds of law simpliciter, leave to appeal ought to have been obtained and that no such leave was sought nor obtained before the Plaintiffs filed their appeal. The Plaintiffs filed a reply brief in which it is argued strenuously that the grounds of appeal are competent.

At the oral hearing of the appeal before us, learned counsel for the Defendant/Respondent, on the preliminary objection, argued that all the grounds of appeal were incompetent. He submitted that they were all grounds of fact or at best mixed law and fact. He submitted that none of the grounds of appeal came under section 213(2)(a)-(f) of the 1979 Constitution, then applicable. He submitted further that in such circumstance leave to appeal ought to be sought and obtained. He observed that no such leave was obtained. He submitted that the appeal is incompetent and should be struck out.

Learned counsel for the Plaintiffs/Appellants argued to the contrary. He admitted that the Appellants did not obtain leave to appeal in this case. He conceded it that ground (iv) is not a ground of law. He submitted that grounds (i)-(iii) and (v) are grounds of law and urged the Court to discountenance those of their particulars that are unnecessary. He relied on ADEROHUNMU V. OLOWU (2000) 4 NWLR 253 at 265-266 & 267 and ANIEKWE V. OKEREKE (1996) 6 NWLR 60 at 71. He finally submitted that the appeal is competent.

From the admission of learned counsel for the Appellants it would appear that the Appellants have appealed to this Court pursuant to section

213(2)(a) of the 1979 Constitution applicable to these proceedings. This appeal will only be competent if the grounds of appeal or some of them involve questions of law alone. If otherwise, the appeal would be incompetent in that as leave to appeal had not been sought nor obtained, Appellants would not come under sub-section (3) of section 213.

This Court has in a number of cases considered the question: what is a ground of law? and has laid down guidelines to follow in answering this question. See in particular the lead judgment of Eso JSC in OGBECHIE V. ONOCHIE (1986) 2 NWLR 484 where the learned Justice of the Supreme Court observed:

“There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the ground of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted in which case it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. The issue of pure fact is easier to determine.”

He set out in the judgment, with approval, some useful postulations contained in an article in the Law Quarterly Review Volume 100 titled “Error of Law in Administrative Law” by C. T. Emery and Professor B. Smythe, both of Durham University.

In determining the nature of a ground of appeal the ground and its particulars must be read together. For it is only by reading the ground as a whole that it can be determined what the appellant is complaining about in the judgment. The body of the ground is not to be considered in isolation of its particulars. Learned counsel for the Appellants has urged us to disregard some of the particulars to the grounds of appeal in order to save them. I do not think that is the duty of the Court. It is for an appellant to move the Court in the appropriate manner to amend his grounds of appeal, if he thinks they do not correctly convey the complaints he has against the judgment on appeal. I have read the two cases cited by him; I do not see how they help him.

I now turn attention to the grounds of appeal in this case. Ground (i) is clearly vague. It is difficult to ascertain what the Appellants are complaining of in that ground. In any event, having regard to its particulars, it cannot be described as a ground of law. The ground is incompetent.

Ground (ii) does not fair better either. Reading the ground and its particulars together, it is difficult to fathom what the Appellants are complaining about. Certainly, I cannot say that this is a ground of law. This ground is equally incompetent.

Reading ground (iii) and its particulars together, one is at a loss to understand what the Appellants are complaining about. Particular (c) may suggest that the Appellants are saying that the conduct of the Respondent over suit No. 0/67/77 was one of standing-by. This obviously must be an issue of fact after a review of the evidence. Consequently, the ground cannot be described as a ground of law simpliciter. I hold that it is incompetent. None of grounds (i) – (iii) complies with the provisions of Order 8 rule 2(4) of the Rules of this Court in that it discloses no reasonable ground of appeal.

Learned counsel for the Appellants rightly, in my humble view, conceded that ground (iv); the omnibus ground, is a ground of fact. There being no leave to appeal, the ground is clearly incompetent.

All the four grounds contained in the Notice of Appeal being incompetent, the appeal itself is also incompetent. And being incompetent, the additional ground will have no appeal to be anchored on. That apart, it is patent that the additional ground of appeal is in no way a ground of law simpliciter; its particulars betray its true nature.

In conclusion, I uphold the preliminary objection of the Respondent and strike out the purported appeal of the Appellants with N10,000.00 costs to the Respondent.

H

WALI JSC

I have had the privilege of reading in advance the lead judgment of my learned brother Ogundare, JSC and I entirely agree with his reasoning and conclusion for dismissing the appeal.

Looking at the 6 Grounds of Appeal with their particulars, I have no hesitation in coming to the conclusion that none of them is a Ground of Law. They are grounds of fact or at best, of mixed law and fact. Such grounds are only competent when leave is sought and obtained before they are filed. See section 213(3) of the 1979 Constitution; section 27(1) of the Supreme Court Act, 1960 and *OBIJURU V. OZIMS* [1985] 2 NWLR (Pt.6) 167 and *ERISU V. IDUKA* [1984] 4 NWLR (Pt. 66) 511. As no such leave was sought and granted prior to their filing, they are incompetent and are hereby struck out.

The preliminary objection is well taken and is accordingly sustained. The purported appeal having no valid ground of appeal to sustain it is incompetent and is hereby struck out with N10,000.00 costs to the Respondent.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, J.S.C. and I agree entirely with the reasoning and conclusions therein reached. I have nothing to add.

For the same reasons as are contained in the said judgment, I, too, strike out this appeal as incompetent with costs to the respondent against the appellants which I assess and fix at N10,000.00.

UWAIFO JSC

I read in advance the judgment of my learned brother Ogundare JSC. I agree with it. None of the grounds of appeal is a ground of law alone. The appellants needed to obtain leave to appeal to this court. Since no such leave was obtained, the appeal they filed is incompetent. I,

too, uphold the preliminary objection of the respondent and accordingly strike out the appeal with N10,000.00 costs to the respondent.

EJIWUNMI.JSC

B

Having had the privilege of reading before now, the draft of the judgment just delivered by my learned brother, Ogundare JSC, I agree entirely with the reasons given for striking out this appeal.

C

This appeal was successfully cut down by the preliminary objection raised against the competence of the grounds filed by the appellants pursuant to the hearing of the appeal in this Court.

D

Learned Counsel for the appellants were therefore invited to make oral submissions thereon. For the defendant/Respondent, his learned counsel P. Umeadi Jnr., submitted that all the grounds of appeal pursuant to this appeal were incompetent as they were all grounds of fact or at best mixed law and fact. He further argued that as none of the grounds came within the provisions of section 213(2)(a-f) of the 1979 Constitution, then applicable, the appellant ought to have sought and obtained leave, having regard to the nature of their grounds of appeal. In the absence of such leave, he submitted, the appeal is incompetent and must be struck out. Though learned counsel for the appellants argued to the contrary, it is evident that his argument cannot change the long settled principle that where grounds of appeal are of mixed law and fact or facts simpliciter, leave must be sought and obtained, to render them competent for the purposes of the appeal for which they were filed.

F

G

In the instant case, after a careful perusal of all the grounds of appeal filed pursuant to this appeal, I am satisfied that all the grounds of appeal are incompetent in that the appellants failed to obtain leave to render them competent.

H

I will therefore uphold the preliminary objection of the respondent, and also strike out the appeal for these reasons and the fuller reasons given in the leading judgment